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EUROPEAN REGULATORY MEASURES AND ECONOMIC GROWTH

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The topic of European regulatory measures, in the sense of the regulatory framework setting of the European Community (EC) and economic growth¹⁵⁴, is a complex one. To clarify: the issue at hand is not the growth of the European regulatory measures in itself- a steady and frequent complaint in many EU Member States, concerning the tremendous increase in printed paper (often filled with legal norms of vague abstract terms and bounded compactly to compile the daily Official Journal of the European Union Series L, from the Latin: legislatio). This Journal visibly comprises the multitude of European regulations and directives on such matters as energy network access or skin protection against the sun, public procurement procedures or carbon dioxide reduction, the advertisement of tobacco products or unfair business practices with customers and on a wide variety of many other subjects. Complaints about this swelling fertility of the European legislator usually have two aspects.

The first concerns European contempt of the autonomy of the Nation States, in other words contempt of the principle of subsidiari-

¹⁵⁴ The text is based on a lecture of the author delivered at the International Conference on “European Integration at the Crossroads” in Prag on March 16, 2007.

ty¹⁵⁵. This concern is uttered by those Member States in particular which deem a concrete Community action as being effectively detrimental to their economy when compared with the economy of other Member States¹⁵⁶. Yet, discrimination and subsidiarity are not the subject of this contribution.

The second aspect in the complaints over the regulatory activities of the European legislator emphasises restriction, demotivation and distortion of economic initiatives and activities, in other words a negative dynamic which hinders economic growth¹⁵⁷. In particular, the time consuming burdens of European regulatory measures are expressed: form requirements, applications, registrations, admissions, information, documentation and other bureaucratic demands. These cost time and money and are deemed by many observers to suppress private initiative, or more precisely the level of investment and employment and hence economic and social prosperity¹⁵⁸. However, in this respect there are only vaguely reliable cost calculations available. The Dutch government estimated the bureaucratic costs for 2002 for enterprises in the European Union at the astronomic sum of 340 billion euros¹⁵⁹. According to the Dutch government, a decrease of 25% of the aforementioned burden would increase the overall net gross product by a rate of 1.7%.¹⁶⁰ Although the figures themselves may be challenged by others, their core message is clear: deregulation or

155 This principle is contained in Article 5 par. 2 of the EC Treaty.

156 For example, in Spring 2007, plans of the European Commission for consumption targets of renewable energy were considered in Germany to be particularly unfavourable for the German economy; see *Frankfurter Allgemeine Zeitung v. 7.März 2007*, Nr.56, S.11: "Klimaschutzziele der EU belasten Deutschland".

157 See, e.g., *Bundesverband Deutscher Banken*, Eine bessere Regulierung für mehr Wachstum in Europa, 15.März 2005 (Schlechte Regulierung und hohe Bürokratiekosten dämpfen das Wachstum in der EU).

158 *Ibid.*

159 *Bundesverband Deutscher Banken*, Eine bessere Regulierung für mehr Wachstum in Europa, 15.März 2005, S.1.

160 *Ibid.*

“better regulation” is considered to be a growth incentive par excellence.

This second aspect directly leads into the core of the present topic: namely the relationship between the European regulatory framework on the one hand and economic growth on the other. It should be noted that this does not simply mean the relation between regulation and growth but specifically the relation between European regulation and growth within the European Union. It will be shown why this distinction is very important. The following observations are subdivided into three pockets of critical analysis, namely into one preliminary aspect and two polarising (on the surface contradictory) assumptions: first (this is the preliminary aspect) the content of the weasel words “regulatory framework” and “growth” (A), second the assumption that the absence of EC regulation is the best guarantee for growth (B) and third, the assumption that EC regulation generates growth (C).

A. Preliminary Aspect: The Content of the Words “Regulatory Framework” and “Growth”

The use of the words “regulatory framework” and “growth” is manifold and oscillating.

I. Growth

The term “growth” appears to imply a rather clear concept: namely an increase of the economy. Yet the meaning of “economy” as a general yardstick is not clear in itself. Article 2 of the EC Treaty names the task of the EC “to promote throughout the Community ... a harmonious, balanced and sustainable development of economic activities” and also “a sustainable and non-inflationary growth” (in the German text, “eine harmonische, ausgewogene und nachhaltige Ent-

wicklung des Wirtschaftslebens” und “ein beständiges, nichtinflationäres Wachstum”). The Constitutional Treaty for Europe (CTE)¹⁶¹, which has the chance to be put into effect in this substantive respect by the newly projected Reform Treaty¹⁶², echoes this objective as “sustainable development of Europe based on balanced economic growth and price stability” (Article I-3 par.3 CTE). However, this again poses a question of meaning: economic activities in the sense of the working hours of individuals in a defined area? Economic results in the sense of the market share of undertakings? Economic growth in the statistical sense of the “gross product” of a specific economic sector or territory, or in the sense of general welfare?

