# Political Goals, Legal Norms and Public Goods: The Building Blocks of Europe?

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# Summary

In the introduction of technical norms and the free circulation of goods and people, as in the harmonization of indirect taxes or the portability of social rights, the principle of competition dominates over all other principles in the building of Europe. This primacy of competition has aroused the distrust of many citizens regarding the Union and is now obstructing the emergence of public goods in Europe. While economic theory provides satisfactory explanations of public goods management, it is has great difficulty in analysing their genesis. This helps to explain the discrepancies between the theory's predictions and the empirically observable distribution of powers. Theories of justice maintain that the persistence of strong national traditions in areas such as professional relations or the expression of solidarity make the construction of a social Europe more difficult. Legal analysis highlights the decisive role played in all member states by judges and courts, whose jurisprudence continuously and practically delimits the role and prerogatives of all the players. By so doing, they create the conditions for a review of the allocation of these powers by the political authorities. The necessary reconstruction of European institutions must then anticipate the formation of new public goods as diverse as security and justice, science and energy security.

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# INTRODUCTION

"Brussels interferes too much in specifically national matters…." "The European Union is not social enough!" These two apparently contradictory views illustrate the extent of public dissatisfaction with the current division of competences between the European Union and the member states on the one hand, and the way they are exercised on the other. There are several arguments in favour of a rethinking of the allocation of competences in Europe. In this respect, a combination of the two main approaches, that of the jurist, often inductive and pragmatic, and that of the economist, more axiomatic and deductive, provides valuable insights and surmounts some of the difficulties that a mono-disciplinary approach cannot always resolve.

In fact, the allocation of competences is a much more complex issue than suggested by an approach based on the opposition between European Community responsibilities and the subsidiarity principle.[3] Our first task is to clarify the lessons of economic theory and apply them to the current EU situation: from a strictly theoretical point of view, and taking into account the level at which the public goods are defined, how should competences be allocated?[4] Given the divergence between theoretical predictions and empirical observations, it is worthwhile turning, as a counterpoint, to the law, which is in more direct relation with the practical effects of the norms it enacts.

In order to settle disputes between public authorities stemming from conflicts of power in a federalist political system, jurists have developed various subtle concepts to stabilize the frequent problems of imprecision in the boundaries of competences and in the interdependences between their different domains. A comparison with the transformations in US federalism is enlightening, as it appears to refute the intuitive hypo-

[3]The "subsidiary principle" means that the European Union does not take action (except on matters for which it alone is responsible) unless EU action would be more effective than that taken at the national, regional or local level.

[4] Traditionally, public goods designate "non-rivalrous" goods (consumption by one individual does not reduce the consumption by others), which cannot be the object of exclusion (it is impossible to exclude an individual from the distribution of this "non-rivalrous" good once it has been produced). The production and availability of these goods therefore entails one or another form of collective action, which is not necessarily simply that of the state.

thesis of strong historicity. In both cases, preserving free circulation in the unified market, a collective good, is used to justify many extensions in federal competences.

This text is original in combining economic and legal approaches (Table 1), with a view to proposing some procedures and orientations that could lead to a more satisfactory allocation of competences.

TABLE 1 – TWO APPROACHES TO EUROPEAN INTEGRATION

| | Law and its practices | Mainstream economics |
|---|---|---|
| Method | Resolution of conflicts between parties and principles, thanks to jurisprudence. | Formulation of a model incorporating interdependences and study of the corresponding equilibria. |
| Aim | Case-by-case development of jurisprudence to preserve the legitimacy of the legal order. | Moving the economy towards an optimum in the allocation of resources. |
| Relation to time | Strong historicity, but emergence of general principles (role of the internal market). | Divergence of the economy from its point of efficiency due to unexpected events or "irrationalities". |
| Strategy | Gradual establishment of principles enabling revision of the legal measures governing competences. | Advisory role so that principles resulting from economic analysis can be taken into account by decision makers. |
| Effect on competences | Role of the judge in the delimitation of competences, on the basis of an initial, constitutional-type allocation. | Affirmation of the need to satisfy a principle of rationality in the allocation of resources and financial means. |

After exploring the reasons that justify the reform of European institutions, we use the conclusions drawn from this approach to suggest some prospects for change in the division of competences between the Union and its member states.

## THE NORMATIVE ECONOMIC APPROACH

One of the great merits of economic theories of public action is that they simplify, by abstraction, the multiform interdependences drawn from observation and offer a guide to the allocation of competences.

## The contribution of public choice theory: explicit criteria

The contribution of economic theory to the question of the allocation of competences starts with an investigation of market failures as soon as externalities appear (positive in the case of knowledge, for example; negative in the case of congestion or pollution).[5] Some goods have the property of being able to benefit everybody without any additional cost. The adoption of social justice objectives thus has the effect of modifying the distribution of incomes and goods that would be available under pure market mechanisms. This point of view is inspired by Musgrave's theory (1959), which continues to provide a useful starting point in the delimitation of activities that should be entrusted either to the market or to public intervention. With the increase in public interventions, another problem has appeared, analogous to market failures: government failures (Wolf, 1990). Nevertheless, public choice theory continues to set out three different reasons for state intervention.

- Some public goods have the property, when they are available, of benefiting everyone, without any need for repeating the action of buying and selling: security, defence, the stability of the legal system, the resilience of the system of payments and the monetary order all fall within this category. As the market is incapable of determining the optimum supply level of these goods, a process of political deliberation is required to determine the volume of resources allocated, even if this means using cost/benefit calculations at this level. The purpose of taxation is then to deduct the necessary resources without provoking inefficiency in the allocation process of the other goods. As far as the allocation of competences in Europe is concerned, the question is then: at what level should the different public goods be managed? The answers prove to be very diverse, depending on the types of public goods considered (Table 2). Some interesting results with regard to European issues immediately stand out.

[5] This refers to the effect that an agent's production or consumption activity has on the situation of another agent not directly involved.

TABLE 2 –IS THE SCALE OF EXTERNALITIES A FOUNDATION FOR THE ALLOCATION OF COMPETENCES?

| Externalities | Example | Form of organization | Consequences of recent developments as regards international integration |
|---|---|---|---|
| Local | Use of ground water | Clubs, single or multiple purpose inter-municipal syndicates | Few changes |
| Regional | Cluster effect (e.g. Detroit, Silicon Valley, Italian industrial districts) | Professional association or political body | Strengthening of certain regions in the economic and political order |
| National | Monetary stability, Confidence in institutions | Central bank<br>Constitution<br>Government norms | Pooling of national sovereignty in monetary matters |
| Transnational | Acid rain | Negotiations, formation of cross-border bodies of the specialized syndicate kind | More and more frequent phenomenon |
| European | Large market, Technological standards,<br>Single currency | European Commission or Independent administrative agency | Strengthening of the competition principle<br>ECB learning as regards its relations with national European policies |
| Global | Ozone layer,<br>Financial stability | International treaty, and specialist international organizations<br>Creation of a market in pollution rights<br>Prudential norms | Difficulty in managing global public goods: conflicts of interest, absence of supranational agencies (environment) |

- First, the scale of externalities is extremely variable, ranging from those of the most local nature, for example the management of ground water, to the global level when we consider global warming caused by urban and industrial pollution.

- Second, we must differentiate between natural public goods and those that result from social construction and collective organization, such as the upholding of competition in the market, the maintenance of monetary stability, confidence in institutions, or the transparency of the corporate accounting system.

- For this reason, the European level refers not so much to a geographical unity as to an institutional one, because many public goods are the result of 50 years of economic integration and legal construction.

- Finally, a strict application of the theory of natural public goods leads to a reduced list of explicitly and exclusively European competences.

• Since Keynes, a large proportion of economists have been convinced of the necessary role of public authorities in the *stabilization* of macroeconomic activity. Inflationary bubbles, periods of recession and rising unemployment all introduce externalities with a negative impact on well-being, an impact that the public authorities can attempt to limit. In theory, since the breakthrough of the new classical economics (Lucas, 1983), the importance of this function of the State has often been played down. Macroeconomists, extending an argument first put forward in relation to creative destruction (Schumpeter, 1911), argue that the vigour of recessions stimulates subsequent growth (Saint-Paul, 1997). Observation of the behaviour of economic policy makers shows, however, that the objective of stabilization has not been abandoned, especially in the United States. During the 1960s and 70s, the debate also focused on the comparative merits of budgetary tools and monetary policy. This old debate has been revived by the fact that, since January 1999, for one monetary policy, there is a whole series of corresponding national budgetary policies (Boyer (ed.), 1999; Artus, Wyplosz, 2002). New problems of coordination have emerged, requiring an analysis of the respective costs of coordination (first between those in charge of national budgets, and second between the Central Bank and Ecofin, the council of European finance ministers) and non-coordination.

• The third motive for public intervention is *redistribution*, to satisfy objectives of fairness and social justice. The theory is less positive on this point than it is for allocation and stabilization. Economists have turned to works of political and social philosophy, which propose various criteria of social justice, depending on whether they refer to Rawls (1971), Nozick (1988) or Sen (2000). On this point, theory is the daughter of history, because it is often through social and political conflict that a particular concep-

tion of social justice is established and consent is obtained for the transfer of income or resources with the aim of approaching this objective. As national traditions vary widely throughout Europe, it is easy to understand why this aspect is the most problematic. Thus, very few European programmes seek to define transfers between countries in accordance with a shared conception of what the objectives of social justice should be. And yet, from a predictive point of view, it is important to examine the oft-debated question of a social Europe from this perspective.

When the predictions of this theory are compared with empirical observations, a large number of anomalies and discrepancies appear (see Table 2 above).

## Not all the public goods held to be naturally European have given rise to intervention or supply on a European level

Three examples illustrate the disparity between the predictions of public goods theory and empirical observation of the actual allocation of competences.

- *Intra-European transport*, presented in the treaties as a Community competence, has not given rise to active intervention on a European level. This competence has therefore remained purely theoretical. Yet there are at least two principles that justify a European Community intervention. First, the experience of the 1990s has shown that the absence of uniform social regulation in the European road transport sector has led to a distortion in competition, in the form of an intensification of work and the equivalent of a race to the bottom for welfare and wages", resulting in open social conflict. Second, and most importantly, given the principle of the free circulation of goods and people, the externality between the principle of competition and transport costs may necessitate Community intervention. Indeed, problems in the air transport industry provoked the creation, in June 2002, of a European Air Safety Agency with the aim of harmonizing national policies and encouraging them to converge.
- *Defence*, which most theorists consider a "natural" public good, is, in practice, no such thing. This has been demonstrated by the failure of early attempts to constitute a European defence capability within the Community, frustrated by conflicts of interest between different member states of the Union. This failure prompted the

adoption of a completely different path to European integration: no longer involving defence policy, but economic policy, through the constitution of a common market. The problem, however, is of an even wider nature, for if defence really was a typical public good, then one country's contribution to defence expenditure, within an alliance, should decrease when that of its allies increases, in the face of an unchanging external threat. Yet research has shown that even among the members of NATO, for example, one country's defence spending is positively linked to that of its allies (Milton, 1991). In analytical terms, this means that distrust between partners, or even allies, can prevent defence from becoming a public good on the European scale, even if it is a public good on a national level.

- *Science* is a third example involving an emerging European public good; the development of knowledge, through *scientific progress,* would appear to be essential to the future of Europe's competitive position. Despite a few large European programmes, which are intended to encourage synergy between member countries, most research policy continues to be conducted at a national level, even when this means failing either to attain a critical mass or to stimulate competition and enable the emergence of European scientific centres. Thus, the separation of national systems generates negative externalities: the costs of the "non-Europe" in terms of research have been well-documented in various reports (Soete, 2002; Rodrigues, 2002). And yet we can see no decisive movement towards the recognition of a Europeanization, through modalities that could take the form of shared or at least coordinated skills.

