CHARACTERISING EC REGULATION:

EMULATION, INNOVATION, RE-REGULATION

Submitted by

Duncan Neville Matthews

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Supervisor: Prof. Robert Baldwin

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ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

I certify that the work presented in the thesis is the candidate's own

Duncan N. Matthews

Duncan Neville Matthews

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In memory of my brother Niall Mackay Matthews (1962-1998).

ABSTRACT

The thesis characterises European Community (EC) regulation in terms of three levels of ideas, namely that: (a) the EC regulatory process is best understood by particular styles or processes of regulation that the thesis terms emulation, innovation and re-regulation; (b) there are particular determinants or causes of regulation that are best understood as regulatory competition, consensus and co-operation; and (c) a hypothesis can be derived from the review of associated literature to the effect that diffusion of ideas and policy learning leading to consensus and co-operation are often of greater significance than regulatory competition in the EC regulatory process. To this end, taking as a frame of reference the characterisation of styles or processes of regulation as emulation, innovation and re-regulation, the thesis challenges the assumption, prevalent in much of the literature, that the main determinant or cause of EC regulation is regulatory competition among member states seeking to enhance their own competitive position in the European market and reduce the costs associated with legal adjustment. Using evidence from case study material relating to EC regulation of insurance services and drinking water quality the thesis tests the hypothesis that, although the literature has stressed regulatory competition as the main determinant or cause of EC regulation, in practice diffusion of ideas and policy learning are likely to occur, leading to co-operation between actors in a manner that ensures the emergence of a broad consensus on the preferred EC regulatory approach without recourse to regulatory competition at all. The thesis finds that regulatory competition is not, in fact, the only determinant or cause of EC regulation. Instead, diffusion of ideas and policy learning leading to consensus and co-operation are of crucial importance and should be accorded greater significance in the literature than has been the case in the past.

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PREFACE

This thesis is being undertaken for two reasons: the first derived from personal experience, the second relating to a need to shed further light on the European Community (EC) regulatory process. The former motivation has, perhaps not surprisingly, informed the latter reason for undertaking the thesis.

In the late 1980s I worked for three years as an EC lobbyist, making the case in Brussels that some of the proposals for EC regulation contained in the European Commission's 1985 White Paper on Completion of the Internal Market would have adverse effects on UK business. Once EC regulation introduced under auspices of the White Paper was in place, I then spent five years in the early 1990s engaged in research, based at the National Institute of Economic and Social Research in London, seeking to ascertain the actual impact of new EC regulation on UK business, with the aim of finding out whether particular measures had, in fact, had the adverse effects that were originally predicted. In the course of the research, I had the opportunity to interview over seventy business people across a range of industry sectors. The willingness and enthusiasm of the interview participants to share their experiences of assimilating EC regulation into corporate practice ensured that the project was duly

completed and I subsequently took up the post of Jean Monnet Lecturer in the Law and Politics of European Integration at the University of Warwick.

While I remain grateful to each of the industry experts for setting aside time to talk about their own, very practical, experiences of coping with the demands of new EC regulation, I am even more indebted to these individuals for the insight they offered into a much bigger picture of the EC regulatory process that at one level seems obvious but, in so many respects, is easily ignored in the mass of EC policy-making studies.

Presented with the opportunity to answer a rather straightforward set of questions about the impact of EC regulation on their business operations, many of the interview participants responded that the answer could be found in the form and content of particular regulatory instruments: if EC legislation followed a regulatory approach derived from their domestic law, the requirements of EC regulation were not considered particularly onerous and on occasion even offered opportunities to exploit first mover advantages. Alternatively, if EC regulation followed a regulatory approach already tried and tested in one or more of the other EC member states, the result was likely to be that higher adaptation costs accrued as the UK companies struggled to comply with "foreign" regulatory cultures and new regulatory standards. But despite the expectation that high adaptation costs could well accrue from compliance with the requirements of foreign regulation, there was also widespread acceptance that it was generally efficient for prior national regulation to be identified as a Community-wide approach if such an approach was seen to have worked well elsewhere.

It was this set of responses from the interviewees that appeared to raise more questions than it actually answered. On the one hand, the impact of EC internal market regulation on UK industry could be recorded and reported. But, on the other hand, how could the similarity of EC regulation to existing national law and the widespread acceptance that a particular member state approach offered the most appropriate regulatory model for the Community simply be explained away? To me, this was particularly noteworthy in the case of EC regulation to liberalise insurance services, where prior regulation in the UK was ultimately consented to by other member states, who co-operated on adoption of the UK approach as the EC norm. The extent to which EC regulation so often resembles - or "emulates" - prior national regulation in this way provides an important frame of reference for this thesis.

By the mid-1990s I had also become interested in EC environmental policy, particularly questions relating to the effectiveness of EC environmental regulation and its ability to achieve intended outcomes. Environmental policy was an area where a large number of EC regulatory initiatives had been undertaken since the early 1970s. But unlike some aspects of EC regulation relating, for example, to completion of the internal market EC environmental regulation was an area where it was more difficult to identify a close correlation between EC and prior national approaches. Instead, it appeared that EC environmental regulation was often more innovative than in some other policy areas, with innovative EC standard setting taking the lead where national regulation had previously been absent. In the absence of prior national standards, EC environmental regulation appeared more likely to be based on a command and control approach, setting maximum permissible pollution limits in relation, for example, to water quality on the basis of new scientific evidence about risks to health and the

environment. By relying on scientific evidence, the consensus in favour of EC environmental regulation appeared, initially at least, to have gone largely unchallenged by member states co-operating on a preferred regulatory approach to standard setting. Understanding the extent to which the style or process of EC regulation is characterised by innovation therefore provides the second characterisation or frame of reference for this thesis.

As the impact of EC regulation begins to be felt, pressure increases for reviews of the appropriateness of EC regulatory standards and, if necessary, second round regulatory change to rectify the unintended consequences of first round regulation. In some instances clarification of how EC regulation should be applied is possible through a process of re-regulation. In the case of EC regulation to liberalise insurance services, re-regulation was required to provide clarification after the initial impact of the newly emulated regulatory approach had been felt. In other instances, however, the standards set initially by EC regulatory activity appear to have become embedded in the public consciousness, any perceived relaxation of those environmental standards as the result of re-regulation subsequently proving difficult to achieve. In the case of EC regulation of drinking water quality, second round change in the form of reappraisal and re-regulation was difficult to achieve because any perceived relaxation of environmental protection standards was seen as politically unacceptable by the majority of member states. Regulatory entrenchment, rather than regulatory refinement, occurred as consensus and co-operation broke down. Re-regulation therefore provides a third, and final, frame of reference for this thesis.

It appeared to me, then, that emulation, innovation and re-regulation were all styles or processes of regulation that characterised the EC regulatory process.

In the thesis emulation, innovation and re-regulation provide a valuable frame of reference for understanding the core argument to be presented here, namely that although "regulatory competition" is stressed as the main determinant or cause of EC regulation by authors such as Adrienne Héritier, such explanations are flawed. Héritier's suggestion is that different member states seek to enhance their own competitive position in the European market and reduce costs associated with legal adjustment by attempting to push their own regulatory approach as that to be adopted as the EC norm, in preference to the approaches taken by other member states. The European Commission then chooses the regulatory approach that it wants to put on the EC legislative track from the multitude of policy proposals put forward by different member states. The thesis demonstrates, however that the validity of the "regulatory competition" model of Héritier and others, is not borne out by case study analysis.

Although the literature on EC regulation has tended to stress the regulatory competition model as the main determinant or cause of EC regulation, the thesis argues that in practice diffusion of ideas and policy learning are in fact more likely to occur, leading to co-operation between actors in a manner that ensures the emergence of a broad consensus on the preferred EC regulatory approach without "regulatory competition" taking place at all. Demonstrating the validity of this argument is the task the thesis sets itself.

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INTRODUCTION

Aims and objectives

This thesis characterises European Community (EC) regulation in terms of three levels of ideas. At the first level, the thesis argues that the EC regulatory process can be best understood by particular styles or processes of regulation may be termed emulation, innovation and re-regulation. At the second level, the thesis suggests that the main determinants or causes of EC regulation can be best understood as regulatory competition, consensus and co-operation. At the third and final level, the thesis constructs a hypothesis derived from the review of relevant associated literature that diffusion and ideas and policy learning leading to consensus and co-operation are of greater significance than regulatory competition in the EC regulatory process.

With regard to the first level of ideas the thesis presents evidence of the propensity for EC regulation to emulate prior national approaches in a case study of EC regulation to liberalise insurance services, which copied an earlier UK regulatory approach. The thesis then suggests that, as an alternative to emulation, regulatory innovation may occur, particularly when no prior national approach exists that can be readily copied and when scientific uncertainty drives new standard-setting initiatives. The thesis puts

forward evidence of regulatory innovation in a case study of EC regulation of drinking water quality. The thesis also acknowledges that re-regulation and clarification may be required after the initial impact of the newly regulated approach has been felt. Evidence of re-regulation is found in the case study of insurance services. However, the thesis goes on to argue that, once standards resulting from this initial process of regulatory innovation are in place, second round change in the form of reappraisal and re-regulation may be difficult to achieve. This may be the case even when compelling arguments can be made in favour of re-regulation on the basis of new scientific evidence because of a perception that the outcome of re-regulation may be a lowering of standards. Evidence of this type of regulatory entrenchment is put forward from the case study of EC regulation of drinking water.

Context

Using the characterisation of the EC regulatory process as emulation, innovation and re-regulation as a frame of reference for the thesis, the second and third levels of ideas then come into play. It will be recalled that the second level of ideas in the thesis is the suggestion that the main determinants or causes of EC regulation can be best understood as regulatory competition, consensus and co-operation. At the third level, the thesis is then able to construct a hypothesis derived from the review of relevant associated literature to the effect that diffusion and ideas and policy learning lead to consensus and co-operation, this being of greater significance in the EC regulatory process than regulatory competition.

In the established literature on the subject, the regulatory model (a term coined by Giandomenico Majone 1998a: 5) is firmly established as one of the main theoretical tools for understanding the evolution of the EC (Radaelli 2000: 133). It is generally accepted that EC regulation can have different outcomes for different national systems, depending on the similarities or differences between prior national regulation and the new EC regulatory approach in question. However, the process by which particular forms of EC regulation come about is less well understood. While legal scholars have focused their attention on legal interpretation and regulatory impact, comparatively little has been written by way of explanations of EC regulatory policy-making that go beyond political scientists' desire to ascertain what interests are at work in the EC policy process. Established explanations leave under-developed the question of how and why particular EC regulatory approaches are likely to emerge.

Despite a general shortage of appropriate analytical tools for undertaking EC regulatory policy analysis there are some notable exceptions. In particular, Héritier (1996, 1999) and Majone (1998b) offer useful, if ultimately flawed, insights that can provide a starting point for this thesis. For Majone, the scarcity of EC regulatory policy analyses has been surprising and can only be explained by the absence of a suitable framework for analysis (Majone 1990: 30). This thesis seeks to contribute to the debate about what form a suitable framework for analysis should take – informing future debate by structuring our understanding of the EC regulatory process.

In one sense, analysts of regulatory processes have not been slow to suggest ways this might be achieved. They have recognised the tendency to "transfer" (Héritier 1999: 164), "imitate" (Majone 1990: 3; Scharpf 1999: 90) or "emulate" (Woolcock, 1994:

15) regulatory approaches in the EC context. However, there has been a tendency to stress the role of "regulatory competition" or "competition among rules" as key determinants in deciding which dominant national approach will win out as the model for subsequent EC regulation.

The literature on the term "regulatory competition" is used in two different senses. First, it is used to describe the response of national regulators to the international competition for mobile factors of production and mobile tax bases (Bratton, McCahery, Picciotto 1996). Second, it is used to describe the fact that member states compete with each other in order to influence the content and form of EC regulation with a view to minimising their own adjustment costs (Scharpf 1999: 85). It is with the latter use of the term that this thesis is concerned.

In some instances, it may well be that a range of diverse member state approaches must be accommodated before EC regulation can be achieved and that, indeed, "regulatory policy-making is driven by competition between highly regulated member states" as Héritier (1999: 159) suggests. However, there has been a tendency in the literature of EC regulation to underplay the extent to which consensus and co-operation between actors in the regulatory process is also required before a particular approach comes to the fore in the resolution of logjams that would otherwise necessarily arise as the result of unfettered competition.

While competition is characterised by the absence of clear consensus about which national regulatory model should be adopted as the EC approach, this absence of consensus leads several member states to all envisage their preferred approach being

adopted as the EC norm. Where there are several possible national approaches to choose from, there will be a resultant need for compromise in the form of bargaining and compensation to offset the losses that may accrue to those member states that find that their national approach is not chosen as the model for Community regulation. With an expectation that not all member states will benefit from the first mover advantages of low compliance costs that may result from regulatory emulation, trade-offs, package deals and compensatory payoffs may be required before compromise is reached.

It is this "competition" scenario that has become a common explanation for EC regulation, particularly when explaining why EC regulation so often emulates prior national regulation in at least one member state. However, the contention of this thesis is that, while competition explanations for the EC regulatory policy-making process might offer useful insights and explanations for what has happened in some specific instances (transport policy, for example), more generally particular regulatory approaches often come to the fore not as the result of competitive conditions in the EC regulatory process at all, but rather as the result of a more consensual, co-operative style of regulatory policy-making that has not been sufficiently emphasised in the literature on the EC regulatory process.

In this sense, while the work of analysts of regulatory processes provides a valuable starting point, offering insights and analytical approaches that inform this study, a review of this work also highlights that explanations for outcomes from the EC regulatory policy-making process remain under-developed because competition

explanations of the EC regulatory policy-making process cannot alone explain how regulatory initiatives come about and are subsequently adopted in the EC context.

So an aim of this thesis is to demonstrate that competition between rival regulatory models in the policy process is rather less prevalent than has been anticipated in the established literature. The thesis argues that consensus and co-operation are also important determinants of EC regulation. Furthermore, the thesis argues that too much emphasis has been placed on competitive struggles in the regulatory policy process by authors such as Héritier. The thesis puts forward the hypothesis that, instead, more emphasis should be placed on consensus and co-operation as drivers, determinants or causes of EC regulation. The validity of this hypothesis will be tested as the thesis progresses.

In the context of examining case study material gathered during fieldwork for the research, the thesis also considers whether theories of regulatory competition, which have tended to be emphasised as explanations of why particular EC regulatory approaches have been adopted, can account for the existence of regulatory emulation innovation and re-regulation. The thesis argues that once EC regulation is identified as either being the result of emulation of prior national approaches in at least one member state or the result of innovation in the sense that it reflects scientific uncertainty, the assertion that EC regulation is largely the result of competition between highly regulated member states is difficult to sustain. Instead, the thesis suggests that it is much more likely that emulation, innovation and re-regulation in the EC regulatory process are the result of consensus and co-operation rather than competition.

By presenting evidence from the case studies, the thesis argues that, aside from regulatory competition, consensus and co-operation between member states are also important drivers of emulation, innovation and re-regulation in the EC regulatory process. However, the thesis cautions that there are limits to what can be achieved by consensus and co-operation between member states. While second round regulatory change may be possible in the form of regulatory refinement and clarification of key concepts, there is also the prospect that re-regulation may be difficult to achieve once initial regulatory standards have become entrenched.

Method

The characterisation of EC regulation in terms of emulation, innovation and re-regulation and the hypothesis that consensus and co-operation have been insufficiently considered by scholars of EC regulation is tested through case study analysis of two instances where EC regulation can be observed: first, the liberalisation of insurance markets; and, second, the setting of standards for maximum permissible limits for pesticides in drinking water.

Research for the case studies was undertaken by means of documentary analysis and face-to-face structured interviews with 28 representatives of the policy-making community, the business community and public interest non-governmental organisations (NGOs). Half of these were second-round interviews undertaken when the interviewer returned to talk again to the individuals representing the business community who had originally been spoken to during the previous research project, as

outlined in the preface of this thesis. The remainder of the interviews were conducted with representatives of the policy-making and NGO communities that had not been the primary focus of the original research project. Given the significance of the two case studies in the UK most of the fieldwork was conducted in this country, augmented by two research trips to Germany, where the perception of the regulatory issues in the two case studies is markedly different from the UK in terms of the extent that initial EC regulation and subsequent re-regulation were considered desirable and necessary - with implications for the pressures exerted for or against initial EC regulation and subsequent re-regulation in relation to each case study, and two further research trips to Brussels, where the relevant European Commission officials were interviewed.

Analysis of data collected during fieldwork for the case studies was undertaken by breaking down the EC regulatory process into its component parts. This dissection of the process is useful for analytical purposes. By dividing the EC regulatory process into four phases - opportunity, negotiation, adoption and reappraisal - it was possible to test the significance of various factors at each stage of the EC regulatory process. Evidence from these four phases of the EC regulatory process is therefore presented under the sub-headings of opportunity, negotiation, adoption and reappraisal in the two case study chapters.

Structure

How best, then, can this thesis be set out in such a way as to characterise the EC regulatory process in terms of emulation, innovation and re-regulation? This is the third level of ideas presented in the thesis, namely a hypothesis derived from the review of associated literature that, by focusing on the diffusion of ideas and policy learning, implicitly supports the contention that consensus and co-operation are of greater significance than regulatory competition in the EC regulatory process.

Initially, the thesis must derive lessons from earlier attempts to shed light on the EC regulation and the EC policy process. The thesis must build upon the progress already made but, at the same time, avoid the pitfalls encountered by those earlier studies. This lesson learning exercise will involve undertaking a literature review of the extensive body of academic publications relating to European integration, EC policy studies, international relations theory, policy analysis and the study of EC regulation. The thesis will seek out evidence that these studies can contribute to, if not fully explain, the phenomena of EC regulatory policy-making, the propensity for innovation and emulation in that policy-making process, and the trend towards consensus and co-operation alongside competition explanations for why certain EC regulatory approaches are adopted.

So, the intention of the thesis is not to dismiss the validity of earlier studies of EC regulation out of hand, but rather to provide a broad overview of their central themes, offering an indication of the usefulness and limitations of each approach for the task of this thesis, namely to explain how and why particular national regulatory

approaches or particular scientific standards are chosen as the EC regulatory approach, and accounting for particular outcomes of attempts at re-regulation.

In this context, Chapter 1 reviews the growth of regulation as the dominant policy tool in the EC and pays particular attention to accounts of regulatory emulation by making particular reference to Majone's suggestion that emulation of prior national regulatory approaches by EC regulators is justifiable on grounds of the need to achieve efficiency in the policy-making process.

Chapter 2 engages in three stages of analysis. First, it examines whether Héritier's portrayal of the EC regulatory process as being dominated by "competition" between interests can adequately account for the emergence of regulation that emulates prior national approaches. Second, it assesses whether explanations of emulation derived from "diffusion" and public policy analysis in the United States, particularly in the work of Berry and Berry, can assist by adding clarity to our understanding of the EC regulatory process. Third, Chapter 2 examines the potential for "policy learning" to provide adequate explanations for the EC regulatory process.

Chapter 3 also sets the context for the case studies to be undertaken in later chapters of the thesis by reviewing the key literature on interests, actors and institutions in the EC regulatory process. The literature review is time-specific and relates in particular to the period up the turn of the millennium because this was the period that the case study material presented in subsequent chapters relates to.

In terms of interests, Chapter 3 gives particular consideration to member state preferences, through functionalist and liberal intergovernmentalist explanations of the delegation of regulatory powers from member states to the EC institutions. Chapter 3 also focuses on the significance of institutional actors in the EC regulatory process. In part, these accounts relate to the rational choice institutionalism of Pollack (1997), which offers explanations for the emergence of EC regulatory approaches that are similar to functionalist theory but argues, in a way that functionalist theory does not, that institutional arrangements in the European Community give the Commission considerable formal and informal agenda-setting powers. Chapter 3 then examines the significance of policy entrepreneurship on the part of the European Commission drawing, in particular, on the work of Kingdon and Majone, who envisage institutional actors as policy entrepreneurs because they are constantly in search of solutions in a particular policy stream of ideas to try to take advantage of opportunities that might arise to push a particular policy approach. In this respect, the judicial activism of the European Court of Justice is also seen as significant in providing opportunities for regulation. EC institutional actors also influence the EC regulatory process because they are constantly engaged in a strategy designed to achieve small incremental steps towards achieving their regulatory goals, or through strategies of linking up and packaging together regulatory proposals. The role of experts, meeting within epistemic communities, is also considered in this respect as are advocacy coalitions, policy learning, policy networks, historical institutionalism and post-decisional arguments.

Chapter 4 undertakes detailed case study analysis of EC regulation to liberalise insurance markets, providing evidence of how emulation operates in practice. It also

examines how re-regulation, involving regulatory refinement and clarification of key concepts was subsequently achieved.

Chapter 5 contains an equivalent case study of EC regulation to ensure drinking water quality in order to demonstrate evidence of how innovative scientific standards might become present in EC regulation. These substantive chapters of the thesis will suggest also that consensus and co-operation, rather than competition, characterised the EC regulatory policy-making process although, in the case of drinking water quality, the thesis will show that attempts at reappraisal and re-regulation undertaken with the aim of updating scientific standards proved problematic because earlier standards embodied in earlier EC regulation became entrenched.

As suggested above, the structure of chapters 4 and 5 is that both case studies will look at the EC regulatory process in terms of four distinct phases: opportunity; negotiation; adoption; and reappraisal. In the case of chapter 5, however, the process of second round regulatory change was more complex and wide-ranging, so the case study of drinking water quality will look in more detail at the process by which opportunity for re-regulation arose and how second round negotiations were played out.

The first phase of the EC regulatory process can be characterised as the phase in which the "opportunity" for new regulation occurs. This phase concerns not only the conventional consideration of how agenda setting, leading to new EC regulation, occurs but also the wider issue of how the initial opportunity for new regulation arises at all. In this sense, the premise on which this part of the thesis will be based is that,

far from there being competition in the regulatory process leading to an opportunity for agenda setting, opportunities for EC regulatory policy-making often arise because, under appropriate conditions, a convergence of interests occurs with key actors all recognising the benefits of solving a common problem through a particular course of action, leading to consensus in favour of new regulatory endeavours at EC level and subsequent co-operation to ensure that progress on new regulation is made.

While conventional models of agenda setting in the EC regulatory process tend to stress the existence of competitive conditions, within which different actors seek to find time and space in the institutional setting in which to carry forward their own regulatory initiatives, this thesis will seek to demonstrate that the reality is often somewhat different. It will seek to show that when the opportunity for new regulatory activity arises, it is because there is a consensus amongst actors as to the existence of a particular policy problem, and a widespread belief that co-operating to achieve policy solutions via EC regulation is the most appropriate way forward for all concerned.

The case study chapters will then both address the second phase of the EC regulatory process: the "negotiation" of EC regulation. Issues to be discussed under the "negotiation" heading include both the problem formulation and comparison of alternatives stages of the EC policy process. This will investigate the scenario whereby, once there is a broad consensus amongst key actors about the appropriateness and necessity of a particular approach that should be emulated and enshrined in EC regulation, what might be termed "regulatory consent" may occur. Regulatory consent of this type may arise when there is an absence of competing

national regulatory approaches to choose from, such as when a particular member state is perceived by others to have developed a unique and efficient problem solving approach at the domestic level that can subsequently be transplanted into the legal architecture of other member states via its adoption as the EC regulatory norm, or where there is scientific uncertainty and the European Commission innovates and constructs a new regulatory approach where no appropriate member state regulatory approach already existed.

In terms of the negotiation phase of the EC regulatory policy-making process, the contention of this part of the thesis will be that the expectation of regulatory competition between member states, with the presumption that member states advocate different regulatory preferences, is in practice unrealistic. In reality, consensus and co-operation often play a significant role.

The third set of issues that need to be taken into account in the EC regulatory process can be considered under the heading of "adoption". Two predominant pathways present themselves. On the one hand, it may be that when EC regulation is formulated it is possible to detect some element of path dependency on prior national regulatory approaches as part of a process amounting to regulatory emulation. Alternatively, the adoption of new regulatory initiatives may be the result of the European Commission's decision to exercise its own right of initiative to put in train a process whereby new and previously untried regulatory approaches can be invented. The role of scientific expertise may be particularly significant here, particularly where scientific communities are of one mind that a particular approach should be a standard enshrined in EC regulation. In either instance, this thesis suggests that the scenario

played out is not one of competing member states seeking to ensure that their national regulatory approach becomes the EC norm but, rather, that consensus on a particular regulatory approach is likely, followed by co-operation leading to adoption of the preferred EC regulatory approach.

Once a particular EC regulatory approach has been adopted and the impact of the new norms have been felt, attention turns to "reappraisal" leading to reconfiguration, which may be required to deal with unintended consequences and outcomes as member states seek to transpose EC regulation in a form that best suits their local conditions. This is the fourth set of issues that will be dealt with in Chapters 4 and 5. As the EC regulatory process reaches the stage at which the impact of regulation has been experienced and can then be evaluated, there is an implicit expectation that regulators will engage in a process of regulatory reappraisal, with pressure for refinement, clarification and/or re-regulation.

In particular, where the outcome of first round EC regulation is other than that originally anticipated, strengthening or modification may be required in the form of second round regulatory changes and adjustment amounting to regulatory reappraisal. This may be in the form of amendment to or updating of the standards that regulation sets down, or improvements to the implementation mechanisms and the enforcement approaches that the regulatory measure prescribes. On-going regulatory consolidation of this type is anticipated because neither regulation, nor the problems it seeks to address, will remain static over time.

As the case study of EC regulation of insurance services will show, pressure for second round change may come in the form of requests for clarification of how EC regulation should be applied in practice. However, as the case study of drinking water quality will illustrate, once EC regulation has become embedded, regulatory entrenchment may occur with the effect that regulatory standards initially adopted as EC norms cannot then be amended, even when this is generally considered desirable because scientific knowledge has subsequently improved and where regulatory adjustment could have the effect of alleviating unintended consequences of regulation, such as unacceptably high adaptation costs, in the case study in hand in relation to significantly higher water bills associated with regulatory compliance costs.

In the light of the foregoing arguments about the role and significance of emulation, innovation and re-regulation in the EC regulatory process, the concluding section of the thesis in Chapter 6 will seek to set out a clearer, structured, understanding of the factors that may account for the particular form and character that EC regulation may take, the driving forces that may better explain the EC regulatory process. Given the emphasis placed on consensus and co-operation in the thesis, closer consideration must be given in this respect to the extent to which these drivers might help to account for emulation, innovation and re-regulation in the EC regulatory process.

In the light of this assessment, attention will then be given to whether, in view of the evidence presented in the case studies, the thesis can further inform our understanding of why emulation, innovation and re-regulation characterise the EC regulatory process. In particular, based on the premise that consensus and co-operation can

account for outcomes in the EC regulatory policy process, the thesis will seek to offer a greater degree of certainty and predictability in such a way as to assist our understanding of existing and future EC regulation.

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CHAPTER 1

CHARACTERISTICS OF THE EC REGULATORY PROCESS

"Given the importance of Community regulation in so many areas of economic or social life, from banking to technical standardisation to environmental and consumer protection, this scarcity of regulatory policy analyses is surprising and can only be explained by the absence of a suitable theoretical framework." (Majone 1990: 30)

Introduction

Before undertaking a lengthy study of emulation, innovation and re-regulation in the EC regulatory process, it is worth reviewing the main reasons why regulation has become of such great significance as the dominant policy tool in the European Community and considering the particular characteristics of EC regulatory activity. This chapter will undertake two tasks. First, it will seek to account for the significance of the regulatory model of the European Community, offering a justification for devoting so much attention in this thesis to an analysis of the form and content of EC regulation. It will do so with particular reference to Majone's characterisations of the regulatory state and explanations for the growth of regulation in the European

Community. Implicit in this reasoning is a wealth of arguments that provide useful insights into a key premise of this thesis, namely that member states are prepared to adopt a consensual approach towards delegating regulatory power to the Community, co-operation in the EC regulatory policy-making process presenting itself as the most efficient strategy for sovereign nations. In the light of this discussion, the chapter also undertakes a second task, to examine the reasons why, on grounds of regulatory efficiency, the EC regulatory process has so often been characterised by emulation of solutions originally generated in one context and then applied in somewhat different contexts (see also Armstrong 1999: 784).

The regulatory model of the European Community

In terms of providing an initial justification for arguing that structuring our understanding of EC regulatory policy-making should be bounded in terms of consensus and co-operation as well as competition, it is instructive to turn to Majone's explanation for the relatively late and sudden rise of statutory regulation in the European Community (Majone 1994b: 83).

For Majone, regulation is a distinctive form of policy-making mainly concerned with the correction of various types of market failure, including externalities, monopoly power, public goods or inadequate information (Majone 1991a: 5). In this context, the term "regulation" describes rules issued for the purpose of controlling the manner in which private and public enterprises conduct their operations (Majone 1996: 9). It is the new border between the state and the economy (Majone 1993a: 24). Majone sought to explain why economic and social regulation – the kingpins of the

"regulatory state" – have replaced the re-distributive policies of the Keynesian welfare state (Majone 1997: 141) as the dominant public policy approach, with statutory regulation replacing older forms of state intervention as the new frontier of public policy and public administration in Europe (Majone 1993b: 11). This administrative style of statutory regulation, long the tradition in the United States, has more recently become a phenomenon in Europe with public ownership through state enterprise and bureaucratic centralisation replaced, over the last two decades, by a policy-making approach based on regulation with particular European origins (Majone 1996: 10; 1997: 155).

Rise of the regulatory state in Europe

For Majone, the rise of the regulatory state in Europe is best understood as a direct consequence of the same processes that have contributed to the decline of the interventionist positive role of the state: privatisation, Europeanisation of policy-making, and the growth of indirect government via agency politics (Majone 1997: 143). Regulatory policies in Europe grew as a response to demand for more focused and more flexible forms of public intervention and for more attention to those areas of social regulation that were often neglected by the welfare policies of the past (Majone 1993a: 25). In this respect, the rise of regulation in Europe owes much to the perceptions of a mismatch between existing institutional capacities and the growing complexity of policy problems (Majone 1993a: 30; 1994b: 85). Throughout the 1970s and 1980s, governments on a country-by-country basis throughout Europe came to the realisation that the interventionist and welfare policies of the past had either failed or could no longer be afforded (Majone 1993b: 12). Strategic adaptation to these new

realities resulted in a reduced role for the positive, interventionist state and a corresponding growth in the role of the regulatory state, with regulation replacing tax and spend policies (Majone 1997: 140 and 148).

The problem of imposing effective public control over nationalised industries, together with subsequent debates on privatisation and deregulation directed the attention of European public opinion towards regulation as an efficient mode of policy-making aimed at correcting market failure (Majone 1990: 6; 1993a: 25; 1997: 144). According to welfare economics, market failure occurs when one or more of the conditions for the validity of a Pareto-optimal allocation of resources is not satisfied. Thus, if regulation succeeds in removing market failures at reasonable cost, it can improve market efficiency or even ensure the viability of markets, for example in financial services markets where trust, transparency and information disclosure are of crucial importance (Majone 1997: 141). This rise of administrative regulation changes the role of the state from being a producer of goods and services to that of a regulator whose main function is to ensure that economic actors play by the agreed rules of the game (Majone 1990: 9). It may also lead to the growth of economic and social regulation by means of semi-autonomous regulatory agencies operating outside the line of hierarchical state control (Majone 1993a: 22), with the shift from direct to indirect or proxy government (Seidman and Gilmour 1996) leading to what Hood and James (1996) have termed the 'inner face' of the regulatory state.

The reasons for new regulatory instruments are strikingly similar in each European country and strongly reminiscent of the arguments earlier put forward in the United States. These explanations include: the need for expertise in complex technical

matters; the need for a rule-making or adjudicative agency that is separate from government and partisan politics; the ability of agencies to provide greater policy continuity than elected politicians; and the ability of independent agencies to focus on controversial issues, thus enriching public debate (Majone 1996: 49). In addition, the main political, economic and technical reasons for the rise of the regulatory state in the EC were: external influences, mostly from the United States (Majone 1994a); the crisis of interventionist policies; the need for a new regulatory framework for privatisation; and the cumulative impact of the growing body of EC regulation (Majone 1996: 49). Of these factors, the increasing interdependence of domestic and supranational policies within the EC is by far the most significant factor for the rise of the regulatory state in Europe (Majone 1997: 144), given that a good part of national regulations are now of EC origin or are measures introduced to implement EC regulation (Majone 1996: 56).

The growth of EC regulation

So why do member states co-operate to achieve EC regulatory growth? For Majone (1996: 61) the growth in EC regulation, both quantitative and qualitative (Majone 1997: 145), poses a major theoretical puzzle. Aside from competition policy and measures necessary for the integration of national markets, few regulatory policies or programmes are specifically mentioned in the Treaty of Rome (Majone 1991a: 9; 1993b: 16; 1994a: 85). Of those Treaty areas that could have given rise to significant regulatory activities, some, including transport and energy policies have remained largely undeveloped. On the other hand, in areas such as environmental protection, significant policy development has taken place even in the absence of a clear legal

basis (Majone 1990: 30; 1994a: 87; 1998: 17). Despite the fact that environmental protection was not mentioned at all as a Community competence, between 1967 and 1987 when the Single European Act finally recognised the authority of the Community to legislate in this area, almost 200 directives, regulations and decisions were introduced by the Commission (Majone 1990: 31; 1991a: 9; 1997: 145). In a number of important policy areas, EC regulation has often been more innovative than those of all or most member states (Majone 1996: 74-78; 1997: 145).

It is also surprising that Community regulation should have grown so rapidly in the face of member state opposition to any erosion of national sovereignty. At the same time, member states appeared prepared to accept the transfer of regulatory competences to the Community that were neither required by the Treaty, nor strictly necessary for the proper functioning of the common market (Majone 1996: 61). Given the tight control of the Commission by the European Council, Council of Ministers and the Committee of Permanent Representatives of national governments (COREPER), many commentators on EC policy innovation (see, for example, Rehbinder and Stewart 1985: 213) have concluded that the member states normally set the parameters for Community action, while for intergovernmental theorists policy innovation is impossible since the Commission's role is simply to facilitate bargaining between member states.

While policy analysts have traditionally explained changes in regulatory policy as the result of shifts in the configuration of dominant interests or of changes in economics or technology, it is unlikely that the reasons for change are monocausal. Majone

(1996: 266-267) identifies four central themes in the EC regulatory policy-making process.

Firstly, EC regulation has had an extraordinary impact of the actions and behaviour of the member states. This impact is attributed to the range of specific legislative and administrative measures that fall within Community competence, the choice of policy instruments and the relationship between EC regulation and national styles of policy-making. In particular, Majone draws attention to the influence of policy learning, Community actions often providing the stimulus for national governments to reconsider the logic of traditional policies and institutional arrangements.

Secondly, the character of EC regulatory policy-making is the product of a relationship between national and European regulation. For Majone, this relationship is far from having reached any sort of stable equilibrium. Instead, there is a discernible trend towards greater centralisation in some areas, with indications of an evolving coordinated partnership in others. This relationship is made more complex by a lack of mutual trust, the tendency of national governments to use EC regulation and uneven implementation and enforcement of Community law to their advantage.

Thirdly, the limits of national and EC regulatory policy competence have not yet been clearly defined.

Fourthly, the legitimacy and democratic accountability of EC regulatory policy-making remains complex and includes unresolved issues, closely related to wider questions of political legitimacy in the Community. While the problem of

accountability of the regulatory process is present at all levels of government, they are more obvious at the Community level because regulation is the core of EC policy-making while, in member states, welfare and macroeconomic policies are politically more prominent than regulation (Majone 1993b: 30).

For Majone, this continuous growth of Community regulation is not easily explained by traditional theories of EC policy-making (1990: 31) since, at most, such theories tend to suggest that the serious implementation gap that exists in the Community may make it easier for the member states to accept Commission proposals which they have no serious intention of applying. These theories do not, however, account for the fact that in some policy areas regulatory activity has been slow while in other areas significant policy development has taken place even in the absence of clear legal bases. Furthermore, Majone contends that existing theories of EC regulatory policy-making do not draw a sufficiently clear distinction between regulatory and other types of policies (1990: 32). While non-regulatory direct-expenditure programmes are constrained by budgets, the costs of regulatory measures are borne directly by the firms and individuals who have to comply with them (Majone 1990: 32; 1991a: 10; 1994a: 87; 1996: 64; 1998a: 19). The distinction between the re-distributive policies of direct expenditure of public funds and regulatory policies is particularly important for EC policy-making because, while the costs of producing new rules is negligible, the real costs of regulation are not only economic, since the political and administrative costs of enforcing EC regulations are borne by the member states (Majone 1990: 32; 1993a: 31; 1993b: 18; 1994a: 95; 1995a: 10, 1997: 149; 1998a: 19).

The growth of EC regulatory powers can, in part, also be explained by the fear among member states that national governments may use regulation to promote their own interests rather than common regulatory objectives (Majone 1995b: 6). In the absence of mutual trust and a sense of comity, centralisation of regulatory authority at a higher level of government is desirable as a means to correct negative externalities. Thus mutual distrust of the member states results in demand for a higher level of centralisation. But member states not only mistrust each other, they also mistrust the Commission (Majone 1995b: 9; 1998b: 28). This paradoxical attitude has consequences both for the quantitative growth of Community rules and for the poor level of enforcement of EC regulation. The immediate consequence is that the Commission is kept on a tight rein: chronically understaffed; closely monitored through an intricate system of "regulatory" and "management" committees which can block its proposals and transmit the file to the Council, which can overrule the Commission and ensure that it is obliged to rely almost exclusively on national bureaucracies for the implementation of measures it elaborates (Majone 1995b: 9).

A further consequence of mistrust is the fact that the Community budget has been historically kept quite small: less than 1.3 per cent of the combined gross domestic product of the member states or about 4 per cent of the combined expenditures of the central governments of the member states (Majone 1991a; 1993a: 30; 1994a: 85; 1995b: 10). The financial resources of the Community are mostly accounted for by the Common Agricultural Policy and a handful of re-distributive programmes, the remaining resources are insufficient to support large-scale initiatives in other policy areas such as industrial policy, energy, research or technological innovation (Majone, 1991a: 11; 1998a: 19). While the power of the member states is still the traditional

role of taxing and spending (Majone 1993a: 19), the EC has lacked such power, regulation offering the only solution to the problem of maximising the influence of EC policy-makers (Majone, 1994b: 95; 1997: 150). Thus an important part of the explanation for the growth of EC regulation must be the desire of the Commission to increase its influence, even beyond the functional requirements of the common market, by escaping budgetary constraints and resorting to regulatory policy-making (Majone 1991a: 11; 1998: 20).

For Majone (1997: 150; 1998: 27), the absence of binding budgetary constraints for regulatory policy-making has three important consequences. Firstly, neither national parliaments nor governments systematically determine the overall level or regulatory activity in a given period. Secondly, no office is responsible for establishing regulatory priorities across the government. Thirdly, while spending programmes are regulatory audited, no such control has been exercised historically over regulatory programmes.

For Majone, this explains the continuous growth of Community rule making in practically every area of economic and social regulation (Majone 1993a: 31) because the most important paradox of institutional mistrust is actually the fact that, in an attempt to restrict the scope of supranational policies by imposing a tight budget constraint, member states have unwittingly encouraged the expansion of a mode of policy-making that is largely immune from budgetary discipline. This trend has been aggravated by institutional factors: because the Commission is a collegial body, central control over the regulatory activities of the different Directorates General (DGs) is weak. The consequence is that lack of central coordination leads to serious

inconsistencies across and within regulatory programmes, absence of rational procedures for setting priorities, and insufficient attention to the cost effectiveness of individual rules (Majone 1995a: 11). Given the institutional constraints under which it operates, regulation has turned out to be the most effective way for the Commission to maximise its influence (1995a: 10).