If one considers the idea of growth from the angle of the statistical “gross product”, then the increase of economic activity does not necessarily mean a growth of the overall gross product. This depends upon the productivity, in other words upon the value of the concrete economic activities. If this increase is due to a shift from more valuable activity to less valuable activity, then this increase of economic activity does not necessarily imply an increase of the “general welfare” in a region or in an economic sector. Hence at least two dimensions of “economic growth” must be kept in mind: activity and gross product. Moreover, sectoral and regional differentiations are necessary. The increase of the gross product of the European Community as a whole does not necessarily imply an increase in all Member States or in all regions or in all sectors at the same degree¹⁶³. Overall growth can overarch regional and sectoral shifts and asymmetries¹⁶⁴.

161 See, e.g., *Peter-Christian Müller-Graff*, Strukturmerkmale des neuen Verfassungsvertrages für Europa, integration 2004, 186ff.

162 See as a first analysis of the Conclusions of the European Council of 21 and 22 June 2007 *Peter-Christian Müller-Graff*, Die Zukunft des europäischen Verfassungstopos und Primärrechts nach der Deutschen Ratspräsidentschaft, integration 2007, 223ff.

163 In other words: The principle of comparative costs (*David Ricardo*) is blind for its concrete effects in the specific regional parts of the whole economic area.

164 This is one main reason for the Community's empowerment to pursue a policy of economic and social cohesion (Article 158 of the EC Treaty).

Hence, for example, the profitable increase in Irish banking services (and thereby the gross product of the EC) can diminish the gross result of the Luxemburg insurance business. It is a triviality that a competition-driven economy is an ever changing, fluid and dynamic system.

II. Regulatory Framework

On entering the second territory of terminology, namely the word “regulatory framework”, again different dimensions show up. If any measure or law of the European Community which affects economic activities is labelled “regulatory”, as it is often done by economists¹⁶⁵, then the word is highly abstract in the sense of any economically relevant public action. At the same time, it is meaningless and useless for a substantive analysis of the two aforementioned contradictory assumptions on the relationship between regulatory measures of the EC and economic growth. This also applies to a recent study of the World Bank which argued that locations with better regulation grow faster¹⁶⁶ but seems to include any unit of a legal order¹⁶⁷ in the term “regulation”¹⁶⁸. In order to avoid this trap, one must recall the simple fact that public action can pursue very different objectives, apply very different techniques and generate very different effects on economic growth. Hence I propose first to confine the notion of regulatory framework to binding public measures with the intent to influence economic activity¹⁶⁹ and then to distinguish between three ty-

165 See, e.g., *Herbert Giersch*, Europa 1992 — Nicht auf dem Verordnungswege, in: *Frankfurter Allgemeine Zeitung* v. 8.10. 1988, S.15.

166 *Simeon Djankov/Caralee McLiesh/Rita Ramalho*, Regulation and Growth, The World Bank, March 6, 2005.

167 For a thorough analysis of the diverse functional units of a legal order and their functional connection see *Robert S.Summers*, Form and Function in a Legal System, 2006.

168 See *Simeon Djankov et al.* above.

169 They are sometimes called “special regulations” (spezielle Regulierungen) of certain mar-

pes of such measures. These three would be regulatory measures to encourage border-crossing competition (1), regulatory measures to protect free competition within the internal market (2) and regulatory measures to achieve specific economic results in the European Union (3). **1. Competition Encouraging Regulatory Measures.** Regulatory measures of the EC, which intend to encourage border-crossing competition, concern in particular the realm of EC directives which aim to open up more or less closed national markets. For example, in public procurement¹⁷⁰, telecommunication services¹⁷¹, energy supply¹⁷², transportation¹⁷³. Since this form of European regulatory framework tends to jeopardise vested interests (such as public monopolies in one country), it hence sparks complaints from affected undertakings that the border-crossing competition will restrict their individual growth.

kets as different from “constitutive regulations” (konstitutive Regulierungen); see *Wernbard Möschel*, Regulierung und Deregulierung. Versuch einer theoretischen Grundlegung, in: Wirtschafts- und Privatrecht im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung. Festschrift für Ulrich Immenga, München 2004, S.277ff.