## In contrast, the European Union exercises competences in domains where the European character of the corresponding public goods has not been established

The most striking case is that of the Common Agricultural Policy (CAP). For a long time, Europe has been intervening in the organization of the markets and prices for certain agricultural products, despite the fact that the objective of eliminating food shortages and/or guaranteeing the security of European food supplies has been overwhelmingly achieved. The resolute defence of national farmers' interests by certain

countries explains this remarkable path and past dependence (CAE, 2000), although the percentage of European Community funds allocated to farming has, admittedly, slowly fallen over the passage of time. In fact, the objective of the CAP has been transformed, as it now aims to support farmers' incomes rather than to maintain the supply of a public good. This objective shall remain unless the overhaul of the CAP and its conversion into an instrument for the protection of the environment and the preservation of rural life involve a restructuring of public interventions in this domain. This transformation has been under way ever since Fordist agriculture started to erode (Allaire, Boyer, 1995). Nevertheless, the question remains of the level at which this competence should be exercised: there are several arguments in favour of the idea that it should be exercised at the level of each country; these would be free, as a consequence, to organize their farming and forms of direct income support for farmers without intermediating prices. Economic theory suggests that the rational pursuit of each country's best interest would imply they resort to the world market, bearing in mind that the risk of food shortages tends to diminish with growth in agricultural productivity, the abundance of the supply from countries producing surpluses, and the moderation of the demand for farm and food products as the standard of living rises. It is, however, a remarkable fact that most of the big countries resort to measures of aid, often massive, for their farming sector. Consequently, we must abandon pure public goods theory and focus on the political economy analysis of state interventions, from which their actual production levels result (Drazen, 2000).

## Interdependence between public goods can favour their recognition and their institutionalization

Although each public good is considered separately in mainstream theory, they can have relations of complementarity with other goods, in the sense that the joint availability of these goods enhances the interest of each of them. The European construction is rich in such interdependences, and presents an invitation to revisit and reinterpret the "Monnet method" (1976).

- How did the idea of constituting a *European market* emerge? It arose out of the belief that economic conflicts between France and Germany were at the origin of the two World Wars. Consequently, to encourage *lasting peace* in Europe – a funda-

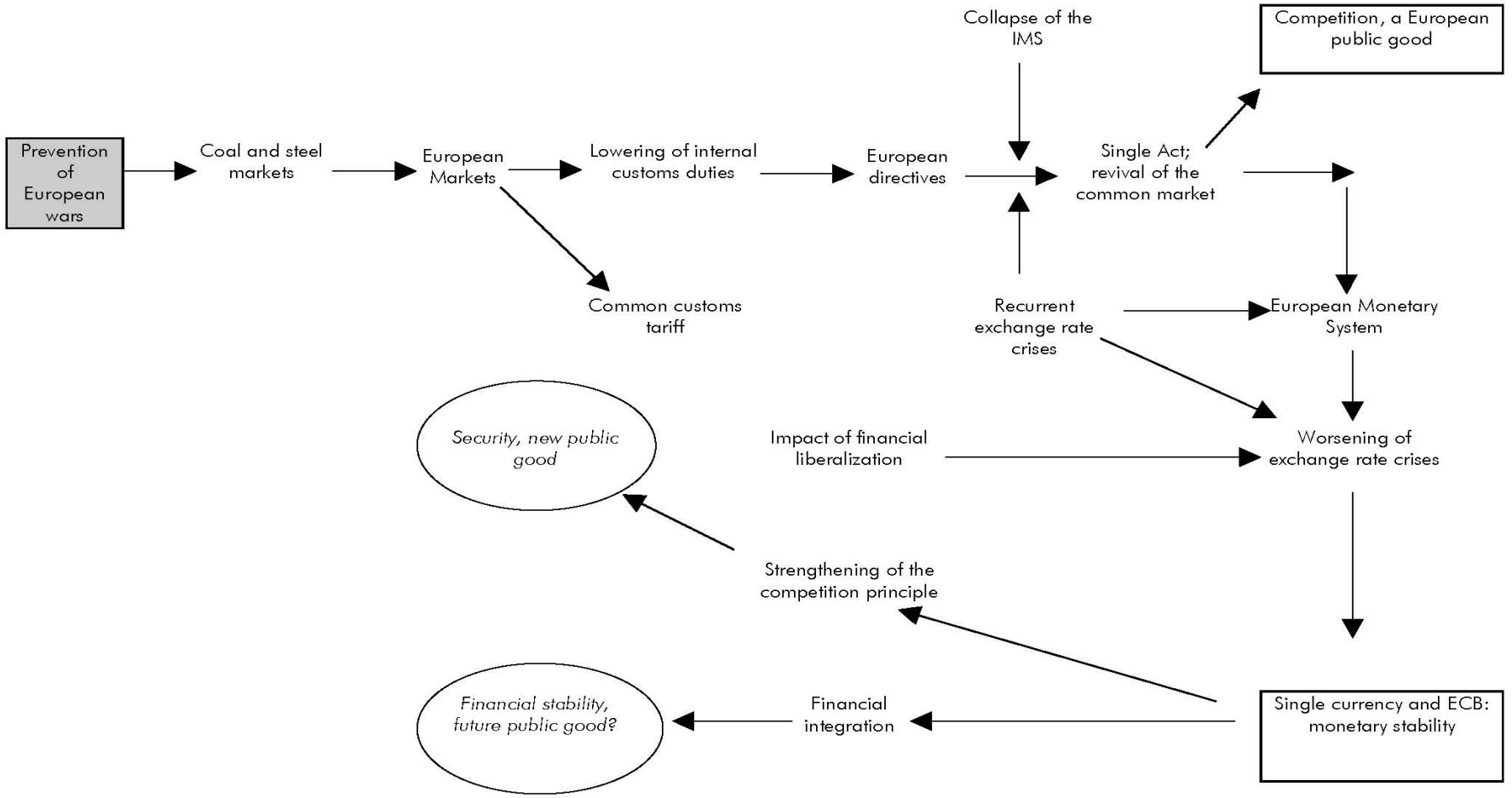
mental public good –Jean Monnet's idea was to "use the economy", in the hope, already expressed by Joseph Schumpeter (1919), that democratic countries that trade with each other will not resort to war as a means of resolving their conflicts. Thus, the public good of maintaining competition in the European common market was born out of the search for another public good, peace in Europe. This complementarity widened in the 1990s with rising awareness of the fact that the economic prosperity of Europe could be seriously jeopardized by the multiplication of wars on its current borders, whence the search for *common diplomacy and defence* to preserve the public good constituted by peace in Europe.

• This method, which has sometimes been described as *functionalist*, has been used continually by the European Commission to extend its competences, provoking objections from regional and national politicians in the process. Thus, during the 1980s, *the preservation of the common market* presupposed the establishment of another public good: *internal monetary stability;* the transition to flexible exchange rates and then financial liberalization provoked recurrent exchange rate crises between the member countries and readjustments that threatened to undermine the principle of the single European market. In a way, the long path to exchange rate stabilization started with the institution of the European Monetary System. The crises worsened, and the need for a single currency, proposed as early as 1970 in the Werner report, found an outcome in the Treaties of Maastricht and then Amsterdam, which instituted the euro and delegated its management to the European Central Bank (ECB). Thus, the public good represented by monetary stability in the Union is, in one sense, a consequence of the continual defence and extension of competition within the European market.

• In turn, European monetary unification has encouraged the redeployment of financial assets and incited mergers and acquisitions of banks and financial organisms beyond the limits of national borders. Consequently, the monitoring of banks and financial systems that has traditionally been performed by each national authority, often under the supervision of the Central Bank, may prove to be inadequate and unsuited to the task of dealing with a transnational crisis, all the more so when the crisis is large-scale and brutal, as is the nature of financial crises. The running of monetary policy by the European Central Bank presupposes the good

health of banks and the financial sector; its operations would be paralysed if confidence in the financial stability of Europe were brought into question. This analysis allows us to make a prediction: the question of *financial stability* as a European public good will inevitably arise during the next decade.

FIGURE 1: THE CONSTITUTION OF A EUROPEAN MARKET, GUIDING THEME IN THE EXTENSION OF COMMUNITY COMPETENCES?



## The primacy, centrality and driving force of competition in the internal market

These three examples bring to light a relation of hierarchy, rather than complementarity, between the principle of competition and European public goods. The constitution of the internal market has constantly generated externalities and called, as a consequence, for the creation of new European public goods. This process can be considered the *driving force* behind European integration. The history of the United States illustrates this process: modern federal competences owe much to the extension of the competition principle in the internal market to new domains through jurisprudence. Consequently, what Figure 1 presents as a set of partial complementarities appears rather to define a process of integration, thanks to the gradual constitution of inter-related European public goods.

Nonetheless, a word of caution is required here. The diagram could suggest that the successive steps were in some way the necessary consequence of this founding act, once the initial political impetus had been given. But history is rich in symbols and examples of processes of integration that have been abandoned after ambitious starts. There are certain stages during which a crisis in integration (often connected with the lagging behind of certain European public goods or of coordination between member states) could just as easily bring the process to a halt, or even call the whole construction into question, as result in a desire for further strengthening. Consequently, the institutional response of national and European politicians is not determined solely by the economic context when they react to the new interdependences created by integration (Moravcsik, 1998). The blocking of the ratification process of the European constitution bears witness to this ambiguity. And this last observation brings to light another shortcoming of the public goods approach: it *overlooks the political processes* that are supposed to respond solely to the search for greater economic efficiency. Economic theory deals with the management of public goods rather than their emergence, and therefore with institutions already in existence rather than the conditions that brought them about. For its part, law also deals with developments in the allocation of competences, but through a genetic and historical approach, at odds with the method of economists, whose strength, and at the same time weakness, is that they pass over historical time.

## The conception of public goods is marked by strong path dependence

Few public goods, recognized as such by economists, survive through different historical periods and become established everywhere. We need look no further than the modern period, where systematic international comparisons bring to light notable differences in the conception of public goods, the legitimate sphere of public intervention or the organization of public services. Indeed, a recent synthesis of the literature concludes that it is useful to expand the current standard definition "...by distinguishing between a good's potential to be public – based on its properties of non-rivalrousness and non-excludability – and its actual publicness in consumption, which is often a social construct" (Kaul, 2006, p. 33). Additionally, history shows the diversity of trajectories leading to the successive recognition of a series of public goods: individual freedom, internal security, access to education, and so on. In terms of European integration, there is little doubt that what are considered Community public goods have never ceased to evolve in response to changes in national economic structures and the growing importance of interdependences between member states . Even if the constitution and extension of the common market appear as a constant in European Community strategy, other considerations have widened the domain of European public goods: monetary stability, the recognition of fundamental social rights, and so on.

This is not simply a lesson to be drawn from history: theoretical formalizations can also give an account of transformations in the composition of European public goods. For example, at a certain stage, the configuration of interests is such that the member countries can agree to finance a public good at the European level; however, subsequent increases in standards of living and in the heterogeneity of preferences are likely to call this agreement on the arbitration between public and private goods into question (Feinstein, 1992). This type of analysis is all the more important as the very success of the European integration process encourages new countries to join the hard core of founding members. Once they have entered the Union, these countries discover that the allocation of competences in accordance with the *acquis communautaire*[6]

[6] This is a French term meaning essentially, "the EU as it is", in other words, the rights and obligations that EU countries share. The "acquis" includes all the EU's treaties and laws, declarations and resolutions, international agreements on EU affairs and the judgements given by the Court of Justice. Candidate countries have to accept the "acquis" before they can join the EU and make EU law part of their own national legislation.

comes nowhere near satisfying their own interests, so they call for renegotiation. This can herald the start of an endogenous, fundamentally political process of renegotiating public goods and their appropriate levels.

## Complementarity between different public goods influences the allocation of competences

Public goods theory suffers from the shortcoming of treating each good separately, without taking into account the interdependences that can emerge from their gradual constitution. The complementarities in question may have one of two origins, either functional or strategic, resulting from a process of negotiation (Ben-Ner, 2006). In the first category we can classify the strong relation between the promotion of competition in the common market and the stabilization of exchange rates between member countries. The creation of the CAP, on the other hand, can be interpreted as compensation for the opening up to competition of national industries: this is an example of strategic complementarity. Likewise, structural funds are the necessary complements to the enlargement of Europe to include countries with lower competitiveness and standards of living. The difference is that functional complementarity defines a force of attraction that imposes itself over a long period, whereas strategic complementarities are subject to negotiation. This is helpful in explaining several stylized facts. The doubt then centres on the character of the pure public good instituted by the strategic complementarity, unless the imperative of social cohesion is included among the public goods that are constituted and then preserved at the European level. This is the essence of the question of a social Europe.

In this way, the concept of complementarity between public goods brings to the fore the historicity of the European process of integration and the existence of different trajectories in the allocation of competences within the various federal structures. When we compare the experiences of Germany, Canada, the United States and Switzerland, we can appreciate the powerful influence of political processes in the allocation of competences and jurisdictions (McKay, 2001). It would, however, be going too far to deduce that each configuration is specific: recent research in political science has reduced the importance of the path dependence model (Crouch, Farrell, 2002), which was developed chiefly in relation to the adoption of technologies with increasing returns (Arthur, 1994). One of the lessons to be drawn from the legal analysis presented in the

following sections is that the defence of the public good of competition in the internal market has had a powerful structuring effect, beyond the considerable differences between the political process of the constitution of US-style federalism on the one hand, and the Community method on the other. It has to some extent eroded the political specificities governing the decision to pursue economic integration.