Moreover, by denying the Commission any significant role in implementation, the member states have encouraged a tendency to focus on the quantitative growth of EC regulation rather than on effective compliance and actual results. But Majone does not blame the growth of EC regulation entirely on the Commission since many regulations and directives are introduced at the demand of individual member states, the Council, the European Parliament, the Economic and Social Committee and a variety of private and public interest groups (Majone 1995a: 11; 1998: 27).

While the responsiveness of the Commission to such requests may increase its political legitimacy, uncontrolled and un-coordinated demands can also produce a number of negative consequences, of which legislative inflation is the most obvious one (Majone 1998: 27). The subsequent dominance of the EC regulatory process has been criticised by Majone as being highly discretionary, suffering from weak accountability, weak judicial review, absence of procedural safeguards, and insufficient public participation (Majone 1993a: 39; 1994a: 94). It suffers from an absence of central coordination, leading to serious inconsistencies across and within regulatory programmes, lack of rational procedures for selecting priorities, insufficient attention paid to the cost-effectiveness of individual rules, inadequate staffing and insufficient research capabilities (Majone 1991a: 32; 1998: 27).

Majone suggests that one method of limiting regulatory growth would be to set up an office with the power to oversee the entire regulatory process and to discipline the activities of the DGs by comparing the social benefits of proposed measures with the costs imposed on the European economy by the regulatory requirements. Such an office – a "regulatory clearing house" similar to the US Office of Management and Budget – would provide a centralised review process to help screen demands for new EC regulation (Majone 1995a: 11; 1997: 151; 1998: 28).

In the European Community, such a clearing house could be located at a sufficiently high level in the EC bureaucracy, possibly in the office of the President of the Commission, with DGs asked to submit annually draft regulatory programmes to the clearing house for review. By extending centralised control over the regulatory agenda of the DGs, this review process would help the Commission shape a consistent set of regulatory measures to submit to the Council or the European Parliament (Majone 1994a: 96). Alternatively, the growing complexity of regulation may require greater reliance on standing committees of experts and an enhancement of the role of specialised regulatory agencies (Majone 1991a: 32).

Constraints on the growth of EC regulation

But despite the range of contributory factors that account for the growth of EC regulation, there are also a number of constraints that have operated as mitigating forces to restrict regulatory growth. Both short and long run factors constrain the EC regulatory policy-making process (Majone 1993c: 14). In the short run, technology,

institutions, administrative capacities, financial resources, physical inputs and manpower are important. Given sufficient time, however, technological limitations and institutional obstacles can be removed, laws changed, capacities increased and new skills learned. This time dimension is important because factors that can be disregarded in the short run can become binding constraints in the long run. The need to maintain continuing cooperative relationships among policy-makers is thus likely to be more significant than one-off, single-issue policy agreements might indicate. Because of the potential variety of policy constraints, shared beliefs about the limits of public policy are essential, argument and persuasion playing a key role in identifying constraints, evaluating their significance for different implementation strategies and estimating the costs and benefits of relaxing those constraints (Majone 1993c: 14). However, it is impossible to know all the relevant limiting factors and it is often difficult to predict which assumed set of constraints will actually be binding.

Hence, as policy moves from decision to implementation, previously hidden constraints force policy changes. It is this process of discovering constraints and modifying strategies accordingly that Majone identifies as being the essence of the policy process (1993c: 14). For Majone, ideas are important not only in identifying and categorising policy constraints, but also in pushing out the boundaries of the possible in public policy. What is politically feasible within given constraints will depend on popular knowledge and the relation of popularly accepted values to permissible practice (1993c: 15). Majone anticipates that constraints on policy can often be eased after public opinion has been conditioned to accept new ideas and concepts.

Demand and supply model of EC regulation

The EC regulatory process includes many actors, including: industrialists, trade unions, public interest groups, national and sub-national politicians and bureaucrats. The Commission plays a key role in the *supply* of regulatory initiatives to meet the *demand* of this variety of actors (Majone 1998: 20). Evidence to support the view that the growth in regulatory output is attributable to its supply side function rather than the scale of its budget can be observed in the great expansion of Community action since the mid-1980s in areas such as the environment, health and safety at work, consumer product safety and the regulation of financial services, which has been accompanied by a significantly less than proportional increase of expenditure for administration costs - from 4.35 per cent of the total Community budget in 1985 to 4.8 per cent in 1994 - while the number of directives has more than doubled in the same period (Majone 1996: 65).

For Majone, the fact that budgetary appropriations per unit of regulatory output have actually decreased suggests that the Commission *prefers* 'task expansion' to budgetary growth. The Commission has been constrained by budgetary limitations and has simply expanded its competences in different directions (Majone 1996: 65). Given the imposition of these tight budgetary constraints, expansion of regulatory policy-making activity has provided the only way for the Commission to increase its activities (Majone 1996: 66). Majone suggests that it is a "fairly safe behavioural assumption" that the remarkable growth of Community regulation must take into account both the desire of the Commission to increase its influence and the possibility

of escaping budgetary constraints by resorting to regulatory policy-making (1990: 33).

Majone (1990: 33; 1991a: 12) suggests that a further element in the expansion of regulatory policy-making in preference to other forms of intervention is the interest of multi-national, export-oriented industries in avoiding inconsistent and progressively more stringent regulations. In practice, however, it should be acknowledged that diversity and inconsistency are the significant problems for regulatory policy-making in terms of implementation asymmetries. Yet for Majone, multinational companies tend to prefer Community to national regulations not only to avoid the costs of meeting differing national standards, but also to avoid the risk of progressively more stringent regulations in some member states in a process akin to the strong corporate support for federal regulation ("pre-emptive federalism") observed in the United States, for example in relation to air pollution measures (Majone 1990: 33; 1991a: 15; 1994a: 87). The interaction of national policy with new EC regulatory initiatives may also have the effect of re-orienting national perceptions of policy priorities. In this context, the Community has the advantage of providing a back door method for adopting measures that would not be adopted by national governments (see also Rehbinder and Stewart 1985: 331-332).

Demands for EC regulation also come from public-interest organisations such as environmentalists, consumer groups and, particularly, groups in those countries with a low level of health and safety regulation. For Majone, these groups hope to initiate protective EC regulation because, due to their political weakness, they are unable to

achieve equivalent regulatory changes from their own national governments (Majone 1996: 67).

Majone suggests three (related) reasons why member states have accepted such far-reaching limitations on their sovereignty through EC regulation. Firstly, using the theorem of Ronald Coase (1960) on the rationale for supranational regulation, Majone (1998: 20) suggests that international regulatory failure occurs when national regulators are unsure as to whether international agreements are kept or not. This is because much economic and social regulation is discretionary. Since regulators lack information that only regulated firms have in their possession, and because governments for political reasons are reluctant to impose excessive costs on industry, bargaining is an essential feature of the process of regulatory enforcement. A "market" is created over the precise obligations of the latter (Peacock, 1984) and, since bargaining is so pervasive, it may be impossible for an outside observer to determine whether or not an international regulation has in fact been violated (Majone 1998: 21)

Majone's second explanation for member states' willingness to delegate regulatory powers well beyond what was required by the founding treaties lies in the different kinds of transaction costs that arise in the formulation and implementation of international regulatory agreements (Majone 1996: 69). Any international agreement involves search and bargaining costs, but enforcement and measurement costs are particularly significant in the case of regulatory agreements and it is the high costs of enforcement, mostly derived from policy discretion in choosing between several possible courses of action (Majone 1994a: 89), that explain the decision to delegate

powers to a supranational authority rather than setting up an international secretariat (Majone 1996: 70). The delegation of regulatory powers to an agency distinct from national governments is, of course, in itself also an important means by which national governments commit themselves to EC regulation (Majone 1996: 71). Majone also points out that the Treaty of Rome is a framework treaty rather than an international agreement providing a detailed specification of objectives and policy instruments. The result is a Treaty that Majone (1996: 71) describes as a "relational contract" among the member states, namely an agreement which frames the entire relationship by recognising that it is impossible to agree all relevant bargaining action at the contracting stage, making the delegation of discretionary powers to supranational Community institutions essential. The delegation of regulatory policy-making powers to the Commission thus becomes an appropriate response to the (necessarily incomplete) contractual arrangements set out in the Treaty of Rome (Majone 1996: 72).

Indeed, the demand for regulatory initiatives supplied by the Commission often comes from member states themselves, for example the UK exerted considerable pressure on the Commission to liberalise the market for life and non-life insurance where British insurers enjoyed a comparative advantage over their competitors on the continent (Majone 1998: 20).

Finally, perhaps the greatest advantage of EC membership (Majone 1998: 21) is the possibility of delegating politically difficult decisions (such as strict environmental regulations) to supranational non-majoritarian institutions (Majone 1991b) since, by showing that their hands are tied by EC regulation, member states can increase the

international credibility of their policy commitments and reduce the power of re-distributive coalitions domestically. For Majone (1998: 22), it is the low credibility of purely intergovernmental agreements, together with the advantage of shifting politically difficult decisions to non-majoritarian institutions, which explains the willingness of member states to delegate important regulatory powers to the European Commission.

Regulatory efficiency as an explanation for EC regulatory emulation

Most importantly, Majone has also suggested reasons why EC policy innovation so frequently resembles prior national regulation in at least one member state. For Majone (1990: 1) genuine EC policy innovation, where new Community standards replace and improve on those used in member states is rare, the ability of EC regulatory policy-makers to innovate often depending more on their skill in utilising existing models than on inventing novel solutions. Looking for models that imitate rather than seeking originality thus becomes the key to EC regulatory policy-making because "imitation affords relief from the necessity of searching for optimal decisions and conscious innovations which, if wrong, expose the decision maker to severe criticism" (Majone 1990: 2).

Regulatory efficiency thus encourages adoption of the emulation model. Selection between policy variants then occurs, a process that may be separated by a time lag of several years or even decades because events occur too fast and ideas mature too slowly for responses to be devised anew for each set of pressing problems (Majone 1990: 1).

Where events occur too fast, policy-makers will usually select their ideas from the stock of existing models available at a particular time (Majone 1991: 21), known in other literature as the "normative repertoire" as part of a process of regulatory competition. In turn, the existing policy ideas are usually the results of intellectual efforts or practical experiences of preceding years. Derthick and Quirk (1985: 57) have made the similar observation that the existing stock of ideas shapes the response of policy-makers to events by defining the conceptual alternatives from which they can choose (also quoted in Majone 1990: 2).

From the range of available regulatory policy models, choice of the most appropriate alternative will be dependent on evidence that the idea is workable and, given the desire to avoid the uncertainties of social experimentation, persuasive proof of successful implementation in some country or jurisdiction not too different from that of the policy-making regime. Essentially, therefore, policy-makers are engaged in a process of finding reassurance and inspiration in concrete historical experience rather than abstract theories (Majone 1990: 2). As a result, "EC regulation often seeks to diffuse throughout the Community solutions already adopted in the most advanced member states" (Majone 1998b: 18). This desire for reassurance limits the range of policy variants a good deal more than one would otherwise expect. By searching for models to imitate rather than seeking originality, imitation affords relief from the necessity of searching for optimal decisions and conscious innovations that would expose policy-makers and politicians to the risk of exposure to severe criticism in the event of regulatory failure. According to Majone (1990: 2), this strategy of adopting patterns of action observable in past successes instead of searching for novel solutions

accords with the expectations of evolutionary economics that rational (economic) actors will seek to learn from action observable in the past in a complex and uncertain environment.

Successful regulatory emulation is not, however, simply a case of observing and copying existing policies. The critical question is whether emulation is appropriate given the likelihood that the set of circumstances in which it is being replicated will be different for those that the measure was originally designed for. As Scharpf (1999: 90) puts it "policy imitation remains a difficult and uncertain process whose outcome depends not primarily on the attractiveness of the foreign models but on the domestic conditions affecting adoption and implementation". The key decision is therefore whether a programme or policy that is successful in one setting can be transferred to another and, in practice, regulatory policy-makers often seem only mildly preoccupied with this problem of transferability.

For policy-makers, it is often sufficient to know that a policy idea is likely to be modified by the political and institutional conditions in which it is introduced (Majone 1990: 3). What policy-makers want above all is less a detailed blueprint, since this is likely to be inapplicable to the specific conditions in which they operate, than the general guidance and *prima facie* evidence that the proposed policy is feasible (Majone 1990: 3). Majone, then, leaves us with the assertion that the existence of regulatory emulation can be explained fairly straightforwardly on grounds of regulatory efficiency (1990: 46). However, he also leaves unanswered the question of why a particular national regulatory approach comes to be adopted as the EC norm at any given time. This question remains under studied in EC regulatory policy analysis.

Summary

To summarise the foregoing discussion, Majone's regulatory model of the European Community provides a range of explanations for the growth of EC regulatory activity. These include the assertions that:

- The costs of new (non-direct expenditure) EC regulation are seen as negligible;
- Mutual distrust amongst member states encourages EC regulatory activity, since they distrust the Commission less than they distrust each other;
- Demands for EC regulation are expressed by public-interest organisations and multi-national corporations who prefer coordinated Community regulatory activity to piecemeal national measures;
- Member states seek to reduce the transaction costs associated with the formulation and implementation of regulation by pooling resources at EC level;
- Member states see delegation of difficult regulatory decisions to the Community as being politically expedient;
- Emulating prior national regulation is considered efficient, with regulators less concerned with transferability than with general guidance, ideas and feasibility.

The question that remains, however, is whether emulation of prior national regulation is the result of a process of regulatory competition as the dominant literature has tended to suggest or, alternatively, whether emulation is in fact the result of co-

operation and consensus between member states who learn from the experience of others and choose a prior national approach as the preferred model for EC regulation because it has appeared to work well elsewhere. The possibility that consensus and co-operation of this type can best explain the propensity of EC regulation to emulate a prior national approach will be investigated as the thesis progresses.

CHARACTERISING EC REGULATION:

EMULATION, INNOVATION AND RE-REGULATION

CHAPTER 2

COMPETITION, DIFFUSION AND LEARNING IN THE EC REGULATORY PROCESS

Introduction

The central theme of this thesis is that EC regulation can be best understood in terms of three levels of ideas, namely: (a) that the EC regulatory process is best understood by particular styles or processes of regulation; (b) that there are particular determinants or causes of regulation that are best understood as regulatory competition, consensus and co-operation; and (c) a hypothesis can be derived from the literature review to the effect that diffusion of ideas and policy learning lead to consensus and co-operation, this being of greater significance than regulatory competition in the EC regulatory process.

In order to inform this approach and underpin subsequent analysis, this chapter undertakes three tasks. Firstly, it examines whether characterisations of the EC regulatory process in terms of "competition", derived from the work of Héritier, can adequately account for the emergence of EC regulation. Secondly, it assesses whether explanations derived from "diffusion" and public policy analysis in the United States

can assist by adding clarity to our understanding of the EC regulatory process. Thirdly, it examines the potential for "policy learning" scenarios developed in the EC context to provide adequate explanations of the EC regulatory process. In its conclusion, the chapter suggests that analysis of the diffusion and policy learning literature may indicate that consensus and co-operation between member states in the EC regulatory process is a viable alternative to the model of regulatory competition envisaged by Héritier. In order to make this argument, it is to an analysis of competition as a process leading to EC regulation that this chapter will first turn.

Competition as a process leading to EC regulation

A common explanation of regulatory policy-making is that it tends to be the result of competitive struggles and outcomes dependent of the resources used in these struggles and the distribution of those resources between the different involved institutions, with the play of power central to that process (see, for example, Hancher and Moran 1989: 277). In the context of the European Community regulatory process, one prominent proponent of this scenario has been Héritier, whose work on competition and accommodation of diversity is reviewed in five sections of this chapter: the first looks at Héritier's explanation for the origins of "competition" in the EC regulatory process; the second, reviews her categorisation of member states as "leaders" and "laggards" in regulatory terms; the third, summarises her depiction of the Commission as a "gatekeeper" for member state initiatives; the fourth, reappraises Héritier's description of the "coordination" of diverse interests; and the fifth looks at the strategies identified by Héritier that she claims are used to overcome deadlock in the EC regulatory process.

Origins of competition in the EC regulatory process

Chapter 1 of the thesis began by setting out reasons why regulation has come to be the dominant tool in EC regulatory policy-making. It noted that central to Majone's characterisation of the EC regulatory state has been the identification of member states as providing by far the most important source of demand for EC regulatory initiatives, with the Commission introducing legislative proposals in response to requests from particular national governments or the Council of Ministers (Majone 1996: 68). There are several reasons why a particular member state may want EC regulation to impose its own approach to a particular regulatory issue on other member states. Such a strategy would minimise the costs of legal and administrative adaptation to new Community rules, would give competitive advantage to the national industry which has already adjusted to that particular regulatory regime and, in the case of countries with a high level of social protection, would reduce the cost advantages of countries with lower levels of protection (i.e. social dumping) by forcing all member states to adopt the same regulatory standards (Majone 1996: 68). Conversely, member states that anticipate high adaptation costs as the result of EC regulatory change may be expected to oppose the initiative.

Building on this scenario of regulatory innovation primarily driven by member state interventions, Héritier has made a strong case for the assertion that "European [Community] regulatory policy-making is characterised by regulatory competition among the highly regulated member states which, by influencing European policy-making, seek to enhance their competitive position in the European market and to reduce costs of legal adjustment" (Héritier 1996: 164).

Héritier describes the EC regulatory policy-making as being driven by "competition between highly regulated member states" (Héritier 1996: 159), with the "the inevitable outcome of regulatory competition [being] an ever-increasing and thickening network of European regulations" (Héritier 1996: 159).

Chapter 1 also noted that, in Majone's characterisation of the EC regulatory state, member states are willing to transfer national regulatory policy competence to the Community due to mutual distrust, while the European Commission is engaged in a strategy of policy expansion. As a corollary to this model of the regulatory state, the EC version of "competition" envisaged by Héritier attributes to member states not only the desire to transfer regulatory competence to the European level, but also the desire of those member states to see EC regulation fashioned in the image of their own regulatory traditions. The result is that EC regulation either amounts to a "policy patchwork" in which diverse member state regulatory approaches are linked under the roof of the same Directive or, alternatively, that EC regulation is modelled after the regulatory style of one particular member state (Héritier 1996: 149).

It is anticipated that the specific outcome of a process of accommodating the diverse interests of the member states will vary according to the institutional conditions of each stage of the policy-making process (namely the phases characterised in later chapters of this thesis as opportunity, negotiation, adoption, and impact/reappraisal). Héritier finds that this expectation is to some extent corroborated by the empirical development of EC regulation, especially in the field of the environment, but also acknowledges that there are countervailing tendencies: the subsidiarity principle and

the lack of support among member states for ever-increasing and detailed EC regulation (Héritier 1996: 159). Recognising the changing tides, Héritier suggests that the Commission, in devising legislation, has deliberately given more latitude to member states in policy implementation, with often only policy objectives laid down while the choice of instruments to reach these is left to member states. In this regard, it is important to distinguish between the older EC regulatory approach that pre-dated the Single European Market Initiative and which was largely prescriptive, dictating the policy method to be followed, from the so-called "new approach" to EC regulation that became commonplace from 1986 onwards. This thesis is concerned with the latter approach.

Furthermore, an important precondition that Héritier identifies as being prevalent under conditions of EC regulatory competition is the fact that there is no structural "first mover", by which she means that no one member state emerges as the "winner" in terms of seeing its outcomes consistently predominate across a range of regulatory policy areas. The consequence is that Héritier sees no particular tradition dominating EC regulation across the board, but rather "a colourful patchwork composed of various instruments and national regulatory styles derived from distinctive regulatory backgrounds" (Héritier 1996: 159).

Leaders and laggards in EC regulatory competition

The "competition" that Héritier identifies in EC regulatory policy-making is largely confined to a particular cohort of countries, namely the highly regulated member states with a long and well-established tradition of regulatory control. Although

Héritier does not elaborate on her definition of "highly regulated member states", France, Germany and the United Kingdom are examples that she cites as countries that have the appropriate credentials and regulatory traditions (Héritier 1996: 164). It is this group of highly regulated member states that seek to enhance their competitive position in the European market and to reduce costs of legal adjustment. The proposals put as the preferred EC regulatory approach tend to correspond to that member state's own economic interests and regulatory traditions since "the initiator seeks to widen the scope of European policy-making according to its own preferences, and to transfer its own regulatory style to the European level" (Héritier 1996: 151). These member states are Héritier's "leaders" in regulatory terms that are likely to provide the model for the "laggard" member states that lack their own traditions of highly regulated arrangements. Héritier then envisages that it is the regulatory achievements of highly regulated member states that are presented to the Commission which then determines the chances of the member states' regulatory proposals to influence the EC regulatory policy agenda (Héritier 1996: 164).

The initiator, or "first mover", member state has the opportunity to define the scope and nature of problems dealt with by EC institutions and shape the content of EC regulation, where as other member states are forced into reactive mode. By defining the problem, the "first mover" is also able to suggest a practical approach to solving the problem that it has defined and may carry on the role of "first mover" from the "problem definition to the "problem solving" (or "negotiation") stage of the regulatory policy-making process and anchor its approach in draft EC regulation. If not seriously challenged by an opposing approach by another (highly regulated) state,

"problem solving" then proceeds within the regulatory approach defined by the "first mover" member state (Héritier 1996: 150).

The chances for one of the cohort of (highly regulated) member states to influence EC regulatory policy-making by directly approaching the Commission are, according to Héritier (1996: 164) relatively high, because the attempt to exert influence does not have to pass the institutional filters of a parliamentary democracy governed by parties. Instead, if a "leader" or "first mover" member state is successful in gaining the support of a division of a particular Directorate General within the Commission, it can shape problem definition during what this thesis categorises as the initial "opportunity" state of the EC regulatory process. For Héritier, this first mover advantage may, however, be lost once a regulatory policy proposal leaves the institutionally secluded stage of drafting within a division of a particular DG and it is then, at what this thesis terms the "negotiation" phase of the regulatory process, that "[D]istributive issues come to the fore which are the object of extensive bargaining processes, in the course of which compensations are offered to those who perceive themselves as the losers of a proposed new regulation" (Héritier 1996: 164).

In sum, the scenario that emerges is one in which the "leader" member states seek to see their national regulatory approach adopted as EC regulation for four reasons: firstly, they seek to avoid the costs of institutional and legal adjustment caused by EC legislation; secondly, they try to establish favourable competitive conditions for their own industry by raising EC standards to their own national level; thirdly, they suggest more stringent technology-oriented rules to enhance the market for national technology industries; and, fourthly, by preventing more lenient EC regulation,

national authorities seek to maintain their bargaining power with their own industries because the latter cannot point to more lax EC standards when required to implement national standards (Héritier 1996: 151).

Yet being the "leader" or "first mover" once does not mean always being so. Presumably with the objective of avoiding 'regulatory capture', the Commission avoids frequently adopting the proposals of one member state in a way that would accord it the status of "structural first mover" (Héritier 1996: 153) in any given regulatory policy area. EC institutional arrangements dictate that, although holding the Presidency can assist "first mover" initiatives by allowing a member state influence over agenda setting (Héritier 1996: 158), on the other hand qualified majority voting in the Council can increase the risk of "foreign" regulatory approaches being "imposed" on a member state via EC regulation.

Being the "leader" and making the first move does not necessarily imply a policy advantage, but may immediately trigger the formation of an opposing coalition seeking to obstruct the first mover's initiative. Thus Héritier accepts that it does not necessarily follow that "first movers" will see their preferred regulatory approach adopted as the EC norm (1996: 153) since the first move may trigger the formation of opposing coalitions of member states, but she also points out that agenda setting and problem definition generally occur under conditions of extreme secrecy, allowing the Commission considerable discretion in choosing from among policy options in the European "policy market" (Peters 1992: 75; quoted in Héritier 1996: 154). The Commission has considerable latitude in choosing from among the policy options in the EC regulatory market (Héritier 1996: 153).

But, given the primacy accorded to heavily regulated member states in Héritier's analysis, what role can be accorded to less regulated member states in the EC regulatory policy making process? For Héritier, because less regulated countries often consider lower standards preferable because they allow businesses established within their territories greater competitive advantage over those based in more heavily regulated member states, there is a tendency for less regulated states to acquiesce to new EC regulation without playing a significant role in determining its content, then relying on non-implementation or incomplete implementation as a way of retaining competitive advantage (Héritier 1996: 154). She goes on to suggest that, for less regulated states, no new EC regulation is the preferred outcome, with a "mixed" regulatory approach, the second best option, the introduction of EC regulation which closely corresponds to a highly regulated member state being the least attractive option.

Commission as "gatekeeper" in EC regulatory competition

By virtue of their decision to allow the transfer of regulatory policy making duties from the nation state to the EC institutions (Majone 1996), member states have effectively "stepped back as innovators" (Héritier 1999: 93) in the regulatory process. The Directorate General of the Commission responsible for a particular policy area forms what Majone (1994a: 90; 1996: 73) describes as the "central node" of a vast "issue network" which includes national experts, academics, consumer and other public interests groups, economic interests, professional organisations and sub-national governmental organisations (see also Héritier 1999: 94). Within this issue

network, the variety of policy positions will be much greater than at the national level and it may even be the case that national experts find the Commission a more receptive forum for new ideas than their own national government (Majone 1996: 74).

So, with the Commission to the fore, it is able to act as a policy entrepreneur and is constantly faced with a variety of policy options from actors from various member states. This means that whether or not a member state is successful in shaping the European regulatory agenda by using the 'first mover' strategy depends on the response of the Commission, with the Council unable to take any policy decisions unless the Commission has put forward a corresponding proposal. It is in this role as a "gatekeeper", confronted with a variety of regulatory options by member states, that the Commission must choose the regulatory approach that it wants to put on the legislative track as EC regulation. In this sense, Héritier portrays the EC regulatory policy-making process as a "market", in which member states offer their "products" to the Commission (Héritier 1996: 152).

From the multitude of policy proposals, Héritier suggests that the Commission chooses the ones that it wants to put on the legislative track. The member states can thus be regarded by as "innovative policy entrepreneurs in the EC regulatory market, offering their products to the Commission" (Héritier 1996: 152). The Commission's responsiveness to such policy proposals is no act of generosity on the part of a supranational institution. Having relatively few personnel of its own, the Commission depends on member states to provide policy expertise. But whether or not the Commission responds favourably to the policy initiative of the 'first mover' member state will ultimately depend on whether the proposal fits into the overall EC

regulatory policy-making philosophy (Héritier 1996: 152). The Commission is also a corporate actor (Héritier 1996: 152), interested in expanding its own regulatory policy competence but endowed with limited financial resources (Majone 1994). This leads Héritier to acknowledge that, ultimately, despite the primacy she accords earlier to the role of member states in EC regulatory policy-making, whether or not the Commission responds favourably to the regulatory initiative of a "first mover" member state depends on whether the proposal fits into the overall "policy-making philosophy" of the European Community (Héritier 1996: 152).

The scenario that emerges is therefore one in which, after a "first mover", with the Commission acting as "gatekeeper", has defined a problem and set the agenda, a "coordinative pattern" emerges in the problem-solving (Scharpf 1991) phase of early drafting. At this stage, technical, scientific experts, who are more interested in pragmatic problem-solving (Majone 1994: 91) play an influential role, the more technically oriented a regulatory question, the more easily it can be insulated from "distributive questions" (Héritier 1996: 155). These scientific committees are seen as playing an important role in simplifying problem-solving, even allowing a learning process to evolve which facilitates the development of "epistemic communities" and mutual learning among national experts (Haas 1992a; quoted in Héritier 1996: 156), building a consensus across diverse national interests.

The role of the European Commission as a policy entrepreneur and the role of epistemic communities in the EC regulatory process leading to emulation, innovation and re-regulation are discussed in greater detail in the next chapter of this thesis.

Coordination of interest diversity in EC regulatory competition

Within the scope of Héritier's hypothesis that competition drives new initiatives in EC regulatory policy-making, she has observed that at specific stages of the EC regulatory policy-making process, patterns of "informal coordination", based on compensatory payoffs, evolve among actors (Héritier 1996: 150; see also Richardson 1994: 140). As "competition" gives rise to interest diversity, coordination follows once the member states that are "leaders" in regulatory terms have made their strategic "first move", Héritier envisages that there will then be "unilateral adjustment" by all other member states during the problem definition stage of the EC regulatory policy-making process (1996: 150). It is then at the bargaining stage of the regulatory policy-making process that coordination between member states occurs, with the consequence that it is most difficult for the "first mover", the "leader" in regulatory terms, to maintain "structural advantage" in the face of compensatory and distributional questions (1996: 151). The presumption of Héritier here is that other member states will seek payoffs and compensation as the result of their perception that member states that are "leaders" in providing the model for EC regulation terms will be "winners" in terms of low adaptation costs and first mover advantages once their national regulatory approach is adopted as the EC norm. Héritier's presumption appears to be that re-distributive issues will come to the fore in the EC regulatory policy-making process because "laggard" member states will see themselves as "losers" in regulatory terms, faced with the burden of high adaptation costs once new and, for them, previously untried EC regulation comes on stream. For Héritier, the "first mover" may at this stage experience a "clear home run" or have to make considerable concessions with respect to the regulatory approach proposed, with the

final version of EC regulation often containing a mix of diverse national approaches amounting to a "thwarted home run".

Overcoming institutional deadlock in EC regulatory competition

Héritier (1999: 87) points out that the conventional wisdom of EC decision-making is that it has a distinct tendency to stall because, in a system of multi-level governance, diverse actors are likely to reach stalemate in any given policy area if the application of new EC regulation is likely to cause economic loss, impair their decision-making competences or impose additional costs of instrumental adjustment. Since virtually all regulatory decisions entail some form of "winners and losers" scenario, there might have been a rational expectation that deadlock in the policy-making process might result from the intransigence of one or more actor, motivated by self-interest and self-preservation. Héritier (1999: 88) supports the view that deadlock flows from conflict over economic costs and benefits, gains and losses in policy competence and the costs of instrumental adjustment. In policy areas where national legal culture and existing practice favour a dichotomy between differing national regulatory approaches, the reluctance to change the national problem-solving approach and expose domestic actors (firms, consumers) to high compliance costs of adaptation, makes EC regulatory progress particularly difficult to achieve.

How, then, is progress ever achieved in practice? In relation to environmental policy, Héritier suggests that package deals are frequently struck, allowing for differential rules within a framework of regulation that takes account of the diverging regulatory cultures of different member states (Héritier 1999: 90). The task of the EC regulatory

process therefore becomes one of interest accommodation and interest bargaining. Elsewhere within the EC institutional setting, Héritier (1999: 89) suggests that a shift in the decisional arena may play an important role in promoting progress towards agreement on a new EC regulatory approach. The significance of this "shift in the decisional area" in the EC regulatory process, will be discussed in this thesis in terms of judicial activism and the windows of opportunity opened by policy entrepreneurs.

Diffusion as a process leading to regulation

An alternative to Héritier's explanation of competition leading to regulation may be derived from the United States where, although the terminology of emulation and innovation adopted in this thesis has not always been used, in practice the issues involved have been a topic of research for over thirty years. Walker (1969) began this endeavour with his classic public policy study that defined government innovation as a "program or policy which is new to [the state] adopting it" (Walker 1969: 881). The central research question that US public policy analysts have sought to answer since then is: what causes government to adopt a particular new program or policy?

Three principle schools of thought have sought to provide an answer to this question. Through the 1970s and 1980s, state innovation in the United States was characterised by the segregation between *internal determinants* models (Downs 1976; Regens 1980), which suggested that the factors causing a government to innovate are political, economic and social characteristics internal to that state but specify no role for regional influence, and *regional diffusion* models (Grupp and Richards 1975; Light 1978), which assumed that states emulate their neighbours when confronted

with policy problems but attribute no significance to the internal dynamics of the state. In terms of usage of these two models, while internal determinants have tended to be portrayed as determinants of policy innovation, it is regional diffusion models (Canon and Baum 1981; Gray 1973; Walker 1969) that have been framed in terms of explanations for policy emulation. The *event history analysis* model (Berry and Berry 1990, 1999) has attempted to combine elements of the earlier variations. The key aspects of the internal determinants, diffusion and event history analysis models are set out below.

The internal determinants model

The internal determinants model assumes that new regulatory measures are attributable to political and economic characteristics internal to the state. The internal determinants model would preclude diffusion effects but, once one state has adopted a particular approach, it is extremely unlikely that another state's adoption of the policy would be completely independent of the previous adoption. Berry and Berry (1999: 178) suggest that internal determinants models alone offer inadequate explanations for policy innovation and emulation, given that diffusion of some degree is likely to occur via, for instance, media coverage or communication among state officials. However they also suggest that where internal determinants models may be helpful is by assisting in an understanding of how organisational characteristics might determine if and when adoption will occur. Individuals in an organisation who advocate particular policy ideas and are willing to devote their energies to pushing these ideas can play a critical role in the adoption of new policy.

Most attention in this respect has focused on policy entrepreneurs and their role in agenda setting (Kingdon 1984). Kingdon has commented on the rarity of government innovation, noting that it occurs only when a set of conditions occur simultaneously to create a policy window (Kingdon 1984). He argues that policy entrepreneurs consciously wait for such windows of opportunity to press their policy demands. Similarly, Sabatier and Jenkins-Smith (1993) argue that advocacy coalitions (that is to say coordinated groups of governmental officials, activists, journalists, researchers and policy analysts) can be crucial in paving the way for the adoption of policy. These concepts are examined in greater detail in the next chapter.

The national interaction diffusion model

Rogers (1983: 5) defined diffusion as "the process by which innovation is communicated through certain channels over time among the members of a social system". The national interaction model of public policy assumes that there are multi-lateral communications networks between officials from various states, in which officials learn about regulatory initiatives from their peers in other states. It is presumed that officials from states that have already adopted a program interact freely with officials from those states that have not yet adopted it (Berry and Berry 1999: 172). Thus Walker (1969) discovers clusters of states having similar orders of adoption for a variety of policies and then assesses whether states in the same cluster are in the same region of the country. Some of the variation in approach may be anticipated due to what Glick and Hayes (1991) call policy 'reinvention', namely diffusion from one state to another, but this occurs in a way that allows the latter state to learn from its predecessor's mistakes, developing a more sophisticated regulatory

approach to solve a similar set of problems. It does so by using information about the impacts of the initial regulation to refine its approach rather than simply borrowing a regulatory approach wholesale. This method of regulatory "reinvention" displays a higher level of sophistication than straightforward imitation of an earlier regulatory approach because it displays characteristics of adaptation and an appreciation that the application of identical regulatory standards may result in different outcomes depending on local conditions and implementation approaches.

The national interaction diffusion model reflects many of the assumptions implicit in the policy learning literature, officials interacting and learning from one another within institutional structures, with the result that "best practice" in policy is diffused from one state to the next. However, in considering the application of the national interaction variant of the diffusion model, it is also important to acknowledge that cautionary warnings have already been given in the United States: when studying the diffusion of regulatory policies, states should not be treated as undifferentiated units (Berry and Berry 1999: 173). In much the same way as Mississippi differs in many ways from New York, it can be envisaged that Spain differs in many respects from Sweden in the EC regulatory context. It is in recognition of these regional disparities that the "regional diffusion" model has been advocated as a more appropriate analytical tool.

The regional diffusion model

While the national interaction model assumes that any number of states may interact with one another on a relatively undifferentiated basis, the regional diffusion model

takes into account the geographical proximity of states to each other when determining the likely influence that one may have on another. Accordingly, Crain (1966) and Lutz (1986) assess the relationship between adoptions by states and previous adoptions by their neighbours, seeking to establish whether adoptions occur more frequently in jurisdictions with neighbours that have already adopted than in jurisdictions with no such neighbours. "Neighbour" models assume that states tend to be influenced by those with which they share a border (Berry and Berry 1990). Other, "fixed-region" models predict that there are multiple regions within which states tend to emulate the policies of other states within the same region (Mooney and Lee 1995). The reasons for emulation might be that states "learn" more from those near by than from those far away because states have more in common with their neighbours, in terms of cultural and social confluence, and geographical and environmental conditions (Mooney and Lee 1995: 605). Applying this scenario to the EC regulatory process, member states may also find that their legal traditions more closely resemble those of their near neighbours, further enhancing a perception of common interests and the need for a unified position when negotiating EC regulation. Similarly, public pressure to adopt a particular regulatory approach may be greater if a state nearby has already initiated similar measures (Berry and Berry 1999: 175). The impact of that regulation may well be more visible to citizens, who are more likely to travel to nearby states, and to business, which is more likely to have trading links with a state that shares its borders.

The leader-laggard diffusion model

Related to the regional diffusion model is the leader-laggard model of policy transfer. Leader-laggard models assume that certain states are pioneers in the adoption of policy approaches, and that other states emulate those leaders (Walker 1969: 893). In the United States it is often assumed that this leadership is regional, with one state providing leadership for others in that region. Collier and Messick (1975) hypothesise that "leaders" tend to be characterised by high economic development, with an ordering of successive adoption by the laggards from most developed to least developed countries. Leaders and laggards have been identified in US empirical analysis in surveys of state officials (Freeman 1985; Grupp and Richards 1975; Light 1978; Menzel and Feller 1977), for instance, where respondents are asked what states are leaders in a particular policy area or which officials in other states they consult for advice, the diffusion patterns then discerned from the responses.

Event history analysis

Later studies rather blurred the dichotomy between the internal determinants and diffusion models. The work of Berry and Berry was the first to acknowledge explicitly that neither a pure internal determinants model nor a pure regional diffusion model can provide a plausible explanation of state innovation on its own. In practical terms, their work highlights the fact that it may be unrealistic to assume that a state blindly emulates its neighbours' policies without its public officials being influenced by the political and economic environment of their own state (Berry and Berry 1990: 396). On the other hand, they also claim that it is implausible to presume that states

are totally isolated from influence by neighbouring states, given that state officials meet each other, and that media attention often draws attention to state innovations. So, in support of their claim that both internal and regional factors influence a state's propensity to innovate by emulating a neighbouring state, Berry and Berry use Mohr's (1969: 111) theory to assert that the propensity to innovate is a function of "the motivation to innovate, the strength of obstacles against innovation, and the availability of resources for overcoming such obstacles".

In order to reflect the simultaneous effects of both internal determinants and policy diffusion, the goal of the event history analysis that Berry and Berry advocate (1990: 398) is to explain a qualitative change (an "event") that occurs in the behaviour of an individual at a particular point in time. The data for analysis (the "event history") is a longitudinal record showing whether and when the event was experienced by a sample of individuals during a period of observation. Since most individual government programmes can only be adopted once by a given jurisdiction, in applying event history analysis to the study of state policy innovation, analysts will typically be dealing with non-repeatable events the conceptual variant thus being the probability of a state's adopting a policy during a particular period.

Berry and Berry (1990: 398) suggest that this form of event history analysis has several critical advantages over the internal determinants and regional diffusion models. Firstly, it is suitable for testing a unified theory of state innovation incorporating both internal determinants and regional influences. Secondly, including both internal and regional influences in the same model guards against mistaking a spurious relationship between states' years of adoptions and those of their neighbours

as evidence of regional diffusion, namely an assumption that a state adopting a programme is affected by what its neighbours did perhaps decades earlier. Thirdly, while internal determinants and diffusion approaches are capable of predicting only whether a particular type of state should have adopted a policy prior to a specified date, or the timing of a state's adoption relative to that of other states, event history analysis can predict the probability that a particular type of state will adopt a policy during a particular year.