170 See, e.g., *Ingeborg Seidel*, Öffentliches Auftragswesen, in: Manfred A. Dausen (Hrsg.), Handbuch des EU-Wirtschaftsrechts, Loseblattsammlung 2007, H. IV; Jürgen Schwarze/Peter-Christian Müller-Graff (Hrsg.), Das öffentliche Auftragswesen in der EG, EuR Beiheft 1/1996; *Peter-Christian Müller-Graff*, Der gemeinschaftsrechtliche Rahmen der Vergabe öffentlicher Aufträge, in: Juristische Fakultät der Universität Heidelberg (Hrsg.), Der Einfluß des privaten und öffentlichen Baurechts auf die Unternehmenstätigkeiten nach deutschem, französischem und europäischem Recht, 1987, S.87ff.

171 See, e.g., *Christoph Engel/Sebastian Seelmann-Eggebert*, Kommunikation und Medien, in: Manfred A. Dausen (Hrsg.), Handbuch des EU-Wirtschaftsrechts, Loseblattsammlung, E V; *Peter-Christian Müller-Graff*, Liberalisierung und Wettbewerb in der Telekommunikation in der EG, in: Siegfried Lamnek/Marie-Theres Tinnfeld (Hrsg.), Globalisierung und informationelle Rechtskultur in Europa, 1998, S.156ff.

172 See, e.g., *Rudolf Lukes*, Energierecht, in: Manfred A. Dausen (Hrsg.), Handbuch des EU-Wirtschaftsrechts, Loseblattsammlung, M; *Peter-Christian Müller-Graff*, Gemeinschaftsrechtliche Rahmenbedingungen der Liberalisierung und Privatisierung der Energiewirtschaft, in: Festschrift für Winfried Tilmann, 2003, S.721ff.

173 See, e.g., *Astrid Epiney*, Verkehrsrecht in: Manfred A. Dausen (Hrsg.), Handbuch des EU-Wirtschaftsrechts, Loseblattsammlung, L; *Peter-Christian Müller-Graff*, Grundelemente des Gemeinschaftsrechtsrahmens für Verkehrsdienstleistungen, in: Festschrift für Rudolf Nirk, 1992, S.715ff.

2. Competition Protecting Regulatory Measures. Distinguishable from the former are those EC regulatory measures which protect free competition within the internal market against restrictions and distortions, through a set of abstract playing rules. This is the domain of the classical ordoliberal concept of EC Competition Law¹⁷⁴ with the intent to hinder or wipe out competition restrictions caused by undertakings (e.g. Articles 81 and 82 of the EC Treaty and respective regulations and decisions)¹⁷⁵ or with the intent to guard against mergers which substantially infringe effective competition (Merger Control Regulation)¹⁷⁶ or with the intent to defend against competition distorting state aid (Article 87 of the EC Treaty)¹⁷⁷. Since this type of European regulatory framework encroaches in activities, plans and benefits of certain market participants, Community law itself grants particular exceptions in order to give way to those restrictions or distortions of competition which are expected to generate overall economic progress or growth (e.g. Article 81 par.3 of the EC-Treaty¹⁷⁸; Article 87 par.3 of the EC-Treaty and secondary law¹⁷⁹). **3. Specific Result Intending Regulatory Measures.** Again, a distinguished variety of EC regulatory measures are those which intend to achieve specific economic results within the European Union. In particular, this concerns the variety of measures which exert an influential effect

174 see, e.g., *Ernst Joachim Mestmäcker*, Offene Märkte im System unverfälschten Wettbewerbs in der Europäischen Wirtschaftsgemeinschaft, in: *Wirtschaftsordnung und Staatsordnung*, Festschrift für Franz Böhm, 1965, S.365ff.; *Peter-Christian Müller-Graff*, in: Christoph Vedder/Wolff Heintschel von Heinegg (Hrsg.), *Europäische Verfassungsvertrag*, 2007, Art.III- 161 Rdz.2.