## There is no political equilibrium in a system of majority decision

Once the different public goods have been identified, the question arises of the optimum quantity of each of them that the public authorities should provide. In a regime based on majority voting, public choice theory imposes very strict constraints for the existence of equilibrium: a stable set of quantities of public goods in accordance with the expressed wishes of the majority. These conditions concern an electorate strictly limited to people situated in the zone within which the public good has its effects, a two-by-two comparison of all the possibilities of public demand for each public good (Condorcet procedure), the one-dimensional nature of each public good (each good is characterized by one sole criterion of choice) and, finally, the "unimodality" of each individual's choice function (one sole function). It is hardly realistic to envisage the organization of electorates for each public good, which would take an inordinate length of time and provoke many disputes (about the identification of people likely to be concerned by the decision, or the weighting of votes in relation to the intensity of each person's interest). Very few public goods can be considered one-dimensional, in particular because of the high level of interdependence between public goods; as all public goods entail choices about social justice (especially redistribution), they do not respect the condition of unimodality of preferences. The conclusion of this analysis is well-known: in the general case, the economic theory of public goods is not associated with a democratic decision-making regime. It is only compatible with a decision-making system based more or less on what the theory itself calls tyranny: the will of one.

## Three main failings

The purely economic analysis of the distribution of competences in Europe is impeded by three obstacles.

• Most often, economic theory does not take the *historicity* of processes of integration into account. Adopting a functionalist point of view (every rationally-justified European public good is or will be effectively instituted), the economist often overlooks the endogenous and constructed character of public goods and externalities. For example, for countries to benefit from a common defence capability, they must believe that their interests and destiny are shared in the face of the international environment. Adopting a common currency means more than just minimizing transaction costs and reducing the uncertainty in the formation of exchange rates, it is a *de facto* affirmation of economic solidarity and therefore of common interests expressed through economic policy. This explains why some of what the economist considers "natural" public goods are never instituted (European transport, for example), while others, born out of political compromise, end up constituting a *de facto* form of solidarity – is this not the case for European farmers and the CAP?

• For the sake of convenience in formalization, economic analysis favours the idea of the *separability of public goods*, even if they are recognized as being *interdependent*. This is illustrated by the trajectory of the European market, which, starting from the principle of competition, has produced a whole series of other public goods: monetary stability, security in the use of goods, and probably, in the future, financial stability. A certain path dependence thus becomes apparent, even if the development of economic integration reveals, in most cases, a similarity in the allocation of competences. The following section explores this theme through a comparison between European and US developments and jurisprudence.

• In principle, economics favours the idea of *non-cooperative strategies*, even if the objective is to explain how and under what conditions the rational pursuit of self-interest by each agent leads to cooperation. Retrospectively, the Monnet method consists in promoting *explicitly cooperative strategies* by using deliberation and political discussion to build a convergence of interests. This cooperation is then materialized in the form of Community measures, thus liberating it from the perils of opportunism that characterize *homo oeconomicus*. This brings us into a different domain from that of the microeconomic theory of pure public goods.

This is precisely the domain within which the legal approach operates, and we shall now give a brief overview of this approach and relate it to the economic analysis.

# THE LESSONS TO BE DRAWN FROM THE LEGAL APPROACH

The legal procedure is pragmatic, because it has to deal with conflicts within a given configuration for the allocation of competences, and at the same time performative, because it affects the development of this construction through jurisprudence. But the concepts involved are more diversified and subtle, for history plays a central role, and the most important factor is the long-term dynamic of the principles underpinning this division of competences.

## Judges possess a large share of the competence over competences

In a federal legal system, three main instruments can be used to modify the allocation of competences, particularly in response to the changing conditions of their exercise: modification of the fundamental text; (conditional) extension, by the Union's legislative body itself, of the competences devolved upon the Union by the fundamental text or by the jurisprudence of the Supreme Court, in other words the judges; respect of the fundamental text by the authorities.

• *Modification of the fundamental text* is long and difficult. In a union of states (or a federation), it entails the widest possible, or even unanimous, agreement of the member states of the union. In this respect, the European Union remains more inter-governmentalist than federalist. The different organs of the Union play no part in the decision making; the modifications must be adopted unanimously and ratified by the member states according to their national procedures. Moreover, when it transfers a competence to the Union, it must, at the same time, define the decision-making procedures and the precise objectives to be followed by the Union.

This method has *three disadvantages*: it makes the devolution of a competence to the Union practically irreversible; it binds the competence and its objectives too tightly and precisely by synchronizing and merging the modification procedures, and it blocks the attribution of more governmental competences to the Union, if it reserves the monopoly over final decisions for governments.

• In the European Union, as in the United States, the fundamental text provides for the legislative body of the Union always to have the possibility of *extending the com-*

*petences* given to it by the Constitution, if it requires this increase in power in order to exercise the competences expressly vested in it by the fundamental text.

In the United States, the constitutional measure that grants this power to Congress is the "Necessary and Proper clause".[7] In the European Union it is *Article 308* (formerly art. 235). Admittedly, the mode of functioning is different (recourse to it is explicit and the Council can only "authorize" itself such a move by unanimous decision), but in practice the Council has never felt itself constrained by these obligations and the Court has never sought to persuade it otherwise.

• In a political system of law, respect of the fundamental text by the authorities is always placed under the control of a fully independent jurisdiction (*Supreme Court*, *Constitutional Council, Court of Justice*, and so on) whose decisions are imposed without appeal on all authorities. The allocation of competences is no exception to this absolute rule; normative texts are often subjected to its censure on the grounds that their authors (the Union, the States of the Union) lack the appropriate jurisdiction. This gives the Supreme Court considerable resources for shifting the borders of competences through its decisions. When a political authority considers a decision of the Supreme Court to be unfounded, unwelcome or dangerous, there is one legal path it can take to reverse the decision. It can call on the Court itself to undertake the modification of the supreme text. No other means exists or could exist in a State of law. Any possibility of appealing against a decision of the Court of Justice concerning the allocation of competences (or, more generally, the decision of the judge) before a political body, even an *ad hoc* or specialist body like a "third house" or a "house of subsidiarity", as some have envisaged, would strip it of all its authority. This loss of authority would severely unbalance the European political order and paralyse the Union, even in the domains where it appears to be well established today, such as the internal market.

In principle, the power of such a court is very limited: its standards are imposed by the fundamental text, with regard to which, in theory, it only possesses a *power of interpretation.* This interpretation is itself restricted by principles written into the fundamental text. The court is only allowed to make decisions of an individual nature, bear-

[7] "Necessary and Proper clause", Art. 1, section 8, at the end of the federal Constitution: "*The Congress shall have power […] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.*"

ing on specific cases, without ever being able to impart a regulatory character to its rulings, even if they may have more general implications; its decisions must, in any case, be grounded on clear, stable principles; finally, it is always possible that subsequent reform of the fundamental text might challenge its decisions and weaken its authority. In reality, this power is very important and its exercise by federal supreme courts, especially in the United States, has produced a theory of the allocation of competences that is both rigorous and flexible and that has served as a lever for the transfer of entire domains of competence from the States to the Union.

## A complex intellectual construction

For jurists, competence is not an indivisible elementary particle having the same relation to the theory of political responsibility as the atom had to the old theory of matter. It is a combination of several different criteria. Constantinesco (1974), in a study that remains a reference today, suggested that six main criteria should be taken into account.

• *The organic criterion* differentiates between different competences according to the type of distribution of responsibilities between the organisms involved: is such a responsibility unique or shared amongst several bodies? If the latter, is there a hierarchical relation between the different bodies involved?

• *The genetic criterion* separates the competences according to their source, distinguishing chiefly between attributed and non-attributed competences.

• *The material criterion* is the one that generally dominates non-legal approaches. It is based on a *ratione materiae* definition of competence, in other words a domain-by-domain, sector-by-sector, or even activity-by-activity definition. It is itself far from simple. The contents of the competence can be more or less divided into elementary activities and particular domains. The activity itself can be divided into different types of action (prohibition, obligation, authorization ), phases of action (initiative, preparation, adoption, execution) and control (hierarchical or tutelary).

• *The teleological criterion* differentiates between competences according to whether their attribution to an authority is coupled with an objective or, on the contrary, delegated without any condition about the intended objectives. When there is an associated objective, the competences can be differentiated according to whether the objective is sectorial or global, or whether or not there is a specified deadline for attaining it.

• *The instrumental criterion* differentiates between competences according to the degree of freedom left to the responsible authority (whether or not the power is discretionary) and the types of legal action it is allowed to take (obligatory or non-obligatory; regulatory or personal).

This breaking down of competence into different constituent elements brings to light a large number of possible ideal types of competence: as many as there are different combinations of criteria. These criteria are unlikely to be independent. Few of the *a priori* possible ideal types are really independent. Two interdependences have particularly drawn the attention of jurists. The first is that which connects the sharing out of competences between the different political orders of the federal States (and the European Union) with the contents of the competences (material criterion), a phenomenon described by D. Simon (1998) as transmutation. The second is that which connects the distribution of competences between these different political orders with the bodies in which the competences are vested (organic criterion).

## Concurrent competences and absolute competences

Citizens' expectations about the allocation of competences in Europe could be satisfied by a clear answer to the question "who does what?", distinguishing precisely between exclusive competences (competences totally transferred to the Union by the member states), retained competences (exercised exclusively by the member states) and shared competences[8] (which can be exercised simultaneously by the member states and the Union). This classification protects the prerogatives of both the member states and the Union and at the same time guarantees the existence of exclusive and retained competences. In certain domains of "each to his own" public policies, this ensures that no incursions are tolerated. The existence of shared competences makes it possible to delimit the field of joint exercises in the action of the States and the Union.

From a political point of view, this classification is rational and well-balanced. As far as the rules of law of political responsibility are concerned, however, it is insufficient: it is unacceptable that this responsibility cannot be precisely assigned, making it impossible to answer the question "who does what?" for shared competences, and therefore for the exercise of a competence. On this point, law and public economics

[8] Sometimes called "concurrent", although this term has a precise legal meaning, as we shall see below. It should therefore be avoided when characterizing citizens' expectations with a different content.

agree, in recognizing that competitive or cooperative mechanisms alone do not enable arbitration of the distribution of public powers.

• Jurisprudence tolerates no exception on this point. Through the concept of "absolute competence", which lays down that power cannot be shared in law, although it can be exercised collectively, it prevents any possibility that public authorities might make contrary decisions or undertake contrary actions: it discards the concept of "shared competences" in the sense usually given to it by a citizen of the United States. This principle of "absolute competence", the cornerstone of the whole construction of the allocation of competences, was laid down by the Supreme Court in the very first case dealing with the question. The Gibbons ruling (1827) observed that competence in the sense of power to act or to make others act is a monopoly; once an authority has been attributed a competence, it has this competence fully at its disposal, and it is not entitled to undertake anything outside of it.[9]

• In Europe, this ruling has inspired the whole jurisprudence of the Court of Justice of the European Communities (ECJ), although it has never been laid down expressly in a ruling of principle. To settle the classic question of whether member states can legislate in a domain transferred to the Union before the latter has itself legislated, the ECJ invoked the principle of absolute competence.[10] Likewise, when it observed that when the Union possesses segments of competences far removed from the execution of an action (for example, a competence of simple coordination in the preparation of an action), the exercise of these competences by the Union is legally binding (cases 281, 283, 284, 185, 287/85, cited by Lenaerts, 1988, p. 47).[11] Obviously, once the Union has accomplished its task, the degree of real constraint (the effect of the Union's coordination on the action of each member state) depends solely on the member states, separ-

[9] This interpretation of the ruling accords with the classic doctrine, which considered that "*the question of the scope of the competence that the federal constitution grants to Congress by this measure remains separate from the problem of the possible implicit limitation of competence of the States resulting from this attribution of competence to Congress*" (Lenaerts, 1988).

[10] In the ERTA ruling, the Court gave a classic definition of the principle of absolute competence: "*. . . the member states only keep their competences as long as the Community has not exercised its own, in other words effectively laid down the common normative measures. On the other hand, when and to the extent that the Community has effectively established such regulations, the member states lose all competence to legislate at the same level*".

[11] "*When an article of EEC treaty, in this case article 118, entrusts the commission with a precise mission, it must be accepted, if the measure is not to lose all usefulness, that by the same article it also, necessarily, vests the commission with all the powers indispensable to the accomplishment of this mission*".

ately ("community spirit", "European habitus", and so on) or collectively ("peer pressure").