By using event history analysis, Berry and Berry deduce that numerous internal determinants of innovation reflect officials' motivation to innovate, the obstacles they face and the resources available. They then seek to establish whether regional influences also play a determinant role. Using Elazar's (1972) claim that policy-makers tend to view nearby states as "experimental laboratories" for policies, they are able to acknowledge that, since the consequences of adopting a new program can be difficult to predict, information about the effects on similar states can help to overcome uncertainty. Thus policy adoptions by nearby states provide crucial resources (information) for overcoming an obstacle (uncertainty) for innovation. When a policy decision is unpopular with the electorate, the presence of previously adopting nearby states becomes a resource useful for overcoming an obstacle to innovation. When a policy decision is generally popular with the electorate, the existence of previously adopting nearby states should intensify internal pressures to adopt a similar approach as voters see a popular policy in place in nearby states and want it in their state as well (Berry and Berry 1990: 400). As a greater number of states adopt a popular policy, the motivation for a state to adopt is heightened.

Berry and Berry suggest that this insight adds credence to their claim that a unified theory of the causes of state innovation, relying on both internal and regional influences, can be developed, with recognition that previously adopting nearby states can be a resource for overcoming obstacles to innovation suggesting that the strength of regional influences on a state's probability of innovation should vary depending on the internal circumstances in a state. It will now be instructive to proceed to an assessment of the extent to which theory derived from US public policy analysis can assist in explaining the characteristics of the EC regulatory process.

Using diffusion to explain EC regulation

The diffusion model, derived from US public policy analysis, does not of course seek directly to account for policy developments in the EC context and there are two important reasons why we might want to be cautious about over-emphasising the transferability of US analytical models when explaining European phenomena. Firstly, the range of instruments and approaches available to policy-makers in the US simply do not exist in the European context. As we observed in Chapter 1, the EC has been characterised as predominantly a "regulatory state". While US states have been able to rely on a wide variety of policy instruments including fiscal, social and judicial measures, in the EC regulation has, virtually to the exclusion of all other approaches, emerged the dominant policy tool. The second reason to be cautious about using US public policy analysis in the EC context is that the approach seeks to explain purely intergovernmental phenomena. The studies that have been undertaken in the US describe policy interactions of an intergovernmental nature, set within the frame of interactions between states operating within a constitutionally enshrined

federal structure, some states influencing others that occupy equivalent constitutional territory. Accounting for EC regulatory emulation involves accounting for a rather different set of circumstances. Our interest in this thesis is in the ways that EC regulation emulates, innovates and re-regulates. Member states are involved in this process, but the factors to be taken into account are not only intergovernmental interactions between national governments, but also the interactions between member states and the European Commission. The utility of US public policy analysis in the EC regulatory context is given further consideration below.

US public policy analysis is not entirely without its insights into the factors that might influence EC institutions in terms of regulatory opportunities: the internal determinants model, for instance, would appear to offer a viable account of regulatory innovation by corroborating the characterisation of the EC regulatory process, discussed in Chapter 1, as being at least partly accountable for in terms of the policy entrepreneurship of Commission officials. On grounds of regulatory efficiency, there is an expectation that some EC member states might emulate the regulatory policies of others. Like their US state counterparts, policy-makers within the European Commission exploit 'windows of opportunity' to choose between regulatory alternatives in a way that will achieve the desired regulatory objectives in the most efficient way. Given the supranational nature of EC decision-making, intergovernmental relations between member states are further complicated by the role accorded to EC institutions, particularly the Commission, in the EC regulatory process. In many respects, it is member states that are observing successful regulatory initiatives in other parts of the Community and presenting, from a range of regulatory

alternatives, a preferred option that can then be coordinated by the Commission as the EC regulatory approach.

In relation to public policy diffusion models, US analysts imply that states bordering each other in a particular region often display a common policy preference. So, applying policy diffusion models to EC regulation, the expectation would be that member state preferences alter slightly from one country to the next, with those states furthest apart holding more pronounced differences in their views on the preferred EC approach, while those bordering each other would be more likely to share common aims.

This also suggests that, when there is potential for member state regulatory options to compete for adoption as an EC approach, the likelihood for regionally focused diffusion of regulatory policy would be greatest. In a sense, the logic of common interests between a regionally homogenous alliance of EC member states, northern European states for example, presenting a common regulatory approach as the preferred EC approach, is contrary to what one would expect from a competitive model. Berry and Berry (1999: 175), for instance, envisaged that US states are more likely to be concerned about competition with their close neighbours than with remote states. However, in the EC context while this might hold true in terms of, for example, competition for corporate location decisions and foreign direct investment, Berry and Berry's model tends to fall down in relation to its omission of similarities or differences in cultures – particularly in legal cultures – between neighbouring EC member states. The possibility that similarities (and differences) between legal traditions motivate EC member states to form regionally based negotiating blocs

during negotiations over the form of EC regulation will be investigated as subsequent chapters examine the dynamics of the EC regulatory process.

Can, then, leader-laggard diffusion models assist in identifying the determinants of EC regulatory emulation for the purposes of this thesis? This model assumes that some states emulate other states as part of a 'learning' process but Berry and Berry (1999: 176) criticise the leader-laggard model for its failure to identify: (i) the states (or even the types of states) that are expected to be the pioneers; and (ii) the predicted order of adoption of the states that are expected to follow. Is this criticism valid in the EC context? Is it possible to be able to predict, with any degree of certainty, how and why particular national regulatory approaches are adopted based on the leader and laggard model? Surely some predictability can be attributed to the departmental culture on the part of the Commission, the critical mass of member states that already follow a broadly similar regulatory approach, or the extent to which a particular member state has developed a novel and successful regulatory approach that others can see clear benefits from following.

Perhaps the greatest potential benefits for US public policy analysis to assist in providing explanations for the characteristics of the EC regulatory process lie primarily in the distillation of internal determinants and diffusion models carried out by Berry and Berry (1990, 1999). By utilising Berry and Berry's interpretation of Mohr's (1969) analysis of organisational innovation, we are able to see the foundations of a suitable conceptual framework that can be applied in the EC regulatory setting with diffusion of ideas, not regulatory competition, the most likely cause of consensus and co-operation as determinants or causes of EC regulation.

Berry and Berry (1990: 399), citing Mohr, argue persuasively that policy outcomes are dependent on the motivation to innovate. Applying this variable in the EC context, we are readily able to see circumstances in which the willingness of member states to sanction new EC regulation and the desire of Commission policy-makers to carry through their preferred regulatory policy initiatives are likely to fall under the same "motivation to innovate" heading described in the US.

Next, the utilisation of Mohr's assertion that the strength of obstacles is an important determinant, with the probability of policy innovation inversely proportionate to the obstacles being faced, appears to carry resonance in the EC regulatory context in relation to the acknowledgement made in Chapter 1 that windows of opportunity open for policy entrepreneurs in the European Commission. Finally, the suggestion that availability of resources is a key variable in innovation, leading policy-makers in the US to engage in the emulation of policies previously adopted by nearby states on grounds that the success of a neighbour's earlier policy approach offers an important analytical resource and accords closely with the account of "regulatory efficiency" as an explanation for EC regulatory innovation that was presented earlier in this thesis.

In the light of the potential relevance of Berry and Berry's work on providing the foundations of a unified theory capable of accounting for regulatory innovation and emulation, it is now worth summarising the three explanations that they suggest:

- States emulate one another because they are engaged in "competition" (Berry and Berry 1999: 171), with pressure on states to conform to regionally accepted standards (Walker 1969: 891) leading to the adoption of approaches

already widely accepted by other states. It is thus often rational for states to emulate others, on the one hand, in order to achieve a competitive advantage and, on the other hand, to avoid being disadvantaged (Berry and Berry 1999: 171).

- States "learn" from one another as they borrow approaches perceived as being successful elsewhere (Berry and Berry 1999: 171). This hypothesis is in keeping with Walker's (1969) presumption that state regulators seek shortcuts when faced with complex problems, one crucial method of simplification being to choose from a range of alternatives that have been tried and tested in other states. By demonstrating how emulation of other states' innovations can simplify complex decisions, policy diffusion assists in demonstrating how apparently new and radical approaches in one state can actually reflect a wider notion of incremental change (Lindblom 1965) when considered as part of a wider scheme of intergovernmental interaction.

- States emulate each other because of "public pressure", arising from public concern or electoral dissatisfaction.

It will be instructive to test the applicability of Berry and Berry's explanations for policy-making decisions in the United States in relation to EC regulation in greater depth as the thesis progresses. At this stage, what is required is an indication of the extent to which the "competition" and "learning" explanations, already highlighted as concepts familiar to scholars of EC regulatory policy-making analysis, are akin to the equivalent concepts as they are used in the US sense. What follows is an examination

of the "policy learning" literature as it is used in the EC context, the task being to indicate the extent to which these approaches have already followed a parallel path to Berry and Berry's work, and to assess the extent to which existing theory is capable of accounting for emulation in the EC regulatory process.

Learning as a process leading to regulation

Despite the advantages offered by the policy diffusion literature that emerged from the United States following Walker's (1969) emphasis on the need to find explanations for diffusion based on timing, geographic location and resource similarities, by the mid-1980s, there was a growing perception that "a major problem of this research tradition is that it reveals nothing about the content of new policies. Its fascination is with process not substance" (Clark 1985: 65). Out of this perceived need to address questions ignored by policy diffusion studies grew a new body of literature on lesson drawing and policy transfer.

In addition to the possibilities offered by "competition" and "diffusion" explanations for regulation, a separate but related strand of literature suggests that states "learn" from one another as they borrow approaches perceived as being successful elsewhere. The "learning" scenario relates to, but is not identical to, the explanation for emulation offered by the diffusion model. In their diffusion hypothesis, Berry and Berry (1999: 171) follow Walker's (1969) presumption that state regulators seek shortcuts when faced with complex problems, one crucial method of simplification being to choose from a range of alternatives that have been tried and tested in other states. In this sense, the "policy learning" explanation for emulation accords closely

with Majone's (1990: 2) assertion that looking for models that imitate rather than seeking originality is the key to EC regulatory policy-making because imitation is efficient in regulatory terms.

As Hancher and Moran (1989: 285) have expressed this: "Copying is obviously an economical way of solving the problem of regulatory design. Since regulation typically is begun under pressure of time, or in conditions of crisis, the incentive to imitate is great. The result is that 'early' regulators often provide a model for countries following later along the regulatory road". As Hancher and Moran put it: "there are 'early' and 'late' regulators. This simple fact of historical timing has profound implications for regulatory arrangements, because it intimately affects the international diffusion of regulatory forms. The most casual acquaintance with any important substantive area of regulation soon reveals that "institutions and rules are widely imitated" (Hancher and Moran 1989: 285).

Similarly, in the EC regulatory context, Armstrong (1999: 784) has suggested a process of "bounded learning" in which a preferred approach is selected from a limited set of policy choices. This approach is taken instead of a rational appraisal of each specific situation leading to a unique and efficient policy prescription. Armstrong suggests that EC regulatory change takes into account a variety of sources of pressure for change – from economic and political constituencies to the institutions themselves – with the result that these forces have not resulted in a single efficient regulatory reform process, but rather that competing approaches have been mediated through the organisational, procedural, and normative structures of the EC.

The result, according to Armstrong, is that past solutions become attached to what is perceived as a new problem as the result of an evolutionary process of learning. With EC regulatory options restricted to pre-existing solutions to problems rather than developing new solutions, "the process of learning may, therefore, be viewed as bounded, in that strategies and instruments deployed in one setting may be applied in other settings or at least frame the debate about appropriate structures and instruments" (Armstrong 1999: 784). Given the long histories of the nation states in seeking to develop policy solutions, "the EU institutions can themselves learn and apply policy solutions which have their origins in the Member States...these national structures and strategies can, therefore, either be mimicked in the development of EU policy or simply harnessed in the delivery of EU goals and objectives (Armstrong 1999: 785).

Advocates of lesson drawing and policy transfer argue that it can assist in providing explanations for emulation to the extent that they are concepts that refer to a process in which knowledge about policies, administrative arrangements and institutions in one setting are used in the development of policies, administrative arrangements and institutions in another time or place. Initially, these studies focused upon "voluntary" policy transfer, with "lesson drawing" implying that actors in one country draw lessons from one or more other countries, which they observe and then apply to their own system. Dolowitz and Marsh (1996: 344) have suggested that policy transfer has a wider meaning as a term that can cover both "voluntary" and "coercive" transfer, the key distinction being that the latter envisages that one government or supranational institution, such as the Commission, 'pushes' other governments into accepting a particular policy approach.

Dolowitz and Marsh have identified six main categories of actors involved in emulation: elected officials; political parties; bureaucrats; pressure groups; policy entrepreneurs/experts; and supranational institutions (Dolowitz and Marsh 1996: 345). The latter two categories warrant particular attention: policy entrepreneurs/experts are important actors in lesson drawing and policy transfer because they act as advocacy coalitions, their concern with a particular subject leading them to build an international network of contacts in that area as a source of ideas (Rose 1991); supranational organisations such as the European Commission encourage the exchange of information between policy entrepreneurs/experts and also promote comparison so that member states become aware of what their competitors are doing and decide which elements of foreign programmes they wish to emulate (Rose 1991).

However, most lesson drawing and policy transfer studies prior to Dolowitz and Marsh tended to pay too little attention to the interplay between supranational organisations and coercive forms of policy transfer. This is surprising given the potential for EC regulation to emulate prior national regulation not only as a result of comparison and voluntary emulation, but also for EC institutions to play a key role in coercive policy transfer (Dolowitz and Marsh 1996: 348). This thesis, for instance, highlights the extent to which the European Court of Justice (see also Shapiro 1992) used judicial activism to open the window of opportunity to enable further rounds of EC regulatory activity to liberalise insurance markets in the form of measures that closely resembled and emulated prior national financial services regulation in the UK. In addition to the direct imposition of policy transfer, Dolowitz and Marsh (1996 p. 348) also assert that emulation may arise as the result of "indirect coercive transfer",

with functional interdependence leading to lessons that can be used in drafting regulation in other regimes, externalities resulting from interdependence pushing governments to work together to solve common problems. This argument carries particular resonance in relation to environmental regulation. Majone, for example, discovered that externalities stimulated the development of EC regulation of dangerous chemical substances in response to US legislation controlling imports of toxic substances. In response to US regulatory action, member states turned to the Commission to draft a common EC regulatory response (Majone 1991b: 98).

Technology can also push governments into policy transfer since, not knowing how to deal with the issues that technological advances create, regulators turn to other regimes for solutions. In terms of environmental regulation, this thesis discusses the decision of the EC in the later 1970s and early 1980s to introduce strict toxicological limits in order to ensure drinking water quality was driven by advancements in scientific detection of chemicals in water, the associated rise of environmental lobby groups and the politicisation of environmental protection issues in Western Europe.

Policy transfer also suggests that regulators can also be pushed towards 'indirect coercive transfer' as the result of a process akin to Berry and Berry's "leaders and laggards" scenario of policy diffusion outlined above: actors perceive that they are falling behind their neighbours or competitors, with the result that "action elsewhere may translate into a feeling of insecurity about being the odd-man out" (Bennett 1993: 150). Thus the emergence of a European Community of member states encourages comparison with European neighbours and a collective insecurity about the EC's

international competitive position in global markets, both contributing to the trend to emulate the best-placed member state in regulatory terms.

When engaged in policy transfer actors have a range of alternative ways of drawing a lesson. Rose (1991: 22) identifies five possible scenarios: firstly, copying occurs when a programme already in effect in another jurisdiction can be adopted more or less intact; secondly, emulation occurs when a programme already in effect in another jurisdiction can be adapted with adjustment for different circumstances; thirdly, hybridisation combines elements of programmes from two different places; fourthly, synthesis combines familiar elements from programmes in effect in three or more different places; and fifthly, inspiration occurs when programmes already used elsewhere provide the intellectual stimulus for developing a novel programme.

This thesis suggests that explanations for EC regulation can be derived from a set of variables that are related to, but not identical to, those outlined by Rose. These explanations were set out in the introduction to the thesis. By way of comparison with Rose's range of options open for actors seeking policy transfer, the first, direct copying, is not considered directly relevant in the EC context given that the form of EC regulation – the Directive – essentially gives member states a large degree of discretion in terms of the implementation of a particular Community legislative instrument, largely negating the likelihood of direct copying without changes being required to take account of administrative structures and legal traditions in different parts of the Community. Rose's second category, which he terms "emulation" is akin to the scenario of emulation as it is discussed in this thesis, namely the adaptation of a programme already in existence in one member state and its implementation, via an

EC Directive, to other parts of the Community. This thesis then shares with Rose an acknowledgement of the potential for a "hybrid" of approaches from more than one member state providing the model for EC regulation, but it also agrees with Dolowitz and Marsh's suggestion that the hybridisation and synthesis categories should, in fact, be combined, so that the "hybrid" heading includes the combination of elements found in more than two states. Finally, the thesis incorporates Rose's notion of 'inspiration' in the context of lessons that inspire "invention" in regulatory terms, developing novel approaches without the prior existence of analogous regulation elsewhere.

Assessment

Héritier has emphasised the significance of regulatory competition as a determinant of what this thesis has termed emulation and innovation in the EC regulatory process, the scenario being that highly regulated member states "competing" with one another to see their national regulatory approach chosen as the EC norm. However, competition is only one possible explanation for the characterisation of EC regulation in terms of emulation, innovation and re-regulation. This chapter noted that policy diffusion theory has identified other explanations for emulation: policy learning and public pressure. In relation to explaining the EC regulatory process these determinants remain relatively understudied, with the work of Rose (1991) and Dolowitz and Marsh (1996) offering an insight into the potential of policy transfer literature and explicit encouragement to others to engage in much-needed further research. This lack of appropriate theoretical frameworks is all the more surprising given the evidence that member states may not be "competing", but may in fact be making rational

decisions to co-operate and "learn" from one another to achieve the most efficient regulatory outcomes at Community level.

Diffusion, competition and learning are all processes that may influence the EC regulatory process and are far from being mutually exclusive. Rather, they should be viewed as complimentary scenarios that can account for different events and different outcomes within the complex web of interests, actors and institutions in the EC regulatory process. Indeed, while Héritier's EC regulatory policy-making analysis has tended to emphasise the "regulatory competition" scenario on a largely intergovernmental level with the Commission as "gatekeeper", the potential for rival national regulatory approaches to engage in "competition" may have been somewhat overstated. In other instances, when member states all demonstrate their preference for a particular regulatory approach, consensus and co-operation may be more significant. Subsequent chapters of the thesis will outline the significance of this debate in relation to case studies of EC regulation of insurance services and drinking water quality.

In the light of the foregoing literature review, a hypothesis may be constructed that:

- Regulatory competition, stressed by Héritier as the dominant form of interaction resulting in emulation of EC member state regulatory policy, is only one possible route to EC regulation that closely resembles prior national regulation;

- Diffusion and learning may equally lead to co-operation between actors in the EC regulatory process in a manner that ensures the emergence of a broad consensus on the preferred regulatory approach for Europe. This co-operative, consensual process takes the place of "competition";

- The result is that, through a process of distinguishing between regulatory competition, on the one hand, and regulatory consensus and co-operation, on the other, it is possible for the thesis to construct a more refined model of the particular determinants or causes of EC regulation;

- Having emphasised the significance of consensus and co-operation as factors influencing outcomes in the EC regulatory process, this model can then be tested against case study material in chapters 4 and 5 of the thesis. Before undertaking detailed case study analysis the next chapter will first look at the key interests, actors and institutions that influence outcomes in the EC regulatory process, stressing the extent to which policy learning leads to co-operation and the emergence of a broad consensus that may help to explain the tendency of a particular EC regulatory approach to emerge.

CHARACTERISING EC REGULATION:
EMULATION, INNOVATION AND RE-REGULATION

CHAPTER 3

INTERESTS, ACTORS AND INSTITUTIONS:
MEMBER STATE PREFERENCES AND
EUROPEAN COMMISSION ENTREPRENEURSHIP
IN THE EC REGULATORY PROCESS

Introduction

So far, this thesis has set out the reasons behind its intention to characterise EC regulation in terms of emulation, innovation and re-regulation. It has reviewed explanations for the growth of EC regulation, derived from the work of Majone in particular, and suggested that the competition explanations of the EC regulatory process advocated by Héritier are flawed and that explanations based on consensus and co-operation, derived from theories of diffusion and policy learning, are more helpful in understanding what happens in practice. Before undertaking detailed case study analysis in the next two chapters of this thesis to test the validity of these hypotheses, it is instructive to look more closely at the key interests, actors and institutions that influence outcomes in the EC regulatory process and to consider the extent to which prior accounts and established theoretical approaches in this respect can inform our understanding of the EC regulatory process.

Although often preoccupied with issues other than the "regulatory" nature of the European Community, well-established theories of European integration and EC policy-making nonetheless offer useful insights for this thesis. Existing theories may have inherent weaknesses in terms of explaining either the tendency for emulation, innovation and re-regulation to characterise the EC regulatory process, or for consensus and co-operation to be the main drivers for a particular EC regulatory approach, but each theory provides some relative degree of insight, however flawed, into possible reasons for path dependency between national and Community regulatory approaches. A number of theoretical approaches that offer up possible assistance when accounting for consensus and co-operation in the EC regulatory process are considered in this chapter by two broad headings: (i) explanations that emphasise member state preferences; and (ii) explanations that emphasise European Commission entrepreneurship.

Member state preferences

Functionalist theory

Functionalist explanations for the delegation of regulatory powers from member states to the EC institutions envisage successful market integration in limited areas leading to unpredictable "spillovers"' into other areas of competence. Within the functionalist scenario, where the EC is a bargaining forum for member states' national interests to be expressed, innovation in EC regulation or emulation of prior national regulation as the EC norm might occur because, given the primacy of national governments vis-à-

vis EC institutions that functionalists anticipate, national governments reach consensus on the need for coordinated action at EC level.

In Keohane's classic study of the functional theory of regimes, international institutions make interstate agreements possible by improving the information available to each state about the preferences, goals and behaviour of other states (Keohane 1984). The international regimes provide a stable forum for bargaining, allowing states to proceed directly to negotiation of agreements without having to establish bargaining rules every time they seek agreement on a particular policy issue.

In EC regulatory policy-making, the functional, transaction-cost approach forms the basis of the traditional "Monnet method", namely that of promoting market integration starting with limited achievements, establishing *de facto* solidarity, from which a federation would gradually emerge (Monnet 1978: 93). Functionalist explanations of European integration anticipate unpredictable spillovers, a mechanism akin to policy transfer explanations, which amount to "a form of generalised policy promiscuity in which no one really knows what leads to what" (Weale 1997: 669).

Functionalist theory thus offers explanations of why member states have been prepared to delegate regulatory powers to the EC institutions (Haas: 1968) based on facilitating co-operation, monitoring compliance with EC regulation, identifying breaches in regulation, and consolidating regulation. The need for consolidation through second-round regulatory changes and re-adjustment is also anticipated by functionalist theory because the dynamics of the subject matter mean that initial

regulation will be incomplete. The functional scenario, then, is that the EC is a bargaining forum for member states' national interests to be expressed.

The chief advocate of a functional interpretation of the EC bargaining process is Moravcsik (1993, 1998), whose liberal intergovernmental agenda is mainly intended to structure the explanation of "celebrated intergovernmental bargains" in the history of European integration (see also Scharpf 1999: 65). Moravscik contends that EC institutions strengthen the autonomy of national governments, make bargaining between member states more efficient and so reduce transaction costs (Moravcsik 1993: 507-508). In the context of negotiations leading to the Single European Act, Moravcsik suggested that it was interstate bargains between the UK, France and Germany that were the key determinants (Moravcsik 1991: 42). While recognising arguments of the regime school of international relations that a common EC approach reduces transaction costs and minimises uncertainty, and the primacy given by the realist school to member states as the principal actors in the EC system, Moravcsik differentiated his liberal intergovernmentalism by stressing the importance of domestic politics in influencing the changing interests of states (Moravcsik 1991: 48). He has argued that preferences of national governments in EC negotiations are determined by domestic societal forces, the identity of important societal groups, the nature of their interests and their relative influence on domestic policy (Moravcsik 1993: 483), subject to some "agency slack" (1993: 484) where societal forces delegate power to governments and, in doing so, allowing government agents a wider range of discretionary powers in EC negotiations.

In exploiting agency slack, Moravcsik argues that national governments have not been passive agents, but have used EC institutions as part of a two-level game to increase autonomy in relation to domestic interests (1993: 515). In this sense, Moravcsik has argued, EC institutions may have in fact strengthened the state by allowing the manipulation of domestic constituencies so that they accept common policies (according to Richardson 1996: 52). For Moravcsik, "the unique institutional structure of the EC is acceptable to national governments only insofar as it strengthens their control over domestic affairs, permitting them to attain goals otherwise unachievable" (1993: 507). Yet the unique institutional structure of the EC is also likely to undermine the autonomy of national governments as strengthen it (Richardson 1996a: 212) because the ability of one member state to influence, let alone control, the EC process is extremely limited, in part due to the multiplicity of national interests and, in part, due to the propensity of interest groups to realign and reframe previously purely national issue areas in response to EC endeavours.

Moravcsik's approach is based on three key characteristics: the importance of the leading role of member states in EC bargaining, lowest-common denominator bargaining, and the protection of national sovereignty (Moravcsik 1991: 46). He argues that these characteristics are more significant than supranational institutionalism in determining outcomes in the EC context. However, as Bulmer and Armstrong (1998: 31) argue, it does appear that Moravcsik underestimates important aspects of supranational institutional input, over rationalising the negotiation process through a "reductionist emphasis on the role of national governments" (Bulmer and Armstrong 1998: 33).

In reality, the impact of EC institutions on outcomes in the EC regulatory process goes beyond simple bargaining efficiencies for member states (Sandholtz 1996: 405). Functionalism also envisages that regulatory powers will be delegated to the EC institutions where this is deemed more efficient than individualistic action on the part of the member states. But transfers of competence to the EC institutions also create conditions for "agency losses", namely the potential for EC institutions not only to reflect the intentions of the member states, but also to pursue their own agendas. Overall, then, the functionalist expectation would be that member states are only prepared to accept the involvement of EC institutions in regulatory policy-making in so far as such involvement is in their own national interests. The role of institutional actors in the EC regulatory process will be addressed later in this chapter.

Multi-level governance

Avoiding an approach reliant on intergovernmental interpretations of the EC regulatory process, the literature on multi-level governance (Hooghe 1996; Leibfried and Pierson 1995; Marks 1993; Marks *et al* 1996; Scharpf 1994) and related work on new institutionalism (Bulmer 1994 and 1998) is based on the premise that the sovereignty of member states is not being confronted directly. EC institutions are considered political actors rather than agents in a relationship where member states are principals.

In this sense the Commission is learning to behave like a political actor (Sandholtz 1996: 411-412) and, as a result, regulatory policy-making is multi-level rather than interstate (Marks 1993; Marks *et al* 1996). Instead of being explicitly challenged,

member states are being encouraged to participate in multi-level regulatory policy-making because they see the intrinsic benefits of decisional reallocation to the EC level.

Multi-level governance explanations anticipate that the Commission can manipulate access to information and regulatory policy-making and shape political coalitions (Sandholtz 1996: 411). This is because member states derive diverse benefits from a complex array of bargains that are not divisible into separate deals that EC regulatory policy-making becomes a set of linked compromises that could not possibly be extracted from the larger-body and made free-standing (Sandholtz 1996: 411). This means that member states have an interest in a range of EC regulatory bargains, even when this involves inefficiencies and awkward compromises. When there is an EC common policy they dislike, national governments are unlikely to simply walk away because it would mean the abandonment of other bargains that produce clear benefits (Sandholtz 1996: 411).

Policy networks

An important aspect of multi-level governance explanations of regulatory policy-making is an emphasis on policy networks (Borzel 1998; Coleman and Perl 1997; Dowding 1995; Hassenteufel 1995; Jordan and Schubert 1992; Kenis and Schneider 1991). Multi-level governance explanations stress that what happens at one level of policy-making reverberates and affects the others, so that different policy networks at multiple levels are intertwined (Zito and Egan 1998: 96). The policy networks explanation may assist in understanding of ways in which ideas are translated into

proposals in the EC regulatory policy process (Richardson 1996b: 4), especially in the technical areas of 'low politics' (Hoffmann 1966) where the emphasis will be on the importance of ideas, knowledge and expertise rather than pure 'interest'.

The policy networks explanation stresses the importance of the structural relationship between institutions (Rhodes and Marsh 1992) within which policy networks can be seen as a cluster of actors connected by resource interdependencies (Grant, Perl and Knoepfel 1999: 5). Exchange of resources occurs between actors in the network, usually involving more than one resource. Resource exchanges include information, finance, legal competences, time and consensus. Mature policy networks are characterised by stability over time and shared procedural norms ('rules of the game') that govern conflict resolution procedures.

The policy networks explanation concerns itself with interests at national and regional level that shape the direction and content of regulation (Sabatier and Jenkins-Smith 1993: 48-58) and provides some insights into how the policy process defines and constrains EC regulatory outputs (Rhodes, Bache and George 1996: 377 and 381-385). Because EC regulation often deals with complex and technical areas, regulators need access to high levels of expertise and knowledge throughout the policy formulation, decision-making and implementation stages (Zito and Egan 1998: 95).

Historical institutionalism

"Historical institutionalist" arguments suggest that gaps develop in member state control over EC regulatory policy-making because there will be short-term electoral concerns, due to unintended consequences, due to the shifting preferences of national decision makers, and because policy reversal will become progressively more costly (Pierson 1996).

For historical institutionalists, the term "institutions" is used to refer to all formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals and various units of the polity and economy (Hall 1986: 19). Historical institutionalism is concerned with the way that relatively stable routines frame policy-making behaviour. It suggests that institutional arrangements are not neutral, but embody beliefs and ideas that provide an advantage to some actors over others (Jordan 1999: 24). Once created, institutions take on a life of their own, acting as intervening variables between the preferences of actors on the one hand, and regulatory outcomes on the other. More significantly, institutions are said to constrain the choices available in regulatory policy-making and modify actor preferences. In this sense, institutions lend a path-dependent character to regulatory policy-making in the face of actor preferences and (necessarily incomplete) information on the nature of policy problems (Pierson 1996, 1997).

In terms of consolidation and revision of EC regulation, historical institutionalism makes a potentially useful contribution to explanations of EC regulatory policy-making (Hall and Taylor 1996). The institutionalist perspective envisages that, once a

regulatory choice is made, it both precludes and facilitates alternative future choices (Krasner 1984: 225). This approach views regulatory policy-making as a branching model within which the choice of a particular fork then makes it difficult to follow a regulatory path that has earlier been rejected (Jordan 1999).

Historical institutionalists would predict that, with the passage of time, the possibility of departing from a particular regulatory route decreases (Arthur 1989). This is due to the fact that interest groups learn how new institutional systems operate and mobilise their resources according to the incentives they create, locking them into place. Institutional factors thus prevent flexibility in regulatory policy-making. Once regulatory choices have been made, the preferences of policy actors are shaped and defined by their response within a closely defined framework (March and Olsen 1984, 1989).

In the context of EC regulatory policy-making, it is possible to identify a complex web of formal and informal institutions. In seeking to explain the interactions between agency and structure within that web, institutionalists begin from the intergovernmentalist perspective that member states are utility-maximising actors capable of dominating the policy process. They then proceed to show that institutions structure and restrict the terrain upon which member states attempt to alter existing policies and adopt new ones (March and Olsen 1989: 53-67).

Pierson (1996, 1997) and Jordan (1999) suggest that this model of historical institutionalism explains why member states periodically lose control of particular

policy areas and find themselves locked into new forms of regulatory consolidation or regulatory entrenchment that do not entirely suit their needs.

European Commission entrepreneurship

Returning to the work of Majone, whose conception of EC regulation was set out in Chapter 1, Majone's expectation was that the insulation of the Commission from partisan politics and electoral results may further contribute to the ability of the Community to rely on policy entrepreneurship as such an important feature of EC regulatory policy-making (Majone 1996: 78). The issue of political independence of regulators is generally considered essential for the credibility of regulatory policies (Majone 1996: 270) yet this is problematic for politicians because in a democracy political agendas have a short time scale. The delegation of regulatory powers to politically independent agencies is thus an important way in which governments can commit themselves to regulatory strategies that would not be credible in the absence of such delegation.

While Majone attributes the willingness of member state governments to accept the independence of EC regulators to an issue of political credibility, he also recognises that, in practice, national governments are often driven by considerations of political expediency that provide the motivation to interfere with regulatory decisions or to limit regulatory discretion and creating an ambivalent attitude towards regulatory independence (Majone 1996: 270). The lack of clarity as to the limits of political independence of EC regulators is particularly problematic given the Treaty-based

requirement that the Commission pursue common Treaty objectives in an even-handed and non-partisan way.

Majone points out that, in practice, EC Commission officials are not immune from political influences from the member states and from elsewhere within the Commission (Majone 1996: 272). Yet, while recognising that pressure from member states may be difficult to withstand, the fact that the final regulatory policy-making decisions are taken by the Commission only when it meets as a collegiate body is also significant. The need to achieve a majority within the Commission college is of crucial importance in curbing political interference in regulatory policy-making, albeit with the inherent risk of sub-optimal decisions in the resultant outputs.

Within the European Commission, departmental culture may also be a significant factor in determining how an EC regulatory approach is formulated (see also Cini 1996: 223; Bulmer and Armstrong 1998: 59; Hooghe 2001). The extent to which the nationality of specific individuals, or groups of individuals, working within the higher echelons of a particular Directorate General of the Commission may influence the EC regulatory approach that is adopted will be the subject of particular analysis in relation to the case studies reported in the next two chapters of this thesis.

As a general principle, it should be recalled that the European Commission has a legal right of initiative in proposing new EC regulation. EC regulation is thus defined, developed and formulated through agreement among the member states on the basis of proposals made by the European Commission, but the earliest stages of the regulatory process take place before this, within the Commission.

This stage of policy formulation has been characterised as informal and fluid (Gold 1993), the informality of the process allowing the Commission to choose, on a pragmatic basis, whether or not to ask a committee of experts to assist in the preparation of a regulatory initiative. The informal and fluid nature of this process has been accounted for largely in terms of the Commission's responsibilities to propose regulation that reflects the complexity of existing law, practice and traditions in the member states (Gold 1993). In achieving this task, the distinctive approach of the Commission towards new regulation has been viewed traditionally in terms of its openness to new ideas and its accessibility to client groups (Wallace, Wallace and Webb 1983).

These client groups include member states and non-state actors (for instance industry and public action non-governmental organisations), with the involvement of particular actors varying depending on the nature of the issue at stake (Nugent 1991). Generally, however, it can be said that during the process of formulating new EC regulation member states and non-state actors will seek to influence the form and content of proposed EC regulation. For non-governmental actors, pressure is exerted by lobbying (in either a pre-emptive or reactive way) targeted directly at the Commission or indirectly via national governments who in turn take forward particular interests during intergovernmental negotiations (Mazey and Richardson 1992).

As member states and non-state actors seek to influence new EC regulation the ways that the Commission and the Council engage in negotiation are constantly shifting and evolving the interpretation and application of EC Treaty provisions are themselves an

important stimulus for new EC regulation (Weale and Williams 1994). It was via the Single European Act, for instance, that the European Commission was able to reassert its own procedural authority in relation a wide spectrum of policy issues.

For Pollack institutional arrangements in the European Community give the Commission considerable formal and informal agenda-setting powers (Pollack 1997). Within this institutional structure, Pollack views member states as "principals" that delegate specific tasks to supranational "agents", namely the European Commission, which in turn develops areas of autonomous regulatory influence. For Pollack, the activities of the Commission in EC regulatory policy-making become autonomous of member state influence because the latter cannot exercise complete control where this is costly or where member state preferences diverge and sanctions may be ineffectual.

In this context, new governance explanations of the EC regulatory model (Majone 1996; Kreher and Meny 1997; Beyers and Dierickx 1998; Hix 1998; Wessels 1998; Skou Andersen and Rasmussen 1998) assume that EC regulation becomes "positive sum" when policy responsibility is delegated to independent institutions that act in the public interest but at arm's length from majoritarian institutions (e.g. national governments, parliaments and the Council of Ministers).

However, this does not fully account for the growth of EC regulation that has been experienced. It is to the Commission's propensity to engage in policy entrepreneurship that this chapter will, therefore, now turn.

Policy entrepreneurship

Majone, whose explanation for the growth of EC regulation was set out in Chapter 1, characterises the Commission as a corporate actor interested in expanding regulatory policies in order to enhance its own powers (Majone 1994a). However, having relatively few personnel or financial resources of its own, it depends on member states to provide policy expertise.

The role of the Commission can be seen as that of "agenda setter", where the agenda setter is able to select its most preferred solution among a range of options (Scharpf 1999: 75). In performing this role, the Commission is confronted with a variety of regulatory proposals from different member states and, from this multitude of proposals the Commission chooses the ones that it wants to put on the legislative track (Héritier 1996: 152). In this sense, "one European measure may be modelled after the regulatory style of one member state" (Héritier 1996: 149).

The existence of large margins of regulatory discretion allows the Commission to play the role of policy entrepreneur (Majone 1998a: 24) and to determine the extent to which the opportunity for EC regulation will occur (Wendon 1998). Policy entrepreneurs are described as being constantly searching for windows of opportunity to push their preferred ideas (Kingdon 1984). The Commission's capacity for taking advantage of windows of opportunity (Cini 1996: 221) is a significant feature of the EC regulatory process.

Policy windows will open infrequently, usually when three separate policy streams (problems, politics and policy ideas) come together (Majone 1996: 74). As policy entrepreneurs come together to search for solutions to a particular problem, a stream of policy ideas will be generated. The entrepreneurs must then try to take advantage of a receptive political climate to promote their solution to a policy problem.

A successful policy entrepreneur possesses three qualities: firstly, he must be taken seriously either as an expert, as a leader of a powerful interest group or as an authoritative decision maker; secondly, he must be known for his political connections or negotiating skills; thirdly, he must be persistent (Kingdon 1984: 189-190).

Majone (1998a) has attributed Commission officials with qualities of successful policy entrepreneurship unmatched by national civil servants. Their qualities are due to the way Commission officials are recruited, the structure of their career incentives and the crucial role of the Commission in policy initiation (Majone 1994a: 91; 1998b: 25). Eichener (1992) supports the view that the "structural conditions of recruitment and career favour a tendency to support new ideas and to pursue a strategy of innovative regulation which attempts to go beyond everything which can presently be found in the Member States".

In relation to the single market programme, Sandholtz and Zysman (1989) argue that the success of the initiative should be viewed in terms of "elite bargains formulated in response to international structural change and the Commission's policy entrepreneurship" (Sandholtz and Zysman 1989: 97). Within this version of the

model, Sandholtz and Zysman suggest that three factors combine to influence decisions in broad policy sectors: domestic politics, the Commission's initiative and the role of business elites.

Cowles (1995) has also identified the role of a coalition of elite industrialists, meeting within the European Round Table of Industrialists, as a significant factor supporting completion of the internal market. The role that elites comprising industry non-governmental organisations (NGOs) and their public interest counterparts representing, for instance, environmental and consumer concerns, play in the EC regulatory process will be discussed in greater detail during the analysis of case study material undertaken in subsequent chapters.

Bulmer and Armstrong (1998: 35) have criticised Sandoltz and Zysman's approach on grounds that, for an article presenting Commission entrepreneurship as the motor for the single market programme, it is strange that there is no detail on how this entrepreneurship affected how the Commission's 1985 White Paper on Completion of the Internal Market was drawn up, arguing only that the Commission's approach had much to do with "policy learning", that is to say learning from the failures of the old harmonisation approach of EC regulation and from the lessons of the European Court of Justice *Cassis de Dijon* judgement. Policy learning and the role of the European Court of Justice in opening windows of opportunity that the Commission, as a policy entrepreneur, could utilise, are discussed later in this chapter.