175 See, e.g., *Richard Wisb*, *Competition Law*, 5th edition, 2003, p. 79 et seq., 175 et seq..

176 Regulation 139/2004, OJ 2004 L 24/1.

177 See, e.g., *Peter-Christian Müller-Graff*, in: Christoph Vedder/Wolff Heintschel von Heinegg (Hrsg.), *Europäischer Verfassungsvertrag*, 2007, Art.III-167.

178 See, e.g., *Richard Wisb* above, p. 149 et seq.; *Peter-Christian Müller-Graff*, *Die Freistellung vom Kartellverbot*, EuR 1992, 1ff.

179 See, e.g., *Peter-Christian Müller-Graff*, in: Christoph Vedder/Wolff Heintschel von Heinegg (Hrsg.), *Europäischer Verfassungsvertrag*, 2007, Art.III-167 Rdz.28ff.

on products, production processes and services¹⁸⁰. This area aims to make these compatible to all kinds of requirements which have been politically conceived to be mandatory, such as: specific standards of health protection (for instance, which require that childrens' toys do not contain certain harmful colour additives: the Toys Directive¹⁸¹), or specific standards of consumer protection (such as those which require that consumer credit contracts contain defined information about any incurred costs: the Consumer Credit Directive¹⁸²), or specific standards of environmental protection (which require, for example, that cars do not emit more than 120 units of carbon dioxide: the planned Carbon Dioxide Directive). The reverse side of this variety of regulatory measures is the prohibition of products or services which do not comply with those standards. In particular, this third type of EC regulatory framework regularly encounters the two contradictory assumptions on its effect on economic growth.

B. First Assumption: Absence of EC-Regulatory Measures is the Best Guarantee of Economic Growth

The first basic assumption encountered is that the absence of regulatory policies of the European Community is the best guarantee for economic growth, both in the sense of benefits for business activities and the overall gross product of the European Community. **I. Underlying General Ideas**

This assumption is founded on the general basic idea of any liberal theory starting as early as the famous “laissez faire, laissez aller” at the turn into the 19th century¹⁸³. It is also the basis for the clas-

180 See *Peter-Christian Müller-Graff*, Die Verdichtung des Binnenmarktrechts zwischen Handlungsfreiheiten und Sozialgestaltung, EuR Beiheft 1/2002, S.7, 19.

181 Directive 88/378/EEC, OJ 1988 L 187, 16 July 1988, 1.

182 Directive 87/102/EEC, OJ 1987 L 42, 12 February 1987, 48.

sical international trade doctrine of the emergence of welfare, generated by a system of comparative costs (*David Ricardo*)¹⁸⁴ or, in modern words, by the effects of transnationally unrestricted und undistorted competition of private economic initiatives¹⁸⁵. This doctrine expects that the optimum overall economic results (in the sense of initiative and investment, use of scarce resources and creativity, innovation and invention, adaptation and flexibility in a defined territory) are generated by the multitude of free and mutually freely coordinated decisions of demand and offer¹⁸⁶. Through this, it is expected that economic growth can be spurred as well, if this is appropriate to such a self creative and self steering system¹⁸⁷. However, these results may not necessarily meet the ambitious target lines of overall or regional growth, which are defined at the political level.

II. Idea, Consequences and Merits in the EC Treaty Turning to the EC Treaty it is indeed this idea of an open market economy with free competition, which has made its way into the EC Treaty and is explicitly summarised as such in its Article 4¹⁸⁸. This theory is the very foundation of the internal market concept, as defined in Article 14, par.2 of the EC Treaty as an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the EC Treaty¹⁸⁹. This idea is established

183 See as an offspring in the early 20th century: 198 U.S. 45, 25 St.Ct. 539 (1905) with Justice *Holmes* dissenting.

184 *David Ricardo*, Principles of Political Economy and Taxation, 1829.

185 For the concept see *Willem Molle*, The Economics of European Integration, 1990, p.9.

186 For the expected positive functions of a system of free and undistorted competition in general see as an overview, e.g., *Wernhard Möschel*, Das Wirtschaftsrecht der Banken, 1072, S.337ff.

187 *Ibid.*

188 See *Peter-Christian Müller-Graff*, Die wettbewerbsverfaßte Marktwirtschaft als gemeineuropäisches Verfassungsprinzip, in: EuR 1997, 433ff., 439.

189 See *Peter-Christian Müller-Graff*, Binnenmarktziel und Rechtsordnung — Binnenmarktrecht, 1989.

by the EC Treaty as the prime method for achieving the aforementioned objectives: namely to promote economic activities and growth¹⁹⁰.