## Distinguishing between the competence and its effects

Once the idea of "shared competences" has been discarded, the question arises of the way in which the distinction should be made between the competences of the States and those of the Union. This is why jurists have gradually created the concept of "concurrent competences". To do so, they have added the teleological criterion to the criterion of "material" delimitation (*ratione materiae*) that is supposed to separate competences perfectly into those of the Union and those of the member states: the allocation of competences no longer depends solely on the policies themselves, but on their interdependences and objectives.

The criteria of the judge, which form the basis for the distinction between exclusive competences and concurrent competences, can be seen most clearly in the practical approach adopted to settle a concrete conflict of competences (Table 3).

- For the judge, the prerequisite for any analysis of the division of competences is the determination of the *ratione materiae* boundaries of competences, which serve as the foundation for his or her reasoning, independently of their reciprocal influences.

During this preliminary stage, the judge refers to the fundamental texts intended to draw the line perfectly between those competences that are by nature national (the national public good of the economy) and those that are by nature federal (federal public good, by nature). This demarcation is generally founded solely on the material criterion. When the competences transferred to the federation or Union are listed in the constitutional text (by the treaty), as is the case with the United States Constitution, the judge obviously refers strictly to this list, otherwise he or she must infer this list from the fundamental text. This preliminary determination is never sufficient, however, because the reciprocal influences of the competences are such that an authority making a decision in one domain often encroaches on a connected domain, and this must also be taken into account. To what extent is this encroachment legitimate? The judge will answer this question differently according to whether the competences involved are national or Union, and he or she is less interested in the policies themselves than in their reciprocal effects. By demonstrating the inadequacy of the material cri-

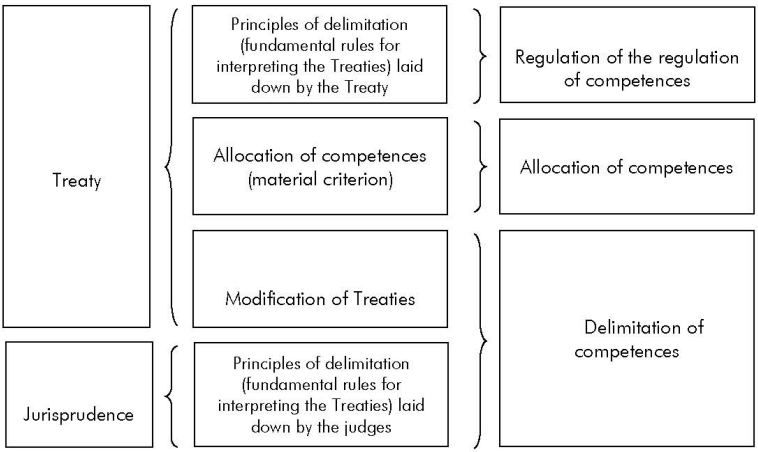
terion for the demarcation of competences, this approach confirms the inadequacies of the economic theory of the allocation of competences founded solely on the concept of public goods, itself based entirely on the material criterion.

• Within a domain of competence attributed to the federation or Union, two zones must be defined:

–a zone of *independent competences,* which have no effect on the other zones;

–a zone of *reciprocal-effect competences,* which affect and are affected by other zones.

TABLE 3 – FROM THE DIVISION TO THE DELIMITATION OF COMPETENCES




It is only at this stage that the distinction between exclusive and concurrent competences is introduced. It is used not only in the field of reciprocal-effect competences, but also in that of independent competences. Nevertheless, the distinction has different contents in each of these two zones.

•In the zone of independent competences, a distinction must be made between:

– the zones in which the states can never set the norms, even when the Union does not do so, and

– the zones in which the states can set the norms when the Union has not done so.

- In the zone of reciprocal-effect competences, it is important to:

  – define which competence prevails over the other when there is a conflict, in the absence of a hierarchy between political orders (fundamental federal principle), in which case the hierarchy of competences is a substitute for the hierarchy of orders;

  – define the rules governing the exercise of competences by each order, so that the attribution of competences using the material criterion is not nullified by the judge's rulings on the delimitation of competences;

  – differentiate, as in the zone of independent competences, between exclusive competences (one authority cannot fix a norm, even when the other authority has not done so) and concurrent competences (one authority can fix a norm when the other has not done so).

This system of distinctions, drawn from the experience of the United States and very similar to that used by the European judges, can be reconstructed from the jurisprudence. It has never been truly and exhaustively made explicit, either by judges or doctrine. Both judges and doctrine have confined themselves to the distinctions between absolute, exclusive and concurrent competences.[12]

## The principles used by US judges for allocating competences

To make these distinctions, judges refer to rules drawn from texts or from judicial precedents that greatly weaken the final influence of the material criterion in the allocation of competences. These rules endow the competences transferred to the federation or the Union (therefore commercial integration) with a strong power of attraction over

[12] In the United States, the question of "concurrent competence" has been identified as that of "*the silence of Congress*": in what cases can the states legislate or not legislate in a domain that has an effect on a domain of competence of the Union, and when Congress itself has not legislated? This criticism of the doctrine of concurrent competences, by Thomas Reed Powell, quoted in Lenaerts (1988), is most eloquent in this respect. "*At present, Congress has a marvellous competence that is only known to judges and jurists. Congress has the power to remain silent. Congress can regulate inter-state commerce quite simply by doing nothing. Obviously, when Congress is silent, it takes an expert to know what it means. But judges are experts. They say that by remaining silent, Congress sometimes means that it is saying nothing and sometimes that it is saying something*".

the other competences and a major role in the objectives assigned to the Union in the implementation of the competences that have been transferred to it (in this case, for the European Union: the free circulation of goods between the different states).

- The first principle is that of supreme jurisdiction, which accords normative supremacy to laws properly enacted by the federation or Union.
- The second principle is that of the *Necessary and Proper Clause*, which gives the federation or the Union the capacity for all the norms required to attain the objectives it has been given in the fundamental text and in the domains of competences devolved upon it. Through this fundamental principle, the material criterion on which the judges' reasoning is based is called strongly into question by the subsequent step, which aims to make the material criterion operational, in all the cases where conflicts of competences are likely to appear, all the more numerous when the integration of the internal market is at stake.
- The third principle is that of the *Interstate Commerce* clause, which gives the federation, or the Union, every competence in the sphere of the regulation of commerce between the federated states (the member states).
- The fourth fundamental principle is that of the *Less Restrictive Alternative* clause, which obliges the judge to ensure that the result targeted by a rule enacted by a member state could not be achieved through rules that encroach less on the powers of the Union.
- The last standard laid down by the principle of limiting the judge's possibilities of transferring competences to the Union is the "*reservation of competences*" clause, which protects the powers of member states in domains that have not been delegated to the Union. This aims to limit all the potentialities of transfers conveyed in the preceding principles.

## Legal parallelism between Europe and the United States

The experiences of economic integration in the United States and in Europe remain very different. The political systems cannot be compared. Even the measures for the allocation of legal competences written into the US Constitution and the Treaty are far removed from each other (Table 4). The Treaty, in particular, contains no clause

comparable to the US "*supremacy clause*". It contains, on the contrary, numerous clauses explicitly reserving certain competences for member states.

And yet US and European judges have arrived at almost identical jurisprudential solutions. The paths followed have therefore been very different, starting from dissimilar texts and converging on the same point of equilibrium. This is what can be seen in the jurisprudential dynamic in Europe and the landmarks of US jurisprudence.

TABLE 4 – A COMPARISON BETWEEN TWO JURISPRUDENCES: SUPREME COURT AND ECJ

| Delimiting principles written into the Constitution or laid down by the Supreme Court | | Delimiting principles written into the Treaty or laid down by the ECJ | |
|---|---|---|---|
| Constitution | Supreme Court | Treaty | ECJ |
| Supremacy clause | | | Direct effect (Costa vs Enel,1974) |
| Necessary and Proper clause | | Art. 308 (ex art. 235) | |
| Interstate commerce clause | | Art. 81 (competition rules) | Commission vs French Republic, 1969 |
| Reservation of competences clause | | Art. 5 (ex art. 3B) Reserved competences | |
| Loyalty clause | | Art. 10 (ex art. 5) | |
| | Cumulative effect | | Brasserie de Haecht judgement (1967) |

It is the Court of Justice, through a Praetorian jurisprudence drawn from an extensive interpretation of the Treaty, that has gradually endowed the Union with the legal resources equivalent to those which figure in the US Constitution. In this respect, certain judgements appear particularly influential.

• In the Costa vs ENEL ruling (1964), the judge established the primacy of Community law in all its generality.[13] This primacy was also ruled to apply to prior national laws (SA. Simmenthal, 1976) and to European laws concerning a competence not transferred to the Community (Walt Wilhelm, 1969), in the name of the unconditional and irrevocable nature of the commitments made by member states.

•In the Brasserie de Haecht ruling (1967), the Court adopted the "cumulative effect" doctrine of the United States Supreme Court, by extending the Union's competence to national actions of which the effects may remain strictly national, but of which the generalization could infringe on the primacy of Union law.

The European judge is not unaware of US jurisprudence, which constitutes an element of reference and a source of inspiration. Nothing obliges him or her to give it priority, especially since this jurisprudence was late in attaining a point of doctrinal equilibrium, at the end of a long and winding path.

## From the allocation to the delimitation of competences: the judges' role

A clear distinction must be made between the allocation of competences – written into the fundamental text and based mainly on the material criterion, assumed to be capable of separating competences transferred to the Union from those that have remained national – and the delimitation of competences – the principles of which are partly written into the fundamental text, but the implementation of which favours the criterion of finalities and is a matter for the judges (Figure 2). Because of this, the judges are led to arbitrate between the different finalities, precisely through observation of externalities stemming from the implementation of the allocation of competences. Consequently, jurisprudence may emerge that calls into question what would have been produced by the simple projection of the texts codifying competences in the local space, that is, the space in which the players express themselves day to day.

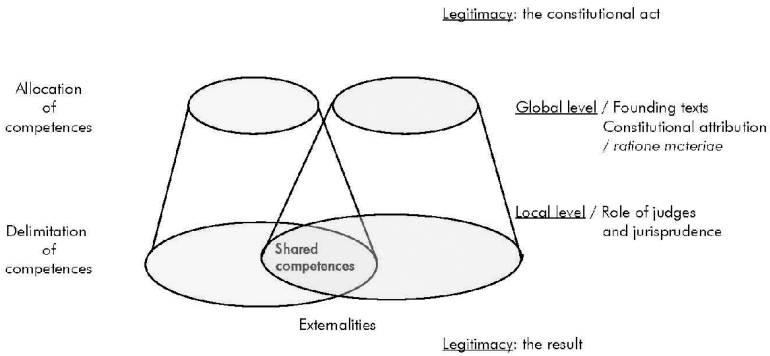
There is nothing absolute about this distinction. The "border control" performed by the judges may only have a marginal effect on the large equilibria between the

[13] " *… the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question"* case 6/64, Costa vs. E.N.EL., 15 July 1964.

blocks of competences reserved for the different political orders, and authorize, or even provoke, significant redistributions of territory.

Thus, the US experience shows that judges can, by means of the delimitation of competences, exert a decisive influence on the main blocks of allocation of competences specified in the fundamental text. Thus, it was on the grounds of the Union's competence in commercial matters that the US judges allowed Congress to legislate in the social domain and in the domain of fundamental rights, in the name of legally and economically fragile theories (the "Cumulative principle" and the "Protective principle").

FIGURE 2 – FROM THE ALLOCATION TO THE DELIMITATION OF COMPETENCES
JURISPRUDENCE AS A RESPONSE TO EXTERNALITIES BETWEEN DOMAINS




There is nothing inevitable about this continual dynamic of attraction of competences towards the centre. In the United States, it required specific institutional and political conditions: a strong Congress, no explicit reservation of competences for the States in the Constitution, close coordination between the Supreme Court and Congress, a common law culture and, finally, a severe economic crisis.

None of these conditions exist in Europe: there is no Congress, the European Parliament is weak, the Treaty explicitly protects certain State competences, legal tradition attaches greater importance to texts than to their interpretation by judges influenced

by public opinion or an evolving public conscience and, finally, Europe has never had to face a crisis as brutally devastating as the 1929 crisis in the United States.

## Politics opens the prospect of various forms of federalism

Legal analysis thus produces a paradox at the heart of the process of European integration and the formation of federalist systems.