Policy entrepreneurs can break up existing equilibria in order to create new and more profitable political outcomes through agenda setting, strategic behaviour and the

introduction of new policy dimensions into political debate (Riker 1986). This strategy, for example, has been attributed to the introduction by the Commission of the concept of working environment into the debate on appropriate EC regulation of health and safety at work (Majone 1998a: 26), inspired by the regulatory philosophy of the Netherlands and Denmark, which first introduced the concept of working environment into their legislation (Eichener 1992).

The nature, timing and quality of many EC regulatory developments cannot be fully understood without taking into consideration other factors such as the policy entrepreneurship of the Commission or the activism of powerful actors who cannot wait for incremental task expansion to produce policy outputs they want (Majone 1996: 66). Supranational institutions such as the Commission have, of course, interests of their own, such as growth and survival, which are separate from the sum of the national interests of the member states (Majone 1996: 73).

The Directorate General of the Commission responsible for a particular policy area forms what Majone (1994a: 90; 1996: 73) describes as the "central node" of a vast "issue network" which include national experts, academics, consumer and other public interests groups, economic interests, professional organisations and sub-national governmental organisations. Commission officials consult widely and operate less as technical experts alongside other technical experts than as policy entrepreneurs (Majone 1994a: 90; 1998b: 24) at the hub of the issue network, constantly looking for 'windows of opportunity' through which to push their preferred ideas.

Over relatively long time periods, the Commission exhibits considerable persistence in its policy proposals, with many regulatory initiatives achieved many years after policy proposals were originally made. A successful policy entrepreneur has been characterised as being one who, acting through agenda setting and strategic behaviour, especially through the introduction of new policy dimensions to political debate, "probes until he finds some new alternative, some new dimension that strikes a spark in the preferences of others" (Riker 1986: 64). The Commission can act in this way breaking up existing coalitions and equilibria in order to create new and more profitable outcomes (Majone 1998b: 26).

Majone (1994a: 91; 1996: 74) suggests that this tendency to favour innovative regulatory solutions means that even national experts may find the Community a more receptive forum for their ideas than their own national government. In this context, Eichener (1992: 52) has described the origins of the 1989 Directive on the safety of machinery where the crucially important technical annex of the Directive was drafted by a UK Health and Safety Executive (HSE) inspector who originally sought to reform the UK regulatory approach. Having failed to persuade the policy makers in his own country, the HSE inspector brought his ideas about risk assessment to the Commission, where they were welcomed by Commission officials and eventually became the basis for EC health and safety at work legislation.

In view of the claims by proponents of intergovernmental accounts of the EC regulatory process that it is under the control of the most powerful member states, it is instructive to note here that both Eichener and Majone point out that the Machinery Directive and other equally innovative directives in the area of occupational safety

were inspired by the regulatory philosophy of two small countries – the Netherlands and Denmark, which first introduced the concept of working environment into their legislation - and was initially opposed by Germany, which sought to preserve the power and traditional approach of its own regulatory bodies (Eichener 1992; Majone 1998b: 26).

For Majone, some of the best examples of policy entrepreneurship at Community level are in the field of social regulation (1996: 76). Using James Q. Wilson's (1980: 36) taxomony of regulatory policies according to the pattern of distribution of benefits and costs, Majone (1998b: 130) argues that, in the case of most social regulation, the costs are borne by a small segment in society. The costs of cleaner water or safer working conditions, for example, are borne at least initially by particular segments of industry. Scharpf (1999: 98, quoting Vogel 1995, 1997) notes that many environmental regulations will add only marginally to the costs of production, so that the downward pressure exerted by economic interests will be relatively week. On the other hand, Majone agrues that the incentive to organise is strong for the opponents of the policy but weak for the beneficiaries, with the effect that social regulation can only be passed if there is a policy entrepreneur to mobilise public opinion (Majone 1996: 77). It can also be suggested that the absence of a clearly defined clientele group does make it harder to maintain the momentum in a particular policy area (Grant *et al* 2000: 202). The benefits of EC regulatory developments in relation to health and safety at work or environmental policy may not be immediately obvious or tangible to citizens who might otherwise be adversely affected by poorer working conditions or long-term environmental degradation.

The insulation of the Commission from partisan politics and electoral results further contribute to the ability of the Community to rely on policy entrepreneurship as such an important feature of EC regulatory policy-making (Majone 1996: 78).

For Majone (1998b: 25), adequate explanations of the EC regulatory process must also take account of the dynamics of relationships of mutual interdependence between EC institutions. Thus the Commission was able to act in an entrepreneurial manner in response to the *Cassis de Dijon* decision of the European Court of Justice to advance the mutual recognition principle and produce a programme of legislative proposals to complete the Single Market (Alter and Meunier-Aitsahalia 1993: 26).

Fitting together all the variables influencing the EC regulatory process (including budgetary constraints, bureaucratic and economic interests, the poor credibility of intergovernmental agreements and the highly technical nature of most regulatory policy-making) Majone (1994a: 92) suggests that we begin to see not only the origins and growth of EC regulation, but also its increasingly innovative character.

For Majone (1998b: 26), in order to understand the development and growth of EC regulation, it is important to distinguish between different manifestations of the phenomenon: quantitative growth, regulatory complexity, task expansion and "deepening", that is, genuine policy innovation. For Majone, while member states and third parties must bear a considerable share of the responsibility for the quantitative growth and complexity of EC regulation, where the policy entrepreneurship of the Commission becomes important is in explaining the progressive deepening of innovative EC regulation (Majone 1998b: 30). Majone challenges the view that

genuine policy innovation is unlikely if not impossible (Majone 1996: 62). While Majone acknowledges that his own demand and supply model of EC regulation (see Chapter 1) seeks only to explain the quantitative growth of regulation (Majone 1998b: 26), he is also prepared to acknowledge that a satisfactory model of the EC regulatory process should also be capable of explaining the ability of the Commission to innovate with respect to the regulatory practices of all or most member states (1996: 63). He identifies social regulation as offering greater scope for entrepreneurship and innovation than traditional EC policy areas (Majone 1998b: 30).

For Majone, it is precisely this highly selective expansion of EC policy competences that neo-functionalist theories fail to explain (1996: 63). While Ernst Haas (1968) predicted that since all sectors of the economy are interdependent, the logic of functional spillover would eventually bring about a general transfer of policy-making powers to the supranational institutions, EC regulatory developments have in fact demonstrated that this process was neither inevitable nor automatic (Majone 1993a: 20), the methodological mistake of the neo-functionalists being the failure to distinguish between different policy types or even between regulatory and direct-expenditure programmes (Majone 1996: 63).

For Majone (1990: 1), the ability of policy-makers to initiate regulation often depends more on their skill in utilising existing models than on their ability to invent novel solutions since policy innovation is the outcome of a dual process of conceptual variation and subsequent selection by political actors from the range of existing policy variants. Innovation derived from the range of existing policy models is achieved by the community of academic, governmental and other experts who share an interest in

a particular policy area, with subsequent selection from the pool of policy variants being made in the political arena (Majone 1989: 161-166).

From a structural point of view, the policy-making stage of the EC regulatory process is characterised by institutional and policy diversity, with great potential for a clash of policy goals. In the absence of innovation (Majone 1996: 62), most EC regulatory initiatives would inevitably end in failure as the "result of stalemate" (Héritier 1999: 1) or a "joint decision trap" (Scharpf 1988: 255). In this sense, innovation is a necessary element in the EC regulatory process in order to overcome institutional deadlock, the scope for innovation at the policy-making stage being closely linked to the accommodation of diversity of interests (Héritier 1999: 35), the more polarised the interests requiring accommodation, the more constrained the innovatory options available in terms of substantive change in relation to the policy status quo. Conversely, where there is a consensus in favour of regulatory change in order to tackle common problems, the convergence of interests will be more favourable to innovation in regulatory policy-making. What, then, are the main characteristics of innovation in the EC regulatory process?

It is under conditions of relative institutional "messiness" (Héritier 1999:8) in the European Community that the Commission and European Court of Justice have seized opportunities for regulatory growth. The complexity of the EC institutional structure itself offers multiple opportunities for creative actors to take policy initiatives and see them through by side-stepping obstacles in the regulatory policy-making process (Héritier 1999: 6), leading to a strong element of policy entrepreneurship and the chance to wield influence on the process of policy definition.

As Hancher and Moran (1989: 284) put it, "regulation is largely a matter of organisational routine, punctuated by occasional opportunities or crises".

Despite the formal right of initiative accorded to the Commission under the EC Treaty, in practice the innovative potential of the Commission in the EC regulatory process is tightly controlled (Majone 1988b: 14) by the member states. Yet the Commission is motivated by core interests of its own, such as growth and survival, separate from the interests of Member States (Majone 1996: 73). Commission officials sound out ideas and opinions and operate less as technical experts alongside other technical experts than as policy entrepreneurs (Majone 1994b: 90, 1998b: 24) choosing preferred regulatory options from its vantage point at the hub of a vast issue network.

Majone's use of the term policy entrepreneurship is linked to the work of other authors. Inter-organisational linkages are widely acknowledged as being the subject of a large existing literature on network theory which demonstrates the significance of policy communities and networks within which "elite coalitions" allocate issues to particular arenas, manage the policy agenda and control the range of participants allowed into decision making (Hancher and Moran 1989: 291). Operating within issue networks, the Commission is constantly looking for windows of opportunity through which to push their preferred ideas.

Formal windows of opportunity: judicial activism

One important relationship that may prompt windows of opportunity to open in the regulatory process is the mutual interdependence (Majone 1998b: 25) between the Commission and the European Court of Justice. Through its judgements, the European Court of Justice has, on occasion, prompted windows of opportunity to open in the EC regulatory process (Majone 1998b: 31). The Commission has then been able to act in an entrepreneurial manner in response to this 'judicial activism' on the part of the European Court of Justice. Judicial activism has arisen where the EC Treaty has failed to adequately specify the precise extent of EC competence that have also led the European Court of Justice to adopt an expansive role in delivering rulings which have been instrumental in shaping EC regulatory policy making (Weiler 1991). In relation to the key stimulus for the Single Market Programme, for instance, intergovernmentalists emphasise the fact that the Commission's 1985 White Paper[1] on mutual recognition merely reflected a change in member state preferences towards deregulatory policies (Keohane and Hoffman 1990: 288, quoted in Majone 1998b: 17).

However, other authors have instead emphasised the impact of the *Cassis de Dijon* decision of the European Court of Justice in advancing the principle of mutual recognition and in many respects providing the window of opportunity in which the Commission produced a programme of legislative proposals to complete the Single Market (Alter and Meunier-Aitsahalia, 1994: 26; Garrett 1992). Garrett and Weingast (1991) show how the idea of "mutual recognition" became institutionalised through

[1] COM(85) 310 final.

the jurisprudence of the European Court of Justice in its *Cassis de Dijon* decision of 1979.

Garret and Weingast (1993: 176) suggest that "ideas, social norms, institutions, and shared expectations may influence both the way actors choose to cooperate and the stability of these arrangements over time", with EC institutions seen as playing an important role in providing information and in helping to construct a shared belief system, in the context of the single market initiative this taking the form of the Commission's White Paper on Completion of the Internal Market of 1985, which introduced a new phase of EC regulatory policy-making, characterised by reduced emphasis on harmonisation of national regulations and greater reliance on the principle of mutual recognition (see also Majone 1997: 157). Bulmer and Armstrong (1998: 36), who provide a helpful critique of Garrett and Weingast's work, also acknowledge that the *Cassis de Dijon* case indirectly provided a potential new route map to the goal of the common market (Bulmer and Armstrong 1998: 20).

Although the Court's ruling did not mention the mutual recognition principle by name, following the *Cassis* ruling, in July 1980, the Commission sent an interpretive Communication to the member states, the European Parliament and the Council, stating that, the Cassis judgment would serve as the foundation for a new approach to harmonisation. The prospect of mutual recognition resulting in competition among rules was not greeted enthusiastically by the member states, the Legal Services of the Council delivering a counter-interpretation of the *Cassis* ruling (Majone 1998b: 18), stating that the Commission's interpretation was excessive. However, the Commission's interpretation prevailed, with the Council ultimately endorsing the

strategy set out in the Commission White Paper on Completion of the Internal Market at the Milan meeting in June 1985. The idea of mutual recognition had a powerful influence on the development and implementation of the internal market programme (Majone 1993c: 18) and, in this instance, it appears that shifting arenas from the Commission to the European Court of Justice were an important source of official windows of opportunity, giving rise to regulatory growth in both qualitative and quantitative terms.

The most striking feature of the new approach was the combination of extensive deregulation at the national level with re-regulation at EC level (Majone 1991a: 23; 1993b: 71; 1994a: 97). Majone suggests that it was international regulatory failure rather than market failure which explains the willingness of member states to delegate regulatory powers to the Community (Majone 1993b: 21), EC regulation amounting to a necessary curb to excessive or counter-productive regulation by national authorities (Majone 1993b: 24). This apparently paradoxical combination of deregulation and re-regulation has been called 'regulatory reform' (Majone 1991a). For Majone, the relationship between policy and institutionalised ideas (or *meta-policy*) is dialectic and, rather than disclosing new possibilities, ideas only codify initial practice, but at the same time rationalise, evaluate and transform that same practice (Majone 1993c: 18). So, ultimately, our understanding of the way a policy develops cannot be separated from the institutionalised ideas and theories by which the policy is guided and evaluated (Majone 1989: 146-149).

Finally, and perhaps most significantly, Majone argues that the function of post-decision arguments is to *transform a single play into a sequential game* by facilitating

communication and monitoring (Majone 1993c: 18). The importance of transforming a single play into an iterated game has been demonstrated by game theory, where the prisoners' dilemma situation allows more complicated strategies than simply 'co-operate' or 'defect'. Majone points out that, when the game is repeated, patterns of co-operation emerge that would be highly unlikely in a single play. The "giving reasons" requirement changes "one-shot" situations into iterated or sequential games, hence it is an efficient institution designed to facilitate co-operation among policy actors (Majone 1993c: 19).

Informal windows of opportunity: stealth and incremental change

In addition to Kingdon's conception of official windows of opportunity that occur during periods of institutional reform, Héritier (1999: 11) suggests that there is a second, more informal, type of window which occurs on a day-to-day level of EC regulatory policy-making in between the key intergovernmental meetings. By stealth and incremental change, the Commission's entrepreneurial activities consolidate and broaden the scope of EC policy competence. In some respects, it is the incremental growth in regulatory instruments over a long time frame that is more innovative in terms of creating opportunities for growth in EC policy than the higher profile institutional reform packages negotiated at intergovernmental conferences. It is these "persistent, small-scale attempts" (Héritier 1999: 12) to develop EC regulatory policies that are, in many ways, the cornerstone of innovative regulatory development in the EC.

One strategy that the Commission has used to bring about innovation is that of "linking-up" (Héritier 1999: 94) or packaging together specific regulatory measures under the umbrella of a wider regulatory framework initiative. Once member states have reached broad consensus on the general objectives of the framework approach, more specific measures can follow. In relation to social policy and environmental protection measures, for instance, the trend towards action programmes has been evident since the early 1970s (in the 1974 Social Action Programme and in the 1973 First Action Programme on the Environment). The strategy of linking-up allows innovation by generating considerable public and political support for the general aims of improved social and environmental policy measures. "Social" regulation – health and safety at work regulation and environmental regulation in particular – is an area where the Commission has made use of the "framework approach" to regulation to good effect, whereby the commitment of actors is sought for framework directives that are of such a general nature that it is difficult for specific objections to be put forward or for the benefits and costs of compliance to be accurately assessed. Measures within the scope of framework 'mother' directives might therefore initially seem quite innocuous (Heritier 1999: 93) but subsequent 'daughter' directives (for example, relating to health and safety on temporary and mobile construction sites) then increasingly specify regulatory duties that automatically derive their legitimacy from the previously agreed general framework directive (in this example, the Framework Directive on Health and Safety in the Workplace). In this sense, a bureaucratic momentum (Grant *et al* 2000: 202) can be built up through a framework Directive approach, with the series of daughter Directives that follow.

Committees

Once a window of opportunity for EC regulatory activity has been opened, the initial drafting stages will be crucial on the form and content of legislative measures ultimately adopted. Cini (1996: 147), for example, notes that a final proposal adopted by the Council typically contained at least 80 per cent of the original Commission draft.

During this initial drafting stage of the EC regulatory process, although there are a multitude of influences upon the Commission (Cini 1996: 146), in practice the task of determining the content of new regulatory instruments will often lie with "small and powerful committee able to make far-reaching decisions" (Milward 1992: 336). In part, the Commission's network of advisory committees is a mechanism to assist in the interest aggregation process (Cini 1996: 148). It is also an opportunity for the Commission to have access to expertise that may not exist in-house within the Commission Directorate Generals. While it is normally compulsory for the Commission to consult with expert committees during the policy formulation process, there is no obligation on the Commission to take on board the advice that it receives and perhaps the most significant role played by advisory committees is to give the Commission the opportunity to sound out potential opposition to a policy proposal (Cini 1996: 148).

Although the earliest management committees started with the Common Agricultural Policy in the 1960s, the importance of what is termed the "comitology" system, namely the network of advisory, management and regulatory committees that oversee

and in some cases control the policy formulation stage of the EC regulatory process (Bradley 1992: 693) came to the fore in 1986 when, in recognition that there was no real control of the *ad hoc* committee structure that had emerged, the member states solution was to condition the exercise of delegated power on the approval of a committee composed of member state representatives (Craig and de Burca 2003: 150). The Single European Act modified Article 202 (ex Article 145) in order to provide a secure foundation for the existence of this delegation and to provide for a more orderly organisation of the committee structure. The modified Article 202 required the Council to establish rules and principles that would in future govern the operation of implementing committee procedures (see also Bulmer and Armstrong 1998: 26; Cini 1996: 162).

The activities of the comitology system were subsequently set out and tightly controlled by Council Decision 87/373/EEC of 13 July 1987.[2] A new Decision 99/468/EC was adopted on 28 June 1999 to ensure greater consistency with choice of committee procedure, greater involvement of the European Parliament, improvement in the information given to the Parliament, and to make the committees more accessible to the public (see also Joerges and Vos 1999; Lenaerts and Verhoeven 2000).[3]

The comitology system consists of a large number of advisory, management and regulatory committees. Regulatory and management committees can block a Commission measure and transmit an issue to the Council, the latter having the power

[2] Council Decision 87/373/EEC of 13 July 1987 laying down procedures for the exercise of implementing powers conferred on the Commission, OJ L 197/3, 18.7.87.
[3] Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184/23, 17.7.99.

to overrule the Commission (Majone 1998b: 15). Given the Council's apparent control over the comitology system, it might be concluded that the EC regulatory process is only possible when member states' preferences converge. In practice, the Council acts only rarely on the complex technical matters dealt with by the comitology committees and is generally supportive of the Commission's original proposals (Majone 1998b: 23). In the past, the Commission has reported overwhelming (98 per cent) support for its regulatory proposals from the various committees (Eichener 1992, quoted in Majone 1998b: 23).

The Commission's lack of own resources and its reliance on external experts for advice and technical assistance in regulatory policy-making are also important in this respect and accord with Berry and Berry's observation in the United States context that "theories of individual and organisational innovation have stressed the importance of financial resources...and other characteristics reflecting the potential of the potential adopter...as contributors to innovation. Similar kinds of resources are often held to be critical for government innovation" (Berry and Berry 1999: 183). For Héritier (1996: 152) this has led to an ever-growing reliance on epistemic (or knowledge) communities.

Epistemic communities

The Commission's lack of own resources and its reliance on external experts for advice and technical assistance in regulatory policy making has led to an ever-growing reliance on "epistemic", or knowledge, communities (see also Héritier 1996: 152). Epistemic communities are networks of professionals with recognised expertise

and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that issue area (Haas 1992b). The literature on epistemic communities (see also Adler 1992; Christensen 1996; Haas 1990; Richardson 1996b; Zito 1994) suggests that EC regulatory policy-making in areas with a significant technical content is a function largely left to technical experts (Peters 1996: 72). The greater the conditions of uncertainty in the EC regulatory policy-making about how information should be interpreted (Richardson 1996a: 13-14), the more important the role of epistemic communities will be in providing and interpreting information and ideas (Haas 1992a, quoted in Richardson 1996a: 15). Although member states are able to set the framework for the Community solution (Rehbinder and Stewart 1985: 213, quoted in Majone 1998b: 15), it is technical experts meeting within epistemic communities who operate largely beyond the control of the Council and are able to develop innovative approaches towards regulation.

This positioning of epistemic communities in the EC regulatory process can lead to two possible outcomes. The first possible outcome is that, free from the institutional constraints of the Council-Commission relationship, new regulatory approaches and new modes of thinking will emerge from the comitology system. However, a second outcome is more common. That outcome is entrenchment of established norms and values amongst a common community of scientific and technical experts. The significance of 'comitology' (Baldwin and Cave 1999; Buitendijk and van Schendelen 1995; Joerges and Neyer 1997; Pedler and Schaefer 1996; St. C. Bradley 1997; Vos 1997; Wessels, 1998) in the EC regulatory process is that technical experts will often form the core of these committees. This occurs because of the functions of the committee system and has also been attributed to the fact that epistemic communities

often operate in a self-contained policy environment (Haas 1992a) where there is a lack of external standards of proof for justifying their claims (Peters 1996: 72). In EC environmental policy-making, for example, different national interpretations of scientific evidence are often difficult to separate from genuine disagreements about appropriate standards. Clear examples of this emerge from the case study of the Drinking Water Directive, where attempts to revise and update regulation were hindered by different interpretations of the toxicological data relating to maximum admissible concentrations of pesticides in drinking water.

The system of committees of national experts that are intended to assist the Commission, and at the same time limit its regulatory policy-making discretion, have also been identified as a contributory factor in regulatory complexity by introducing a strong technical basis into the EC policy-making process (Majone 1995b:12; 1998b: 28). Moreover, Majone (1998b: 23) suggests that national experts have significantly increased the quality of Commission proposals (see also Weiler 1988; Dehousse *et al*, 1992), committees tending to provide a good deal of *copinage technocratique* between Commission officials and national experts (Majone 1998b: 23) who are genuinely interested in problem solving rather than in defending national interests (Eichener 1992). Yet a narrowing of the range of policy options considered may result from the biases of the knowledge communities (Grant *et al* 2000: 204) represented on the expert committees themselves.

In fact, the strategy of "insulating policy drafting in expert circles" (Héritier 1999: 59) can itself be an effective device of innovation in the EC regulatory process. The benefit of insulating draft regulation within a community of experts is that the policy

cannot subsequently be challenged in the formal decision-making process due to a lack of necessary expertise (Joerges and Vos 1999). Not all policy areas lend themselves to this avenue for innovation. Expert-dominated committees are most important when the issues under consideration are of a technical nature (Sebenius 1992) that cannot readily be dealt with by political decision-makers (Héritier 1999: 59). This allows technical experts, who consider themselves to be part of an "epistemic community" (Haas 1992a) with a greater interest in establishing an optimal problem solution than in representing national interests, to exert a considerable amount of influence over the content of resulting regulation. Once the results of deliberations by committees of experts are subsequently presented to the Council for adoption into regulatory form, it is often difficult for political elites to unravel the economic and social impact of the proposed standards because the solutions proposed by experts are not readily understood by those outside the narrow constituencies of epistemic communities.

This technical bias (Majone 1995a: 13) may also have the consequence that, by the time a Commission proposal reaches the Council of Ministers, all technical details will have been worked out (see also Majone 1998b: 24), without sufficient attention being paid to the cost effectiveness or practical implementation problems (Majone 1995a: 12). A reluctance of the Council to engage in difficult and time-consuming control over highly technical aspects of EC regulation, coupled with the lack of central oversight at the Commission level, may well result in EC regulatory policy outcomes with consequences other than those intended. Social and environmental problems, for instance, are not just technical issues that can be dealt with by regulation designed by technical experts.

The economic interests of third parties, namely specialists in various aspects of regulation such as lawyers, accountants, engineers or safety experts may also compound regulatory complexity (Majone 1998b: 28) by "gold plating" EC regulatory proposals. Majone suggests that these groups care more about the process than the product of regulation since complexity increases the value of their expertise, the "red tape" being a private interest that arises because a complex regulatory environment allows for specialisation in rule making and "rule intermediation" (Kearl 1983; Quandt 1983).

If policy-makers are attempting to draw lessons from regimes that are similar in terms of institutional, economic and cultural characteristics, it might be argued that, instead of expanding the number of ideas and actors involved in decision making, the likelihood is that a relatively small number of actors will consistently draw lessons from each other (Dolowitz and Marsh 1996: 355). The literature on epistemic communities, primarily Haas (1992a), describes networks of experts who supply knowledge to authoritative policy actors in a way that helps to legitimise the decisions made by actors by giving them an external source of 'scientific' authority. States require the input of epistemic communities because 'the forms of uncertainty that tend to stimulate demands for information are those which arise from the strong dependence of states on each other's policy choices for success' (Haas 1992a: 4).

Advocacy coalitions

What the epistemic communities literature does not do, but advocacy coalition literature does rather well, is help to explain how the potential conflicts among policy communities will be resolved (Peters 1996: 72). The main proponent of advocacy coalitions, Sabatier (1988a), recognises that policy-making processes are not random. This is because policy problems and ideas attract coalitions of actors. An advocacy coalition can include a variety of actors, including elected or agency officials, interest group leaders or researchers, who share a particular belief system in the form of a set of basic values, causal assumptions and problem perceptions (Richardson 1996a: 17). Patterns emerge because policy problems and ideas attract co-operation between actors. Actors involved in regulatory policy-making 'learn' from each other and from past experience.

Peters (1996: 72) describes advocacy coalitions as being something of a "quasi-market" for policy ideas, where conflicts over policy are often about ideas and the technical content of policy. In this context, advocacy of ideas is the means by which the participants learn about their policy options and attempt to create a viable consensus over a policy option. Although this process cannot alter the fundamental perspectives of the participants (their 'core values'), arguments over more technical issues can often identify a zone of agreement and with that there emerges a possibility of effective regulation (Peters 1996: 72).

For Sabatier, policy change is likely to occur because actors attempt to translate their belief systems into action and because of *systemic* events, such as changes in socio-

economic conditions or governing groups, which affect resources and present external constraints on the coalition. One of Sabatier's hypotheses is that there will be "policy learning" across belief systems when there are sufficiently prestigious coalitions to participate and the beliefs are dominated by professionals' norms (Sabatier 1988b: 118). Sabatier (1988b) focuses on the relationship between knowledge and interests in his "advocacy coalition" framework. Sabatier looks at how aggregations of individuals with shared belief systems, comprising knowledge, perceptions and core values, operate within policy-making. An advocacy coalition can include actors from a variety of positions (elected and agency officials, interest groups, researchers) who share a particular belief system and demonstrate a non-trivial degree of coordination over time (Richardson 1996: 17).

Unlike the largely technocratic nature of epistemic communities, advocacy coalitions seek out defined policy goals. Within a particular policy area, "actors can be aggregated into a number of advocacy coalitions composed of people from various organisations who share a set of normative and causal beliefs and who often act in concert. At any particular point in time, each coalition adopts a strategy(s) envisaging one or more institutional innovations which it feels will further its objectives" (Sabatier 1988a: 133, quoted in Richardson 1996: 17). The advocacy coalition framework shares with the epistemic community approach an emphasis on influential non-state actors, but rejects the idea that the influence in groups will be determined by the relative power of those actors (Rosamond 2000: 126). Rather, advocacy coalitions are engaged in "policy oriented learning" (Sabatier 1988a).

Related to advocacy coalition explanations are suggestions that the EC may be moving towards a model of regulatory policy-making that is neither national or supranational, but rather based on institutionalised arrangements that promote policy transfer or "policy learning" (Majone 1996: 268-269). Policy learning is what happens when governments learn from each other by sharing information on how policies have been constructed and how they have succeeded or failed (Dolowitz and Marsh 1996; Peters 1997).

Hence we begin to see the potential of policy learning to be a significant factor in the EC regulatory process, particularly in the context of the scenario envisaged by this thesis whereby EC regulation emulates prior national approaches, being based on consensus and co-operation rather than purely on the intergovernmental bargaining suggested by the regulatory competition explanations of authors such as Héritier.

Assessment

Over the past two chapters, we have come full circle in our consideration of interests, actors and institutions influencing the EC regulatory process. In the later sections of Chapter 3, the significance of theories of regulatory policy-making based on ideas of diffusion, learning and policy transfer that were first outlined in Chapter 2 of the thesis have again come to the fore. In the next two chapters case studies of EC regulation of insurance services and drinking water quality will be set out to test the validity of the central argument presented by this thesis, that diffusion and learning, leading to co-operation and the emergence of a broad consensus on a preferred approach, can help explain why emulation, innovation and re-regulation best

characterise the EC regulatory process. Before doing so, the main points raised in this chapter are set out below:

- From the analysis of theoretical approaches outlined in this chapter it would seem that the European Commission recognised the new possibilities for EC regulation that emerged when consensus was achieved on the goal of completing the internal market when the European Court of Justice engaged in judicial activism and gave its ruling in the *Cassis de Dijon* case.

- The Commission has responded to windows of opportunity and demonstrated its own entrepreneurial characteristics as it seeks opportunities for EC regulation.

- Particular EC regulatory approaches followed are influenced by policy learning in the sense that member states and the Commission learn from their own experiences and the experiences of others.

- Member state preferences, policy entrepreneurship on the part of the European Commission and judicial activism on the part of the European Court of Justice, supported subsequently by elite bargains, with experts meeting as epistemic communities in technical committees all contribute to subsequent EC regulatory activity.

- In particular, explanations based on policy learning leading to co-operation and the emergence of a broad consensus help to explain the tendency for a particular EC regulatory approach to emerge.

- The next task of this thesis is to undertake detailed analysis of the evidence collected in relation to case studies of insurance services and drinking water quality, using the three core concepts of emulation, innovation and re-regulation in the EC regulatory process as conceptual lenses through which to reappraise the basic hypotheses drawn from the literature review. Using the conceptual lenses provided by emulation, innovation and re-regulation, the next chapters will attempt to throw further light on whether regulatory competition has in fact been the dominant form of interaction in the EC regulatory process - as the literature on EC regulation often asserts - or whether, in fact, a more co-operative, consensual approach derived from diffusion and learning should be given greater prominence alongside competition when seeking to explain outcomes of the EC regulatory process.

CHARACTERISING EC REGULATION:

EMULATION, INNOVATION AND RE-REGULATION

CHAPTER 4

EMULATION AND RE-REGULATION:

THE CASE OF INSURANCE SERVICES

Introduction

This chapter undertakes detailed case study analysis of EC regulation to liberalise insurance markets. It does so in order to provide evidence of how emulation – one of the particular styles or processes of regulation that the thesis argues best characterise EC regulation - operates in practice. It also examines how re-regulation – the third core concept identified in this thesis - involving regulatory refinement and clarification, was subsequently achieved. The first part of the chapter sets out the background to EC regulation of insurance services in order to provide the context for the subsequent analysis of case study material. The second part of the chapter then describes the key factors that led to the emergence of an opportunity for EC regulation of insurance services. The third part of the chapter reviews the negotiation of EC regulation of insurance services. The fourth part of the chapter examines the adoption of new EC regulation on insurance services. The fifth part of the chapter addresses the impact and subsequent re-appraisal of EC regulation of insurance services. The concluding section then summarises the key findings of the case study and, using the conceptual lenses of emulation and re-regulation, considers evidence to support the

key assertion of this thesis that diffusion and learning leading to consensus and cooperation have characterised the EC regulatory process in relation to insurance services to a greater extent than has regulatory competition, as anticipated in the dominant literature identified in earlier chapters.

Background

The origins of EC regulation of insurance services can be found in the provisions of the EC Treaty on right of establishment found under Articles 52 to 58 (now renumbered 43 to 48) and on freedom to provide services, found under Articles 59 to 66 (now Articles 49 to 55). Articles 43 to 48 required the removal of restrictions on the right of individuals and companies to maintain a permanent or settled place of business in a member state. Articles 49 to 55 required the removal of restrictions to the provision of services between member states, whenever a cross-border element is present, resulting either from the fact that a provider is not established in a state where the services are supplied, or that the recipient has travelled (or where the provision of services takes place by telecommunications) to receive services in a member state other than that in which he or she is established (see also Craig and de Burca 2003: 765).

The nature of insurance and, in particular, the long time periods that may elapse before payouts are required has tended to lead to highly regulated insurance markets in nearly all member states. However, the form of that regulation has varied (see also McGee 1998: 7).

Historically, the approach to policyholder protection taken in Germany, for instance, has involved close control over the business activities of insurers. National authorities approve and supervise the specific rates and conditions applied by insurers. This form of supervision is used to ensure that consumers are not subjected to the risk of insolvency from insurers engaged in irresponsible underwriting activities. The scrutiny of business returns then assumes secondary importance to the standardisation of policies and rates available to the consumer. Prior to EC regulation to liberalise insurance markets, variations on this highly regulated model of insurance supervision were followed in most EC member states.

In contrast to the highly regulated model of insurance supervision found in other EC member states, the UK has adopted a more liberal regulatory approach, focusing on the establishment of strict solvency requirements based upon scrutiny of returns and the maintenance of safety net funds, financed by compulsory contributions from all insurers and then available to meet the obligations to policyholders of any insurer that may become insolvent.

The European Commission, perceiving different approaches to the regulation of insurance services as being an important factor in segmenting national markets, saw its task as being to introduce measures to ensure coordination of insurance supervision throughout the Community.

Since the late 1970s the EC regulatory approach to the liberalisation of insurance services in the single market has been to seek to end the prescriptive supervisory approach followed in the majority of member states. The EC regulatory focus in

relation to insurance services has therefore been to allow undertakings from member states where there is no standardisation of policies and rates to offer their products across frontiers by according them the right of establishment and freedom to provide services in other member states. The scenario envisaged is that direct competition with companies operating out of more liberalised markets forces national authorities with more heavily regulated markets to relax their controls so that their domestic insurers are not at a disadvantage when competing for business in their own country or abroad.

Although the regulation of reinsurance dates back to 1964, according to Pool (1992: 179) it was the complexity of differing national approaches to supervision of insurance markets that delayed EC regulation until the 1970s.

The first steps to liberalise insurance markets throughout the EC were taken in *Council Directive 73/239/EEC on the taking up and pursuit of the business of direct insurance other than life assurance*[4] (hereafter the First Non-Life Directive). Taking as its legal basis Article 57(2) (now Article 47(2)) of the EC Treaty, the First Non-Life Directive specified admissible legal forms of insurance undertakings, restricted the activities of those undertakings to insurance and immediately derived activities, and required that all classes of insurance should be supervised, with the member state where the head office is located having general control and supervising solvency margins.

[4] OJ L 228/3, 16.8.73.

Each member state where the insurer was established was required to supervise the undertaking. The object was to satisfy each EC member state that insurance undertakings operating in their territory, but licensed elsewhere, were financially secure and offered minimal risk of insolvency to their policyholders. The principal measures related to minimum capital and solvency levels. Each country was free to set higher requirements for insurers established in that country, in which case such requirements must not discriminate against insurers from other EC member states. The principle of the right to establishment laid down in the First Non-Life Directive therefore had the effect of preventing national governments from erecting barriers around their own markets.

In the same year as the First Non-Life Directive, *Council Directive 79/267/EEC on the taking up and pursuit of the business of direct life assurance*[5] (hereafter the First Life Directive) was also adopted. Taking as its legal basis Articles 49 and 57 (now Articles 40 and 47) of the EC Treaty, the First Life Directive was based on the approach previously taken in the First Non-Life Directive but its regulatory arrangements were more complex because: (i) the solvency margin rules took account of the varying mix of types of risk covered and investment in different types of insurance; and (ii) the role and definition of life companies differed from one member state to another, so the Directive avoided the harmonisation of national supervisory standards. Instead, the First Life Directive made provision for each member state to decide for itself what life companies could do within its borders; (iii) the problem of composite undertakings (i.e. those carrying out both life and non-life insurance) was addressed, with the Directive requiring that no new composites or branches could be

[5] OJ L 63/1, 13.5.79.

formed, although existing ones could continue. The multiple authorisation system under the First Life Directive set out the principle that the country where the insurer has an establishment (whether a head office, branch or agency) authorises the insurer and is responsible for the supervision of the technical reserves.

However, although the first generation of EC insurance directives allowed insurers better access to other national markets, subject to authorisation on specified conditions and supervision by the host state, they did not in themselves achieve full liberalisation in the market for insurance services since each branch of an insurance company established in another member state was still subject to regulation by national authorities if it wished to enter that market. Furthermore, member states that traditionally operated highly regulated insurance markets, particularly Germany, initially resisted further attempts to liberalise the EC insurance sector. This situation was to change once a window of opportunity opened in the regulatory process.

The opportunity for EC regulation of insurance services

Key factors

The stimulus for additional EC regulation to liberalise insurance markets came from four sources: (i) the European Commission's 1985 White Paper on Completing the Internal Market; (ii) the Single European Act, 1986, which introduced qualified majority voting on the adoption of EC regulation in the Council of Ministers; (iii) the European Court of Justice judgement in 1986 on the right of establishment and freedom to provide services in relation to German insurance markets; and (iv) the

Cecchini Report of 1988 on the benefits of completing the internal market, which identified the characteristics of the economic sector and the potential new market opportunities that would emerge. These factors, it is suggested in this chapter, created the conditions under which consensus in favour of the liberalisation of insurance markets led to enhanced co-operation between member states, leading to agreement on new EC regulation in the form of the Second and Third Generation Insurance Directives.

White Paper on Completing the Internal Market

The European Commission's 1985 White Paper proposals to complete the internal market stressed the importance of ensuring the free circulation of financial products and made explicit the link between the *Cassis de Dijon* judgement on free movement of goods and what had to be done next for insurance policies and other aspects of financial services.[6] The view of the European Commission was that it should be possible to facilitate the exchange of financial products at the Community level, using a minimal coordination of rules (especially on such matters as authorisation, financial supervision and re-organisation, etc.) as the basis for mutual recognition by member states of what each does to safeguard the interests of the public.[7]

[6] It will be recalled that the significance of the *Cassis de Dijon* ruling was that it affirmed that the principle of free movement of goods set out in Article 30 (now Article 28) of the EC Treaty could apply to national rules which did not discriminate against imported products, but which inhibited trade because they were different from the trade rules applicable in the country of origin. See case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

[7] Commission of the European Communities (1985) *Completing the Internal Market: White Paper from the Commission to the European Council Milan, 28-29 June 1985)*, COM(85) 310 final, Brussels 14 June 1985, para 102, page 27.

The White Paper stressed that such harmonisation, particularly as regards the supervision of ongoing activities, should be guided by the principle of "home country control", meaning attributing the primary task of supervising the financial institution to the competent authorities of its member state of origin, to which would have to be communicated all information necessary for supervision. The authorities of the member state which is the destination of the service, whilst not deprived of all power, would have a complementary role. There would have to be a minimum harmonisation of surveillance standards, though the need to reach agreement on this must not be allowed further to delay the necessary and overdue decisions.[8]

As regards insurance undertakings, the White Paper pointed out that the 1973 Non-Life and the 1979 Life Directive had been adopted to facilitate the exercise of the right of establishment and to co-ordinate rules and practices for the supervision of insurers and particularly of their financial stability. The White Paper also pointed out that a high degree of *de facto* co-operation between supervisory authorities was already in place and that the ground had thus been prepared for freedom of services across frontiers, which the European Commission felt should not present insurmountable problems.[9]

The Commission nevertheless noted that a Directive intended to facilitate the exercise of freedom of services in non-life insurance by spelling out the part to be played by the various supervisory authorities in cross-frontier operations had not yet been

[8] *Ibid.*, para 103, page 28.
[9] *Ibid,* para 105, page 28.

adopted by the Council of Ministers and that further aspects of freedom to provide services with regard to life assurance was also required.[10]

The proposals from the European Commission that followed took the form of a two-stage regulatory strategy. This innovative "staged" regulatory approach was developed by the European Commission specifically in relation to financial services regulation. The Second Generation Insurance Directives were finally adopted in 1988, two years after the deadline set in the European Commission's White Paper, with the Third Generation Insurance Directives adopted in 1992, a year after the White Paper deadline.