III. The Need for Safeguards Granted by Public Authority

However, it is already well known that the realisation and functioning of this concept as a durable and lasting system needs safeguards granted by public authority: namely rules and their enforcement against the specific techniques of undertakings to restrict competition (in particular by forming cartels) or to abuse dominant market positions. Hence a system of free competition needs the order of abstract playing rules (the Latin word for this is *ordo*) as developed by the influential *ordo-liberal* doctrine¹⁹¹ of *Walter Eucken* and *Franz Böhm* and their pupils, in particular *Ernst-Joachim Mestmäcker*¹⁹². A European regulatory framework is necessary in this sense of protecting competition. This requires reliable legal rules (such as Article 81 and 82 of the EC Treaty) and legal certainty in order to give the competitive forces a chance to effect the expected positive results¹⁹³ of initiative and investment, optimal use of scarce resources and creativity, innovation and invention, adaptation and flexibility and, through all of this, also to potentially generate economic growth, if this is proper to the self regulating system of market forces. Therefore, the assumption that the total absence of any EC regulatory framework should be the best guarantee for economic growth within the internal market fails to convince. At the very least, a legal system which guarantees the system of free competition must be present.

It should be added that the previously described basic idea evidently does not imply the presently hotly disputed so-called more

190 See also Article 2 of the EC-Treaty.

191 See *Fritz Rittner*, *Wirtschaftsrecht*, 1979, S.23

192 See *Ernst-Joachim Mestmäcker* above.

193 As an overview of the expected positive results see, e.g., *Wernhard Möschel* above.

economic approach, favoured by parts of the European Commission in the General Directorate IV¹⁹⁴. This approach advocates applying the abstract rules of EC Competition Law — prohibitions and exceptions- to an individual case, through primarily caring for consumer welfare, in particular through achieving low prices or better distribution¹⁹⁵. Apart from the aspect that consumer welfare is not necessarily identical with economic growth, this approach seems to show a certain misunderstanding of the classical function of the EC regulatory framework to protect competition. The prime orientation towards consumer welfare fails to meet the complex profile of the EC Treaty's legal framework of competition. This aims to guarantee a system of freedom of competition¹⁹⁶ but not to primarily achieve short-term consumer welfare results¹⁹⁷, although they can regularly be expected from a system of free and undistorted competition¹⁹⁸. Moreover, an economically discretionary approach destroys legal certainty, since undertakings, when they act (by concluding agreements between them or on the basis of a dominant market position), can only speculate as to whether future economic theorists will assess their action as having been beneficial for consumer welfare or not. Last but not least, the economic approach might overestimate the capability of economic analysis to predict results in a complex market economy.

194 See, e.g., *Mühlberger*, in: Capital Nr.10/2006, S.22ff.

195 See *European Commission*, Discussion Paper on the Application of Article 82 EC Treaty, December 2005, in which an effects based approach is advocated and the objective of Article 82 of the EC Treaty defined as “the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources” (at notes 4, 54).

196 See, e.g., *Volker Emmerich*, in: Ulrich Immenga/Ernst-Joachim Mestmäcker, EG- Wettbewerbsrecht, Kommentar, Band I, 1997, Art.85 Abs.1 Rdz.3, 5f.; *Helmut Schröter*, in: Hans von der Groeben/Jürgen Schwarze (Hrsg.), EUV/EGV. Kommentar, 6.Aufl., 2003, Art.82 Rdz.16.

197 Notwithstanding the possibility of exemptions of agreements between undertakings which distort competition from the prohibition of Article 81 par.1 of the EC Treaty on the basis of Art. 81 par.3 of the EC Treaty (with a broad notion of “consumer”).

198 For the expected diverse positive functions of a system of free and undistorted competition see above.

C. Second Assumption: EC Regulatory Measures Generate Economic Growth

Moving on to the second polarising assumption in the relationship between EC regulatory framework and economic growth immediately a contradiction appears. The second assumption is that EC regulatory framework can generate economic growth in principle¹⁹⁹.

I. Underlying General Ideas This assumption rests on two differing general ideas: first, to enhance economic activities in general and in specific economic sectors in particular through public intentional fostering of growth; second, to generate expected growth effects from regulatory challenges.