• On the one hand, if the analysis focuses on the *process*, the development of competences results from a dynamic, the origins of which can be traced back to an initial political decision for integration, and the implementation of which has affected the strategies of all the players involved. Conflicts then spring up between the consequences of this objective of integration and local legal and regulatory frameworks. The judge must then interpret how the exercise of competences can be made compatible, most often by means of a process of negative integration, seeking to remove the obstacles in the path of integration. To clarify certain ambiguities and reduce this friction, the federal authority in the United States, or the Community authority in Europe, can legislate or issue directives provisionally re-defining the rules of the game. These new rules in turn shape the strategies of the agents and provoke other conflicts that the judge must arbitrate. Thus, a spiral movement is imparted to the integration process. This sequence can be observed equally well in the United States as in Europe.

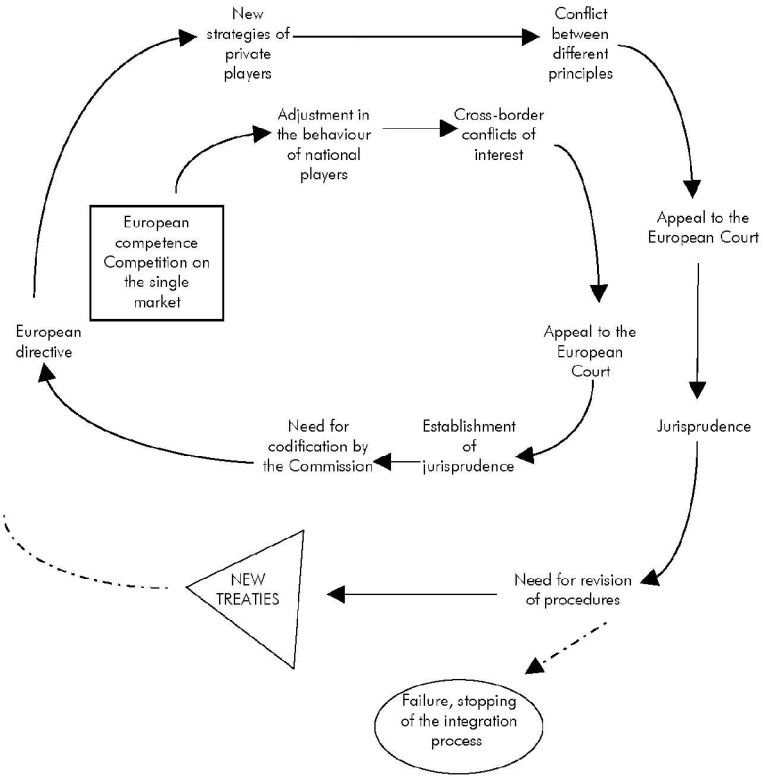
A second similarity can be found in the central role played by the constitution of a common market in the evolution of the allocation and delimitation of competences. A recurrent conclusion of various stages of reasoning, this view has been confirmed by institutionalist research into European integration (Fligstein, Sweet, 2002). From a meticulous analysis of the spheres of trade, actions brought before the ECJ, the directives issued by the Commission and, finally, the intensity of lobbying activities, it can be seen that these four sequences link up over time with three key periods: 1958, date of the Treaty of Rome, which launched the integration process; the 1970s, period of acceleration in this movement and emergence of a jurisprudence; and finally the mid-1980s, when the integration process was revived. Within each of these stages, the same causality can be observed between legislation, proceedings brought before the ECJ and the intensification of lobbying. Figure 3 illustrates this approach with a spiral diagram, describing the inter-relations between the economic, legal and political spheres.

• On the other hand, the *result in terms of the allocation of competences* is not the same in the United States and in the European Union. Admittedly, European integration is much more recent than US federalism, which has unfolded over more than 200 years. Moreover, the founding principles are far from identical, so that history continues to play an important role. This explains, for example, why the US federal government has been attributed exclusive competences in diplomacy and defence, while the history of the European nation states easily explains why the second pillar of the Community[14] only developed very much later. Finally, much depends on the way political parties are organized, for they play a determinant role in the allocation of competences in the federal states, as highlighted by a comparison between certain federalist systems (United States, Canada, Australia, Germany and Switzerland). One original feature of the European Union is that it has not yet developed a European political arena: despite new attributions granted to the European Parliament, the great majority of political debates for national public opinions continue to take place within the parliaments of each country. We can understand, in addition, why "intergovernmentality" and the issuing of directives by the European Commission play the role they do. It is even reasonable to consider that the Open Method of Coordination (OMC)[15] is nothing other than an attempt to surmount obstacles to the formation of a European government in due form.

[14] The "second pillar" is the common foreign and security policy, where decisions are made by the European Council (made up of the heads of state of all the EU countries, plus the President of the European Commission).

[15] The open method of coordination encourages member states to learn from each other by sharing information, adopting best practices and aligning national policies.

FIGURE 3 – THE SPIRAL OF EUROPEANIZATION: TREATY, DIRECTIVE, JURISPRUDENCE... AND SO ON



This is why a comparison between European integration and US federalism is not very illuminating on this point. Can the absence of a federal tax system be taken as sufficient grounds to argue for the extreme fragility of European cohesion and the inability to follow effective macroeconomic stabilization policies? Economists are often tempted to do just that, presupposing the existence of an optimum model on the one hand, and treating the functionalist need for stabilization as the impetus behind European integration on the other (Tondl, 2000). In any case, it appears that the political style has a significant influence on the architecture of powers and competences, because amongst different federal systems, we can differentiate between those founded on competition between member states and those which, on the contrary, organize cooperation between the different levels of responsibility. It may be that the European Union is constructing yet another form, which some observers have been tempted to summarize in terms of the method that has developed over the last ten years to surmount the obstacles to a "communitization" of European intervention: the Open Cooperation Method (Table 5).

From the point of view of economists who, by vocation, focus on efficient equilibria, or managers, who look for best practices (in order to implement them by means of the decision structures specific to a firm), none of the three configurations – competitive federalism, cooperative federalism, nor open cooperation method – deliver better results, whatever the context or the indicator. This echoes a central message of institutionalist economics: institutions have the property of defining the relations between players and channelling expectations and strategies; as a consequence, they are not selected according to a criterion of efficiency (North, 1990). Institutional complementarity renders a simple piling up of best practices impossible and serves to explain a strong path dependence that is, therefore, not necessarily archaic or irrational.

This confrontation between law and economics makes it easier to identify the tensions running through the European construction today.

## TABLE 5 – EUROPEAN INTEGRATION: FEDERALISM OF THE THIRD KIND?

| Configuration / Characteristics | Federal system | | European Union |
|---|---|---|---|
| | Competitive | Cooperative | Open Method of Coordination |
| Competences placed in common | • Defence, diplomacy<br>• Currency, internal market | • Defence, diplomacy<br>• Currency, internal market | • Coordination of defence and diplomacy policies<br>• Currency, internal market |
| Tax | • Federal and state<br>• Wide autonomy of states under the constraint of tax competition | • Federal and regional<br>• Coordination through institutional measures | • Exclusively national, then transfers to finance the European budget |
| Infrastructure policy | | | • Responsibility of nations (although transport belongs to the Community domain) |
| Strong points | • Limit to the expansion of public budgets<br>• Possibility of experimentation | • Maintenance of solidarity between regions | • Flexibility of peer control procedures<br>• Harmonization around common objectives |
| Weak points | • Risk of a race to the bottom<br>• Possible collective under-investment | • Difficulty of reform<br>• Possible brake on innovation | • Sometimes problematical effectiveness of the open-cooperation method<br>• Absence of a decision-making centre in the face of urgency and arbitration |

# TOWARDS A RECONSIDERATION OF COMPETENCES: A CONVERGENCE OF FACTORS

There are several arguments in favour of a reform in the allocation of competences.

## The growing doubts expressed by public opinion and local politicians about the legitimacy of Europe

In national political debates, decisions made in Brussels are often blamed for changes imposed independently of the will of the government involved… despite the fact that in many domains the decisions are made unanimously or by consensus. Furthermore, spectacular interventions involving European circulars contradicting long-established practices and laws managed at a local level to provoke recriminations levelled at what opponents call the "Brussels bureaucrats". More fundamentally, particularly high abstention rates in European elections bear witness to the fact that citizens generally do not identify with the European project. The victory of the "no" vote in the French and Dutch referenda on the EU constitution appears to have been a means of punishing institutional advances as much as the present allocation of competences. These doubts about the European construction cover at least three different domains.

- Whether they be citizens, representatives of regional authorities, defenders of the autonomy of states in federal systems or of the law proper to member states, some players are worried about *unwarranted transfers of competence*. On this point, pro-Europeans invoke a principle of efficiency, grounding their argument not only on the objective, written into the Treaty, of "ever closer integration", but also on the jurisprudence of the ECJ. Governments themselves stoke up these recriminations when they present reforms that they have actually endorsed as a constraint imposed by Brussels, hoping thus to legitimate unpopular reforms that would otherwise be blocked by the national political process. The same goes for the countless European regulations and norms that prove to be inappropriate because of their excessive preciseness or difficult application. Finally, in federal states, the states protest at being dispossessed of their prerogatives under the cover of Europe.

• The *European Commission* has suffered a *loss of confidence*, especially due to affairs such as the resignation of the Santer commission, following an investigation into allegations of corruption and misuse of public funds involving certain commissioners. The Prodi Commission, helped by the vigilance of the European Parliament, established internal control procedures, but the efforts deployed to this end almost certainly detracted from the Commission's capacities of stimulus and proposal. The Barroso Commission has not produced the hoped-for boost, especially compared to past Commissions that served as a driving force in the construction of the common market and then the single currency. The increasing number of European agencies, conceived as independent administrative authorities, has contributed to this loss of confidence in the Commission. On the one hand, this forms part of a very general trend that can be observed throughout the world, for specialization by domain and the novelty of the problems raised often exceeds the competence of traditional ministerial departments. It would thus be useful to reduce the intermediaries between the decisions and the players affected. On the other hand, this can express distrust of the organization of the Commission itself. The creation of the European Central Bank is emblematic of such delegation and of a legitimacy originating in the application of a treaty. Moreover, the new types of externality and cross-border spillover effects have led to the creation of independent European agencies,[16] tending to reinforce the idea that the Commission is trying to manage old problems with the use of outdated methods. Nevertheless, these independent European administrative agencies are the only bodies capable of meeting the new expectations of the public and professionals concerned. This erosion of legitimacy jeopardizes the efficiency of proposals that would in all other respects be perfectly viable and appropriate.

• Finally, national public opinions can get the impression that *pressure groups*, often representing powerful economic interests, exert great influence on the decisions of the Commission and the legislation introduced by the European Parliament. Although populist discourse stresses the excessive size of the Brussels bureaucracy, the reality is quite different, because, lacking their own resources of information, the best the Commission departments can do is to set the different pressure groups in competition with each other so that they reveal relevant information, providing a basis for decisions by administrative officials far from the daily

[16] A recent example is provided by the European Safety Agency.

practices they are meant to supervise (Stéclebout, 2000). In this respect, some analysts have suggested the possibility of an evolution towards a US-style configuration, marked by the omnipotence of pressure groups over the formation and choices of politicians, despite the fact that the latter are elected by the citizens (Streeck, Schmitter, 1996).

## A mixed track record, a difficult assessment

If the criticisms described above are expressed in the political sphere, those involving efficiency are more likely to be levelled by economists concerned with examining the extent to which the present organization approaches a social optimum. The two concerns may come together, insofar as the efficiency of the Community's management can help to increase its legitimacy. Even if European processes are far from being transparent, they would be more easily accepted if they contributed to an improvement in the situation of Europeans, thanks to a boost in growth, a fall in unemployment or an extension of fundamental rights.

- The first source of questioning concerns the quality of the management of *European programmes* within the framework of the CAP and structural funds. The Commission has no direct administrative power, unlike a federal agency in due form, so the quality of supervision of these programmes leaves something to be desired, as it is entrusted to national or regional authorities. The criticism is that the results achieved by a European authority are not necessarily better than those achieved by application of the subsidiarity principle, given the extent of the inefficiencies and management costs.

- In this context, the general trend is to create *independent Community agencies*, intended to be in closer contact with the activity they supervise, and therefore more flexible… but of course also more susceptible to capture by pressure groups. If we adopt this point of view, then we should examine closely each of the functions of the European Commission, in order to arbitrate between direct management or delegation to one of these authorities. The whole question then revolves around the precision of the objectives, the means and form of supervision of these independent administrative agencies by the political authorities. This emergent form of public goods management has repercussions on the architecture and allocation of competences.