In the light of these statements, the White Paper set out a timetable for the Council of Ministers to adopt the proposal for a Directive to facilitate freedom to provide services in insurance other than life insurance, which had originally been proposed in 1975 with a revised proposal published in 1978,[11] by a new deadline of 1986. Furthermore, the While Paper set out a timetable for adoption of a new proposal for a Directive for freedom to supply services in the field of life insurance, which would be published in 1987 with adoption by the Council of Ministers expected by 1991.[12]

The Single European Act

A second key factor in the re-emergence of consensus in the EC regulatory process in the 1980s was the Single European Act, signed in 1986, which marked the shift in decision-making arrangements in the Council of Ministers from unanimity to

[10] *Ibid.*, para 105, page 29.
[11] COM(75) 516 and COM(78) 63.
[12] *Ibid.*, section 1.2, page 26.

qualified majority voting. The Single European Act represented a political commitment to the target date for completion of the internal market by the deadline of 1992. It was the centrality of the internal market project that explains why member states supported the Act (see also Craig and De Búrca, 2003: 19). In terms of substantive changes, the Single European Act introduced into the EC Treaty Article 8A (now Article 18), which set out the internal market aim of "progressively establishing the internal market over a period expiring on 31 December 1992", and defined the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

To ensure that EC regulation deemed necessary to complete the internal market was put in place in a timely manner, qualified majority voting by the Council of Ministers was introduced into a range of areas that had previously been dealt with under unanimity, and a new Article 100A (now Article 95) was added by way of a derogation from the "harmonising" provision of Article 100 (now Article 94). Article 100 required unanimity in the Council when adopting Directives to approximate national measures affecting the establishment or functioning of the common market, while Article 95 instead allows for qualified majority voting when adopting measures to achieve internal market objectives of Article 8A.

The Single European Act therefore encouraged consensus in favour of new EC regulation designed to facilitate market liberalisation because the prospect of being outvoted in a qualified majority decision in the Council became politically unpalatable for member states. With regard to insurance markets, qualified majority voting improved the likelihood that member states with heavily regulated insurance

markets, and Germany in particular, would be willing to compromise in favour of new EC regulation designed to ensure liberalisation.

The European Court of Justice ruling on insurance services

Chapter 3 argued that one important relationship that may prompt windows of opportunity to open in the regulatory process is the mutual interdependence between the Commission and the European Court of Justice. Through its judgements the Court of Justice has, on occasion, prompted windows of opportunity to open in the EC regulatory process. The Commission has then been able to act in an entrepreneurial manner in response to this 'judicial activism' on the part of the European Court of Justice. Judicial activism has arisen where, as noted previously in this thesis, the EC Treaty has failed to adequately specify the competences of the EC institutions. This has led the European Court of Justice to adopt an expansive role in delivering rulings which have been instrumental in shaping EC regulatory policy-making. This is precisely what happened in relation to EC regulation of insurance services when, on 4 December 1986, the European Court of Justice gave its judgement in Case 205/84 *Commission of the European Communities v Federal Republic of Germany* concerning the freedom to provide insurance services and right of establishment.[13]

The case arose when, on 14 August 1984, the European Commission brought an action before the Court, under Article 169 (now Article 226) of the EC Treaty, for a declaration that, by applying the Versicherungsaufsichtsgesetz (insurance supervision law), the Federal Republic of Germany had failed to fulfil its obligations with regard

[13] Case 205/84 European Commission v. Federal Republic of Germany [1986] ECR 3755.

to freedom to provide services and right of establishment under the Treaty. The German insurance supervision law in question required that, where insurance undertakings in the European Community wished to provide services in the Federal Republic of Germany in relation to direct insurance businesses through salesmen, representatives or agents or other intermediaries, such persons must be established and authorised in the Federal Republic of Germany.

The European Commission referred separately to the fact that, in bringing into force the Versicherungsaufsichtsgesetz, the Federal Republic of Germany had failed to fulfil its obligations under Articles 59 and 60 of the Treaty and under Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative practices relating to Community co-insurance. This was because the German insurance law required that, in relation to Community co-insurance operations, the leading insurer (in the case of risks situated in the Federal Republic of Germany) must be established in that state and authorised there to cover the risks insured also as sole insurer.

Furthermore, by fixing through the Bundesaufsichtsamt fur das Versicherungswesen (Federal insurance supervision office), in the context of Directive 78/473/EEC excessively high thresholds in respect of the risks arising in connection with fire insurance, civil liability of aircraft insurance and general civil liability insurance, which may be the subject of Community co-insurance, so that as a result co-insurance as a service is excluded in the Federal Republic of Germany for risks below those thresholds, the European Commission claimed that the Federal Republic of Germany

had failed to fulfil its obligations under Articles 1(2) and 8 of Directive 78/473/EEC and under Articles 59 and 60 of the EEC Treaty.

The European Commission also brought equivalent actions against the French Republic (Case 220/83), Denmark (Case 252/83) and Ireland (Case 206/84) in connection with the transposition by those states of Directive 78/473/EEC into national law. However, the Commission did not include, in its actions against France, Denmark or Ireland, claims equivalent to the complaint that the Federal Republic of Germany had failed to fulfil its obligations with regard to freedom to provide services and right of establishment under the Treaty, even though the other three member states had legislation in place that contained restrictions on the supervision of insurance undertakings that were similar to those to be found in German law.

The similarity between insurance laws in France, Denmark and Ireland and the situation in Germany accounts for the fact that, in Case 205/84, the Irish Government, together with the Governments of Belgium and Italy, intervened in support of the Federal Republic of Germany. The United Kingdom and Netherlands Governments, on the other hand, intervened in support of the European Commission.

While the arguments in Case 205/84 relating to conformity with Directive 78/473/EEC on co-insurance are outside the scope of this thesis, it is instructive to consider in greater detail the arguments presented in relation to application of the First Non-Life and Life Insurance Directives.

On this point, the Commission and the United Kingdom and Netherlands Governments argued that the First Non-Life and Life Insurance Directives were intended to facilitate the setting up of branches or agencies in a member state other than that in which the head office is situated. They laid down rules governing the relationship between, on the one hand, the legislation and the supervisory authority of the state in which the head office is situated, and, on the other hand, the legislation and the supervisory authority of states in which the undertaking had set up branches or agencies.

However, the European Court of Justice noted that the First Non-Life and Life Insurance Directives did not concern the activities pursued by the undertaking in the context of the provisions of services within the meaning of the Treaty. Consequently, the provisions of those Directives could not be applied to the relationship between the member state of establishment, where the head office, branch or agency was situated, and the member state in which the service was provided. That relationship was considered only in the proposal for a Second Insurance Directive.

The two First Generation Directives did not, the European Court of Justice noted, harmonise the national rules concerning technical reserves, that is to say financial resources which were set aside to guarantee liabilities under contracts entered into and which did not form part of the undertaking's own capital resources. Since the First Directives expressly left the necessary harmonisation in that respect to later Directives, the Court acknowledged that under Directives 73/239 and 79/267 it was for each member state in which business is carried out to lay down rules, according to

its own law, for the calculation of reserves, for determining the nature of assets that represented such reserves and the valuing of such assets.

The Court recognised that the assets covering business conducted in the member state in which the service was provided must be localised in that state and their existence monitored by the supervisory authority of that state, although the First Directives provided that the state in which the head office was situated had to verify that the balance sheet of the undertaking showed equivalent and matching assets to the underwriting liabilities assumed in all the countries in which it undertook business. The abolition of that requirement of localisation was proposed only in the draft for a Second Generation Directive that existed at the time of the case, the Second Directive concerning in particular the harmonisation of national provisions relating to technical reserves.

The key finding of the Court, as regards the concern with judicial activism and the stimulus for subsequent EC regulation, was an acknowledgement that the German Government and the Governments intervening in its support had shown that considerable differences existed in the national rules in force at that time concerning technical reserves and the assets which represented such reserves. In the absence of harmonisation in that respect and of any rule requiring the supervisory authority of the member state of establishment to supervise compliance with the rules in force in the state in which the service is provided, the Court recognised that the latter state was justified in requiring and supervising compliance with its own rules on technical reserves with regard to services provided within its territory, provided that such rules

did not exceed what was necessary for the purpose of ensuring that policy-holders and insured persons were protected.

Finally, the Court noted that the First Non-Life and Life Insurance Directives made no provision for harmonisation of the conditions of insurance and left each member state in which business was conducted the task of ensuring that its own mandatory rules were complied with in respect of business carried on within its territory.

The Court noted that the proposal for a Second Insurance Directive defined the scope of such mandatory rules and excluded their application to certain types of commercial insurance which was defined in detail. In the absence of a Second Directive and in view of the considerable differences existing between national rules at that time, the Court found that the member state in which the service was provided was justified in requiring and verifying compliance with its own rules in respect of services provided within its territory.

To summarise, despite the existence of the First Non-Life and Life Insurance Directives, the European Court of Justice found that significant barriers to the completion of a single market in insurance services were still in place because regulations in Germany required an insurance company to be established within its territory in order be eligible to offer services in that market were contrary to EC law. However, the European Court of Justice also noted that national laws had not yet been brought sufficiently into line to guarantee policyholder protection in the insurance sector. Until a sufficient degree of harmonisation was achieved, the state where the policyholder was resident or where the risk was situated could lawfully impose

onerous requirements on the insurer based in another member state, for the "general good" (*intérêt general*). According to the European Court of Justice, these requirements could include an authorisation in the host state, which might insist on its own rules for: (i) technical provisions, including the calculation of policy provisions and the nature and localisation of assets covered; and (ii) general and specific policy conditions which determine the nature of the insurance product.

From the European Court of Justice's judgement in 1986, it was clear that the First Generation of Insurance Directives dating back to 1973 and 1979 were insufficient to ensure fully a single market. To complete the single market in insurance services, the European Commission would have to introduce further legislation to overcome the barriers that member states could still impose legitimately on foreign insurers. Subsequent rounds of EC regulation would be required.

The timing of the European Court of Justice judgement was crucial. It coincided with the Single Market Initiative of legislative measures to remove remaining barriers to free movement of goods, services, workers and capital in the European Community and with the associated ratification of the Single European Act, which reintroduced majority voting, under Article 100A (now Article 95) of the EC Treaty, as the legal basis for measures necessary for completion of the single market.

Insurance industry representatives interviewed for the thesis concurred with this. They stressed that the main reason why the Second and Third Generation Insurance Directives emerged was the European Commission's long-held intention to liberalise the market in this sector. In this sense, the 1986 European Court of Justice judgement

provided the catalyst for action to fulfil that long held want, one respondent commenting that "every bureaucracy needs a stimulus to get things done". As another interview respondent put it: "although the 1986 European Court judgement did act as a stimulus to the legislative process, the Commission had always intended to apply the principles of free movement enshrined in EC law to the insurance market through legislation on top of the First Directive." The window of opportunity for the Commission to act had, however, been provided by the 1986 judgement.

Cecchini Report on the benefits of a single market

Publication of the European Commission's Cecchini Report in 1988 added further impetus to the momentum in favour of EC regulatory activity to liberalise insurance services. The Cecchini report noted that restrictions on direct cross-frontier insurance business between member states remained significant and pointed out that most member states (with Germany highlighted as an example) simply did not permit non-national insurers to solicit directly without a local permanent establishment, with the effect of insulating national insurers from outside competition (Cecchini 1988: 41). The report predicted significant falls in the price of insurance policies as a result of increased competition once EC regulation had been put in place to liberalise insurance markets.

Assessment

In the case of EC regulation of insurance markets the opportunity for new regulatory activity arose due to a confluence of member state preferences, namely the desire to

complete the single market for insurance services and ensure benefits for consumers and businesses, and to EC policy entrepreneurship in the form of judicial activism of the European Court of Justice in the German Insurance ruling and opportunities created by the Single Market Programme.

The window of opportunity that opened for EC regulatory activity in the form of the Second and Third Generation Insurance Directives was driven by consensus in the insurance industry itself and, following the 1986 European Court judgement, by all member states on the need for regulation. It was therefore a regulatory process underpinned by the decision to emulate a regulatory approach already in place in one EC member state and to learn from the approach deemed successful in another regulatory setting.

The White Paper on Completion of the Internal Market, the introduction of qualified majority voting as a result of the Single European Act, the ruling of the European Court of Justice in the 1986 German insurance case and Cecchini Report, all contributed to the new consensus amongst member states that emerged in the late 1980s in favour of EC regulatory activity to liberalise insurance markets.

Policy entrepreneurship on the part of the Commission, procedural innovation in the form of a return to majority voting, the stimulus given by judicial activism on the part of the European Court of Justice and the legitimacy given to the EC regulatory initiative by the Cecchini Report all worked together to create a consensus in favour of liberalised insurance markets, engendered by a spirit of co-operation between member states, leading to new EC regulatory outputs from the policy-making process.

So were the events leading to the emergence of new EC regulatory activity to liberalise insurance markets really the result of a competitive game between leaders and laggards, as commentators on EC regulation such as Héritier would suggest? It will be recalled from Chapter 2 that the competitive model envisages that being the "leader" member state and making the first move does not necessarily imply a policy advantage since this may simply trigger the formation of an opposing coalition seeking to obstruct the first mover's advantage. But this did not necessarily happen in the case of EC regulation to liberalise insurance markets, where member state opposition to liberalised insurance markets fell away, even in Germany following the 1986 European Court judgement. In the case of EC insurance markets, there was little to be found elsewhere in Europe by the way of an alternative to the UK model of liberalisation, where the policy towards insurance markets was very much that of a heavily regulated, protectionist approach. The distinction was not, then, between the stylised characterisation of heavily regulated states in favour of new EC regulation versus less regulated member states that might acquiesce to new EC regulation without playing a significant role in determining its content, but with no new EC regulation the latter's preferred outcome.

Rather, the situation was one in which the regulatory approach of a member state that was an innovative regulator with liberalising tendencies was identified by the European Commission, when looking for a efficient regulatory way in which to liberalise EC insurance markets as part of the Single European Market Initiative. The UK approach was seen by the European Commission to be proven and working effectively in terms of both providing increased competition in the insurance services

sector and providing appropriate safeguards in terms of regulatory supervision. But why, then, did more heavily regulated member states exhibit preferences that supported EC regulation in favour of the liberalising approach?

In part, this may have been the result of the Commission's predisposition to regulate on the liberalisation of insurance markets, with member states effectively stepping back from being innovators, in their place the Directorate General of the Commission responsible for that particular policy area taking the lead. It is also clear that the judicial activism of the European Court of Justice was significant.

In Héritier's terms this was a shift in the decisional arena that played an important part in promoting progress towards agreement on a new EC regulatory approach. In this context, the judicial activism of the European Court of Justice played an important role as the institution that established principles on which the Commission was later able to regulate further. The emergence of a window of opportunity through judicial activism was perhaps also significant because the European Court of Justice could not, in the same way as a political body, avoid taking a decision simply because the political and economic environment is hostile to a given solution (Héritier 1999: 35) and could therefore provide a fresh stimulus to the regulatory process.

The European Commission was certainly opportunistic in seizing the moment to propose a new round of regulatory activity in the insurance sector in keeping with an entrepreneurial characterisation of its role. Applying this observation to the more general context of EC regulation, what appears apparent is a sense in which a range of factors influencing regulatory outcomes become mutually reinforcing.

The European Court of Justice judgement, the existence of qualified majority voting for single market measures in the Council of Ministers and the policy entrepreneurship of the European Commission, which sought to exploit the window of opportunity opened by the European Court of Justice case and the Single Market Initiative to promote further liberalisation of financial services markets, all contributed to the creation of conditions of policy space – the opportunity for new EC regulation to liberalise insurance markets.

But how far was a member state like Germany, in Héritier's characterisation a "laggard" in regulatory terms in relation to the liberalisation of insurance markets, actually coerced into regulatory change as the outcome of a competitive struggle of differing regulatory approaches? To what extent was Germany a "loser", overcome by overwhelming forces in favour of liberalising regulatory change as part of a competitive struggle of the type outlined in chapter 2 of this thesis? Could a case not be made to support the assertion that Germany was behaving entirely rationally by seeking to emulate the more liberalised insurance market found in the UK, to the benefit of purchasers of insurance services as a result of the increased product range and pressures to drive down prices for insurance premiums that increased competition would be likely to bring?

The evidence derived from the fieldwork undertaken for this thesis tends to support the latter scenario, with policy-makers and key industry officials in Germany stating that: (i) there was a strong sense at that time amongst German insurance companies that there was an inevitability about the liberalisation of the insurance sector in that

country, bringing with it the associated opening up of a previously protectionist policy towards the insurance market and increased competition from foreign companies; and (ii) in addition to the narrower interests of the German insurance companies themselves, the Federal Government, supervisory authorities and consumer groups recognised that benefits as well as costs would be likely to accrue as the result of the opening up of insurance markets in that country to foreign competition via EC regulatory activity.

There is also evidence, again derived from the results of fieldwork undertaken for this thesis, that regulatory competition alone may be an insufficient means of accounting for EC regulation to liberalise insurance markets across the Community, since policy-makers and company executives in the insurance sector in Germany did not report a struggle or conflict of ideas in regulatory terms prior to new EC measures to liberalise insurance markets and, indeed, ultimately saw the inevitability and potential advantages of the liberalisation of insurance markets along the lines of the UK regulatory approach.

Certainly, the European Court of Justice judgement on insurance in 1986 clarified the interpretation of the Treaty of Rome on a judicial level but it was through the subsequent EC regulatory process that member state preferences in favour of a Community-wide consensus on the need to liberalise insurance markets came about. In some respects, this manifestation of member state preferences followed the lead taken by the European Commission, presenting the Single Market Initiative's wider goal of removing barriers to trade between member states as an overall policy

objective, a guiding principle that needed to be applied to the regulation of insurance markets.

The regulatory objectives put forward by the European Commission when it packaged together proposals as the Single Market Initiative was given added legitimacy by the judicial authority by the decision of the European Court of Justice in the 1986 insurance case.

But, if the emergence of policy space and the opening of a window of opportunity for new EC regulation to liberalise insurance markets had more to do with judicial activism, member state consensus on the need for market liberalising regulation and European Commission strategies than a competitive struggle between leader and laggard member states, how far might diffusion and policy learning theories also assist in providing a clearer understanding of the emergence of the opportunity for regulatory change in relation to this policy-making issue?

Diffusion, policy learning and EC regulation to liberalise insurance markets

Given the fact that EC regulatory activity involves both intervention by a supranational body in the form of the European Commission and intergovernmental agencies in the form of member state governments, it is unlikely that the internal determinants model described in Chapter 2 will alone offer a sufficient degree of sophistication to account for the emergence of an opportunity to regulate at Community level. It will be recalled from Chapter 2 that the internal determinants model (Downs 1976; Regens 1980) assumes that new regulatory measures are

attributable to political and economic characteristics internal to the state and carry the presumption, inherent in the model, that each state acts independently of others. Berry and Berry's (1999: 178) assertion that the internal determinants model is insufficient to account for innovation and emulation also appears to be borne out in relation to explanations for the opportunity for new measures designed to liberalise insurance markets within the EC regulatory process since, even within a highly regulated state such as Germany, the benefits of increased competition leading to lower insurance premiums and greater choice for consumers was readily observable when German regulators noted other systems at work, particularly those in the UK and the Netherlands.

Is it possible, then, that a national interaction model of diffusion (similar to that outlined in Chapter 2) might be more appropriate as an explanation for why the opportunity for EC regulation to liberalise insurance markets arose? The national interaction model assumes that there are multi-lateral communications networks between officials of various states, specialists on particular regulatory issues learning from one another when they interact and exchange knowledge and experience, and the European Community model appears to offer numerous possibilities for interaction, diffusion and learning to occur in the ways that the national interaction model anticipates.

Council of Ministers meetings between national political figures, technical committees of experts, EC-wide groups of industry representatives or interest groups and consultations undertaken by the multi-national workforce of the European Commission all provide forums for interaction across member states. Departmental

cultures and cadres of experts working within the European Commission are themselves significant actors in this process. But it is not only what Kingdon has termed "policy entrepreneurs", working within the European Commission services and waiting for windows of opportunity to emerge in order to press their particular policy demands, that offer the potential for a diffusion of ideas from one member state to another.

There is also the possibility of a leader-laggard diffusion model (see Chapter 2), regulatory policies being transferred from member states that are pioneers to other states that emulate those leaders. Under the leader-laggard diffusion model, a regulatory advanced, but highly regulated, state such as Germany follows the liberalising tendencies of a country such as the UK where a first mover regulatory approach can be observed as having resulted in benefits in terms of both opportunities for companies and benefits for consumers, without unanticipated costs of an unacceptable magnitude also being incurred. By observing first mover regulation and later agreeing to the adoption of the new regulatory approach as the EC model, the laggard state may be behaving in an entirely rational and efficient regulatory way, minimising the risks involved in new regulation by following the approach already taken by a regulatory leader state, even when the subsequent impact of regulation is likely to differ and result in sub-optimal outcomes due to different local conditions, consumer behaviour and corporate cultures in the laggard state.

Chapter 2 noted indications that, in terms of opportunities for EC regulation, the internal determinants model may well assist in accounting for EC regulatory innovation by corroborating the characterisation of the EC regulatory process as one

within which, like their US counterparts, European Commission policy-making officials exploit 'windows of opportunity' to choose between regulatory alternatives in a way that will achieve the desired regulatory objectives in the most efficient way.

This apparent significance of windows of opportunity appears to confirm Majone's assertion that demand for regulatory initiatives supplied by the Commission often comes from member states themselves, Majone himself using the example of pressure exerted on the Commission by the UK to liberalise the market for life and non-life insurance as part of the Single Market Initiative. So, windows of opportunity for new EC regulatory initiatives can open in a co-operative way, not as the result of an historical accident, but as the result of a consensual approach being adopted by member state governments in the regulatory policy-making process – albeit a consensus stimulated, in the case of insurance, by a prior decisional outcome of the European Court of Justice. And if new EC regulation can be the result of demand from consensual, like-minded member state governments, is it also possible, as Majone suggests, that the opportunity for EC regulation can equally be the result of demand from non-governmental, public-interest, organisations such as environmental and consumer groups who prefer coordinated Community regulatory activity to piecemeal national measures, acting alongside the preferences of member state governments? Although consumer pressure was largely absent from the initial rounds of EC regulation of insurance services, as we shall see later in this chapter, latterly this became more significant in relation to the Commission consultation on whether EC financial services regulation was meeting consumers' expectations. In the next chapter, closer analysis of the emergence of the opportunity to introduce EC regulation to ensure the quality of drinking water intended for human consumption

will also offer some insights into whether environmental and consumer pressure was a factor in the growth of EC regulation in that area. Before turning to that case study, however, this chapter will look more closely at the negotiation, adoption and re-appraisal of EC regulation of insurance services.

The negotiation of EC regulation on insurance services

Background

Following the model of liberalisation of financial markets pioneered in Europe by the UK, and already followed at European Community level in the earlier Second Banking Directive, the Second Life and Second Non-Life Insurance Directives dealt with cross-frontier insurance. In direct response to the 1986 European Court of Justice judgement, the Second Generation Directives separated out cases where there was no need for consumer protection (large risks) from those (mass risks) where consumer protection remained important. In the latter cases, the Second Generation Insurance created full freedom from control in the country where the risk is insured. In other cases, where consumer protection was an issue, national supervisory rules could still be imposed by the regulatory authorities of member states where the risk is situated on the basis of the "general good" principle set out in the European Court of Justice judgement.

The *Second Council Directive 88/357/EEC on direct insurance other than life assurance and laying down provisions to facilitate the effective freedom to provide*

services[14] (hereafter the Second Non-Life Directive) works on the assumption that companies intending to insure 'large risks' are aware of both the advantages and potential dangers of placing insurance with an organisation not established in their own country. The Directive focuses its main efforts on protecting the consumer whose interests would fall into the latter category of "mass risks". Accordingly, the Second Non-Life Directive provided for financial regulation of "large risks" (defined categories of major industrial and commercial policyholders) in the member state where the insurer is established. However, in the case of mass risks (i.e. everything not defined as large risks) where consumer protection was judged to be important, the member state where the risk is situated may insist on authorisation and apply controls on cross-frontier business. In the latter case, the Directive did little to encourage cross-frontier business because the option remained for the host country to insist on its own authorisation procedures. An effective barrier to the creation of a Single Market therefore still remained because national supervisory authorities could legitimately discriminate against non-domestic providers of insurance services, excluding them from the market on grounds that individual consumers required additional protection over and above that provided for commercial purchasers of insurance policies.

Despite its failure to create a Single Market for insurance companies seeking to sell policies to non-commercial customers, the Second Non-Life Directive did create a Single Market in the area of greatest commercial need – a policyholder with risks in several member states could insure them under a single contract.

[14] OJ L 172, 4.7.88.

The Second Non-Life Directive was followed in 1990 by the accompanying *Second Council Directive 90/619/EEC on direct life assurance, laying down the provisions to facilitate the effective exercise of freedom to provide services*[15] (hereafter the Second Life Directive). The Second Life Directive gave individuals the right to purchase life insurance from insurers not established in the policyholder's country. This means that regulatory authorities in member states are no longer able to prohibit their citizens from buying life policies from other countries, as many such authorities had done in the past.

The Second Non-Life Directive drew a distinction between active cross-frontier marketing ("active provision of services") and approaches from own initiative buyers ("passive provision of services"). In the active case, the policyholder's state may claim the right to authorise and to control of technical provisions and assets under its own rules. In the passive case, there is no authorisation in the policyholder's state and the technical provisions and assets are supervised in the home state. The underlying principle is that although the life policyholder[16] may expect protection from his own state when insurance is actively sold to him, when he chooses to seek cover in another member state on his own initiative, he will receive no protection. However, the state where the policyholder is resident can no longer prevent him purchasing a life contract unless it is contrary to "ordre public". This was an important change in many member states.

[15] OJ L 330/50, 29.11.90.

[16] Although a policyholder exercising his initiative in approaching an insurer in another member state may in principle do so through an independent broker in his own country, member states have only had to allow the latter to take place since 20 May 1996 (three years after the Directive came into force).

The *Third Council Directive 92/49/EEC on Non-Life Insurance*[17] and the *Third Council Directive 92/96/EEC on Life Insurance*[18] both came into force on 1 July 1994. This Third Generation of Directives provided a single structure for business conducted either on an establishment basis or by cross-border provision of services, with the aim that personal insurance policies could be freely sold throughout the EC. The most significant feature of the Directives was the shift of regulatory control from host country to home country, with the introduction of the 'single licence' (commonly known as the "passport"), confirming the right of insurers to provide services across the EC. The licence would be issued by the 'home' member state in which the insurer has its head office. The basis for mutual recognition of insurers, deriving from their home country authorisations, would be based upon an agreed standard of prudential supervision. This would seem to be facilitating new entry competition and achieving some element of deregulation. The Third Generation Directives also offered purchasers of insurance access to the widest possible market by allowing customers to buy from any insurer in the EC. This was therefore a measure in line with the predictions of benefits from a Single Market contained in the Cecchini Report (1988).

The new single authorisation arrangements were modelled on the Second Banking Directive, during the adoption of which much of the lobbying activity on the future format of EC supervisory control of financial services in a more general sense was undertaken. Following the Third Generation Insurance Directives, an insurance company having its head office in one member state needs to be authorised only in that state (the home state) to enable it to cover the entire EC market. It is able to set up

[17] OJ L 228/1, 11.8.92.
[18] OJ L 360/1, 9.12.92.

branches in a host state or to sell insurance across frontiers, without requiring further authorisation from a host country.

These initiatives were, however, subject to the "general good" provision whereby a host member state may request that an insurance company under home country control should comply with additional legal requirements in the host country so long as these are for the general good and that the additional conditions are objective, proportionate and non-discriminatory. However, there remains a great deal of legal uncertainty as to how far member states can apply the "general good" principle. While the limits of additional requirements which may legally be imposed on grounds of "general good" have yet to be tested in a case before the European Court of Justice, there are concerns amongst insurance firms that the application of the principle could be used by national regulatory authorities as legally justifiable grounds for excluding foreign competitors from its domestic insurance markets. Despite the market opportunities created by the Third Generation Directives, the absence of a definition of "general good" in the Third Directives, or clarification of its meaning by the Court of Justice, has made risk-averse insurance companies reluctant to undertake widespread expansion of their branch network in other member states until such time as clearer guidance on its scope is given.

The Third Generation Directives build upon the model of supervision established by the First and Second Generation Directives, but remove many of the remaining constraints on the establishment of a Single Market in insurance. In addition to the single licence they address a number of areas, including technical reserves, asset admissibility and policyholder information, deemed necessary to complete the

insurance market. Minimum price restrictions are phased out and some national regulations are removed. These measures are intended to have a major deregulatory effect on the market.

Contrary to the old approach to regulation of standard policy terms found in EC member states other than the UK and the Netherlands, prior verification of contracts and rates is now prohibited. Member states are able to carry out only subsequent, non-systematic checks on policies to ensure that their legal provisions protecting the general good are being complied with. Insurers are freely able to fix rates they wish to charge since any state system of controlling rates, whether in advance or retrospectively, is incompatible with the Third Directives.

Assessment

The critical liberalising steps for insurance markets in Europe were taken with the Second Generation Directives. Having established the principles of the Single Market, in the Second Generation Directives, the Third Generation Directives were less contentious. Following the Court of Justice judgements of 1986 and the subsequent Second Generation Insurance Directives, firms in national insurance markets where the old prescriptive approach to standard policy terms and uniform rates had been the norm appear to have displayed an air of acceptance that the Third Generation Directives would inevitably follow.

The UK already had an open regulatory stance and operated a relatively liberalised regulatory environment for insurance services by virtue of the Financial Services Act

1986.[19] During negotiations for subsequent EC liberalising measures in the form of the Second and Third Generation Insurance Directives, UK insurance companies were anxious to ensure that EC regulation was not overly prescriptive. In the event, this problem did not arise in the formulation of the Insurance Directives. The Dutch insurance industry, whose regulatory regime accorded closely with the UK model of a liberalised market, was also particularly supportive of the approach proposed by the Directorate General of the European Commission responsible for financial services (DG XV). Insurance companies in tightly regulated markets (particularly Germany), although less willing to embrace wholeheartedly a liberalised market, did not put forward a viable alternative approach to counter EC emulation of the UK model of financial service liberalisation.

Not only was the approach taken by the Insurance Directives well established and acceptable as far as UK insurance companies were concerned, there were other factors working in their favour. At a domestic level, the Department of Trade and Industry (DTI) and industry representatives from individual companies and the trade associations, the Association of British Insurers (ABI) and the British Insurers' International Committee (BIIC), were considered to be of one mind. The BIIC in particular played a leading role in the formulation of the Second and Third Generation Directives, according to respondents interviewed for this thesis, seeking influence via three routes: the European industry representative body, Comité Européén des Assurances (CEA),[20] direct links with DG XV officials or the DTI. As a result, it was

[19] Subsequently replaced by the Financial Services and Markets Act 2000, which provided a framework within which the Financial Services Authority (FSA) operates as the UK's sole, statutory, financial services regulator.

[20] The title of the CEA in English is the European Federation of National Insurance Associations. A full list of the 24 national member associations of the CEA can be found at: http://www.cea.assur.org/cea/v2.0/pres/uk/frame03.html

felt that there was little in the Directives that differed from the UK Financial Services Act, with the result that little in terms of implementation problems would arise in the UK context.

EC-wide regulatory emulation of the UK model of insurance supervision was the preferred option for British firms and, through the ABI and BIIC, the UK insurance industry was supportive of the rule framework proposed by DG XV in the Second and Third Directives. The potential for first mover advantages to accrue to the UK insurance firms, who would not have to adapt significantly their current compliance strategies to a new EC regulatory regime, was not lost on the UK industry. UK insurers became strong advocates of the general approach to be taken in the Second and Third Directives not only because this suited existing corporate practice, but also because it was widely considered to be the most efficient regulatory approach for the Community as a whole to take, the only alternative being a more burdensome, prescriptive regulatory approach that had been followed in some other member states prior to the 1986 European Court of Justice judgement.

In Brussels, the CEA had less influence than organisations representing individual national insurance industries due, according to respondents interviewed for this thesis, to the divergent views of the leading national member associations – particularly the reluctance of member federations from France and Germany to embrace the liberalised market approach wholeheartedly. In fact, the problem of reaching consensus on regulatory approaches went wider than this specific issue. The CEA had historically found it difficult to reach a meaningful consensus on the strategy it wished to adopt when lobbying the European Commission.

However, lack of consensus and the slow pace of discussions amongst member associations during the negotiations for the Second and Third Generation Insurance Directives, with no viable alternatives put forward, was thought by interview respondents to have diminished the potential influence of the CEA during that time. As one interview respondent put it, within the CEA there was an "air of acceptance that there was an inevitability" about the process of liberalisation. This evidence of lack of consensus, or consensus only at the lowest common denominator, amongst European-level trade associations is not unique to the insurance sector but was particularly marked in this instance. Another respondent commented that, while the French and German insurance industries had been traditionally heavily regulated and hence were more cautious and still tended towards prescriptive regulation and protectionism during negotiation of the Second and Third Generation Insurance Directives, the Spanish and Italian insurance federations had shown themselves to be more open, trying to learn from the experience of the UK and keen to benefit from a more open approach.

Although respondents interviewed for this thesis stressed that the UK model for liberalisation of financial services was adopted by the European Commission because, essentially, it was the most appropriate regulatory approach to take, with other markets in Europe at that time much more heavily regulated, industry representatives also acknowledged that personalities matter.

Directorate General XV of the European Commission adopted a sympathetic approach towards the UK model of financial services regulation during the crucial

period of EC regulatory negotiation not only because the UK approach was seen to offer the only viable model for liberalisation of insurance markets, but also because the key senior officials within DG XV at the time of the Second and Third Generation Insurance Directives were all UK nationals.

The European Commissioner responsible for financial services (Sir Leon Brittan), the Director General of DG XV (Geoffrey Fitchew) and the Head of the DG XV Insurance Division (Brian Pool) might, as UK nationals, be naturally expected to gravitate towards their familiarity with the UK system of regulating insurance markets during the initial period of formulating and presenting proposals for EC measures. It meant also that all the senior policy makers in Brussels were familiar with the UK regulatory approach.

According to interview respondents, the nationality of key Commission officials also ensured that the UK Government received good access during the policy-making stages of the Second and Third Generation Insurance Directives. The subsequent appointment of another UK national (John Mogg) as Director General of DG XV and a Dutchman (Gisbert Wolff), equally sympathetic to the UK deregulatory approach to financial services, as Head of the Insurance Division continued the same tradition That the resulting EC regulatory approach closely followed the UK model was, according to interview respondents, therefore unsurprising.

Aside from the access accorded to the UK Government during the regulatory process, interviewees also pointed out that the strong presence of sympathetic Commission officials ensured that the UK insurance industry enjoyed good access during

negotiations and, indeed that the Commission services often turned directly to UK industry experts for technical advice during the policy formulation stage when the impact of new Community regulation was being assessed. As one interview respondent put it: "the Commission was aware of the tremendous amount of expertise within companies and was receptive to new ideas and comments that industry put forward". There is also some evidence that DG XV sought to form alliances with supportive national industry associations (particularly from the UK) during the negotiation phase in order to build support for its proposals at the earliest stages.

However, what was perhaps of equal importance to the nationalities of Commission staff in determining EC regulatory outcomes in relation to the liberalisation of insurance services was the departmental cultures within that part of the Commission.

Whether departmental cultures can be differentiated from factors relating the the nationalities of key personnel is difficult to unpack with any degree of certainty. However, what can be said is that the liberalising approach of the staff in DG XV was in marked contrast to the approach taken by the Consumer Policy Services of the European Commission, which also retained a strong interest in financial services matters through consumer protection considerations.

The Green Paper on Financial Services: meeting consumers' expectations

The differences between the departmental cultures in the Commission and the fact that the Commission does not behave as a homogenous whole, but may represent a number of competing interests, each perhaps championed via Directorates General,

has been widely acknowledged. It can be seen clearly in the 1996 Commission Green Paper on *Financial Services: meeting consumers' expectations*[21] which, although calling for written responses to be sent to DG XV, clearly had the imprint of Consumer Policy Services in the issues it raises in the text. Indeed, it is generally considered to have been an achievement by DG XV to act as the contact point for responses to the Green Paper since comments may well have received a rather different interpretation had the initial contact point within the Commission been the Consumer Policy Services.

The Green Paper considered the specific protection of a particular category of user of financial services – the private consumer – on the basis that it was a category that generally needs a higher level of protection than more experienced or powerful users. Furthermore, although the financial services Directives were targeted primarily at the financial sector, they were also concerned with the rights and interests of the consumer and contained provisions that safeguard consumers' rights to correct and complete information. Furthermore, all the Directives were intended to secure the stability and trustworthiness of the financial services sector by imposing strict prudential rules and minimum capital requirements. However, the Commission's view in the Green Paper was that a number of problems had been encountered by consumers. These problems included the refusal to sell financial services to non-residents, the lack of information and the fraudulent activities of unscrupulous intermediaries.[22] The Green Paper also raised particular concerns about distance selling of financial products and the granting of cooling-off periods in financial services (where, although EC regulation gave consumers the right to withdraw from a

[21] COM(96) 209 final, 22 May 1996.
[22] Ibid., page 1a.

contract for life insurance within a certain number of days, no equivalent provision existed in relation to non-life insurance).[23]

In particular, the Green Paper set out the Commission's wish to engage in a wide-ranging debate with all interested parties, in particular focusing on the following questions:

- To what extent are consumer interests already adequately taken care of under Community and national law, for example as regards consumer information, transparency, legal protection and redress mechanisms?

- To what extent does existing legislation provide an adequate level of consumer protection in the specific case of distance selling of financial services?

- Are consumer interests or the operation of the single market prejudiced by differing national consumer protection standards?

- What are the obstacles preventing consumers from fully benefiting from the single market in financial services?

- What other major consumer concerns not dealt with in this Green Paper should the Commission be made aware of?

[23] Ibid., page 13.

- Does the introduction of new technologies and new marketing techniques call for additional consumer protection rules in the area of financial services?[24]

In response to the 1996 Green Paper, firms closely allied themselves with DG XV, while consumer groups put their case via DG XXIV (the Directorate General responsible for consumer affairs). The emergence of DG XXIV as a significant player in the EC regulatory process in the mid-1990s under the leadership of a Greek Director-General (Spyros Pappas) was largely undermined in this instance because DG XV took ownership of the consultation process and identified itself as the contact point for comments from stakeholders, reputedly to the dismay of DG XXIV, which had prepared much of the initial text of the Green Paper. It appears to indicate that the traditionally more influential role of DG XV within the Commission had not been wholly overturned by the growing importance of consumer protection on the EC policy agenda during this period. One interview respondent commented that the Green Paper "reflected a DG XV view of the world rather than the consumer protection view of the world held by DG XXIV".

The results of the consultation on the Green Paper were published in the 1997 Commission Communication *Financial Services: Enhancing Consumer Confidence – Follow-up to the Green Paper on "Financial Services: Meeting Consumer Expectations".*[25] The Communication noted that the consultation identified differences of view between the main parties. The financial services industry generally emphasised the need to ensure the full functioning of the single market, existing Directives needing to be properly implemented and fair competition

[24] Ibid., page 15.
[25] SEC(97) 1824 final.

achieved. Consumers raised serious concerns about the content of EC regulation because it lacked specific consumer protection provisions even though consumers often lacked technical expertise on financial services products of an increasing complex nature.