1. Public Intentional Fostering of Growth. The feasibility of generating growth effects through intentional public fostering is the basic conviction in any regulatory concept of public intervention which aims to expand the economy. It is based on the idea that public authorities can form a regulatory framework which incites economic growth. As old as the mercantilistic philosophy of *Colbert*²⁰⁰ this understanding has sparked off very different devices both for the economy as a whole and for different sectors thereof. These include holistic (or global) concepts (such as centralized economy devices²⁰¹ which

199 See *European Commission*, The Commissions Strategic Objectives 2005-2009, COM(2005) 12: "We should make policy choices that ensure that our various objectives are mutually reinforcing. Actions to promote competitiveness, growth and jobs, as well as social and economic cohesion and a healthy environment reinforce each other. These are all essential components of the overarching objective of sustainable development, on which we must deliver."; *European Commission*, Impact Assessment Guidelines, 15 June 2005, SEC (2005) 791; see also *European Council* of 23 and 24 March 2000, Final Conclusions ("Lisbon-Strategy". For the special aspect of fostering growth through infrastructure policy see *Christian von Hirschhausen*, Infrastrukturpolitik: Mehr Wachstum durch Wettbewerb, Regulierung und Privatbeteiligung, in: Klaus F. Zimmermann (Hrsg.), Deutschland — was nun? Reformen für Wirtschaft und Gesellschaft, 2006, S.251ff.

200 See, e.g., *Wolfgang Weif/Christoph Hermann*, Welthandelsrecht, 2003, S.9f.

201 See as an example for the former East European systems before 1989, e.g., the self description for East Germany *Uwe-Jens Heuer* (Hrsg.), Wirtschaftsrecht, 1985.

still prosper to a certain degree in China); the former planification indicative française²⁰²; and the theory of anticyclic budget policy as developed by *John Maynard Keynes*²⁰³ and as transformed into a binding statute on Stability and Growth in Germany²⁰⁴. However, the degree to which these devices factually contribute to sustainable economic growth is very doubtful, or at least disputed among economists²⁰⁵. These concepts can even block economic growth through hindering more profitable activities. On the other side it is also emphasised that an intelligent infrastructural policy, in particular in the areas of transport, telecommunication and energy infrastructures, can increase economic activities²⁰⁶. The same applies —*mutatis mutandis*— to sectoral concepts, such as the public care for sufficient supply of certain products (for example, Germany's former telecommunication and energy handling which, however, resulted in a high level of prices²⁰⁷) or the public care of economic activities in certain sectors (such as the Belgian care of Belgian production of brewery equipment, which failed²⁰⁸; or France's frequently reported policies for the production of French sailing ships in the 19th century or refrigerators in the 60s, which also failed). A sweeping theory calls all these interventions of public authorities a reaction to so-called market failures²⁰⁹, but this terminology misunderstands the role and core of the

202 *Hans J. Hoenisch*, *Planifikation. Recht zwischen Plan und Freiheit*, 1974.

203 *John Maynard Keynes*, *The General Theory of Employment, Interest and Money*, 1973.

204 See *Fritz Rittner*, *Wirtschaftsrecht*, 1979, S.48.

205 see for the discussion, e.g., *Ulrich Teichmann*, *Konjunktur- und Wachstumspolitik*, 1972, S.115ff.; *Walter Hamm*, *Kollektive Investitionslenkung*, ORDO 27 (1976), 134ff.; *Otmar Issing*, *Investitionslenkung in der Marktwirtschaft?* 1975; *Hans Besters*, *Neue Wirtschaftspolitik durch Angebotslenkung*, 1979.

206 See, e.g., *Christian von Hirschhausen* above.

207 See for energy supply *ibid*.

208 See ECJ, case 234/84.

209 See, e.g., *R.G. Noll*, *Government Administrative Behaviour and Technical Innovation*; California Institute of Technology. Working Paper 1975 ("One purpose of democratically elected legislators is to detect serious market imperfections and establish administrative agencies to

market system as well as the broad array of reasons for regulation²¹⁰. The basic issue is not market failure but rather public policy. Here, there exists the tangible danger that futile incentives are given by public authorities to preserve the existing structure of economic offer against the developments of demand or vice versa. On the other side, successful competitive advantages granted by public authorities can frustrate other innovative participants.