• Could reference to the *acquis communautaire*, meant to ensure the equality of conditions governing competition in the common market, be detrimental to the adaptation of European economies, in certain cases? There is no guarantee that the stratification of directives, norms and regulations will ultimately define a system of incentives favourable to growth and innovation. Here again, case-by-case analysis is required, because we can just as easily find European norms that have favoured European competitiveness (the mobile telephone boom in Europe benefited from a definite competitive advantage) as interventions born out of long and complex negotiations that compromise European firms and innovation to satisfy consumer demands.

• The question of the efficiency of the *Common Agricultural Policy* remains open. Originally a constituent element of the European integration process, are its objectives and modes of intervention still appropriate, given the significant fall in the proportion of the active population living from farming, new imperatives in terms of food quality and safety and advances in agricultural technologies? The same question hangs over *structural funds*, which have fulfilled their function in many cases and shown their limits in others, calling for a comprehensive reflection on the means of encouraging real convergence, in other words convergence in the living standards of member countries.

## THE NEXT STEPS IN EUROPEAN FEDERALISM

Two radically contrasting sets of conclusions can be drawn from this long list of the shortcomings to be found in the present European Union. For some observers, there is no doubt about the cause: the European construction has reached its zenith, so that it is now fated to reduce its ambitions in favour of a *rationalization* of the *acquis communautaire*. The failure to obtain unanimous ratification of the European constitution project appears to support this point of view, which is widely held internationally. For others, including the authors of this article, it is through these crises that economic integration has moved forward. The urgency of the problems is a source of major innovations and advances, so it is reasonable to expect a forthcoming revitalization of the EU Community spirit – and there are plenty of projects to get on with.

## Satisfying new demands and organizing the interdependences of member states

An institutional architecture may be legitimate and efficient at a given moment in time, but a series of structural developments involving social changes, technologies, the spatialization of activities, and so on, can then deprive the construction of its relevance and coherence. The 1990s were marked by just such a turning-point in the development of economies (the collapse of Soviet-type regimes, the intensity and new direction of innovation, financial globalization, a shift in paradigms of production, the different aspirations of new generations, the rise in problems of security, and so on), requiring a redefinition of the allocation of competences, which has suffered the slow stratification of European systems and procedures since the 1950s.

- The *introduction of the euro* has had very powerful effects on many institutions and forms of organization. Thus, the centralization of monetary policy by the ECB has revived the question of whether procedures of *coordination of national budgets* are necessary, given that the authorities are faced with a dilemma. On the one hand, the national budget should be able to respond to the national economic situation and the specific shocks experienced by the country. This entails a certain independence in respecting the rule limiting public deficits to a maximum of 3% of GDP. On the other hand, the consolidated position of all the budgets of the member states is an important indicator, which both the ECB and the international capital markets must take into consideration. In this case, beyond the technical and political difficulties, this is a domain of shared or at least coordinated competences. In a way, this was recognized by the reform of the Stability and Growth Pact, under the pressure of the growing number of failures to respect the 3% limit, even by the countries that had originally promoted this clause (Boyer, 2006b). Likewise, the definitive fixing of exchange rates has affected the management of capital and financial investments, so that we can expect an intensification in financial integration on a European scale. Will the *supervision of the European financial system*, which remains the responsibility of each national authority, continue to be viable if cross-border movements generate powerful externalities that dictate the establishment of Community-level financial and banking supervision? Along the same lines, the question has arisen of the homogenization of taxes on financial flows, because of their mobility between countries with differing rates of taxation. As an extreme, one could imagine *Europe-wide taxation* of the most mobile factors, paying for

a specific European budget. In short, the introduction of the euro, which is often taken to be a solution of continuity with regard to the stabilization of intra-European exchange rates, actually marks the emergence of new externalities and public goods.

• In itself, *the enlargement of the European Union* raises the problem of institutions, decision-making procedures and the allocation of competences. The number and heterogeneity of member countries are both growing, a fact which argues *a priori* for *reduced or at least different competences* being attributed to the Community. Enlargement may also entail an increase in transfers connected with the CAP and/or structural funds, tensions that could bring onto the European agenda a debate about the suitability of maintaining these measures. In the same way, application of the *acquis communautaire* faces two dangers. On the one hand, if satisfaction of the criteria is only formal, a *de facto* heterogeneity might develop, which would be harmful to social cohesion, especially in the application of social rights. On the other hand, strict application of the *acquis communautaire* could compromise the competitive advantages of the new members and induce such serious problems of adjustment that the very legitimacy of belonging to Europe might be questioned by public opinion and certain "nationalist" political parties. Likewise, if the mobility of goods and capital is guaranteed, was it legitimate to impose restrictions on the mobility of people, which is one of the most attractive characteristics of Europe for many citizens of the candidate countries?

• Should the promotion of *new social rights* be a Community prerogative? *A priori*, application of the principle of subsidiarity and observation of powerful and diverse national traditions both argue in favour of decentralized management of this competence, at a national or regional level. Looking at the question from another angle, however, one might consider that to rebalance the European construction, of which the guiding theme has been the construction and subsequent extension of the common market, the important thing is to promote new employees' rights. As a matter of fact, negotiation between the social partners has indeed furthered European directives – in terms of gender equality, the right to information or telework, for example – which have then to be transposed into national legislations. The open question is that of the generalization of this capacity of the European Commission to intervene in social legislation, if only through the OMC. In this connection, the question arises of the method of revising competences and their shared or coordinated form of application.

Lastly, we should not overlook the long-term impact of the perception of the *failure of the common foreign and defence policy*, despite the favourable context. From the perspective of public goods theory, there is no doubt that defence and diplomacy should be Community attributes for the same reasons as the currency. The whole difficulty resides in the fact that national interests are not necessarily compatible with the definition of common objectives, because strong national traditions persist in foreign policy matters. The difficulties experienced by European governments in coordinating their response to Kosovo, Iraq, the reform of the UN, or Iran and the Israel—Palestine conflict, have highlighted both the scale of the political and institutional obstacles to be overcome and the need for Europe to find a common strategy. This provides a striking contrast with the emergence of a European prerogative endowed with the authority to apply policy. Defence and diplomacy illustrate the open character of the allocation of competences in Europe.

## Forecasting the formation of new European public goods

A comparison between the legal analysis and the economic approach brings to light a remarkable convergence in their response to a central question: what is the driving force behind the integration process of regions and federal systems? The answer is the preservation and extension of the principle of *competition in the common market* constituted by the dismantling of barriers inherited from national and local traditions. This is the common feature in the history of the United States and the European Union. This public good has given impetus to a whole series of other domains involving technological norms, the harmonization of indirect taxation, subsidies to the economy, the management of exchange rates, the harmonization of educational qualifications, and so on. If we adopt this point of view, then it is possible to predict the emergence of new public goods at the European level. One of these will involve *financial supervision and security*, now that cross-border operations are developing and incorporating the financial markets, previously limited to each national territory. Second, the issue of the *mobility of citizens* and the portability of social rights as conditions governing the admission of migrant workers raises the question of a Community-wide *immigration policy*. Finally, increasing interdependences between member states raises

the question of EU foreign policy and the defence policy associated with it, to preserve the public good of peace throughout the continent.

In another domain, that of services of general interest (SGIs), the ascendancy of the competition principle poses a formidable problem (Herzog, 2006). SGIs have been established as public goods within a national context. Two major transformations have affected the production of these services. First, changes in needs, especially under the influence of the *informational and technological revolution* (transport, energy), necessitate a reconsideration of both their supply and their financing. Second, pursuit of the construction of the single market and the corresponding process of *liberalization* affect private sector services to begin with, but then, potentially, a large number of public services, instituted by national laws that have no equivalent in Community law on SGIs. This poses the question of *Community recognition* of SGIs. The problem is that for services of a social, non-market nature to remain outside the field of market competition, it is not enough simply to institute them at a Community level, if only because there is no equivalent at this level of the pressures and struggles that have led to their recognition and incorporation into public and social law within each member state. Consequently, there is a danger that the companies entrusted with the task of producing services of general economic interest (SGEIs) will be subjected to the general principle of competition.

The conversion of the various national SGIs into one Community SGI is therefore most problematic, but the emergence and rising awareness of new public goods opens prospects of institutionalization. This is the case, for example, for the policy on innovation, the impact of growing cross-border problems associated with immigration, or the energy policy.

## Energizing *European* research and innovation

The completion of the single market was supposed to trigger a revival in economic growth, thanks to reduced transaction costs, the exploitation of returns of scale, and the stimulation of innovation. In reality, these gains have been particularly mediocre, suggesting that the maintenance of free, unhindered competition is far from being a sufficient condition for a return to strong growth.

First of all, empirical studies have shown that the strongest stimulation of innovation is not associated with the highest degree of *competition*, but that an *optimum* level

exists, somewhere in between extreme competition, which deprives firms the capacity to finance spending on research and development, and cartelization, which dries up the sources of innovation (Aghion, 2002). This result supports the idea that externalities connected with research and innovation in companies necessitate correctives and supplements to the market, so that some form of cooperation is necessary: this was and still is organized on a national level, whereas the externalities reach beyond the national context, especially with the increase in minimum required investment in many sectors (biotechnology, pharmaceuticals, aeronautics, energy, and so on). Ideally, knowledge should be managed on a world-wide level (Henry, 2006), but the scale of the conflicts of interest over appropriation of the profits obtained from innovations associated with advances in knowledge suggests that regional bodies may be the most suitable level at which to resolve this dilemma.

Second, research into the *sources of growth* suggest that Europe as a whole suffers from under-investment in the scientific sphere (Soete, 2002), for want of public policies along the lines of those pursued in the United States or Japan. One variation of this analysis argues that European growth during the "Golden Age"[17] was largely a matter of catching up with the technological and organizational advances made in the United States (Sapir, *et al*; 2004). Today, the institutions inherited from that era are compromising the future of European growth, particularly in countries like Germany, Italy and France (Boyer 2004). The conclusion to be drawn is clear: the majority of national and Community policies need to be reassessed with regard to their impact on long-term growth and the capacity for innovation. *A priori*, some technology policies should be conducted at a European level in certain domains or sectors, at the very least in relation to the nature of the externalities involved (Rodrigues, 2004).

Some national initiatives aiming at a renewal of the objectives and tools of the *policy of industrial innovation* could set a process of Europeanization in motion. The creation of the Agency for Industrial Innovation in France testifies to the growing awareness that the competition policy is insufficient, because it is far from inducing the coordination and cooperation between players required by the current course of innovation (Beffa, 2005). The corresponding procedures, open to all European companies, creates an incentive to transfer the management of such programmes to that level. A

[17] "Golden Age", or *Trente Glorieuses* as coined by the French economist Jean Fourastié, refers to the post-war period of 1945—75, characterized by economic expansion and prosperity for many countries.

first step in this direction has been taken with the creation of such an agency in Spain, thus preceding Italy. The Europeanization of innovation policies has been recognized as an important issue by the European Commission.

Paradoxically, the *Lisbon Agenda's* lack of clear success encourages a re-evaluation of the strategy that aimed to make Europe the most competitive economic space while preserving social solidarity through a reform of the system inherited from the period of strong growth (Kok, 2005; Pisani-Ferry and Sapir, 2006). On the one hand, the number of objectives considered as priorities must be cut drastically, in favour of one central objective: encouraging growth and employment through innovation (Rodrigues, 2004). On the other hand, the OMC has proved its worth as a means of developing coordination in specifically national domains of competence (education, pensions, employment, and so on), but it has, at the same time, stumbled over the lack of means available for the implementation of a soft law approach, in other words a set of rules of codes. whose enforcement relies exclusively on peer control, emulation and reputation effects. In a way, this observation shows, on the contrary, the interest of the *Community method* when interdependences are strong and explicit and constraining instruments are needed to attain a common objective. It may well be that much innovation policy falls into this category.

## Immigration: an incentive to the emergence of internal security as a European public good?

The domain of internal security and law entered the field of European integration almost by accident, through an effect of political impetus, or rather, by "mimicry" or "contagion".[18] The public good-based approach alone cannot explain why this public good *par excellence* only assumed a European dimension at such a late stage and why

[18] In Maastricht, just hours before the end of negotiations, the representatives of the member states realized that the Treaty covered every domain of public action except that of internal security (justice and police). In the integrationist (not to say quasi-federal) mood that prevailed at the time, this appeared as an unacceptable omission that should not, symbolically, escape from the domains of competences of the new Union. The departments of the interior ministries were asked to prepare a project as fast as possible. Never having imagined that such a request could be made, no project existed and the question had not been explored; it was therefore decided to take the least "Community-oriented" section of the Treaty as a model, that is to say the common foreign and security policy (CFSP); so it was that a third pillar, immediately recognized by specialists as being totally inadequate to the purpose, was introduced into the Maastricht Treaty.

it is at the heart of the present dynamic of integration: we need to take into account all the dimensions of public policies.