In response, the Communication set out a number of proposals for new or amended Directives but also stated that legislation is not appropriate for all the problems identified, with other means (notably a dialogue between industry and consumers) more appropriate to improve information, market transparency and the potential for resolving consumer problems and complaints.[26] Specifically, in relation to insurance contracts, the Communication noted that further measures were necessary to set common minimum requirements for insurance contracts for consumers. However, in line with submissions to the consultation process made by the insurance industry, the Communication also stated that such measures should not lead to undesirable standardisation of products and to the stifling of innovation. Crucially, again in line with the industry viewpoint, the Communication proposed that this issue should be included in the dialogue between industry and consumers, rather than through re-regulation as favoured by consumer groups. Insurance industry submissions, rather than those of consumer groups, appeared to have prevailed in relation the decision to avoid substantive re-regulation of insurance services designed to enhance consumer protection. Informal consultations between industry and consumers, underpinned by the acknowledgement of the need to avoid overly burdensome and restrictive EC regulation, won the day.

[26] Ibid., page 4.

The adoption of additional EC regulation to liberalise insurance markets

Returning to the Second and Third Generation Insurance Directives, EC regulation appears to fall firmly into the category of EC regulatory emulation. As one interviewee put it, "the Second and Third Generation Insurance Directives closely follow the UK model. They take a liberal approach towards insurance regulation". Furthermore, another interview respondent commented that the outcome of the regulatory process was in many ways a *fait accompli* with much of the consultation on the Second and Third Generation Directives taking place before the adoption precisely because the approach taken was built on the UK regulatory model and because there was general consensus that it was efficient in regulatory terms to emulate the successful UK approach.

Little consideration was given to the desirability of considering competing regulatory approaches. The emphasis was on diffusion of the UK regulatory model, with the European Commission and EC member states keen to learn from the UK approach.

Industry representatives interviewed stated that they were satisfied that the European Commission had listened to industry views and had acted on its advice where appropriate. The Commission appears to have done this in part as a strategy of building alliances with others sympathetic to its preferred regulatory approach and also as a pragmatic strategy of using the technical knowledge and expertise of interested parties to refine and improve the proposal before adoption. As one interview respondent commented: "the Commission is now willing to build coalitions, seeking out member states or national agencies that agree with its proposals to come

on board and provide technical advice to DG XV". By identifying sympathetic non-governmental actors to form alliances with and to act as providers of technical expertise, at the adoption stage of the EC regulatory process the European Commission appears less concerned with considering competing regulatory approaches and more inclined to learn from prior experiences of its preferred regulatory approach in the national context, using the advice and information it receives to refine and hone its regulatory proposals before they are adopted.

Impact of EC regulation on insurance services

From a UK perspective, there appears to have been relatively little of a contentious nature in the Second and Third Generation Insurance Directives. EC regulation did not result in a major change in the way that national markets operate. Domestically in the UK, this was largely due to the first mover advantages that accrued by virtue of the fact that insurance companies operating in the UK had already adapted to the operating conditions required by the Insurance Companies Act 1982 and the Financial Services Act 1986. The extent to which the Second and Third Generation Insurance Directives replicated (or 'emulated') the prior regulatory framework in the UK meant that no fundamental change was required in order to implement EC regulation, nor in the subsequent compliance strategies of the firms themselves. Together with the insurance industry in the Netherlands, where a similarly liberalised market operated prior to the Second and Third Generation Insurance Directives, the insurance market in the UK faced the least disruption of any national insurance sector in the EC as a result of Community-level regulatory changes. On the contrary, initially at least EC regulatory change was seen to offer opportunities to companies already operating

effectively in the UK since the opening up of previously highly regulated markets elsewhere in the European Community was considered to offer first mover advantages to firms already accustomed to deregulated market conditions and able to take advantage of home country authorisation and control measures introduced by the Third Generation Insurance Directives in particular.

However, the full impact of EC regulation designed to liberalise insurance markets was hindered by a climate of legal uncertainty that is incompatible with the principle of freedom to provide services in the Single Market. According to interview respondents, UK insurers were more likely to be looking towards the Asia-Pacific region for growth of business than other European markets. In part this was because representatives of the UK insurance sector interviewed stressed that what UK insurers needed to enter new markets in the EC was not harmonised laws, since companies had been operating under different national rules in more than one country for many years, but rather that they needed good distribution networks to sell insurance policies locally and good claims and support services in close proximity to the consumer.

In addition, from a regulatory point of view, uncertainty remained about the "general good" provisions of EC insurance regulation which allowed a host country to require an insurance company subject to home country control to comply with additional legal requirements. The uncertainty as to how the "general good" principle would be invoked in the host member state proved a disincentive to the development of cross-border provision of services and the entry of foreign companies into parallel national markets.

Regulatory reappraisal: clarification of the "general good" principle in EC regulation to liberalise insurance services

European Court of Justice

The concept of "general good" is based on the case law of the European Court of Justice. It was developed initially in the context of the free movement of services and goods and was subsequently applied to the right of establishment. Case C-55/94 *Gebhard*[27] related to access to the profession of lawyer, an area where harmonisation of the conditions for taking up and carrying on the activity is very limited in comparison with insurance, with the effect that the possibilities for relying on the general good were much more extensive than in the insurance sector where regulations are extensively harmonised. The Court in *Gebhard* noted that "the taking-up and pursuit of certain self-employed activities may be conditional on complying with certain provisions laid down by law, regulation or administrative action justified by the general good, such as rules relating to organization, qualifications, professional ethics, supervision and liability".[28]

However, despite these cases, the European Court of Justice has never given a definition of the "general good", preferring to maintain its evolving nature. It has expressed its opinion in individual cases on the possibility of deeming a given national measure to be aimed at achieving an imperative objective serving the "general good" and has specified the line of reasoning to be followed in determining whether such a measure may be enforced by one member state against a trader from

[27] Case-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [I-1995] ECR I-4165, paragraphs 25 to 27.
[28] Ibid., paragraph 35.

another member state who is operating within the territory of the former. The Court has, however, spelt out the strict conditions to be met by national measures which are aimed at achieving an imperative serving the "general good" if they are to be validly enforced against that trader.

It was in *Gebhard* that the Court noted that "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: (i) they must be applied in a non-discriminatory manner; (ii) they must be justified by imperative requirements in the general interest; (iii) they must be suitable for securing the attainment of the objective which they pursue; and (iv) they must not go beyond what is necessary in order to attain it".[29] This was subsequently confirmed in the Court's judgements in Case C-415/93 *Bosman*[30] and Case C-250/95 *Futura*.[31]

European Commission clarification of the "general good" principle

The first step towards re-regulation in the form of clarification of how the "general good" principle should be interpreted came in the European Commission's communication to the Council of 28 October 1998 on financial services, *Financial Services: Building a Framework for Action*,[32] which was drawn up at the request of the Cardiff European Council meeting of June 1998. In the Communication, the Commission identified differences in interpretation of the Community rules and the resulting legal uncertainty as one of the factors preventing the single market in

[29] Ibid., paragraph 37.
[30] Case C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman* [1995] I-4921.
[31] Case C-250/95 *Futura Participations SA Singer v. Administration des Contributions* [1997] I-2471.
[32] COM(98) 625 final.

financial services from functioning properly. The approach proposed by the Commission was subsequently adopted as an Action Plan[33] by member states at the Cologne European Council meeting on 4 June 1999.

The Action Plan included adoption of a Commission interpretive communication on freedom to provide services and the "general good" in the insurance sector, among the priority objectives for helping to ensure that the single market operated more effectively, particularly in the light of the Third Generation Insurance Directives 92/49/EEC and 92/96/EEC.

Before adopting the Action Plan, the Commission published a draft communication[34] which marked the beginning of a wide-ranging consultation process. Following publication of the draft communication, the Commission received numerous contributions including those from member states, professional associations representing insurers and intermediaries, insurance companies, consumer organisations and law firms. It also organised hearings with interested parties.

The "general good" principle allows a host member to require a branch of an insurance company under home country control to comply with additional legal requirements provided that those requirements are on grounds which are objective, proportionate and non-discriminatory. However, there remained uncertainty about how far member states could apply the general good principle and the insurance industry in the UK was particularly concerned that it could be applied in a restrictive way.

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[33] COM(1999) 232, 11.5.1999.
[34] OJ C 365/7, 3.12.1997.

As a result, a *Commission interpretive communication on freedom to provide services and the general good in the insurance sector* was published as document 2000/C 43/03 on 16 February 2000.[35] The Communication noted that while Third Generation Insurance Directives 92/49/EEC and 92/96/EEC completed the establishment of the single market in the insurance sector by introducing a single system for the authorisation and financial supervision of insurance undertakings by the member state in which they had their head office, such authorisation enabling an insurance undertaking to carry on its insurance business anywhere in the European Community, uncertainty may have occurred due to the requirement that an insurance undertaking must comply with the conditions in which, for reasons of the "general good", such business must be conducted in the host member state.

In the Communication, the Commission noted that, in many cases, application of the "general good" principle resulted in the supervisory authorities applying measures or penalties on insurance undertakings wishing to do business in the single market or the imposition of certain constraints or conditions regarding the conduct of business on their territory. In the view of the Commission, differences in interpretation of the "general good" provision were creating legal uncertainty, both as regards the arrangements applicable to them in the different member states and as regards the content of the products they wished to offer.

The Commission suggested that differences in interpretation could seriously undermine the operation of the mechanisms set up by the Third Generation Insurance

[35] OJ C 43/5, 16.2.00.

Directives and were thus likely to deter insurance undertakings from exercising the freedoms created by the EC Treaty which the Third Directives set out to promote and, hence to restrict the free movement of insurance services. The Commission pointed out that these differences were also preventing those seeking insurance from having access to insurance undertakings elsewhere in the Community and to the range of insurance products available within the single market in order to select the one that best fitted their needs in terms of cover and cost.

Assessment

- The stimulus for additional EC regulation to liberalise insurance markets came from four sources: (i) the European Commission's 1985 White Paper on Completing the Internal Market; (ii) the Single European Act, 1986, which introduced qualified majority voting on the adoption of EC regulation in the Council of Ministers; (iii) the European Court of Justice judgement in 1986 on the right of establishment and freedom to provide services in relation to German insurance markets; and (iv) the Cecchini Report of 1988 on the benefits of completing the internal market.
- The sources that provided a stimulus for additional EC regulation to liberalise insurance markets created the conditions under which consensus in favour of the liberalisation of insurance markets led to enhanced co-operation between member states, leading to agreement on new EC regulation in the form of the Second and Third Generation Insurance Directives.
- Through its judgements the Court of Justice has, on occasion, prompted windows of opportunity to open in the EC regulatory process. The

Commission has then been able to act in an entrepreneurial manner in response to this "judicial activism". This is precisely what happened in relation to EC regulation of insurance services when, on 4 December 1986, the European Court of Justice gave its judgement in *Commission v Germany* concerning the freedom to provide insurance services and right of establishment.

- Negotiation was characterised by consent (generally, despite some initial opposition from Germany), collusion (clustering around the UK regulatory model of liberalised insurance markets) and an absence of competition between different regulatory models (given the consensus in favour of liberalised insurance markets as part of the Single Market Programme, there was an absence of viable alternatives to the UK regulatory model).
- The Second and Third Generation Insurance Directives were in line with regulatory standards already in operation in the UK. However many UK firms subsequently experienced market entry barriers when they attempted to operate in other member states.
- The result was a requirement for regulatory refinement – not in the form of second-round regulatory change *per se* in the form of re-regulation, but in the form of clarification of the existing regulatory approach in relation to the "general good" principle.
- The departmental culture of the Directorate General responsible for financial services (or, more specifically, the nationalities of key DG XV personnel) may have been a factor that contributed to the emulation of the UK regulatory approach but, overall, there was member state consensus in favour of EC

regulation based on the UK model, co-operation between member states leading to adoption of the Second and Third Generation Insurance Directives.

- The need for second round regulatory change came in terms of regulatory refinement. Firstly, this was through the consultations on meeting consumers' expectations, the outcome of which strongly reflected the wishes of the insurance industry for informal consultations with consumers and the avoidance of unnecessarily burdensome re-regulation. Secondly, although the Commission's interpretive Communication on the "general good" stopped short of formal re-regulation by providing guidance on how the principle should be applied by member state supervisory authorities, it made clear that a formal definition on the "general good" would be left to the European Court of Justice to provide.

Postscript

On 5 November 2002 the European Parliament and the Council adopted Directive 2002/83/EEC concerning life assurance.[36] This repealed and replaced First Council Directive 79/267/EEC, Second Council Directive 90/619/EEC and Third Council Directive 92/96/EEC on life assurance. Directive 2002/83/EEC retained the regulatory approach followed in the earlier EC regulatory instruments but introduced additional measures relating to the coordination of financial guarantees required of life assurance undertakings and the clarification of the powers of supervisory authorities. With respect to the "general good" provision, it specified that member states must not prevent a policy holder from concluding a contract with an authorised assurance

[36] OJ L 345/1, 19.12.2002.

undertaking as long as that does not conflict with the legal provisions of the general good in the member state of the commitment.[37] In effect, therefore, a definition of the "general good" principle is still lacking and this awaits definition by the European Court of Justice, if and when the Court finds itself in a position to elucidate on this matter. On the other substantive issue of insurance services regulation addressed in this Chapter, namely meeting consumer expectations, Directive 2002/83/EEC is silent.

[37] Article 33, ibid., page 27.

CHARACTERISING EC REGULATION:

EMULATION, INNOVATION AND RE-REGLUATION

CHAPTER 5

INNOVATION AND RE-REGULATION:

THE CASE OF DRINKING WATER QUALITY

Introduction

This chapter provides a case study of EC regulation to ensure drinking water quality. It does so in order to demonstrate how innovation - the second core concept of EC regulation identified in this thesis – operates in practice as innovative scientific standards come to the fore in EC regulation as the result of consensus and co-operation. In the case of drinking water quality, the scientific standards embodied in EC regulation came to the fore as the result of consensus and co-operation rather than by member states competing with one another in order to influence the content of EC regulation. The chapter also reviews how those standards then became entrenched in EC regulation, even when updated scientific information became available which indicated that more appropriate standards could be adopted in revised EC regulation. It does so by using the third core concept of EC regulation identified in this thesis - re-regulation.

The structure of the chapter is as follows. Firstly, to illustrate the context for the case study, the chapter explains the origins of EC environmental policy, and EC water policy in particular, to demonstrate why a consensus emerged in favour of EC regulatory activity in this policy area. Secondly, the chapter explains how, through the opening of a window of opportunity for EC regulatory activity, consensus grew in favour of EC regulation of drinking water quality, culminating in the 1980 Directive. Thirdly, the negotiation of EC regulation of drinking water quality is examined with particular attention paid to the role of scientific expertise or, more precisely, scientific uncertainty in the EC regulatory process. Fourthly, the impact of EC regulation of drinking water quality is considered. Fifthly, attempts to achieve second round regulatory change, resulting in the 1998 Directive on drinking water quality, are reviewed in order to explain why EC regulation remained entrenched in 1980 standards, despite the emergence of more scientifically accurate toxicological information in the late 1990s. The concluding sections emphasise that, following a process of attempted re-regulation, standards enshrined in EC regulation of drinking water quality remained locked in a sub-optimal trajectory, in spite of attempts to achieve regulatory revision, because the consensus and co-operation that had characterised earlier EC regulatory activity had broken down. This final section will demonstrate that, even when there is a fragmentation of the consensus that previously existed in favour of innovative regulatory standards that were earlier considered appropriate, regulatory entrenchment rather than regulatory revision can result.

Background

Origins of EC environmental policy

Before considering the extent to which EC regulation of drinking water quality can be characterised by the term innovation, it necessary to explain the context in which EC regulation of this issue occurred in the first place. With regard to EC regulation of environmental issues, it is noteworthy that there was no reference to environmental policy at all in the Treaty of Rome of 1957. Environmental issues were not, initially, an issue of great significance in the period of post-war recovery but, as public interest in the problems associated with pollution grew, it became increasingly apparent to political leaders that the European Community should involve itself in a set of environmental problems that did not respect national boundaries. What is sometimes regarded as the EC's first environmental regulation was adopted in 1967, with a Directive dealing with standards for classifying, packaging and labelling dangerous substances, but its real focus was on the facilitation of trade. Subsequent legislation built on the 1967 Directive, notably the 6th amendment of 1979 which provided for the pre-market control of hazardous chemicals. This might more genuinely be regarded as the starting point for EC environmental regulation.

Between 1967 and 1987, when the Single European Act introduced for the first time an "Environment" title into the EC Treaty, 150 separate pieces of environmental legislation were adopted. During this initial period of piecemeal expansion of EC environmental regulation, the European Commission proved creative in the use of Article 94 (formerly Article 100) of the EC Treaty, which allowed for the

approximation of member state laws that directly affect the establishment and functioning of the common market,[38] and Article 308 (formerly Article 235) which allows for the adoption of Community measures where necessary to attain, in the course of the operation of the common market, one of the objectives of the Community where the Treaty has not provided the necessary powers.[39]

This development of environmental competence was given a major impetus at the Paris Summit on 20 October 1972 when heads of state or of government emphasised the importance of a Community Environmental Policy and called upon the European Commission to draw up, before 31 July 1973, an environmental policy.[40]

In 1973 the Commission published the First Action Programme on the Environment, which emphasised the harmonisation of national policies between member states. This was adopted by the Council on 22 November 1973.[41] The First Action Programme on the Environment set out the objectives of Community Environmental Policy as being to improve the setting and quality of life, and the surroundings and living conditions of the peoples of the Community, procuring an environment providing the best

[38] Article 94 (ex Article 100) EC Treaty: "The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives on the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market".

[39] Article 308 (ex Article 235) EC Treaty: "If action by the Commission should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

[40] A step had already been taken in this direction with the formation of an Environment and Consumer Protection Unit within the European Commission in 1971. In 1972 this became an Environment and Consumer Protection Service with 15 staff members attached to the Industrial Policy Directorate, DG III.

[41] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council on 22 November 1973 on the Programme of Action of the European Communities on the Environment, OJ C 112/1, 20.12.73.

conditions of life and to reconcile this expansion with the increasingly imperative need to preserve the natural environment.

In 1981 a reorganisation of the Commission in the light of Greek accession resulted in the transfer of environmental responsibilities from DG III to a reformulated DG XI. There was not, however, a separate environment portfolio for a Commissioner until the appointment of Carlo Ripa de Meana in 1989.

While the development of environmental policy was handicapped by the lack of any basis in the treaties, except from that provided tangentially by Articles 100 and 235, this deficiency was remedied by the Single European Act in 1987 which provided, in Articles 130(r-t) (now Articles 174-176), a new treaty basis for environmental regulation.

The signing of the Act in 1986 formally added new substantive areas of Community competence (see also Craig and de Búrca, 2003: 20) and gave a considerable impetus to EC environmental regulation and, between 1989 and 1991, more EC environmental legislation was enacted than in the previous 20 years combined (Vogel 1996: 127). The additions made by the Single European Act covered co-operation in: economic and monetary union; social policy; economic and social cohesion; research and technological development; and environmental policy. In this respect, while the internal market goals of the Single European Act were a significant driver of subsequent EC regulation such as in relation to liberalisation of insurance markets, the social and environmental policy amendments have been acknowledged as a

significant recognition of autonomous Community competence in these fields, not merely a side-effect of EC market-integration goals (Craig and de Búrca, 2003: 21).

Three features of the Single European Act are worthy of particular note. Firstly, paragraph 1 of Article 130(r) (now Article 174) gave explicit recognition to the improvement of environmental quality as a legitimate Community objective in its own right, with EC environmental regulation no longer required to be justified in terms of its contribution to economic integration.[42] Secondly, the precautionary principle was incorporated into the EC Treaty by virtue of paragraph 2 of Article 130r.[43] Thirdly, paragraph 3 of Article 130r set out the requirement that, in preparing its policy on the environment, the Community shall take account of available scientific and technical data.[44]

Although the precautionary principle was never clearly defined, it was described by former EC Environment Commissioner Margot Mallström as directing the EC to

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[42] "Community policy on the environment shall contribute to pursuit of the following objectives:
- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems." Paragraph 1 of Article 130r (now Article 174).

[43] "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure." Paragraph 2 of Article 130(r) (now Article 174).

[44] "In preparing its policy on the environment, the Community shall take account of:
- available scientific and technical data;
- environmental conditions in the various regions of the Community;
- the potential benefits and costs of action or lack of action;
- the economic and social development of the Community as a whole and the balanced development of its regions." Paragraph 3 of Article 130r (now Article 174).

"take action when the science is not clear, but where there is reasonable cause for concern" (Agra Europe, 4 February 2000: EP/6).

Following the Single European Act, EC environmental regulation, the principles set out in Article 174 (formerly Article 130r) of the Treaty have been acted upon by the Commission into a set of inter-related objectives for EC water policy (European Commission, 1996, p. 5). Accordingly, the Treaty requires that a high level of protection be given to human health and that the precautionary principle, a concept derived from German environmental law, is applied. O'Riordan (1992: 2) sees the precautionary principle resting on four assumptions: prudent action in advance of scientific certainty; shifting the burden of proof onto the would-be developer to show no unreasonable harm; ensuring that environmental wellbeing is given legitimate status; and developing best practice techniques in the pursuit of management excellence. In the context of water policy this means that standards are based on recognised scientific knowledge and that a cautious approach is adopted, maintaining higher standards and using the best available techniques wherever there remains scientific uncertainty about the effects on the aquatic environment.

Preventive action which stops environmental damage from occurring is preferred to action which remedies problems once they have occurred. Certainly in the case of water conservation, once a sensitive ecosystem has been destroyed it may be impossible to repair. Preventing pollution at source is also preferable to end-of-pipe solutions so, for example, action which ensures that natural sources of water used for drinking are not contaminated is preferred to expensive treatment to make supplies suitable for human consumption. Following on from preventive action is the principle

that environmental damage should be rectified once it has been identified and that the polluter should pay for the cost of measures to repair the damage and discontinue the activity that has caused it. Finally, EC water policy should take account of the principle of sustainable development, namely that environmental concerns should be balanced against socio-economic factors and the requirement for increased amounts of fresh water to meet demand (European Commission 1996: 8).

The Commission also recognised that water policy requires coherent integration, both into other EC policy areas and by way of effective implementation of policy at the national and local level (European Commission, 1996: 6). This particularly pertains to the relationship between water policy and agricultural policy, since much of the aquatic pollution that water standards are designed to deal with originates from intensive farming production methods.

Origins of EC water policy

Water quality came to the fore as the focus of EC regulatory activity for practical reasons: aquatic pollution was a more tangible form of degradation than other environmental incidents such as those affecting air or soil quality. Water pollution could not be ignored because its effects were highly visible, particularly when marine life suffered. In addition, EC regulation was generally considered more appropriate than differing national approaches because water pollution was a common problem for all member states - it held no respect for national boundaries, with pollution incidents in major rivers such as the Rhine leading to environmental damage in a number of member states.

As a result, water policy is one of the oldest and most heavily regulated issue areas in EC environmental policy, with its origins to be found in the First Action Programme on the Environment of 1973. The First Action Programme on the Environment identified water pollution as an issue where priority action was required (see Bell 1997: 439) and set out the task of laying down scientific criteria for the degree of harm of the principal forms of water pollution on the basis of parameters set down by a common methodology. However, the Action Programme went on to acknowledge that the determination of standards with respect to water pollution could be provisional in the first instance. Provisional status was accorded to standards for water pollution in tacit recognition of the fact that in the early 1970s relatively little was known, scientifically, about what constituted safe levels of pollutants in water.

In policy terms, water was divided into various categories. These included fresh water, marine water, groundwater and surface water. Different policies were adopted towards rivers, lakes, estuaries, coastal waters, open sea and underground aquifers. Water was also distinguished by its socio-economic uses, such as drinking water supplies, water used by agricultural and industry, water used for leisure and tourism and water requiring a particularly high level of conservation.

Yet, although EC regulation has historically found it useful to divide water into different categories for administrative purposes, it is important to remember that water itself does not recognise these distinctions. As the European Commission acknowledged (European Commission 1996: 1c), in reality, water flows freely between the various categories and often performs a number of functions

simultaneously. Due to the natural characteristics of water, it cannot easily be compartmentalised into administrative, policy-motivated, categories.

The earliest EC regulation of water quality legislation dates back to 1975, regulatory activity driven not only by the agenda of the First Action Programme on the Environment but also by the public perception that ever higher water quality standards were required to ensure public health and prevent further environmental degradation.

Since 1975 there have been over 20 EC regulatory measures that deal directly with water policy or are closely related to it (Haigh 1995: 4.2-1). These have included: the *Surface Water Directive (75/440/EEC)*; the *Bathing Water Directive (76/160/EEC)*; the *Dangerous Substances Directive (76/464/EEC)*; the *Fish Water (78/659/EEC)* and *Shellfish Water (79/923/EEC) Directives*; the *Groundwater Directive (80/68/EEC)*; and the *Drinking Water Directive (80/778/EEC)*.

It is with Drinking Water Directive 80/778/EEC that this thesis is particularly concerned. This is because there were difficulties in immediately establishing a general methodology for defining water quality objectives, with initial work in terms of EC regulation to be based on the information already gathered by member states. EC regulatory innovation followed and new standards were duly adopted as the EC norm. These were not, however, the standards of provisional status that were envisaged in the First Action Programme. Rather, they were fully-fledged environmental standards enshrined in EC regulation.

The opportunity for EC regulation of drinking water quality

Under natural conditions, sources of drinking water possess few chemical properties likely to have an adverse effect on human health. Yet one consequence of intensive farming has been the dramatic increase in residues of chemical substances, particularly nitrates and pesticides, in drinking water supplies. This is attributable to such factors as the use of pesticides as an aid to increasing crop yields, the use of pesticides as weed killers, and the incautious disposal of unused pesticides that may allow them to leach into aquifers. The pesticides most commonly found in high concentrations in sources of drinking water tend to be the herbicides Atrazine, Simazine, Diuron, Glyphosate, Isoproturon (IPU) and Mocoprop. Some, for example Atrazine, are recognised as having carcinogenic properties.

When rainfall is heavy, pesticides are washed into surface water (rivers, streams, lakes and reservoirs) often within a matter of hours after spraying or dumping. In such cases the pesticides will tend to disperse. In contrast, pesticides accumulating in the groundwater system may remain for up to thirty years, though their presence may not be initially identified. With heavy rainfall and the groundwater system containing cracks and fissures the pesticides may enter the system rapidly, though in other cases they may be removed by contact with the soil before they reach the underground water source.

Public awareness of the implications of pesticide residues in drinking water first came to prominence in the early 1960s when the carcinogenic properties of DDT (dichloro-diphenyl-trichloro-ethene) were officially acknowledged. At the same time Rachel

Carson's book *Silent Spring* (1962: 168) highlighted the concern that "what we have to face is not an occasional dose of poison which has accidentally got into some article of food, but a persistent and continuous poisoning of the environment". By the 1970s, the public perception that water pollution incidents had become much more common meant that the issue became emotive throughout the European Community and a clear consensus began to emerge that EC-level environmental regulation should be introduced to prevent further aquatic pollution. In particular, due to public expectations that water be clear and safe, attention focused on concerns over the public health risks associated with pesticide residues in drinking water.

In the light of public concerns over the use of pesticides, the First Action Programme on the Environment set out its intention to establish reference parameters for the uses and functions of drinking water. These parameters were, according to the Action Programme, to be based on the collection of information in order to work out a common method for deciding the measures necessary to achieve and maintain quality objectives in the future.

Negotiation of EC regulation of drinking water quality

Chapter 2 of the First Action Programme stated that the aim of EC regulation would be to establish standards in order to limit or prevent the exposure of targets as a means of achieving or approaching quality objectives. In relation to toxic chemical substances present in water intended for human consumption, the Action Programme stated that a proposal from the Commission should be submitted as quickly as possible and at the latest by 31 December 1974. In particular, it specified that

"maximum use will be made of the results already achieved at national and international level, particularly the work done by the WHO".[45]

However, relying on World Health Organisation (WHO) information on toxicological aspects of water quality was to prove problematic. While EC regulation also sets out quality and health parameters for microbiological content, nitrates and lead in drinking water, it was with respect to pesticide residues that scientific uncertainty was to prove the driver for innovative standard-setting. The 1958 and 1963 WHO *International Standards for Drinking Water* that were available did not refer to the Maximum Admissible Concentrations (MACs) for individual pesticides at all, while the 1971 WHO *International Standards for Drinking Water* made the general observation that pesticide residues which may occur in community water supplies make only a minimal contribution to the total daily intake of pesticides for the population served. No WHO MACs were therefore available for individual pesticides prior to the adoption of Directive 80/778/EEC. The drafters of the Directive could not rely on following WHO standards for pesticide MACs since none existed. Instead they opted to develop innovative standards that aimed at zero pesticide content in drinking water.

In the context of the advice regarding pesticide residues contained in the 1971 WHO International Standards, when the European Commission published its proposal for a Directive relating to the quality of water intended for human consumption in 1975, the limit values for maximum permissible quantities of pesticides in drinking water were

[45] Ibid., n. 3 above.

set at 0.1 microgramme per litre (μg/l), this being the smallest quantity of individual pesticides that could be detected in water by toxicological analysis.

As noted above, the First Action Programme on the Environment had set the deadline of 31 December 1974 for the Commission to submit a proposal for EC regulation on toxic substances present in drinking water. In the event, the proposal was only submitted to the Council by the Commission on 31 July 1975.[46] The original proposal was much shorter than the version finally adopted, the former consisting of only 13 articles. The standard for pesticides that was finally adopted in the Directive 80/778/EEC was set in this original 1975 proposal. It was included in Annex I, which contained the drinking water standards, under Table D ("undesirable or toxic factors"), but no explanation is given in the text as to why the standard for pesticides was set at that level (see also Faure 1994: 54). Furthermore, when the European Parliament gave its opinion on the proposal on 9 February 1976,[47] no amendment was proposed with respect to Annex I, so the parameters proposed for pesticides remained unchallenged.

On 15 July 1980 *Council Directive 80/778/EEC relating to the quality of water intended for human consumption*[48] (hereafter referred to as Directive 80/778/EEC) was adopted. It took as its legal base Articles 100 and 235 of the EEC Treaty. The justification for EC regulation in relation to drinking water quality is set out in the preamble of the Directive which states that, in view of the importance for public health of water for human consumption, it is necessary to lay down quality standards with which water must comply.

[46] OJ C 214/2, 18.9.75.
[47] OJ C 28/27, 9.2.76.
[48] OJ L 229/11, 30.8.80.

The preamble justifies the use of Article 100 on grounds that a disparity between provisions already applicable or in the process of being drawn up in the various member states relating to the quality of water for human consumption may create differences in the conditions of competition and, as a result, directly affect the operation of the common market. The use of Article 235 as a legal basis for the Directive is justified on grounds that the approximation of laws relating to the quality of drinking water intended for human consumption is required to meet the aims of the Community with regard to the improvement of living conditions, the harmonious development of economic activities throughout the Community and a continuous and balanced expansion.

The preamble also justified the need for Community action by referring back to the 1973 Action Programme on the Environment, which provided for the setting of standards to apply to toxic chemical substances and to bacteria presenting a health hazard which are present in water intended for human consumption and the definition of physical, chemical and biological parameters corresponding to the different uses of water and, in particular, to water for human consumption.[49]

Given the extent of public concern about the impact of environmental pollution on the quality of drinking water, the draft Directive received widespread support from member states and was unanimously adopted without substantive discussion on whether the parameters set out in the annex of the Directive were appropriate or whether substantial cost implications were likely to result.

[49] Declaration of the Council of the European Communities and of the Representatives of the Government's of the Member States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, OJ C 112/1, 20.12.73.

Directive 80/778/EEC set out quality and health parameters for microbiological content, nitrates, pesticides and lead in water intended for human consumption or for use in food or drink. It also laid down guidelines for water quality monitoring. Without even convening an advisory committee of scientific experts to look at the most appropriate parameters, officials working within DG CI, the Environment Directorate General of the Commission, took responsibility for setting the MACs for particular toxic substances, including pesticides. The model of epistemic communities of elite technical experts operating within tightly knit networks and committees envisaged by the European integration and policy-making studies outlined in chapter 3 of this thesis did not, therefore, apply in this instance.

As a result, Annex I, Table D, of Directive 80/778/EEC requires, under heading 55, that the MAC for pesticides and related products when substances are considered separately in drinking water was to be 0.1 μg/l and that the MAC for total pesticides in drinking water was to be 0.5 μg/l. Pesticides and related products were defined in Annex I, Section D, under heading 55 as: insecticides (sub-divided into persistent organochlorine compounds, organophosphorous compounds and carbamates); herbicides; fungicides; polychlorinated biphenyls (PCBs) and polychlorinated terphenyls (PCT)s.

That the MACs set for pesticides in Directive 80/778/EEC were set at 0.1 and 0.5 μg/l can be traced back to concerns at the time in relation to adverse toxicological effects of pesticides, especially DDT (see also Bache and McGillivray 1997: 151).

However, detecting pesticides from drinking water completely was no easy task in the late 1970s when the drinking water quality standards set out in the Directive were being formulated. Scientific expertise was such that no organochlorine pesticides could actually be detected in water by toxicological analysis in amounts smaller than 0.1 μg/l. As a result, the maximum admissible concentration for pesticide content in water was set at 0.1 μg/l because this was the smallest amount that could be detected by toxicological analysis. Since the public perception was for drinking water to contain absolutely no pesticides, the requirement was for EC regulation to eradicate pesticides from drinking water completely (see also Premazzi and Ziglo 1994: 95). It was therefore scientific uncertainty rather than scientific expertise that was the main driver for the pesticide limits set in Directive 80/778/EEC. The 0.1 μg/l maximum admissible concentration effectively became a surrogate for zero in EC environmental regulation.

Individuals who had followed the legislative process leading to Directive 80/778/EEC and were subsequently interviewed for this thesis confirmed that the decision on pesticide MACs in Directive 80/778/EEC were set because persistent organochlorine pesticides such as DDT were receiving a great deal of adverse publicity in the late 1970s and there was pressure to ensure that drinking water should contain no pesticides at all. Given that there was no evidence that pesticides existed in drinking water at all in quantities smaller than 0.1 μg/l, because the level of analytical detection at that time was not sufficiently sensitive to detect smaller amounts, respondents interviewed for this thesis also confirmed that 0.1 μg/l became a surrogate for zero.

This view has been corroborated further by Faure (1995: 322), who commented in relation to organochlorine pesticides that: "for practical reasons the standard was set at the minimum concentration...that could be detected by the analytical methods available at the time...and there was no evidence that the proposed standard was in danger of being exceeded because for many pesticides the level of analytical detection was not sufficiently sensitive".

The picture that begins to emerge is therefore one in which, by virtue of the Commission seizing public health concerns as a window of opportunity to compensate for its lack of clear policy competence under the original EC Treaty and, by acting as a policy entrepreneur, it was able to respond to reports of environmental degradation and water pollution to initiate innovative regulatory standards at EC rather than national level.

The Commission was also able to promote regulatory activity at EC rather than national level because it also engaged in an exercise of consensus building amongst national governments on the basis that agreeing to high environmental standards for all member states was an objective best pursued collectively through Community legislation. Where there is a consensus in favour of regulatory change designed to tackle common problems, the convergence of interests may favour innovation in regulatory policy-making.

In reality, the effects of persistent organochlorine pesticides were receiving such adverse publicity precisely because that same scientific community was issuing dire warnings suggesting that the water-borne pesticides would have adverse toxicological

effects. It was this scientific concern that became translated into a public debate, followed by consensus amongst member states that EC measures were required. In this context, all member states saw the benefits of EC regulation in this policy area and recognised that the delegation of discretionary regulatory policy-making powers to supranational Community institutions was a logical approach to take.

Hence, member states anxious to demonstrate environmental credentials to their domestic electorates, agreed to adopt new EC regulation on drinking water quality standards. Having established the need for EC regulatory activity, the task of producing appropriate toxicological standards to be enshrined in EC regulation was then delegated to representatives of the scientific community, established as an EC committee of experts.

Assessment

This thesis has suggested that, in a general context, when the opportunity for new regulatory activity arises it is likely that this will emerge because there is a consensus amongst actors as to the existence of a particular policy problem, and a widespread belief that co-operating to achieve policy solutions via EC regulation is the most appropriate way forward for all concerned.

In the case of drinking water, the opportunity for new EC regulatory initiatives arose due to consensus on the need to address concerns about drinking water quality and, it should also be acknowledged, EC policy entrepreneurship in the form of policy

expansion by DG XI. The window of opportunity that opened for EC regulatory activity was therefore driven by consensus on the need for regulation.

In the face of widespread scientific uncertainty about the toxicological effects of individual pesticide residues in drinking water, the maximum permissible concentration of pesticides were set at 0.1 μg/l as a proxy for zero. EC regulators thus engaged in a high degree of regulatory invention, namely the generation of new ideas. In the absence of prior national standards to deal with new problems recently identified by new scientific techniques, there was little scope for emulating existing national standards, such as occurred in relation to insurance services regulation. In the absence of prior national standards, regulatory invention was the only viable option for EC regulation of drinking water standards.

Impact of EC regulatory change on drinking water quality standards and the drivers for re-regulation

This section focuses on the impact of Directive 80/778/EEC on the UK where high compliance costs were not anticipated at the time the Directive was adopted. In the UK, a number of factors may account for the willingness of the Government to accept the standards set out in the Directive without any apparent dissent. Bache and McGillivray (1997: 152), for instance, note that more time seems to have been spent contemplating whether water authorities would have sufficient legal powers to enter private and commercial properties to carry out their monitoring obligations than on how much the Directive would cost to implement, but these did not prevent adoption of a Directive which departed radically from a domestic policy tradition of "hostility"

towards statutorily prescribed standards (Richardson, Ogus and Burrows 1989: 42, quoted in Bache and McGillivray 1997: 152).

Richardson (1994: 143) suggests there was a widely held view that non-compliance with agreed provisions would present few legal or political difficulties, while Haigh and Lanigan (1995: 22, quoted in Bache and McGillivray 1997: 152) suggest that "the idea that British water might not be clean enough to pass tests which would also have to be met by continentals with supposedly dirtier water probably did not occur to the British Government". In this context, Bache and McGillivray (1997: 152) suggest that the UK saw itself as a "leader rather than a laggard in the provision of clean water supply" to such an extent that "no problems were anticipated in resisting the European Commission should EC standards not be met on time".

Under the terms of Directive 80/778/EEC, formal compliance was required by July 1982. The UK originally intended to implement the Directive by incorporating its requirements within the existing statutory obligation on water authorities and local authorities to provide "wholesome" water supplies. In September 1982 the UK Government sent formal notification of compliance to the European Commission. The Department of Environment of the UK Government subsequently issued Circular 20/82 as guidance for water supply companies on implementation of the Directive, placing responsibility for its administration on the statutory water and local authorities and stating that "the Secretaries of State [for the Environment and for Wales] will regard compliance with the terms of the Directive as a *necessary characteristic but not a complete definition* of any water that is to be considered wholesome" [emphasis added] (quoted in Ward *et al* 1995). This was the first time that quality standards were

prescribed in legally binding terms to facilitate compliance with the Directive in relation to the supply and monitoring of drinking water quality (Bache and McGillivray 1997: 153).