2. Expectable Growth Effects from Regulatory Challenges. The second underlying idea of the assumption that EC regulatory framework generates economic growth presumes expectable growth effects from the creative reaction of the market to regulatory challenges. This argument is most frequently expressed, in the area of new regulatory instruments of environmental protection. If, for example, the permissible emission levels of carbon dioxide from cars is lowered²¹¹, the usual complaints of the industry affected are generally countered in the public debate by politically expressed expectations of innovation, new investment and markets, generated by these challenges. The same pattern of arguments appears, for example, in the discussion of fixing mandatory quotas for the so-called renewable energies (sun, wind, hydroelectric) or in prescribing new safety equipment for television sets. Whether these growth effects outweigh the inherent limitations and distortions of economic activities is a complex question of every single regulation. It is very often a heavily disputed issue since wrong incentives may be given and innovative competitors can become frustrated. However, as already outlined, it can generally be assumed that the accompanying obligations of un-

ameliorate them" (quoted from *Jürgen Müller/Ingo Vogelsang*, *Staatliche Regulierung*, 1979, S.35 Fn.11); *Werner Meißner*, *Investitionslenkung*, 1974. For a different (market immanent and restricted) understanding of market failure see *Jürgen Müller/Ingo Vogelsang*, above, S.31, 33.

210 See, e.g., *Hans Besters*, *Neue Wirtschaftspolitik durch Angebotslenkung*, 1979, S.93; *Peter-Christian Müller-Graff*, *Unternehmensinvestitionen und Investitionssteuerung im Marktrecht*, 1984, S. 81ff., 136, 517.

211 See above for the plans of the *European Commission*.

dertakings to provide information, do paperwork and indulge in bureaucratic documentation have a tendency to burden, to slow down and to de-motivate the readiness for economic activity²¹². The specific impact of regulatory agencies (e.g., telecommunication, energy, transportation) on economic growth is a separate topic, which still needs further exploration²¹³.

II. Basic Ideas, Consequences and Merits in the EC Treaty.

Turning to the EC Treaty and the policy of the European Community both ideas can be found in this context.

1. Public Intentional Fostering of Growth. Concerning the public fostering of economic growth, the programme to complete the internal market at the end of 1992²¹⁴ is an outstanding example. When the objective of the internal market was introduced into the Treaty in 1987²¹⁵ and substantiated by adapting around 300 regulatory measures of the Community²¹⁶, an Italian economist's report, the *Cecchini* Report, supported this²¹⁷. It predicted a tremendous quantified economic growth from this project²¹⁸. Whether reliable studies exist as to if this actually came true as a result of the regulatory measures, is beyond my knowledge. In all probability, they are not at all feasible

212 See above.

213 Regulatory agencies are an increasing phenomenon in Europe. Their radius of action partially overlaps with the topic of "regulated industries"; for the latter see *Jürgen Müller/Ingo Vogelsang*, *Staatliche Regulierung*, 1979, S.354

214 *Commission of the European Communities*, White Book on the Completion of the Internal Market, June 1985.

215 See *Peter-Christian Müller-Graff*, *Die Rechtsangleichung zur Verwirklichung des Binnenmarktes*, EuR 1989, 107ff.

216 See the mentioned White Book of the *Commission of the European Communities*.

217 See *P.Cecchini*, *Europa 1992. Der Vorteil des Binnenmarktes*, 1988, S.122.

218 *Ibid.*: per year approximately 5 % of the Gross Product of the EEC or 400 billions DM.

due to the epochal historical change, which occurred between 1987 and 1992 in Europe.

a. However, the basic assumption of the *Cecchini* Report carries some persuasive authority, at least when assessed in the light of the basic internal market concept as described above. As stated, namely that the abolition of the national regulatory framework, which hinders border-crossing economic activities, will encourage and generate a Community-wide competition with all its benefits.

The same direction is taken by all present single regulatory measures of the Community which encourage trans-border competition: namely by overcoming national impediments, for example, to banking and insurance²¹⁹, energy supply²²⁰ and telecommunication services²²¹, transportation²²² and public procurement²²³. The expectation of potential economic growth through this first type of EC regulatory framework is a paradox for common sense on the surface only. It must be kept in mind that this variety of EC directive replaces 27 different national regulatory frameworks on the subject at hand. Although it may appear monstrous on its own, it is rather small when compared to the combined 27 national regulatory devices of the same issue.

b. In contrast to this type of EC regulatory framework are the measures to foster economic growth on the basis of EC Treaty empowerments for regional²²⁴, industrial²²⁵, infrastructural network-buil-

219 See, e.g., *Ulrich Hübner*, *Banken- und Versicherungsrecht*, in: Manfred A. Daus (Hrsg.), *Handbuch des EU Wirtschaftsrechts*, Loseblattsammlung, E IV.