In a democracy, *judiciary and police* are two closely connected domains. The police force acts under the supervision of the judiciary and sometimes under its orders. Yet they are very heterogeneous: the police proceed by direct action, the judiciary by formal decisions. They are also asymmetrical: the police are more concerned with order than with the respect of liberties; the opposite is true for the judiciary. Finally, the police force is closer to the government, of which it is an instrument, than to the parliament, whereas the judiciary, although independent, is closer to the parliament, ensuring that decisions are respected.[19] Not being able to identify any clear distinction between legislative order and executive order in these institutions, and so not being able to envisage either their unity or their separation, it is natural that the integration of such an heterogeneous and fragmented domain as that of internal security should pose almost insurmountable problems for the building of Europe.

Today, the *pressure for integration* is strong and widespread. It is a direct result of the deepening of economic and social integration and the removal of internal frontiers concomitant with the establishment of the single market. Judges[20] regularly denounce the obstacles to the proper functioning of the judicial system (both on the side of repression and on the side of the defence of liberties and the fundamental principles of law) created by the coexistence of a space in which the circulation of people, goods and capital is entirely free and borderless, and therefore favourable to the contravention of national rules of law, and a space in which the circulation of acts (decisions, means of proof) and actions (capacities of pursuit, transfers of prisoners) is hampered by a tangle of protectionist barriers (national rules of law, limitations to zones of competence and to the movement of judges and police officers) unfavourable to the repression of these same contraventions. The balance between law and crime, between vice and virtue, is unequal.

Governments subjected to the security and identity worries of public opinion also deplore the fact that the disappearance of internal borders facilitates illegal immigration and could aid terrorism. Lastly, certain striking examples of legal injustice or in-

[19] Nevertheless, the independence of the police vis-à-vis the executive is also very strong, although it is more *de facto* than *de jure*.

[20] The Geneva Appeal, for example.

security in particularly sensitive domains (the fate of children in divorce cases) has created a new demand from people involved for European solutions to conflicts of laws over cross-border questions. The idea of "federal" offences or crimes, and therefore of equally federal laws and solutions, is quietly gaining ground. Paradoxically, the police are less vocal in calling for Europeanization, because of a long custom of informal inter-European cooperation in the field, admittedly limited but providing a certain independence when the clandestine nature of this cooperation liberates the actions of the police from the control of judges.

Having crept into the Treaty surreptitiously, the domain of security and justice now occupies an important place in the question of integration and the allocation of competences. *Considerable advances* have been made: significant domains have been "Communitized" (asylum, visas, illegal immigration; cooperation in civil justice matters); common tools have been introduced (Eurojust, Europol, recently Frontex to manage common borders, shared files of data have been created) the concepts are progressing, particularly those of the "mutual recognition"[21] of acts of justice and the "availability of information".[22] Nevertheless, many obstacles continue to slow down or block the transfer to the Union of this new European public good emerging from the functional and historic dynamic, which is reshaping the public space of the European continent.

*The dilemma of collective action* to which this domain of integration is subjected is very different from the dilemmas that Europe has had to resolve in other domains, especially economic and commercial ones: in the case of illegal immigration and asylum, for example, certain countries, guardians of the common external borders, may see no interest in cooperating if they are simply transit countries or doors of entry for illegal immigrants, or if they need foreign workers for demographic reasons. The sharing of responsibilities is difficult to manage successfully. The exchange of information is an essential feature of these policies, requiring absolute mutual trust; here again, any failure by a member state can jeopardize the whole system.

The stakes in terms of the domestic policies of each country are important: it is no longer the interests of one or another category of citizens that may be affected by a de-

[21] An act is recognized throughout the European Union as soon as it is recognized in one sole country.

[22] Any information possessed by one member state must be communicated, on request, to another member country.

cision in this domain, it is the whole national population; no other domain of public action affects public opinion so perceptibly or exposes national leaders to such an extent. Moreover, actions taken in this domain are often a matter of urgency (a sudden inflow of immigrants or the dismantling of an international drug network).

In addition, internal security policies have a very important external dimension: *immigration policies*, notably the expulsion of illegal immigrants to their countries of origin and the fight against terrorism, necessitate policies of close cooperation with uninvolved non-European countries deploying means of a very different nature (economic, political, and police), and require an integrated foreign policy which Europe has yet to acquire. Finally, the success of the policies depends not so much on the quality of their conception as on the quality of their operational implementation.

Thus, it is not the nature of the competence "internal security" or the cross-border dimension it contains so much as the conditions under which it is now exercised in member countries that explains why this competence was the last to be incorporated into the Treaty and why its cross-border elements have proved to be so difficult to transfer to the Union. In this area, then, Europe has come up against its principal current limits (Boyer, Dehove, 2001a and b on the government of Europe), involving not so much the *ratione materiae* allocation of competences as the allocation of competences in large blocks of powers and political functions (legislative, executive), characterized by the absence of an executive and governmental body or function specific to the Union. Indeed, the governments of the member states have always refused to endow it with its own independent executive and operational means, only accepting that a policy become European if they keep a monopoly over the practical implementation of common policies.

Up until now, the solutions chosen for Europe in terms of internal security have always abided by these principles. The whole European construction in this domain has used the resources of *cooperation and coordination*: there is no European Public Prosecutor; no federal police for cross-border crimes; no permanent common border control for the external borders (only *ad hoc* systems constituted of aggregated national resources made available on a voluntary basis); few common norms, but mutual recognition; no right of pursuit into foreign territory, but "liaison officers".

Does this strict executive federalism (in the sense of a process of decentralization) constitute a new form of government, and is it capable of meeting the ever more ur-

gent need for European solutions? At present, the answer is no, so obvious are the inadequacies of these solutions. Should we reinforce the same methods or should we go further and endow the Union with its own, independent operational powers? Without any doubt, this is the domain where the question of *European government* comes into play most strongly. The analysis we have just presented shows that it is more than just a question of the allocation of competences following the *ratione materiae* criterion, for all the criteria of public competence enter into the equation here.

## From the ECSC to energy security

The energy sector accumulates most of the *market failures* that economists put forward as arguments in favour of state intervention: the existence of natural monopolies and monopoly rents, network effects, important scale effects and very high entry barriers because of the heavy investments required, are all characteristic of the energy industry. With the role played by the state in European reconstruction after World War Two and the position of public companies in the social contract that prevailed during the "Golden Age", these factors explain why the production of energy in the member states of the Union was entrusted to public monopolies.

The same factors also explain why these national monopolies were able to survive and why energy production remained almost strictly national despite the potential advantages that European integration could have provided and still could provide: in particular, facilitating the management of peak demand periods (energy is hard to store and the pooling of available resources could help to deal with local demand peaks) and taking advantage of the negotiating strength represented by the weight of aggregate national demands in world markets, faced with cartels of oil- and gas-producing countries, not to mention the possible price reductions that one might expect in a more competitive system of production.

This *resistance to European integration* of the energy sector is all the more surprising when we consider that the common market was constituted as a sequel to the European Coal and Steel Community (ECSC), after the failure of the European Defence Community (EDC). Why were the same economic advantages and political benefits not hoped for from electricity and gas (according to the 1950 declaration, pooling the basic industries in the weapons sector would make war "not only unthinkable but impossible")? Still today, in the treaty on the Union, there is no specific chapter that could

serve as a basis for a European energy policy. This difference between the treatment of electricity and gas on the one hand and coal and steel on the other can be explained by the gradual strengthening of the intergovernmental conception of the Union, and also by the difficulty the Union has experienced in constituting pan-European public services comparable to the national monopolies that existed at the time and that seemed to be the sole guarantors of independence and security in the energy sector. The obstacles are numerous. They are political, to the extent that governments are tempted to defend national independence and/or the promotion of their own champions. They are also institutional because of the absence of a legal framework that could enable the establishment and management of services of general interest at a European level, a general problem encountered in the establishment of European public goods (Herzog, 2006). In addition, citizens do not have the feeling of belonging to a same community, which would be required for a completely centralized public service.

During the 1990s, several factors internal to Europe contributed to the emergence of a project to build a *Europe of energy*: the disparities between national energy costs, especially when they are high, constitute serious handicaps for high energy-consuming companies, particularly in a context of constantly rising profit norms and increasing competition. Here, we can see the integrative logic of an economic domino effect amplified by financialization. The prospect of the heavy investments that must be made during a period of replacement of old equipment, together with budgetary tensions, have worked in the same direction. In some countries, conservative governments are relishing the prospect of weakening trade union power through the modification of the status of the employees of national public monopolies.

These factors have been reinforced by the pressure exerted by the *complete transformation of the energy economy* on a world-wide scale. The increase in environmental questions, the need to limit carbon emissions, and the prospect of the absolute scarcity of traditional energy raw material resources have widened the scale on which energy questions are tackled and heightened the need for European (and global) cooperation. The globalization of the oil market, unlike that of gas, which is dominated by Russia, has also Europeanized the problem of the energy dependence of the member states. On top of this, the perception of danger that an energy crisis would have on the pursuit of growth is a powerful spur for re-examining energy policies, reaching beyond the national context.

These two series of factors combine to stimulate the preparation of a European energy policy, so that the Commission has developed its strategy along two main axes.

- A traditional axis, continuing along the lines of past developments, consists of the *liberalization* of the electricity and gas markets, following a specific model based on an allocation of competences weighted very much in favour of member states and a public service model relying on market instruments: free choice of their energy "bundle" by the member states, the separation of the production and transport activities of the historic suppliers, public service obligations imposed on private and public operators, and the coordination of national regulators. This liberalization was meant to be completed by July 2007. In reality, it has made *little progress* and has encountered serious difficulties. The interconnections between networks are weak, and to strengthen them would require massive investment that the Union cannot afford. Certain countries, often supported by public opinion and trades unions, are attached to the idea of implementing public services through the traditional method of state monopoly. The restructuring of national companies on a European basis raises, for the first time, the question of the nationality of European companies, the authenticity of the commitment to Europe of national governments and their populations, and the institutional form given to the management of European public services. With regard to the security of supply, the question arises of the links between energy policy and a common foreign policy. Is the present European industrial model, based on the low specialization of member states, suitable for the energy sector? If not, would a model requiring the increased industrial specialization of member states be acceptable for this strategic sector, and under what institutional conditions? How can a model of public service be institutionalized and given political legitimacy using market instruments, without a breakthrough in the legal sphere? It can be seen that the question of the *ratione materiae* allocation of competences favoured by the economic approach is also dependent, here, on the allocation of competences using the criteria advocated by the legal approach.
- The other development axis of European energy is founded on the *new questions*, of fundamental importance for the future, raised by today's energy economy: how can we prepare for possible oil shortages and the fight against

global warming? This calls for the reorganization of many public policies, with objectives such as increasing the energy efficiency of member states, developing new technologies for the reduction of greenhouse gas emissions or investing in research and innovation to limit such emissions. Here, Europe encounters *problems of coordination* that are more familiar, because the aim is to discourage non-cooperative strategies, through common standardization and incentives, so as to transform them into a shared interaction that can benefit everybody. There is just one added difficulty, but a formidable one, as the Union is entering the domain of the standardization of production processes instead of limiting itself, as it has done in the past, to product standardization. The Union has played an important role in changing the model of energy consumption, at least by preparing people's attitudes. By playing this pioneering role, it may well, ultimately, gain in legitimacy. Thus the stakes for the Europe of energy reach far beyond this individual sector, involving coordination with the strategy of innovation, foreign policy and even taxation. Once again, what is required is a three-pronged *political, legal and economic* approach.

## Evolving towards a new horizontal allocation of competences

Given the particularity of the process of integration through trade, European law is an especially complicated construction, tending to mix together everything that national legislations take great care to differentiate between: founding principles, laws, decrees and regulations. Consequently, there have been repeated proposals to revise the status of the various European treaty articles, by arranging the three corresponding levels into a hierarchy (Von Hagen, Pisani-Ferry, 2001). The advantages of such a move are obvious, although the task appears daunting. First, it would endow the European interventions based on these clear principles with greater *visibility,* and therefore *legitimacy*. This would, in addition, provide a response to the criticism of *democratic deficit* (i.e. that the EU's decision-making system is too remote from ordinary people who cannot understand its complexities and difficult legal texts) that has been levelled at the European construction, because it would enable the forms of political control at each of the relevant levels to be redefined. Second, such a hierarchical

organization would provide the clarification needed for a *redefinition of the horizontal allocation of competences* (Quermonne, 1999).