At that stage the UK took the view that it was sufficient to achieve the EC's specified standards through averaging across a series of samples whereas the EC regarded the standards as absolute and not to be exceeded at all. Industry experts and government officials interviewed for this thesis confirmed that the UK Government initially interpreted the Directive in a way that was intended to minimise compliance costs for the benefit of its domestic water suppliers.

However, in 1986 Friends of the Earth lodged a formal complaint with the European Commission, claiming that the UK Government had not adequately implemented the Drinking Water Directive into national law, citing the continual high levels of nitrates in drinking water in England and Wales. In 1988 Friends of the Earth lodged a similar complaint relating to pesticides.

Following the Friends of the Earth complaint, in 1989 the European Commission commenced legal proceedings against the UK under Article 169 (now Article 226) of the EC Treaty, for non-implementation of the Directive, arguing that the Directive should be implemented by legislative means rather than by a Department of Environment Circular or similar administrative methods.[50]

[50] "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice." Article 169 (now Article 226) EC Treaty.

In November 1992, the European Court of Justice found the UK to be in breach of its obligations to implement Directive 80/778/EEC by failing to ensure that water used for food production purposes was covered by the 1989 implementing regulations and by failing to comply with the MAC for nitrate in 28 supply zones in England.[51] Although the ruling of the European Court of Justice referred to the UK's failure to implement fully the Directive prior to the privatisation of the industry in 1989 (see ENDS Report 1992) and related to the UK's failure to comply with nitrate and lead rather than pesticide MACs set out in Directive 80/778/EEC, it focused attention on the desirability of revising the pesticide limits set out in the Directive, taking account of improvements in toxicological monitoring and detection standards since the Directive had been adopted.

Formal implementation of the Directive in the UK had been achieved in the context of privatisation of the water supply industry in October 1989 when the Water Act 1989[52] and the Water Supply (Water Quality) Regulations (SI 1989 No. 11470)[53] set, for the first time in UK law, clearly defined toxicological drinking water quality standards. However, from 1989 onwards the UK has accepted the Commission's interpretation that the Directive sets absolute standards that all drinking water must reach. Under the UK Water Industry Act 1991, the obligation to provide water supplies that comply with the standards set out in the UK Water Supply Regulations 1989 passed to the newly privatised water companies, which produce annual monitoring results. The Drinking Water Inspectorate (later incorporated into the Environment Agency) was established to enforce the provisions.

[51] Case C-337/89, 25.11.92.
[52] Consolidated by the Water Industry Act 1991 and the Water Resources Act 1991.
[53] Amended by the Water Supply (Water Quality Amendment) Regulations 1989 and 1991.

To comply with Directive 80/778/EEC, water supply companies in the UK undertook large-scale capital expenditure to install new filtration plant capable of removing pesticides from drinking water supplies, particularly using carbon filtration processes. In some cases this was preceded by ozone treatment, which separates pesticides from water molecules prior to carbon filtration, so making the latter process more effective.

While the installation of new plant and equipment may not have been solely to remove pesticides but to improve the taste and odour of drinking water as well, it was estimated that the total cost of new investment and associated operating costs incurred by UK water supply companies between 1989 and 1994 was in the region of £1bn (OFWAT 1994).[54] These costs were then passed on to consumers in the form of higher water charges to consumers. The perception that EC regulation was the cause of rising water prices began to grow in the minds of the UK public.

Given the cost implications, by the early 1990s the question of drinking water quality had become a political issue with consequences and cost implications out of all proportion to those originally anticipated when the UK Government voted in favour of the Directive in the Council of Ministers seven years previously. The opportunities to pass on the compliance costs to new, privatised water companies in England and Wales became both politically and economically expedient. It is difficult, however, to avoid the view that the UK Government had underestimated the implications of the Directive.

[54] The Office of Water Services (OFWAT) is the economic regulator for water and sewerage services in England and Wales.

Regulatory reappraisal: the opportunity for EC re-regulation on maximum permissible pesticide limits in water intended for human consumption

The initiative to engage in regulatory reappraisal of Directive 80/778/EEC, leading to re-regulation, came from the UK. The reasons for the UK enthusiasm for regulatory reappraisal of the Directive can be traced back to September 1982, when the UK Government set formal notification of compliance to the European Commission, as noted above the Department of the Environment subsequently issuing Circular 20/82 as guidance on implementation of the Directive for the UK water suppliers.

So, from 1989 onwards, although the UK formally accepted the European Commission's interpretation of the Directive as setting absolute standards with which all drinking water must comply, the UK Government began to exert pressure for revisions to Directive 80/778/EEC. The UK's grounds for arguing for a revision of Directive 80/778/EEC were fourfold. First, the costs of compliance with the standards set out in Directive 80/778/EEC exceeded the benefits to health from complying with them. In the case of the UK, with its emphasis on "end of pipe" solutions, the effects of compliance on water charges were considered onerous. Second, there was a risk that existing or new agricultural products under development would breach a standard relating to their concentration in water that had no bearing on questions of health. Third, allowable pesticide residues in foodstuffs exceeded those permitted by the Directive, thus suggesting that the Directive was of little relevance to human health. Fourth, that the maximum admissible concentration of pesticides specified in Directive 80/778/EEC (0.1 μg/l) were out of line with updated scientific evidence, particularly revised and updated parameters produced by the WHO. The UK argued

that toxicological standards for individual pesticides (rather than the blanket 0.1 μg/l proxy for zero) should therefore be adopted (see also Premazzi and Ziglo 1994: 95).

Support for these arguments came from a number of sources. The views of the Director General of Water Services indicated his concerns at the effects of inappropriate pesticide level standards (OFWAT 1993). The UK water supply companies advocated revision of pesticide MACs in the Directive based on WHO or equivalent guidelines and suggested that the cost burden of measures to prevent pesticide pollution should be placed upon pesticide users and manufacturers rather than the water suppliers (Water Industry Co-ordinator 1994).

In their report to the Department of the Environment, the consultancy organisation WRc (1995) commented that "the [maximum admissible] concentration is arbitrary: it has no scientific significance in terms of effects on consumers' health". The report went on to argue that the economic impact of complying with toxicologically based standards would not be very different. Referring to the individual toxicological limits issued by the Department of the Environment (Department of the Environment 1989), the report commented that these follow the WHO recommendations. Generally these limits are above the 0.1 standards set in the 1980 Directive, so compliance with these would remove any economic impact, since the actual pesticide levels found tend to be less than the WHO guidelines.

The content of the WHO guidelines is worthy of further discussion here, given their particular significance during discussions on re-regulation in the form of EC regulatory refinement and reappraisal.

World Health Organisation Guidelines

The WHO first published its *International Standards for Drinking-Water* in 1958 to assist governments in dealing with contaminated drinking water and its impact on health, ranging from massive outbreaks of infectious and parasitic diseases, on the one hand, to subtle toxicological effect, on the other. The WHO parameters were subsequently revised in 1963 but, as noted earlier in this chapter, it was not until the 1971 version of the *International Standards for Drinking-Water* that the WHO suggested that pesticide residues that may occur in community water supplies make only a minimal contribution to the total daily intake of pesticides for the population served.

Due to continued research on water quality and rapid improvements in toxicological testing standards, much more detailed health-based values for pesticides were first set out in the 1984 *WHO Guidelines for Drinking-Water Quality*. By the mid-1980s, therefore, scientific uncertainty was being replaced by more accurate evidence on the toxicological values of individual pesticides.

In terms of philosophy and content, the 1984 *Guidelines* proved to be a significant departure from the old *International Standards*. The 1984 *Guidelines* are advisory in nature, based solely on the impacts on human health of the various substances and organisms concerned. Standards have, by their nature, to take other considerations into account such as social, economic, environmental, political and financial considerations and have to balance a number of criteria. However, not all pesticides were included in these guidelines. A second edition of the *Guidelines* was published

in 1993 and a third edition appeared in 2004.[55] Health-based values for individual pesticides were added and amended in successive versions.

The second edition of the WHO *Guidelines* in 1993 was the first to set out safe parametric values higher than 0.1 μg/l for certain pesticides. Some examples of WHO *Guidelines* for MACs of individual pesticide residues in drinking water, as contained in the current (third) edition of the WHO *Guidelines for Drinking Water Quality* (2004, amended 2005) are set out below.

Glyphosate, a broad-spectrum herbicide used in agriculture for weed control, was reported in the WHO toxicological review as exhibiting low toxicity. Glyphosate was not evaluated in the first two editions of the *Guidelines for Drinking Water Quality*, published in 1984 and 1993 but, in the addendum to these Guidelines, published in 1998, a health-based value of 5 μg/l was derived for glyphosate.

Lindane, an insecticide on fruit and vegetable crops and for seed treatment, was reported in the WHO toxicological review as being toxic to the kidney and liver. In the first edition of the *Guidelines*, published in 1984, a health-based guideline value of 3 μg/l was recommended for lindane. The 1993 *Guidelines* revised this guideline value down to 2 μg/l and this health-based value remains in the third edition of the WHO *Guidelines*.

On the other hand, WHO guidelines for MACs of other pesticide residues are lower than the blanket parametric value of 0.1 μg/l set down in EC regulation. Atrazine, a

[55] WHO Guidelines for Drinking-Water Quality, available at: http://www.who.int/water_sanitation_health/dwq/guidelines4/en/index.html. See also: http://whqlibdoc.who.int/hq/2000/a68673_introduction_2.pdf

selective pre- and early post-emergence herbicide, was reported in the WHO toxicological review as having the potential to induce mammary tumours in mice. Atrazine was not evaluated in the first edition of the *Guidelines for Drinking Water*, published in 1984, but the 1993 Guidelines established a health-based guideline value of 0.002 µg/l for atrazine in drinking water.

2,4-D (2,4-dichlorophenoxyacetic acid), a systemic herbicide used for control of broad-leaved weeds, was reported in the WHO toxicological review as having the potential to cause two forms of cancer in humans: tissue sarcomas and non-Hodgkin lymphoma. 2,4-D was given a health-based guideline value of 0.1 µg/l when the first edition of the *Guidelines for Drinking Water*, published in 1984, but the 1993 *Guidelines* established a health-based guideline value of 0.03 µg/l.

Isoproturon, a selective, systemic herbicide used in the control of annual grasses and broad-leaved weeds in cereal crops, was reported in the WHO toxicological review as being a promoter of liver tumours. Isoproturon was not evaluated in the first edition of the *Guidelines for Drinking Water Quality*, published in 1984, but the 1993 *Guidelines* calculated a health-based guideline value of 0.009 µg/l for isoproturon in drinking water.

Mecoprop, a herbicide, was reported in the WHO toxicological review as being a cause of liver disease. Mecoprop was not evaluated in the first edition of the *Guidelines for Drinking Water Quality*, published in 1984, but the 1993 *Guidelines* established a health-based guideline value of 0.01 µg/l.

Simazine, a pre-emergence herbicide for use with crops, was reported in the WHO toxicological review as being a cause of mammary tumours. Simazine was not evaluated in the first edition of the *Guidelines for Drinking Water Quality*, published in 1984, but the 1993 *Guidelines* established a health-based guideline value of 0.002 µg/l for simazine in drinking water.

Regulatory reappraisal: negotiation of EC re-regulation to set maximum pesticide limits in water intended for human consumption

The drafters of Directive 80/778/EEC had foreseen the need for reappraisal and revision of the standards contained in its annexes, the preamble stating explicitly that the reference methods of analysis defined in the annexes to the Directive must be speedily adapted to scientific progress and technical progress and that, on order to achieve this, close co-operation would be required between the member states and the Commission within a committee responsible for the adaptation to scientific and technical progress. In the light of the imperfect and imprecise data on which decisions about the parameters set out the Directive were made, this expectation of reappraisal and revision of standards at some time in the future is perhaps not surprising.

From a toxicological point of view, the opportunity to reappraise Directive 80/778/EEC came because of the increased sensitivity of modern analytical techniques for detecting pesticide residues in drinking water (see also Faure 1994: 58). However, as this section of the thesis will demonstrate, it proved politically difficult to modify the pesticide standard in a way that might be interpreted as a relaxation of environmental objectives.

Procedurally, the first step to renegotiation of Directive 80/778/EEC was taken at the European Council meeting in Edinburgh on 11 and 12 December 1992, at which guidelines were agreed for reassessing the scope of Community legislation in the light of the principle of subsidiarity, at that time a new legal principle introduced in the EC Treaty by Article 3b (now Article 5) of the Treaty on European Union (see also CEPR 1993).[56] The Edinburgh European Council meeting, which took place against the backdrop of the Danish "no" vote in the Danish referendum on ratification of the Treaty on European Union, approved an overall approach to the subsidiarity principle as a dynamic concept to be applied in the light of the objectives set out in the Treaty (Bulletin of the European Communities 12-1992: 7).

In the light of application of the principle of subsidiarity, the Edinburgh European Council noted that, on the environment, the Commission intended to simplify, consolidate and update existing texts, particularly those on air and water, to take new knowledge and technical progress into account (Bulletin of the European Communities 12-1992: 17).

This meant that water policy measures that could be undertaken most effectively at member state level should not be undertaken at EC level. Even when EC action was taken, subsidiarity also required that the detailed implementation of water policy

[56] "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it herein.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and cannot be sufficiently achieved by reason of the scale or effects of the proposed action, be better achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." Article 3b (now Article 5) EC Treaty.

should be left to the member states where this was more appropriate. Action at national or local rather than EC level may be considered appropriate because environmental conditions in the EC are likely to vary widely between member states. Water policy that was appropriate in one member state (for example in the UK, where water is relatively fast flowing and contaminants in water are dispersed relatively quickly) may be entirely inappropriate in another (for example in Spain, where water shortages have been a frequent problem).

The Commission therefore sought to apply flexibility to ensure that the most appropriate policy is implemented in a particular region (European Commission 1996: 7). However, because water pollution does not observe national boundaries, it may well have impacts across a number of member states. Where there is potential for trans-frontier pollution, there is often sufficient justification for the EC to act (European Commission 1996: 8).

At the beginning of 1993, therefore, and in the light of member state agreement on the need for measures to be taken to reassess the scope of Community legislation in the light of the greater need to consider application of the principle of subsidiarity, the Commission announced its intention to include the 1980 Drinking Water Directive as part of a wider review of older EC regulatory measures. In effect, as Bache and McGillivray (1997: 165) put it, the subsidiarity principle was being "used by Member States as an argument for repatriating some control over water policy".

The Commission undertook a review of Directive 80/778/EEC based the evaluation of published studies and available data. On a number of issues, the Commission

requested the opinion of its Scientific Advisory Committee to Examine the Toxicity and Ecotoxicity of chemical compounds (CSTE). The assessments made by the WHO and its recommendations on guidelines for drinking water quality published in 1993 were taken into account, together with the experience gained during the implementation of Directive 80/778/EEC. The Commission also considered information provided in connection with the Drinking Water Conference it organised in September 1993, as well as other expert advice.[57]

In preparation for the September 1993 conference the UK Permanent Representation to the European Communities (UKREP) submitted a "non-paper" to the Commission on 18 August 1993 (United Kingdom Permanent Representation to the European Communities 1993). The non-paper put forward some general proposals about the way in which the Directive should be revised and made some specific proposals for individual parameters and about monitoring and enforcement.

The UK non-paper called for a revised Directive to accord fully with the principles of subsidiarity and the guidelines agreed at the Edinburgh European Council and should be based on sound scientific knowledge, with standards adopted taking into account the benefits for consumers and the likely costs of achieving them.

With respect to pesticides, the UK non-paper argued that it was appropriate that values should be set with satisfactory margins of safety determined on the basis of the best scientific and medical knowledge available. It noted that the Commission was likely to be considering revising the standards for some parameters in the light of the

[57] According to COM(94) 612 final, page 7.

revised WHO guideline values and noted that, in the view of the UK, the values in the revised Directive should be based on the guideline values about to be published by the WHO, these values being recommended following extensive reconsideration by experts taking into account the latest scientific and medical evidence. In the view of the UK, the WHO guideline values provided for wide margins of safety, represented precautionary values and, therefore, there was no need for the EC to take a different view on parameters covered by those guidelines.

The UK non-paper went on to recommend that the revised Directive should adopt individual guideline values for the pesticides to be included in the new WHO guidelines since there was no direct scientific or medical evidence to support the blanket MAC of 0.1 μg/l for every pesticide. The result of the 0.1 μg/l set by Directive 80/778/EEC was, according to the UK non-paper, large and unnecessary expenditures on treatment and therefore costs to water consumers, or unwarranted limitations on agricultural practices, without any gains to the health of the population. Furthermore, the UK non-paper argued that the MAC of 0.5 μg/l for total pesticides was in practice unenforceable and therefore should not be included in a legal instrument.

In member states other than the UK, there appears to have been less support for change. Other member states argued that, since the precautionary principle is enshrined in Article 130(r) (now Article 174) of the EC Treaty, there is no place for pesticides in drinking water at all if there remains any scientific doubt about their safety, so the 0.1 μg/l limit should be retained as a precursor to the total elimination of pesticides in drinking water.

On 23 and 24 September 1993 the European Commission hosted its consultation event, a conference in Brussels where interested parties presented their views on Directive 80/778/EEC and the need for revision.[58] The views expressed at the conference and the information given subsequently to the Commission were taken into account in the preparation of the proposal to revise Directive 80/778/EEC. These included the views set out by the UK Government in its 'non-paper', submitted the previous month.

However, the UK approach was opposed by Friends of the Earth, which claimed that "a relaxation of the pesticide standard would be politically convenient for the UK because it would legalise the current situation whereby supplies to around 14.5 million people in England and Wales had exceeded the standard at times in 1992 [and] a total of 50 different pesticides have been detected in drinking water supplies during the last three years" (Friends of the Earth 1993a).

Friends of the Earth argued against reliance on the WHO guidelines on grounds that a degree of scientific uncertainty existed regarding the way in which degradation may create new compounds whose effects are not known and further that the effects of interactions between different toxic chemicals cannot be predicted. The Friends of the Earth position was that no pesticides should be allowed in drinking water at all and advocated that all pesticides which exceeded the 0.1 μg/l maximum admissible concentration should be banned outright.

[58] "Pesticides in EC Drinking Water – the Limit Value May be Raised", *Pesticide News*, No. 22, December 1993, page 10. Available at: http://www.pan-uk.org/pestnews/pn22/pn22p10.htm.

On 28 October 1993, Friends of the Earth published additional *Comments on the Non-Paper by the United Kingdom: Revision of the Drinking Water Directive – 80/778/EEC* (Friends of the Earth 1993b). The Friends of the Earth paper challenged the notion that a MAC of 0.5 μg/l for total pesticides was unenforceable, arguing that the MAC was in place to guard against pesticide use strategies which might result in the presence of larger numbers of smaller amounts of pesticides, which would distort the original intent to avoid the presence of pesticides in water.

It was subsequently agreed at the Brussels European Council on 10-11 December 1993 that the Commission would suggest a simplification or recasting of certain existing legislative acts in the light of the application of the principle of subsidiarity. In the explanatory memorandum to the subsequent proposal to revise Directive 80/778/EEC, the European Commission traced back its decision to undertake a fundamental review of the Directive to this Brussels meeting and the Edinburgh European Council a year previously.

The Commission proposal to revise Directive 80/778/EEC

The European Commission published its proposal for a Council Directive to revise Directive 80/778/EEC on 4 January 1995 as COM(94) 612 final. The explanatory memorandum of the proposal acknowledged that, although Directive 80/778/EEC had been the driving force behind the overall improvement in drinking water quality over the proceeding decade, providing governments and water suppliers with a stable and predictable base for their investment programmes, the Directive also had shortcomings. In particular, the Commission recognised that, since Directive

80/778/EEC was based on a proposal made originally in 1975, its ideas and standards corresponded to what was thought to be appropriate 20 years previously.

The explanatory memorandum to COM(94) 612 final also acknowledged that, in the light of the subsidiarity principle, embodied in the Treaty on European Union, there was a requirement to reconsider the Directive, confirmed at the Edinburgh European Council in December 1992, the conclusions of the Edinburgh Council stating: "On the environment, the Commission intends to simplify, consolidate and update existing texts, particularly those on water, to take new knowledge and technical progress into account".

In particular, the Commission agreed that it was necessary to reorient drinking water rules and regulations towards compliance with essential quality and health parameters, leaving member states free to add secondary parameters if they saw fit. This meant in practice that the revised drinking water quality directive would define general parameters, some of which would be fixed in technical terms at Community level and others at national level.

According to the explanatory memorandum, the Commission viewed the single most important proposal in COM(94) 612 final as being the reduction from 50 μg/l to 10 μg/l as the maximum permissible concentration of lead in drinking water. This change was in accordance with the latest recommendations of the WHO and was seen by the Commission as being necessary in order to protect infants, young children, and pregnant women from the neuro-toxic effects that are known to contribute to IQ deficits, learning and behavioural problems.

However, COM(94) 612 final was also significant because it retained the 0.1 μg/l maximum admissible concentration for individual pesticides in spite of the UK's attempts to replace the uniform standard with scientific parameters based on WHO assessments of risk to human health in the case of individual pesticides. A footnote to the COM(94) 612 final did, however, state that the Commission would examine whether an individual value can be set for a given substance after an evaluation of available scientific information.[59] It also acknowledged the role of scientific expertise in refining the parameters, undertaking to review standards in the Directive at least every two years in the light of scientific and technical progress (Article 14). The draft Directive omitted reference to the 0.5 μg/l limit for total pesticides, which was generally considered to have little logic in toxicological terms.

By way of explanation, the explanatory memorandum to COM(94) 612 final noted that, in the case of pesticides, application of the precautionary principle required that the parametric value of 0.1 μg/l should be retained as a matter of principle for each individual pesticides, the Commission noting that experience showed that in most cases this value could be respected without the need for extra treatment provided that pesticides are used in a responsible manner.

No fundamental revision of the MACs for pesticides in drinking water contained in Directive 80/778/EEC were proposed by COM(94) 612 final. This was primarily due to the opposition to change by all member states except the United Kingdom during

[59] COM(94) 612 final, Annex I, Part B, Note 5(3).

the renegotiation process and also the public campaign mounted to oppose the UK proposals by Friends of the Earth (FoE).

Responses to the Commission proposal

Friends of the Earth argued that, in line with the precautionary principle, pesticides should not be allowed in drinking water in quantities capable of analytical detection. Consequently, FoE did not favour using WHO MACs because these only offered a limited perspective on toxicological considerations arguing, for example, that they did not consider the possibility of synergistic effects and that additional complexities were posed by mixtures of chemicals and in interpreting toxicological data.[60]

Rather than assessing new scientific evidence that suggested risks to human health would not be increased by a relaxation of maximum permissible concentrations of some pesticides in drinking water, it appeared that the regulatory entrenchment that characterised reaction to COM(94) 612 final amounted to a public commitment to the exclusion of all pesticides in drinking water in the future.

It will be recalled that, when Directive 80/778/EEC was adopted, the Commission was led by the idea that environmental contaminants are not acceptable in drinking water at all. The actual level reflects what environmental chemists thought to be analytically detectable concentrations at that time. At the end of the seventies there were few objections to this standard as many thought that pesticides used in agriculture could not enter into drinking water. The inclusion of a maximum

[60] Friends of the Earth, comments of Drinking Water Directive and Greenpeace, statement on Drinking Water Directive, 1993.

exceedence standard of 0.1 μg/l for any pesticide in drinking water was therefore considered a surrogate for zero. In other words, the regulatory approach taken was that drinking water should be free from any pesticides but, in the absence of toxicological expertise capable of detecting smaller quantities, scientific uncertainty meant that 0.1 μg/l became the threshold.

By 1993, however, the development of sufficiently sensitive analytical methodology could provide much more accurate empirical data from monitoring studies on raw and drinking water. The WHO had published information on the risks attached to pesticides in drinking water that offer a more accurate scientific and medical assessment. The adoption of WHO standards as the EC regulatory norm would result in the relaxation of the maximum admissible concentrations and more incisive variations in levels of pesticides in permitted drinking water, the risks of which would each be assessed separately rather than being subject to a blanket limit of 0.1 μg/l.

The agrochemical industry lobby group, the European Crop Protection Association (ECPA), therefore recommended that Community MAC levels for pesticides be based on thorough reviews of all the scientific data, in particular toxicological data. ECPA wanted the EC to use limits based on WHO MACs. The ECPA proposed that Community MACs, if exceeded, would trigger a range of remedial actions, arguing that this approach would provide protection to the European consumer and environment, without imposing excessive costs on the water industry and therefore the consumer.[61]

[61] *European Crop Protection Association position paper on the revision of the Drinking Water Directive 80/778/EEC,* ECPA, May 3, 1993.

EUREAU, the association of water suppliers in Europe, also wanted the Directive revised. It pointed to scientific and technical progress and its own experience with implementation and argued that the basis and use of the MAC should be reassessed. EUREAU argued that the term MAC should be reviewed to reflect the fact that breaking the levels does not necessarily constitute a threat to human health, with limits based on the most recent scientific knowledge taking into account the work of national and international bodies such as the WHO.

But, despite the efforts of the UK, EUREAU and the ECPA to encourage the adoption of WHO toxicological standards in the renegotiated Drinking Water Directive, when the new Directive 98/83/EC was finally adopted on 3 November 1998,[62] it retained the 0.1 μg/l. In accordance with Directive 98/83/EC, the earlier Directive 80/778/EEC was replaced by the newer Directive. Following a five year transition period after publication of Directive 98/83/EC, Directive 80/778/EEC was repealed in December 2003 and at that time the new Directive came fully into force.

Directive 98/83/EC

The rationale for Directive 98/83/EC, as set out in the preamble, is that it was necessary to adapt Directive 80/778/EEC to take account of scientific and technological progress and so that the Directive could be re-examined in the light of the principle of subsidiarity, as enshrined in Article 3b (now Article 5) of the Treaty. Accordingly, the new Directive revised parametric values where this was deemed

[62] Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, *Official Journal L 330, 05/12/1998 P. 0032 – 0054.* Full text available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0083:EN:HTML. See also: http://ec.europa.eu/environment/water/water-drink/index_en.html (visited 25 July 2006).

necessary to strengthen them in accordance with the latest available scientific knowledge based on the WHO Drinking Water Quality Guidelines and the European Scientific Committee on Toxicology and Ecotoxicology.

Directive 98/83/EC also seeks to increase transparency by making the point of use of the water the point of compliance with the quality standards, by making reference to ISO/CEN standards It also includes an obligation to report on quality and an obligation to inform the consumer about drinking water quality and measures they can take to comply with the Directive, in particular for lead when the non-compliance is due to the domestic distribution system (a building's internal pipes, plumbing, etc.) and streamlining legislation to only those parameters essential for health. While the old Directive 80/778/EEC contained 66 parameters while the new Directive 98/83/EC contains only 48 parameters.

Directive 98/83/EC also differentiated between mandatory indicator parameters and between audit and check monitoring. The Directive allowed member states to specify additional parameters and standards and to apply tighter standards to existing parameters. The Directive also specified remedial action and restrictions for use and allows time limited derogations under certain conditions provided that they do not constitute a potential danger to human health.

Finally, Directive 98/83/EC included a requirement that at least every five years the Commission shall review the standards and monitoring requirements in the light of scientific and technical progress.

At a seminar organised by the Commission in Brussels in October 2003 to review the application of Directive 98/83/EC, the main conclusion was that the Directive did not require major revision at present but a start should be made on working towards a more risk-based approach to monitoring and standards as recommended in the third edition of the WHO Guidelines for Drinking Water Quality.

However, in spite of the significant changes to EC regulation of drinking water quality brought about as a result of Directive 98/83/EC, the parametric value for MACs of each individual pesticide[63] remained at 0.1 μg/l,[64] while the parametric value of 0.5 μg/l was retained for total pesticides.[65]

Attempts to move to specific MACs for each individual pesticide instead of a blanket parametric value of 0.1 μg/l were defeated by those who argued that drinking water must be free of all pesticides.

The irony of this position is that the preamble of Directive 98/83/EC itself suggests that the standards set out in the annex are "generally" based on WHO Guidelines for Drinking Water Quality (and the opinion of the Commission's Scientific Advisory Committee). This is certainly the case, for example, in relation to the Directive's acceptance of the WHO's recommended standards in relation to the setting of maximum admissible levels of lead pollution, which are adopted in the annex.

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[63] According to a footnote to the Directive, "pesticides" means: organic insecticides; organic herbicides; organic fungicides; organic nematocides; organic acaricides; organic algicides; organic rodenticides; organic slimicides; related products (*inter alia* growth regulators); and their relevant metabolites, degradation and reaction products.

[64] The parametric value applies to each individual pesticide. In the case of aldrin, dieldrin, heptachlor and heptachlor epoxide the parametric value is 0.03 μg/l.

[65] "Total" meaning the sum of all individual pesticides detected and quantified in the monitoring procedure.

It would appear, therefore, that the EC regulatory approach to drinking water quality is inconsistent with the available scientific data and the expectation that risk assessment will be used as a guiding principle in policy-making. The refusal to accept arguments for standards based on an average exceedence level rather than a maximum for any pesticide and the unwillingness to allow trivial exceedences also suggests a non-scientific approach to questions of sampling and sample distributions.

In summary, the stimulus for regulatory reappraisal of Directive 80/778/EEC was the fact that compliance costs associated with the Directive were much higher than had been anticipated in the UK. Proposals for regulatory revision were therefore made with reference to international standard-setting on the part of the WHO. In the case of the 1980 Drinking Water Directive, the approach suggested was by making reference to WHO standards, although ultimately attempts to update and revise outmoded EC regulatory standards in Directive 98/83/EC proved unsuccessful, with political imperatives associated with public concerns about any perceived relaxation of water quality standards taking precedence over the logic of new scientific evidence, as set out in the WHO guidelines.

Assessment

This chapter has set out the reasons why, based on concerns about the toxicological effects of pesticides in drinking water, a consensus emerged on the need for EC regulation to address this. The key findings of this case study can be summarised as follows:

- EC regulation to establish maximum permissible concentrations of pesticides in drinking water was innovative in the sense that, in the absence of prior national standards, the European Commission adopted a pesticide limit of 0.1 μg/l as a proxy for zero, given that there was no scientific evidence that pesticides existed in drinking water at all in quantities smaller than 0.1 μg/l, because the level of analytical detection at that time was not sufficiently sensitive to detect smaller amounts of pesticides in water.
- However, as Richardson (1994) has noted, the EC regulation of water quality has had the potential to have major cost implications for the member states. In this context, this case study demonstrated how compliance costs associated with Directive 80/778/EEC exceeded what had been anticipated in the UK. For Maloney and Richardson (1995: 145), it was lack of foresight by part of the UK Government at the policy formulation stage that led to subsequent difficulties in terms of implementation and failed attempts at revision of EC regulatory standards to change the pesticides MAC.
- Subsequent attempts by the UK to revise the pesticide MACs in Directive 80/778/EEC only served to entrench standards set out in the original Directive and, when regulatory reappraisal did occur and Directive 98/83/EC was adopted, it became clear that other member states had rejected the chance to update EC regulation in the light of developments in scientific expertise by adopting new WHO standards for pesticide limits. Regulatory entrenchment, rather than regulatory reappraisal, was the outcome.
- The message that begins to emerge is that, once environmental standards are enshrined in EC regulation, they become extremely difficult to revise, even

when the standards set out in the first round EC regulation that were initially innovative in the absence of any agreed scientific standards at that time are subsequently superseded by updated toxicological information produced by a highly-regarded institution like the WHO. From a public policy perspective, therefore, member states appear locked into the sub-optimal trajectory (Jordan 1999: 13) of first round EC regulation and are unable to break out of that trajectory through re-regulation and second round regulatory change.

- This case study demonstrates that on emotive environmental issues such as drinking water quality, competition amongst regulatory alternatives may be absent, with consensus between member states on the preferred regulatory approach and co-operation on achieving adoption of that regulatory approach likely to follow.
- However, change is likely to be difficult to effect during a process of regulatory reappraisal once the initial impact of EC regulation has been felt with entrenchment of existing standards more likely than a new consensus on the need for regulatory change. In the case of drinking water quality, regulatory entrenchment occurred even in the face of scientific evidence that the adoption of new pesticide limits could be adopted without harming human health, based on significant advancements in the accuracy of toxicological testing since the original Directive was conceived. Consensus may therefore be difficult to replicate in the EC regulatory process.

CHARACTERISING EC REGULATION:

EMULATION, INNOVATION AND RE-REGULATION

CHAPTER 6

ANALYSIS AND ASSESSMENT:

EC REGULATION - WHERE INTERESTS CONVERGE

In this final chapter, the validity of arguments that were set out in the early chapters of the thesis will be tested against the evidence presented in the case studies of EC regulation of insurance services and drinking water quality.

This thesis began by arguing that EC regulation could be characterised in terms of three core concepts: emulation, innovation and re-regulation. By classifying EC regulation in terms of these core concepts, the thesis made the case that it is possible to shed new light on the factors driving regulatory activity.

The thesis then looked at the use of the term "regulatory competition" and noted that it has been used in two different senses. Firstly, to describe the response of national regulators to the international competition for mobile factors of production and mobile tax bases. Secondly, it has been used by Héritier to describe the fact that member states compete with each other in order to influence the content and form of EC regulation with a view to minimizing their own adjustment costs. It was in relation to the second use of the term that the thesis was chiefly concerned. Specifically, Héritier's use of the term competition does not adequately account for the particular regulatory approaches that come to the fore. The thesis argued that, aside from

regulatory competition, insufficient attention has been paid to consensus and co-operation between member states as drivers of EC regulatory activity and set out the task of presenting evidence to support this contention.

In order to locate this hypothesis in the context of the established body of academic work on EC regulation, Chapter 1 of the thesis reviewed the main reasons why regulation has become the dominant policy tool in the European Community, with particular attention paid to Majone's characterisations of the EC regulatory process. Specifically, Chapter 1 suggested that Majone's work contains a number of useful insights that are helpful when seeking to articulate the contention that consensus and co-operation are under studied factors when seeking to account for emulation, innovation and re-regulation in the EC regulatory process.

In this respect, Chapter 1 noted that Majone draws attention to the influence of policy learning in the EC regulatory process, Community actions often providing the stimulus for national governments to reconsider the logic of traditional policies and institutional arrangements. Chapter 1 also noted that Majone has identified the extent to which EC regulatory policy-makers have had a tendency to look for models that imitate prior regulatory approaches rather than inventing novel solutions. Chapter 1 then acknowledges Majone's assertion that, by searching for models to imitate rather than seeking originality, imitation affords relief from the necessity of searching for optimal decisions and conscious innovations that would expose policy-makers and politicians to the severe criticism in the event of regulatory failure. Chapter 1 then noted Majone's claim that the existence of regulatory imitation can be explained fairly straightforwardly on grounds of regulatory efficiency.

In the light of Majone's characterisation of the EC regulatory process as being marked by imitation (or "emulation") of prior regulatory approaches, Chapter 1 concluded by highlighting the extent to which, according to Majone, member states are prepared to act in a consensual and co-operative manner in the EC regulatory context, doing so on grounds of regulatory efficiency when agreeing that EC regulation should emulate a prior national regulatory approach that has been deemed to work efficiently in at least one member state prior to its adoption as the EC norm.

Building on the model of the EC regulatory process described in Chapter 1, Chapter 2 reviewed explanations of the EC regulatory process in terms of competition, diffusion and learning. It began by examining Héritier's assertion that the EC regulatory process is characterised by regulatory competition among member states, each seeking to influence the content and form of EC regulation in order to enhance their own competitive position in the European market and reduce costs of legal adjustment. Chapter 2 then noted that Héritier sees no particular tradition dominating EC regulation across the board, but rather "a colourful patchwork composed of various instruments and national regulatory styles derived from distinctive regulatory backgrounds".

Chapter 2 also reviewed Héritier's portrayal of the EC regulatory process as being dominated by a group of highly regulated member states that seek to enhance their competitive position in the European market and to reduce costs of legal adjustment. It noted that, for Héritier, the preferred EC regulatory approach tends to correspond to each member state's own economic interests and regulatory traditions since each

seeks to widen the scope of European policy-making according to its own preferences, and to transfer its own regulatory style to the European level. These member states are seen as the leaders in regulatory terms, likely to provide the model for the laggard member states that lack their own traditions of highly regulated arrangements. Héritier, it was observed, argues that it is the regulatory achievements of highly regulated member states that are presented to the Commission, which then decides which approach will be reflected in the EC regulatory approach.

Chapter 2 went on to consider Héritier's suggestion that the initiator, or "first mover" member state has the opportunity to define the scope and nature of problems dealt with by EC institutions and shape the content of EC regulation. By defining the problem, it is anticipated that the first mover member state is able to anchor its approach in draft EC regulation without being seriously challenged by an opposing approach of another member state. So, how far is the scenario envisaged by Héritier borne out by the evidence presented in the two case studies undertaken for this thesis?

In relation to the case study of insurance services presented in Chapter 4, it is possible to see elements of this scenario at work, with the UK regulatory approach given a relatively free run as a first mover approach that was subsequently adopted as the EC approach. In the light of the evidence presented in Chapter 4, therefore, there is evidence that the "leader" and "laggard" model of EC regulation may therefore have much to commend it in some instances. However, in relation to the case study of water policy presented in Chapter 5, the innovative environmental standards adopted in EC regulation are not explained by Héritier's model of regulatory competition. The

limits of her approach are, therefore, apparent where no prior national regulatory approach exists that can be emulated.

Yet, even where emulation is apparent, Héritier's suggestion that the Commission chooses the regulatory approach that it wants to put on the legislative track from a multitude of policy proposals is not borne out by case study evidence presented in Chapter 4 of this thesis because, in the case of EC regulation of insurance services, it was not the case that several possible regulatory approaches were presented to the Commission at all. Instead, the reality was that the Commission did not have a range of member state regulatory approaches to choose from, the UK offering the only viable model of market liberalisation and other member states still operating highly regulated insurance markets of the type the Commission wished to see opened up to greater competition between insurance service providers. Again, this thesis found that Héritier's model did not provide the adequate tools to describe the EC regulatory process.

In terms of regulatory efficiency arguments, Héritier's observation is that the Commission's responsiveness to member state regulatory approaches is no act of generosity but, rather, whether or not the Commission responds favourably by copying (or emulating) a particular member state approach, will depend on the whether the proposal fits into the overall policy-making philosophy of the European Community. In the case of prior UK regulation of insurance services, Chapter 4 demonstrated that UK objectives for liberalised insurance markets and EC objectives of completing the internal market were indeed synergistic.

Chapter 2 also noted that, Héritier asserts, member states will see themselves as "winners" or "losers" from EC regulation, either because they will have low adaptation costs or high adaptation costs associated with regulatory compliance. However, as Héritier points out, virtually all regulatory decisions involve some form of "winners and losers", so there might be a rational expectation that deadlock in the regulatory process might result, with member states motivated by self-interest and self-preservation. In order to overcome deadlock, Héritier predicts that the task of the EC regulatory process becomes one of interest accommodation and interest bargaining. She identifies particular shifts in the decisional arena as being important in promoting progress to interest accommodation and interest bargaining of this type. In relation to the case studies undertaken for this thesis, judicial activism and the opening of windows of opportunity for policy entrepreneurship on the part of the Commission received particular attention in terms of what Héritier calls shifts in the decisional arena.

In this respect, Chapter 4 noted the significance of both the *Cassis de Dijon* case, which reinvigorated the regulatory programme to complete the internal market, and the *German Insurance Case*, which provided the stimulus for the Second and Third Generation Insurance Directives. In both instances, the European Commission seized the opportunity created by the Court's rulings to initiate EC regulation designed to complete the internal market for insurance services. These would appear to be precisely the type of shifts in the decisional arena that Héritier had in mind. The role of Court rulings in stimulating EC regulatory activity is considered in greater detail later in this chapter.