220 See, e.g., *Rudolf Lukes* above.

221 See, e.g., *Christoph Engel/Sebastian Seelmann-Eggebert* above.

222 See, e.g., *Astrid Epiney* above.

223 See, e.g., *Ingelore Seidel* above.

224 Article 158 of the EC-Treaty et seq.

225 Article 157 EC of the Treaty.

ding²²⁶, technological development²²⁷ or agricultural policies²²⁸. Their assessment encounters the same problems outlined just above with regard to the underlying general idea. In this respect, the policies of the EC are not specifically different to national policies. They easily fail if they urge the development of particular technologies or products (such as a certain generation of telecommunication transmission cables). Undertakings are economically usually more inventive than public administrations. On the other side “the establishment and development of trans-European networks in the areas of transport, telecommunication and energy infrastructures” as projected by Article 154 EC Treaty can doubtlessly intensify the free movement and economic activities within the internal market, if intelligently pursued.

2. Expected Growth Effects from Regulatory Challenges.

No specific EC aspect arises concerning the second idea of growth by regulatory measures, namely growth effects from regulatory challenges. The lowering of the permissible emission of carbon dioxide by cars, the introduction of mandatory quotas for renewable energies or the ban of certain colour additives in toys may stimulate initiatives and investment, the best use of scarce resources as well as creativity, innovations and inventions. However, it may also discourage economic and innovative activity, particularly if combined with the burdening obligations of information, paperwork and bureaucratic documentation. As before, this is a complex question concerning every single piece of EC regulatory framework. It requires a specific assessment of whether the overall balance in the light of discouragement and encouragement for new activities is a negative or a positive growth of economic activity and the overall gross product within the European Community. Here, even the Court of Justice can contribute to a given case, albeit not on the basis of economic criterion of

226 Article 154 of the EC Treaty et seq.

227 Article 163 of the EC Treaty et seq.

228 Article 33 of the EC Treaty

growth but on the basis of the legal criteria of fundamental rights²²⁹ or the principle of proportionality²³⁰.

One positive political example in the EC is —besides Britain with its “Regulatory Impact Unit” and its results²³¹- the ambition of a small Member State, the Netherlands, to reduce the bureaucratic burden of the Dutch economy within four years by 25% (this figure is estimated)²³² or by four billion euros. Some political forces in Germany want to follow this example²³³. As far as the regulatory framework of the Community is concerned at least four Presidencies of the Council have already addressed this problem (“Joint initiative on regulatory reform”)²³⁴.

D. Conclusion: The Need for a Differentiating View

This leads to a concluding remark. Through assessing and balancing the relationship of EC regulatory framework and economic growth, it is clear that the appropriate view is one which differentiates on both sides. These are differentiations according to the notion of economic growth on the one side and differentiations according to EC regulatory framework on the other side. Only such an approach offers the chance for an intelligent use or non-use of a regulatory ins-

229 See *Peter-Christian Müller-Graff*, Die Verdichtung des Binnenmarktrechts zwischen Handlungsfreiheit und Sozialgestaltung, in: *EuR Beiheft 1/2002*, S.7, 71f.

230 In relation to measures of the Community the ECJ see, e.g., *ECR 1997, I-2405, I-2405 note 57* (assessment with the result that the measure is not evidently unproportional).

231 *Bundesverband Deutscher Banken*, Eine bessere Regulierung für mehr Wachstum in Europa, 15.März 2005, S.4f.

232 *Raimar Dieckmann*, Mehr Wachstum durch zeitgemäßes Regulieren, *DB Research — Banken, Finanzmärkte und Regulierung*, 2006.

233 *Ibid.*

234 *Bundesverband Deutscher Banken*, see above, S.3 (Die Verbesserung der Regulierung ist eine gemeinsame Aufgabe der EU und der nationalen Regierungen).

trument by the European Community in the light of economic growth. It also encounters the challenges and limits of regulatory and political management of border-crossing economic activities. A wise insight is formulated by the European Commission in its White Paper on European Governance: “Proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at an EU level and whether regulatory intervention is needed.”²³⁵ This is an ongoing task and challenge.

²³⁵ See *European Commission*, White Paper on European Governance, 2001, COM (2001) 428; see also *European Commission*, Impact Assessment Guidelines 15 June 2005, SEC (2005) 791