In relation to drinking water quality, Chapter 5 suggested that it was not judicial activism that provided the stimulus for EC regulation, but rather growing public concern about the adverse effects of pesticides in drinking water for human health. If it is accepted that these case studies provide examples of events leading to interest accommodation and interest bargaining of the type that Héritier refers to, although she does not describe them as such, the decisional shifts that Héritier identifies would therefore appear akin to consensus-building that this thesis has suggested in under studied in the context of EC regulatory analysis.

However, in spite of the utility of some aspects of Héritier's regulatory competition model, doubts must be expressed as to whether the Héritier model can alone account adequately for the EC regulatory process. In relation to insurance services, Chapter 4 demonstrated that there appeared to be an absence of competition, since the opportunity arose for all member states to reach a consensus on the necessity of the Second and Third Generation Insurance Directives and co-operating to achieve the liberalisation of EC insurance markets. Furthermore, Chapter 5 showed how public concern about the implications of pesticides in drinking water resulted in consensus amongst member states on the need for EC regulation and, in the absence of prior national standards, it was left to the Commission to propose a standard that could be used as a surrogate for zero pesticides, based on the toxicological expertise available at that time. The scope for identifying instances of regulatory competition of the type envisaged by Héritier therefore appears to be limited in both case studies.

In view of this, it is instructive to review Chapter 2's consideration of whether explanations of the regulatory process derived from diffusion and public policy

analysis in the United States are able assist with our understanding of EC regulation, as well as the potential for policy learning scenarios developed in the EC context, and assist with explanations for the emergence of emulation, innovation and re-regulation in the EC regulatory process alongside Héritier's regulatory competition model. The outcome of the review of these three strands of literature undertaken in Chapter 2 was that there may be grounds for investigating whether co-operation between member states in the EC regulatory process takes place in a manner that ensures the emergence of a broad consensus on a preferred EC regulatory approach, this consensual, co-operative approach assisting our understanding where Héritier's regulatory competition model was found wanting.

Key characteristics of the diffusion model that informed the case studies presented in this thesis included the proposition that officials learn about regulatory initiatives from their peers and, not being totally isolated, meet state officials and have their attention drawn to state innovations by the media. In this context it will be recalled, for instance, that senior European Commission officials tasked with drafting an EC regulatory approach to insurance services had direct policy experience in UK Government and subsequently looked to the UK for an appropriate regulatory approach to emulate EC wide. In this sense, it would be fair to say that the diffusion of the UK approach to regulating insurance services was achieved in a manner similar to that envisaged by literature owing its origins to public policy concerns in the United States. As news of the perceived success of the UK regulatory approach spread, it is perhaps not surprising that officials from other member states then supported the Commission's proposals to emulate the UK approach. The diffusion model's expectation that states "learn" from one another indeed appeared to be

reflected in EC regulatory practice. Furthermore, the expectation that "leaders" in regulatory terms tend to be characterised by high economic development was set out in Chapter 2 and this prediction appears to reflect the fact that the UK insurance market was the most highly developed in the European Community, its first mover status in regulatory terms therefore perhaps not being so surprising.

The suggestion that policy makers will look to first mover states as "experimental laboratories" that can help to add a sense of predictability to regulatory outcomes was also noted in Chapter 2 and this may have some resonance in the context of the decision to emulate UK regulation of insurance services at the EC level.

In two respects, then, US public policy analysis appears to have proved helpful in identifying characteristics of the EC regulatory process. First, there is an assumption that larger member states, such the UK, will on occasion provide the regulatory model for the EC to learn from. Second, with regard to recruitment and expertise within the European Commission there is some validity in the scenario envisaged by the leader-laggard model, with some member states having personnel that are more highly regarded than their peers from other member states. It is from the former group of experts that the Commission and member states are more likely to take their cue (e.g. the UK on financial services regulation). EC emulation of the regulatory approach previously adopted by one member state thus occurs through the proximity of national experts to the centre of EC regulatory policy-making power.

Chapter 2 also noted that the policy diffusion model of Berry and Berry suggests that states emulate each other because they are engaged in "competition" for mobile

factors of production and mobile tax bases, but that this differs from Héritier's notion of "competition" which is predicated on the notion of bargaining and negotiation within the EC institutional structures. Berry and Berry's use of the term also differs because their perception is of competition involving a sub-national process, namely US states seeking to emulate one another because they are experiencing pressure to conform to regionally accepted standards. In this respect the crucial difference between the US and EC regulatory experience is a willingness on the part of sovereign EC member states to cede regulatory powers to the European Commission.

What is perhaps of greater relevance to this thesis is the extent to which the diffusion model of Berry and Berry asserted that states "learn" from one another, borrowing approaches perceived to be successful elsewhere. This led Chapter 2 of the thesis to look at the wider literature on learning as a process leading to EC regulation, linking back to Majone's assertion that looking for regulatory models to imitate rather than seeking originality is the key to the EC regulatory process because imitation is efficient in regulatory terms, in Hancher and Moran's terms an economical way of solving the problem of regulatory design. The efficiency of EC regulatory emulation of the UK approach to liberalisation of insurance services, described in Chapter 4, again comes to mind in this context.

Finally, Chapter 2 examined how, in Rose's terms, policy transfer can take the form of regulatory emulation where the approach being copied is adopted more or less intact or, alternatively, through adjustment of the approach to take account of different circumstances, or through hybridisation of different prior regulatory approaches, or through the use of inspiration derived from elsewhere that provides the stimulus for

developing a novel programme of action. In terms of the case studies undertaken for this thesis, no evidence of hybridisation of this sort was detected. The case of EC regulation of insurance services accorded closely with the first scenario envisaged by Rose, namely that the UK regulatory approach was adopted more or less intact. The case of EC regulation of drinking water quality, on the other hand, demonstrated how the EC regulation can be designed where no prior national approach exists that can be emulated. From this it can be asserted that the direct copying foreseen by Rose certainly exists in the EC regulatory context but that the thesis was unable to confirm the existence of the other nuances in the model that he predicts in terms of hybridisation.

In the light of the review of the established literature on competition, diffusion and learning conducted in Chapter 2, Chapter 3 then turned to the key interests, actors and institutions that determine whether competition, on the one hand, or consensus and co-operation, on the other hand, can best account for the emergence of emulation, innovation or re-regulation as characteristics of EC regulation. In order to do this, Chapter 3 undertook a review of established theoretical approaches looking, first, at how member state preferences might be accounted for using functionalist explanations for the delegation of regulatory powers from member states to the EC institutions. Second, in order to avoid an approach that relies on intergovernmental interpretations of the EC regulatory process, Chapter 3 reviewed the literature on multi-level governance and related work on new institutionalism, which is based on the premise that the sovereignty of member states is not being confronted directly but, rather, that EC institutions should be considered as actors rather than agents in a relationship where member states are principles. Chapter 3 also examined

explanations of EC regulatory policy-making that emphasise the significance of policy networks, which highlight the importance of ideas, knowledge and expertise, rather than purely focusing on interests, in accounting for outcomes from the EC regulatory process. Chapter 3 then assessed historical institutionalist explanations of why gaps appear in member state control of EC regulatory policy-making, namely as the result of short-term electoral concerns which lead to shifting preferences on the part of member state decision makers, with the effect that policy reversal becomes progressively more costly.

Chapter 3 also returned to an analysis of Majone's work, with the aim of throwing further light on the significance of policy entrepreneurship on the part of the European Commission in the EC regulatory process. Majone's expectation was that the insulation of the Commission from partisan politics and electoral results further contributed to its ability to utilise policy entrepreneurship in the EC regulatory process. When regulatory powers are delegated to politically independent agencies like the European Commission, Majone's expectation was that national governments could commit themselves to regulatory strategies that would not have been credible in the absence of such delegation.

Applying Majone's assertion to the case studies of EC regulation of insurance services and drinking water quality undertaken in this thesis, it is possible to report now that there is evidence of national governments committing themselves to regulatory strategies that would not have been credible in the absence of such delegation. In the context of the liberalisation of insurance services, for instance, it is questionable whether the national authorities in Germany would have been willing or

able to introduce national regulation to liberalise markets and emulate the prior national approach of the UK given the likely pressure domestically from industry and consumer interests to remain a more rigid regulatory approach. Similarly, in relation to the quality of drinking water, it is questionable whether the UK Government would have been in a position to introduce innovative new toxicological standards that were so fundamentally different to the prior approach taken in that member state had it not been for the innovative proposals originally put forward by the European Commission.

Chapter 3 also noted that Majone had recognised the pressure that the Commission may be under from member states to adopt particular regulatory approaches, but that Majone felt that because the final regulatory policy making decisions were taken when the Commission met as a collegiate body, it may be insulated from much of the political interference that would otherwise have resulted in sub-optimal decisions. However, Chapter 3 also noted that departmental culture within the various directorates general of the Commission might also be a significant factor in determining how a particular EC regulatory approach is formulated.

In this respect, it is instructive to recall that the case study of insurance services presented in Chapter 4 highlighted the fact that the key Commission personnel were all UK nationals, so the fact that subsequent EC regulation of the sector emulated the prior approach adopted in the UK is perhaps not surprising. Although the role of nationality in determining departmental culture was far less pronounced in the case study of drinking water quality presented in Chapter 5, it was nevertheless noted that the directorate general responsible for the environment had historically attracted a

large number of German nationals, since environmental issues had generally risen to prominence earlier in that country than in other member states, and that this was underpinned by the fact that the precautionary principle, derived from German environmental law, came to be enshrined in the EC Treaty by the Single European Act. The precautionary principle, it will be recalled from Chapter 5, was one of the factors contributing to the decision not to update the pesticide MACs for drinking water quality when EC re-regulation was undertaken in 1998. As a result, regulatory entrenchment occurred.

Chapter 3 also noted that, as a general principle, the European Commission retains the right of initiative in proposing new EC regulation with the result that, at the earliest stages, problem definition and formulation of regulatory solutions are developed within the Commission rather than with the overt involvement of member states. In relation to the case study of insurance services, Chapter 4 demonstrated how it was possible for the direction of EC regulation to be formulated in-house by the Commission directorate general for financial services on the basis of emulating the regulatory approach already deemed a success in the UK context. Chapter 4 demonstrated that there was relatively little discussion of policy alternatives and that emulation of the UK approach was deemed to be an efficient approach in the EC context. In relation to the drinking water quality case study Chapter 5 described how, in the absence appropriate toxicological standards in prior national regulation, the Commission directorate general for the environment acted in an innovative manner, producing a set of regulatory proposals that assumed zero content of pesticides in water for human consumption as far as was practicable at that time on the basis of toxicological testing ability. The case studies therefore confirmed the proposition,

made in Chapter 3, that at the earliest stages of the EC regulatory process it is the European Commission that defines the problem and proposes which regulatory approach should be adopted as the EC norm. The key role played by the Commission in determining whether emulation, innovation or re-regulation should occur in the EC regulatory process appeared, therefore, to be underlined by the results of case study analysis.

Chapter 3 went on to note that, because the policy formulation stage of the EC regulatory process is informal and fluid, the Commission is able to choose, on a pragmatic basis, whether or not to ask a committee of experts to assist in the preparation of a regulatory initiative. In fact, the case studies of insurance services and drinking water quality demonstrated relatively little involvement by committees of experts, the Commission instead appearing to decide in-house on the preferred regulatory approach to be followed. Despite the technical nature of EC regulation of insurance services and drinking water quality it did not appear, therefore, that the role of experts was of great significance in case studies of the EC regulatory process undertaken for this thesis.

Chapter 3 then noted that the Commission has traditionally been viewed in terms of its openness to new ideas. It may well have been precisely this openness that enabled the Commission to be receptive to the possibility of emulating the prior success of UK regulation to liberalise insurance services and to the possibility of introducing new, innovative, environmental standards to regulate drinking water quality. However, although the literature review undertaken in Chapter 3 predicted the involvement of client groups as a distinctive factor in the Commission's regulatory policy-making

approach, this appears not to have been a significant factor during the earliest stages of the EC regulatory process in relation to the two case studies examined.

The situation was somewhat different, however, in terms of re-regulation. Once the initial impact of EC regulation had been felt, the case studies demonstrated that non-governmental actors were active in advocating clarification of how the standards contained in first round EC regulation should be applied, in the case of insurance services, and in advocating the updating of EC regulation to take account of advancements in scientific knowledge and toxicological testing, in the case of drinking water quality. Two explanations can be suggested for this relatively late involvement of non-governmental actors in the regulatory process. First, it may be that during the negotiation of older EC regulatory initiatives, client groups were simply less well organised and less sensitive to the likely impact of EC regulation than they later became. Second, a plausible argument can be made that once the impact of first round EC regulation has been felt, the involvement of client groups is likely to come to the fore in a much more pronounced way because the adverse impact of the initial round of regulation will by then have been experienced first hand and demands for re-regulation are likely to follow on naturally from this as "losers" seek recourse to second round regulatory change and "winners" seek to enhance the benefits derived from first round regulation. This scenario remains under studied in the literature on the EC regulatory process but is identified here as an area where further research would be appropriate in the future.

Chapter 3 went on to note that, as member states and non-state actors seek to influence the content and form of new EC regulation, the evolving interpretation and

application of the EC Treaty provisions are themselves an important stimulus in the regulatory process. The case studies confirmed that the EC Treaty can indeed be a significant factor in the design and interpretation of EC regulation. In relation to the insurance services case study in Chapter 4 the thesis has demonstrated that the interpretation of the EC Treaty given by European Court of Justice in its *Cassis de Dijon* decision was crucial in opening the window of opportunity for the Commission to engage in additional regulatory activity designed to compete the internal market. Chapter 4 also showed how the European Commission's *White Paper on Completion of the Internal Market* and the subsequent adoption of the Single European Act, with all that it entailed in terms of a systematic programme of further EC regulatory activity provide ample evidence of the significant role that should be accorded to the interpretation and application of EC Treaty provisions in the EC regulatory process. In relation to the water quality case study, the impact of the First Action Programme on the Environment proved, in the absence of an explicit legal basis for EC environmental regulation in the EC Treaty, to be an important driver for the EC drinking water quality standards. Later when, as noted above, environmental objectives were enshrined in the EC Treaty by the Single European Act, the precautionary principle became a significant factor that contributed to regulatory entrenchment as attempts to introduce individual MACs for pesticides in revised EC regulation on drinking water quality ultimately proved elusive.

Chapter 3 also noted that member states can be viewed as "principals" that delegate specific tasks to supranational "agents", namely the Commission, the activities of the Commission then become autonomous of member state influence because the latter cannot exercise complete control where it is costly or where member state preferences

diverge. In the context of the case studies, it is now possible to confirm that, in relation to insurance services, the Commission appears to have taken the lead offered by the White Paper on Completion of the Internal Market and the embodiment of the goals that it set out in the Single European Act by then acting in a largely autonomous way in deciding to emulate a UK regulatory approach. Similarly, in relation to drinking water quality, once the objectives set out in the First Action Programme on the Environment were endorsed by member states meeting within the Council, the Commission used its own discretion in setting innovative drinking water standards without interference on the detail of those provisions from member states. The expectation that the Commission is capable of action that is autonomous of member state influence is, therefore, confirmed by the case study analysis undertaken in this thesis.

Furthermore, and crucially for this thesis, in both case studies there appears to have been a common factor, namely the absence of a viable alternative to the regulatory approach taken by the Commission. In the absence of alternatives, the type of regulatory competition envisaged by Héritier when she describes the fact that member states compete with each other in order to influence the content and form of EC regulations with a view to minimising their own adjustment costs, simply did not occur. In the case of insurance services and drinking water quality, the absence of viable alternatives instead meant that once broad agreement in favour of EC regulatory activity had been achieved, this consensus in favour of action was followed by co-operation between member states to operationalise the regulatory approach being proposed by the Commission.

To re-affirm this, the central tenant of this thesis, namely that emulation, innovation and re-regulation in the EC regulatory process are the result of consensus and co-operation rather than competition have been underlined by the case studies undertaken in the preceding chapters.

Chapter 3 of the thesis then went on to suggest that policy entrepreneurship on the part of the Commission appears to be of considerable significance because, having relatively few personnel or financial resources of its own, the Commission depends on member states to provide policy expertise. Certainly, in the case study of insurance services, this may have been an important factor behind the Commission's decision to emulate the UK regulatory approach in the sense that it was efficient in policy-making terms to do so. In the case of drinking water quality, where considerable effort on the part of the Commission appears to have gone into the setting of innovative new standards set down in EC regulation, this argument is less well borne out by case study analysis.

In this sense, Héritier may have been correct to suggest that one EC regulatory measure may be modelled after the regulatory style of one member state. There also appears to be considerable merit in Majone's suggestion, outlined in Chapter 3, that the large margins of discretion that exist in the EC regulatory process allows the Commission to play the role of policy entrepreneur and to determine the extent to which the opportunity for EC regulation will occur. If policy entrepreneurs are to be seen as constantly searching for windows of opportunity to push their preferred ideas as Majone and Kingdon suggest, the case studies undertaken in this thesis indicate that Cini is also correct when she states that the Commission's capacity for taking

advantage of windows of opportunity is a significant feature of the EC regulatory process.

By seizing the opportunity to complete the internal market in insurance services and to improve the quality of drinking water, once the broad parameters for EC regulatory activity had been set by the European Court of Justice or by member states meeting within the Council, the Commission has not been slow to act. Indeed the suggestion, made in Chapter 3, that windows of opportunity open only infrequently and that entrepreneurs must then try to take advantage of a receptive political climate to promote their own solution to a policy problem, appears to have particular resonance in relation to insurance services, where interview respondents confirmed that the Commission's long-held desire to introduce further EC regulation to complete the internal market was finally fulfilled when the opportunity arose. As noted above, to a lesser extent the same can be said of EC regulation of drinking water quality, where the first Action Programme on the Environment created the conditions whereby the Commission could act in an innovative manner where prior national regulation had previously been absent. The crucial role of the Commission in policy initiation that was highlighted in Chapter 3, derived from the work of Majone and of Sandholz and Zysman, therefore appears to have been borne out by the case study analysis undertaken in this thesis.

However, although Chapter 3 went on to note that Bulmer and Armstrong have criticised Sandholtz and Zysman, who argue instead that the Commission's approach to the single market has much to do with "policy learning", this thesis sees no contradiction between the two interpretations. While Bulmer and Armstrong may well

be correct in their assertion that the Commission's approach to the single market had much to do with its ability to learn from the failure of the old harmonisation approach of EC regulation, this thesis argues that policy learning and policy entrepreneurship should not be considered mutually exclusive. Instead, this thesis would suggest that once the window of opportunity for renewed regulatory activity had been opened, the Commission was well placed to seize the opportunity to put into practice the new regulatory approach that it had learnt on the basis of lessons derived from the failure of an earlier regulatory approach. The Second and Third Generation Insurance Directives, described in Chapter 4, were in fact one manifestation of a dual strategy on the part of the Commission, utilising the window of opportunity opened by the European Court of Justice to apply lessons learnt from earlier approaches in the form of renewed EC regulatory activity designed to liberalise insurance markets.

Chapter 3 also noted that, according to Majone, the Commission has interests of its own, such as growth and survival, while individual Commission officials also display the qualities of successful policy entrepreneurs by virtue of the structure of their career incentives. The result, according to Majone, is that the Commission has a tendency to favour innovative regulatory solutions. In the case of drinking water quality, this may be a factor that accounted for the innovative toxicological standards that were contained in EC regulation. It should also be noted that, in terms of acting as the central node of a vast issue network of non-governmental actors as Chapter 3 predicted, the EC regulatory approach to drinking water quality took account of the prevailing consensus at the time that the EC toxicological standards were being formulated, namely a belief that there should be no pesticides in drinking water and

that this goal should be underpinned by EC regulation as far as was reasonably practicable according to the accuracy of scientific testing available at that time.

The account of EC regulation of drinking water quality given in Chapter 5 also accords with the explanation given by Majone, and reported in Chapter 3, for the tendency of EC policy entrepreneurship to be particularly prevalent in the field of social regulation, such as environmental policy, on grounds that while the benefits to society as a whole if drinking water quality could be improved would be great, it initially appeared that the costs of cleaner drinking water would be borne by particular segments of industry (namely the water supply and agrochemical industries). However, as noted in Chapter 5, privatisation of the water industry in the UK subsequently ensured that the costs of capital investment in filtration equipment were passed on to consumers in their water bills, this itself resulting in pressure for re-regulation and the adoption of more appropriate pesticide MACs in the 1998 revision.

Chapter 3 also noted Majone's claim that the ability of policy-makers to initiate regulation may depend more on their skill in utilising existing models of regulation than on their ability to invent novel solutions, in this sense emulation being more common than innovation in the EC regulatory process. In this context, the case study of EC regulation of insurance services outlined in Chapter 4 of the thesis appears to confirm that, where appropriate existing models of regulation already exist, EC regulators may well seek to emulate those approaches at EC level. In this respect, the thesis has noted already how the Commission directorate general responsible for financial services adopted the UK approach to liberalisation of insurances services and sought to replicate the perceived success of this approach in other member states.

The thesis also noted, in Chapter 5, that with no equivalent model that could be emulated by EC regulation available for setting standards for drinking water quality, the Commission instead engaged in innovative policy-making in the sense that new toxicological standards were adopted that had not previously been used as the basis for regulation at member state level.

Chapter 3 further noted that Majone's characterisation of the policy innovation in the EC regulatory process can be thought of in terms of the "deepening" of EC regulation, with new regulatory initiatives of this type coming to the fore as the result of a demand and supply model. That is to say, genuine innovation in the EC regulatory process emerging when there is a consensus amongst member states and non-governmental actors that EC regulation is desirable and necessary to achieve a particular policy goal and because the Commission is able to devise a regulatory approach that is considered appropriate to achieve that goal. In this context, the thesis noted the emergence of a scenario in which, rather than Héritier's model of member states competing with each other in order to influence the content and form of EC regulations with a view to minimizing their own adjustment costs, there was consensus and a desire to co-operate in order to ensure that the most appropriate regulatory approach was adopted as the EC norm.

Chapter 3 then looked in greater detail at the mutual interdependence between the Commission and the European Court of Justice. It noted that judicial activism, whereby the Court has adopted an expansive role in delivering rulings which have been instrumental in shaping EC regulatory policy making, was a key driver for the Single Market Programme and created the window of opportunity the policy

entrepreneurship on the part of the Commission was able to exploit through its White Paper on Completion of the Internal Market. In addition, Chapter 3 emphasised that the Court's *Cassis* ruling played a key role in helping to construct a shared belief system in favour of the single market initiative and was an important consensus-building event that encouraged co-operation on the part of member states in relation to EC market liberalising regulation. This role of the Court is, it must be acknowledged, akin to Héritier's expectation of decision shifts leading to EC regulation, as discussed earlier in this chapter.

Chapter 4 described how the Court's ruling in the *German Insurance Case* provided the same sort of stimulus for EC regulation of insurance services, opening a window of opportunity for the Commission to fulfil what respondents interviewed for this thesis described as a long-held desire for further regulation to complete the internal market for insurance. The Court's ruling also played an important role in building consensus on favour of further EC regulation of insurance markets by overcoming opposition from member states (such as Germany) that had previously operated protectionist policies designed to favour their domestic insurance industries. Conversely, Chapter 5 described how the outcome of cases that come before the European Court of Justice can be to encourage member states to seek regulatory roll-back and de-regulation. In this instance, the case at hand followed a complaint by Friends of the Earth to the Commission that the UK was failing to meet its obligations under Directive 80/778/EEC on drinking water quality. When the Court found against the UK, the Government of that member state responded by demanding a revision of the Directive concerned, specifically referring to the fact that pesticide MACs set by the Directive were by that time out of date and did not reflect the

improved accuracy of toxicological testing, as embodied in the revised WHO Guidelines on Drinking Water Quality that had, by that time, become available.

Chapter 3 went on to note that EC regulation in the single market context largely amounted to a necessary curb on excessive or counter-productive regulation by national authorities. In this context, the case study of EC regulation to liberalise insurance services that was presented in Chapter 4 then illustrated how this conception of EC regulation has operated in practice.

Crucially, Chapter 3 also discussed the prospects for what Majone has described as the *transformation of a single play into a sequential game*, by which he meant that when the EC regulatory process is repeated, patterns of co-operation emerge that would be highly unlikely in a single play. The effect, therefore, is that co-operation among policy actors is repeated across a range of EC regulatory policy issues as actors learn to co-operate and act together to achieve mutually beneficial results in preference to seeking unilateral solutions where common problems exist. In the context of both case studies, the *sequential game* explanation does appear to offer insight into why member states opt to co-operate in favour of EC regulation, whether this be in terms of measures to liberalise insurance markets, or in terms of standards introduced to improve the quality of drinking water.

Chapter 3 also noted that these sequential games may emerge as the result of persistent, small-scale attempts to develop EC regulatory policies that are the cornerstone of the regulatory development in the European Communities. In this sense, opportunities for EC regulatory activity can develop over relatively long

periods of time, with agreement on regulatory initiatives often achieved several years after policy proposals were originally made. In relation to EC regulation on insurance services and on drinking water quality, the relatively long time scales that elapsed between identification of the problem and the need for regulation on the part of the Commission and emergence of the opportunity for that EC regulation to be negotiated and adopted illustrate the significance of this timeframe for outcomes from the EC regulatory process.

The strategy of linking-up or packaging together that was identified in Chapter 3 as a common theme of the EC regulatory process also appears to have particular resonance in relation to the case studies of insurance services and drinking water quality. For EC regulation of insurance services, the 1985 Commission White Paper on Completion of the Single Market was the key packaging together document, garnering a consensus in favour of a single market that should include a single market in insurance services and setting out the measures that would be required to liberalise such markets. For EC regulation of drinking water quality, the 1973 First Action Programme on the Environment was the key packaging together text that identified EC regulation as necessary in order to ensure the quality of drinking water intended for human consumption. In both cases, linking up specific proposals for EC regulatory activity within a document professing to present an integrated framework approach, serves the purpose of committing member states not only to a set of general policy aims but also to subsequent targeted regulatory initiatives designed to achieve desired outcomes within that framework approach.

Chapter 3 went on to suggest that, once the window of opportunity for EC regulatory activity has been opened, the initial drafting stages are crucial in determining the form and content of measures ultimately adopted. It also noted that commentators in EC policy-making, including Cini and Milward, have identified the crucial role played by comitology during this negotiation phase of the EC regulatory process, with the Commission's network of advisory committees performing a useful function by assisting with the interest aggregation process. However, to reiterate a point made earlier in this chapter, the evidence presented from the case studies of insurance services and drinking water quality in this thesis do not bear out the expectation that experts working within a network of committees will always play an important role in the EC regulatory process. In neither of the case studies undertaken for this thesis was the role of expert committees identified as being a significant factor. In the case of insurance services, where emulation of the regulatory approach already adopted in the UK was so crucial, respondents interviewed for this thesis commented that the European Commission had essentially decided on its preferred regulatory approach early on in the process and that, in the absence of alternative regulatory approaches which might otherwise have enabled member states to present different solutions and to compete with each other in order to influence the content and form of EC regulations with a view to minimizing their own adjustment costs, there was general consensus that the UK regulatory approach was the correct one for the EC to adopt, with co-operation and an absence of dissent characterising the regulatory process.

Similarly, while Chapter 3 acknowledged that there is a considerable body of literature that highlights the significance of epistemic communities of professionals with recognised expertise in a particular domain and an authoritative claim to policy-

relevant knowledge within that issue area, the role of such technical experts appeared to be minimal in relation to the case studies of insurance services and drinking water quality. Although the literature on epistemic communities that was reviewed in Chapter 3 had pointed to the fact that EC regulatory policy-making in areas with significant technical content was a function largely left to technical experts, Chapter 4 noted that there had been relatively little role for experts from outside the Commission services when formulating the preferred EC regulatory approach to achieve liberalisation of insurance services. This was because the Commission itself had decided at the outset that emulation of the UK Financial Services Act would achieve the objectives desired. For drinking water quality, Chapter 5 noted that the absence of prior toxicological standards indicating the level of individual pesticides that were safe to drink led the Commission to adopt a standard that was the smallest quantity that pesticides could be detected in water at the time that EC regulation was adopted. The standard adopted for drinking water quality was not, therefore, the result of a complex set of negotiations and consultations on the part of the Commission but was the result of its desire to see a standard that would act as a surrogate for zero pesticides given its overall objective of eradicating pesticides altogether in response to the public desire to see this achieved. The significance of comitology and the role of epistemic communities in the EC regulatory process should not, therefore, be overplayed in the light of the evidence presented in the two case studies undertaken for this thesis.

Chapter 3 also noted that, in EC environmental policy-making, different national interpretations of scientific evidence are often difficult to separate from genuine disagreements about appropriate standards. In this regard, attempts to revise and

update Directive 80/778/EEC on drinking water quality were stymied, even though updated WHO *Guidelines on Drinking Water Quality* were available to demonstrate that the pesticide MACs set out in the Directive were out of date and that a relaxation of standards could be achieved without harm to human health and at the same time would lead to a reduction in the compliance costs that were being experienced in terms of consumers' water bills in the UK, where the water industry had been privatised.

Furthermore, when technical experts were drawn into the EC regulatory process in relation to drinking water quality in a substantive sense in the context of consultations on how Directive 80/778/EEC should be revised, the decision to retain pesticide limits at the level deemed appropriate almost two decades earlier appeared to fly in the face of scientific logic as interpreted in the WHO Guidelines on Drinking Water Quality. Regulatory entrenchment, based on public perceptions that drinking water should contain no pesticides at all, regardless of whether there were toxicological risks associated with this, won the day to such an extent that the case study undertaken in this thesis indicates that the role of technical experts can and will be subordinated to the political imperatives and dominant public opinion of the day.

Chapter 3 pointed out, however, that the technical bias of EC regulation may have consequences for the way that member state preferences are expressed when a Commission proposal reaches the Council, with all details having been worked out without sufficient attention having been paid to the cost effectiveness or practical implementation problems involved. The case studies confirm that neither the broad regulatory approach nor the detailed standards embodied in a Commission proposal

will necessarily be the subject of close scrutiny and debate when Council scrutiny of proposed regulation is undertaken. Proposed EC regulation of insurance services and of drinking water quality both passed through the Council without undergoing substantive change or revision. Member state consensus in favour of EC regulation that has been identified as a theme of this thesis appeared to characterise both emulation and innovation in terms of EC regulation of insurance services and drinking water quality respectively.

However, Chapter 3 was correct to note that a reluctance of the Council to engage in difficult and time-consuming control over highly technical aspects of EC regulation, coupled with the lack of central oversight at Commission level, could have the consequence of resulting in EC regulatory policy outcomes that were other than those intended. In relation to insurance services, those consequences were in terms of concerns that national supervisory authorities' use of the "general good" exception would effectively keep the market for insurance services segmented, uncertainty on this matter resulting in subsequent re-regulation to clarify the status of the "general good" provision, as discussed in Chapter 4. In relation to drinking water quality, the unanticipated high compliance costs, reflected in consumer water bills, was discussed in Chapter 5.

Chapter 3 also acknowledged the possibility that experts in various aspects of regulation such as lawyers may also compound regulatory complexity by "gold plating" EC regulatory proposals. It was noted that there is a risk that these experts care more about the process than the product of regulation, since the complexity increases the value of their expertise. In relation to the case study of insurance

services outlined in Chapter 4, no specific evidence emerged that indicated a deliberate gold plating of EC regulation. This may be accounted for by the extent to which the Second and Third Generation Insurance Directives amounted to pure regulation of the prior regulatory approach undertaken by the UK. It was, however, noted that the "general good" provision proved difficult to apply in practice, although complexity associated with this specific provision appears to have been more to do with post-decisional arguments about the application of EC regulation in the national context than due to deliberate attempts to create regulatory complexity on the part of experts involved during the EC regulatory process.

Similarly, although the case study of drinking water quality in Chapter 5 demonstrated that pesticide MACs proved difficult and costly in terms of member state compliance, analysis of the regulatory process found no evidence that experts had deliberately put in place red tape. Rather it was the absence of prior national regulatory approaches that resulted in EC regulatory innovation to set out new toxicological limits. Since the case studies indicated that consensus on the approach to be taken was followed by co-operation on the formulation of EC regulation deemed appropriate, there is no indication that unnecessary regulatory complexity was a key factor in the need for re-regulation in each instance. Instead, clarification and updating of regulatory standards were the main drivers of the re-regulation process.

Chapter 3 went on to suggest that, given the relatively small number of actors involved in the EC regulatory process, policy-makers may seek to draw lessons from each other instead of expanding the number of ideas and actors involved in the process. It also suggested that policy actors may choose the present regulatory

proposals by giving them an external source of scientific authority designed to meet demands for information about the likely impact and to indicate that new EC regulation will be a success. This legitimisation function helps to explain why EC regulation may emulate prior national approaches.

As Chapter 3 pointed out, epistemic communities will have their own standards of proof for their knowledge. The perceived success of the UK approach to regulation of insurance services described in Chapter 4, for instance, was undoubtedly a key factor in the emergence of a consensus in favour of emulating the UK approach at EC level via the Second and Third Generation Insurance Directives. However, the case study of drinking water quality outlined in Chapter 5 demonstrated the limits of external sources of scientific authority. In that case study, it will be recalled that efforts to achieve re-regulation were underpinned by the toxicological evidence contained in the revised WHO Guidelines on Drinking Water Quality, which superseded the earlier accepted scientific knowledge that was used as the basis for the original Directive on drinking water quality. Despite this linkage between revised WHO toxicological guidelines and calls for the revision of EC regulation of drinking water standards, the earlier regulatory standards had, as noted above, by that time become embedded in public consciousness as a surrogate for zero.

Chapter 3 went on to describe how notions of advocacy coalitions help to explain the way that actors in the EC regulatory process learn from one another and from past experience. It is through learning that awareness of regulatory policy options comes about. However, the literature on advocacy coalitions outlined in Chapter 3 also notes that the options considered will be bounded by belief systems and norms, with the

effect that policy oriented learning will consider a range of options limited by the core values of the group.

Using this theory of advocacy coalitions, in relation to the case study of insurances services undertaken in Chapter 4 it is then possible to construct a scenario in which consensus on the decision to emulate the UK regulatory approach to liberalising financial services was achieved because, considering the limited range of options available to them, actors in the EC regulatory process learnt from the UK experience, saw that it had been a success and sought to replicate this on a Community-wide basis.

In relation to the case study of drinking water quality, the relevance of the advocacy coalition explanation of bounded policy oriented learning is less apparent. This is perhaps not surprising given the absence of prior national regulation containing the toxicological standards that were introduced in EC regulation. It appears from the drinking water quality case study, therefore, that regulatory innovation is, by its nature, not necessarily driven by policy learning since the likelihood is that no prior standards exist that can be learnt from. Nevertheless, in terms of problem definition, in the second case study the identification of the problem of pesticide residues in drinking water may well have resulted to some extent from learning from past experience.

The significance of policy learning as an explanation of why consensus and co-operation might be drivers for the EC regulatory process therefore appears to have been confirmed by the case studies presented in this thesis. The limits of policy

learning were, however, also identified in the case study of drinking water quality, where proposed re-regulation designed to update toxicological standards contained in EC regulation proved impossible to achieve despite the fact that more up to date toxicological standards had come to light in the time since the original EC regulatory standards had been adopted.

CHARACTERISING EC REGULATION:

EMULATION, INNOVATION AND RE-REGULATION

CONCLUSION:

INFORMING FUTURE DEBATE

This thesis began by characterising the EC regulation in terms of three levels of ideas, namely that: (a) the EC regulatory process is best understood in terms of styles or processes of regulation termed emulation, innovation, and re-regulation; (b) that there are particular determinants or causes of regulation that are understood as regulatory competition, consensus and co-operation; (c) a hypothesis can be derived from the review of associated literature that diffusion of ideas and policy learning leading to consensus and co-operation are of greater significance than regulatory competition in the EC regulatory process.

After examining the body of existing literature that provides explanations for the emergence of regulation as the dominant EC policy instrument, the thesis looked at the regulatory competition model, exemplified by the work of Héritier. The thesis argued that the competition model is, on its own, insufficient to explain why EC regulation may, in some instances, emulate prior national regulation but, in other cases, take the form of innovative new regulation with no precursor in the national regulatory context. By reviewing explanations for the EC regulatory process based on competition, diffusion and learning, the thesis was able to suggest that consensus leading to co-operation are significant in enhancing our understanding of why particular forms of regulation have come to the fore.

The thesis then reviewed the various interests, actors and institutions involved in the EC regulatory process and suggested how established theories could contribute to this debate about the significance of competition, co-operation and consensus. Then, after undertaking case study analysis of EC regulation relating to insurance services and drinking water quality, the thesis was able to present clear examples of instances where emulation and innovation in the EC regulatory process had occurred. Furthermore, co-operation and consensus, rather than competition between different prior national regulatory approaches, best described what had occurred in these specific cases.

Finally, in terms of re-regulation, it was noted that while second round regulatory change in the form of regulatory refinement and clarification may subsequently be achieved, as in the case of insurance services regulation, if the consensus achieved during first round regulation breaks down, achieving co-operation on second round regulation may be difficult to achieve, with the prospect that regulatory entrenchment rather than regulatory refinement may be the outcome, as happened in the case of drinking water regulation.

In this sense, the principal finding of this thesis concurs with Fritz Scharpf's (1999:191) assertion that it is where interests converge that EC regulation is most likely to occur. In the light of the arguments presented in this thesis, it is hoped that, in the future, co-operation and consensus will be accorded greater significance as factors driving the EC regulatory process than has been the case in the past.

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APPENDIX

LIST OF INTERVIEW PARTICIPANTS

The following individuals were interviewed during fieldwork for this thesis. The author would like to thank them for their participation, however any errors remain the author's own.

Insurance services case study

Geoffrey Fitchew, Director General, Directorate-General DG XV (Financial Services), European Commission

Brian Pool, Head of DG XV (Financial Services) Insurance Division, European Commission

Mark Boleat, Director General, Association of British Insurers

Tony Paish, Chief Economist, Association of British Insurers

Brian Sharp, Commercial Manager, Prudential

Ian Williams, External Relations Manager, Prudential

Mike Youngman, Operations Manager – International, Norwich Union

Karen Parry, Marketing and Communications Manager, Sun Alliance

Tony Burcher, EC Adviser, Sun Alliance

Brian Griffin, Group EC Adviser, Royal Insurance

Prof. J. Badenhoop, Director, International Affairs, German Insurance Association (GDV)

Herrn. Edgar Müller-Gotthard, Board of Directors, Victoria Reinsurance, Düsseldorf

Dr Jürgen Zech, Chirmand of the Board of Executive Directors, Cologne Reinsurance Company

Drinking water quality case study

Dr Alastair Ferguson, Eutrophication Manager, National Centre for Toxic and Persistent Substances, National Rivers Authority

Dr Rowena Tye, Scientific Advisor, Costs and Performance Division, OFWAT

Colin Edge, Quality Standards Manager, Anglian Water

Dr Steve Tuckwell, Head of Supply Quality and Regulation and Mr John Coppack, Head of Economic Regulation, Wessex Water

Dr Ultrich Oehmichen, Bundesverband der deutschen Gas- und Wasser-wirshcaste e.V. (BGW), Bonn

Dr Steve White, Environment and Science Division, Thames Water

Dr Michael Harryman and Janet Wright, Environment Protection Economics Division

Mary Taylor, Industry and Pollution Department, Friends of the Earth

Dr Anne Buckenham, Deputy Director, British Agrochemicals Association

Dr Bob Breech, Severn Trent Water

Dr Ingo Heinz, Institute of Environmental Protection, University of Dortmund

Caroline Hager, European Affairs Officer, National Rivers Authority

Dr Gareth Jones, Wessex Water

John Brady, Northumbrian Water

Dr Ted Thairs, Head of Environment, Water Services Association