More precisely, this general principle could have two points of application.

• First, it would be a means of *reforming* more simply and quickly the *common policies,* which need revising because of their success – or in some cases failure. The most obvious example, of course, is the status and reform of the CAP, which could be broken down into different components ranging from the definition of *food security* to the preservation of the *rural environment*. Symmetrically, it may be important for the European Union to promote the coordination of policies for research and the diffusion of innovation, as explained above. Organizing the allocation of competences could be an essential objective of the tidying-up of the texts governing the European construction.

• Second, the European Union sometimes suffers cruelly from the lack of a government, both in the sense of an *executive* capable of reacting to events and unforeseen circumstances, and an *authority* capable of arbitrating between different objectives in decisions about the allocation of public resources or regulatory decisions affecting different domains (Boyer, Dehove, 2001a, 2001b). This includes the *economic government* of the euro zone, the arrangements made to ensure satisfactory coordination between European monetary policy and the decisions of national budgetary authorities. Although the ECB has received a relatively favourable appraisal for its first years of activity – it has more or less followed a Taylor rule-based strategy (Artus, 2002; Wyplosz, 2002) – we must not underestimate the coordination problems yet to be resolved in the running of monetary and budgetary policy, as evinced by the difficult and very imperfect reform of the Stability and Growth Pact ( Boyer 2006a).

# CONCLUSION: EUROPEAN INTEGRATION AT A CROSSROAD

## Politics, law, economics: combined approaches to federalist processes

The first conclusion we can draw from this study is that it would be wrong to depend on one single disciplinary approach to shed light on the European construction,

which we would be tempted to describe as *a four-stage* process. From the original political initiative, rapid growth in trade is followed by arbitration of the corresponding conflicts by judges, then by recourse to the legislator to establish new rules, and finally by competition between different pressure groups to determine these rules (Fligstein, Sweet, 2002). From this perspective, it is not the reductions in transaction costs or the static and dynamic effects of scale returns *per se* that are at the origin of the constitution of the single market. In the absence of European directives, the gradual evolution in jurisprudence and, above all, regular political revival of the integration process, these economic benefits would not have occurred. In this way, we can show that Europeanization is clearly differentiated from globalization by the fact that the cooperation of member states has played a decisive role in the increase in economic exchanges between them (Fligstein, Mérand, 2002).

Thus, *economics* often proposes an *ex-post rationalization* for a process that actually originated in the players' reaction to changes in the institutional context favouring the increase in exchanges within Europe. This might be different if economic theory were treated as a normative tool , exclusively concerned with improving efficiency, in the hope that the satisfaction of this objective will simultaneously ensure the legitimacy of an allocation of competences. Even in this case, the theorist must not confuse the function performed *ex post* by a public good with the conditions of its emergence, a remark that is especially pertinent to the question of international security and the emergence of a European defence identity. In this case, the *nature of the political processes* is essential, because they give rise to questions that become part of the European agenda and, above all, provide the solutions… even if the decision makers are only responding to the new interdependences created by market integration. For its part, *law* participates directly in the complex process by which private players adapt their strategies to the institutional changes resulting from political decisions made on both Community and national levels. The three approaches – political, legal and economic – must therefore be combined if we are to hope for a clear understanding of European integration.

## Recognized limits of the economic approach; the role of judges in regulating the allocation of competences

The second conclusion is that an observation of jurisprudence, whether in the United States or in Europe, should make economists diffident about affirming a *normative* foundation for the allocation of competences.

- On the one hand, a comparison between the predictions of public goods theory and the actual allocation of competences fails to confirm the intuitions and recommendations of economists. We cannot but recognize the *interdependence* of public goods, the role of *political* processes in the allocation of Community competences and, consequently, the historicity of European integration. None of these observations are refuted by analysis of the different forms of federalism (McKay, 2001; Nicolaidis, Howse, 2001).
- On the other hand, historical analysis brings out the *crucial role of judges* in the transition from the allocation of competences to their delimitation and exercise. Judges are well-placed to observe the conflicts of allocation and norms, and in certain cases to impart a significant change in direction to the institutional construction … even if the legislator then recovers the initiative by defining new rules, better able to internalize some of the externalities that systematically appear as a result of the splitting up of domains and the constant emergence of new interdependences.

## Dissolution into a simple free trade zone is not inevitable

The third conclusion is that judges do no more than interpret the intentions of the legislator and make rulings when they conflict in cases brought before them. The *impetus* for the allocation of competences therefore has a *political origin*. This obvious fact takes us back to the constitutional crisis sparked by the French and Dutch referenda. The novelty of the text represented a timid step forward in the clarification of the allocation of responsibilities. Should we infer that a more significant revision would be doomed to failure? Over the short-term, that is probably the case, but not necessarily over the long time scale that characterizes the building of Europe. It is precisely through major crises that the European Union has developed. Let us imagine that political and institutional innovation is the daughter of necessity, responding to a tangled thicket of contradictory pressures. Then the present juncture at which the *sui*

*generis* federalism of the European Union finds itself will not necessarily lead to the slow dissolution of the founding fathers' political project into a simple free trade zone.

# Bibliography


Aghion, Philippe (2002), "Empirical estimates of the relationship between product market competition and innovation", in J.-P. Touffut (ed.), *Institutions, Innovation and Growth,* Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 142-169.

Aghion, Philippe, Elie Cohen and Jean Pisani-Ferry (2006), "Politique économique et croissance en Europe", *Rapport du Conseil d'Analyse Économique*, n° 59, Paris: La Documentation française.

Allaire, Gilles and Robert Boyer (eds) (1995), *La Grande Transformation de l'agriculture : Lectures conventionnalistes et régulationnistes*, Economica-INRA.

Arthur, Brian (1994), *Increasing returns and path dependence in the economy*, Ann Arbor: The University of Michigan Press.

Artus, Patrick (2002), "La Banque centrale européenne à l'épreuve des faits", Rapport du *Conseil d'analyse économique*, Paris: La Documentation française.

Artus, Patrick and Charles Wyplosz (2002), "La politique monétaire de la Banque centrale européenne", Rapport du *Conseil d'analyse économique*, Paris: La Documentation française.

Beffa, Jean-Louis (2005)*, Pour une nouvelle politique industrielle,* Paris: La Documentation française.

Ben-Ner, Avner (2006), "For-profit, state and non-profit: how to cut the pie among the three sectors", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 40-67.

Boyer, Robert (ed.) (1999), *Le gouvernement économique de la zone euro*, Paris: La Documentation française.

Boyer, Robert (2004), "So close and yet so different... France and Germany in the European Union", in J.-P. Touffut (ed.), *France and Germany in the International Division of Labour,* Edward Elgar, forthcoming.

Boyer, Robert (2006a), "The Lisbon Strategy: Merits, Difficulties and Possible Reforms", Mimeograph CEPREMAP, 25 April.

Boyer, Robert (2006b), "The institutional and policy weakness of the European Union: the evolution of the policy mix", in B. Coriat, P. Petit and G. Schméder, *The Hardship of Nations*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 161-187.

Boyer, Robert and Mario Dehove (2001a), "Du 'gouvernement économique' au gouvernement tout court. Vers un fédéralisme à l'européenne", *Critique internationale*, n° 11, April 2001, p. 179-195.

Boyer, Robert and Mario Dehove (2001b), "Théories de l'intégration européenne: entre gouvernance et gouvernement", *La Lettre de la Régulation*, n° 38, Paris, September, p. 1-4.

Conseil d'Analyse Économique (1998), *Coordination européenne des politiques économiques*, n° 5, Paris: La Documentation française.

Conseil d'Analyse Économique (2000), "Agriculture et négociations commerciales", Rapport du *Conseil d'analyse économique*, n° 16, Paris: La Documentation française.

Constantinesco, Vlad (1974), "Compétences et pouvoirs dans la communauté européenne", *Librairie générale de droit et de jurisprudence*.

Crouch, Colin and Henry Farrell (2002), "Breaking the Path of Institutional Development? Alternatives to the New Determinism", Cologne, *MPIfG Discussion Paper* 02/5.

Deubner, Christian (1996), "The Franco-German relationship at the end of the century: from Europe to bilateralism?", SWP Ebenhausen, August.

Drazen, Allan (2000), *Political Economy in Macroeconomics*, Princeton: Princeton University Press.

European Commission (2005), "Working together for growth and jobs", SEC, 28.04.

European Commission (2006a), "Time to move up a gear", Annex to the communication to the Spring European Council.

Feinstein, Jonathan (1992), "Public Good Provision and Political Stability in Europe", *American Economic Review*, May, 82(2), pp. 323-329.

Fligstein, Neil and Frédéric Merand (2002), "Globalization or Europeanization? Evidence on the European Economy Since 1980", *Acta Sociologica*, 45, pp. 7-22.

Fligstein, Neil and Alec Stone Sweet (2002), "Constructing Polities and Markets: An Institutionalist Account of European Integration", *American Journal of Sociology*, 107 (5), March.

Gazier, Bernard and Jean-Philippe Touffut (2006), "Public Goods, social enactions", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 1-12.

Hagen, Jürgen von and Jean Pisani-Ferry (2001), "The delimitation of powers in the EU: rationale and pitfalls", Mimeograph, University of Bonn, October.

Henry, Claude (2006), "Knowledge as a global public good: production conditions and preconditions", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 137-148.

Herzog, Philippe (2006), "Services of general interest in a competitive multinational space", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 68-103.

Huntoon, Laura (1998), "Immigration to Spain: Implications for a Unified European Union Immigration Policy", *International Migration Review*, Vol. 32, n° 2, Summer, pp. 423-450.

Kaul, Inge (2006), "Public goods: a positive analysis", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 13-39.

Kok, Wim, *et al.* (2004), "Facing the challenge. The Lisbon strategy for growth and employment", *Report from the High Level Group*, Luxemburg, November.

Lenaerts, Koen (1988), "Le juge et la constitution aux États-Unis et dans l'ordre juridique européen", *Bruylant*, 1988.

Lucas, Robert E. (1983), *Studies in Business Cycle Theory*, Cambridge, MA: The MIT Press.

Masson, Paul (2000), "La coopération européenne dans le domaine de l'immigration", Rapport d'information Sénat, n° 438, 22 June.

McKay, David (2001), *Designing Europe: Comparative Lessons from the Federal Experience*, Oxford: Oxford University Press.

Milton, Brian (1991), "The McGuire Model and the Economics of the NATO Alliance", *Defence Economics*, 2(2), April, pp. 105-121.

Monnet, Jean (1976), *Mémoires*, Paris: Fayard.

Moravcsik, Andrew (1998), *The Choice of Europe*, Ithaca: Cornell University Press.

Musgrave, Richard (1959), *The Theory of Public Finance: A Study in Public Economy*, New York: McGraw Hill.

Nicolaidis, Kalypso and Robert Howse (eds) (2001), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford: Oxford University Press.

North, Douglas (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge and New York: Cambridge University Press.

Nozick, Robert (1988), *Anarchie, État et utopie*, Paris: PUF.

Obinger, Herbert, Stephan Leibfried and Francis Castles (2005), "Bypasses to a social Europe? Lessons from federal experience", *Journal of European Public Policy*, June, pp. 545-571.

Pisani-Ferry, Jean, and André Sapir (2006), "Last exit to Lisbon", *Bruegel Policy Brief*, March.

Quermonne, Jean-Louis (ed.) (1999), *L'Union européenne en quête d'institutions légitimes et efficaces*, Rapport Commissariat Général du Plan, Paris: La Documentation française.

Rawls, John (1971), *Théorie de la justice*, Paris: Seuil (1987).

Rodrigues, Maria J. (ed.) (2002), *The New Knowledge Economy in Europe. A Strategy for International Competitiveness with Social Cohesion*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar.

Rodrigues, Maria J. (2004), *European Policies for a Knowledge Economy*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar.

Saint-Paul, Gilles (1997), "Business Cycles and Long-Run Growth", *Oxford Review of Economic Policy*, 13 (3), Autumn, pp. 145-153.

Sapir, André, *et al.* (2004), *An Agenda for a Growing Europe: The Sapir Report*, Oxford: Oxford University Press.

Schumpeter, Joseph (1911), *Théorie de l'Evolution Économique. Recherche sur le profit, le crédit, l'intérêt et le cycle de la conjoncture*, traduction française (1983), Paris: Dalloz.

Schumpeter, Joseph (1919), "Zur Soziologie der Imperialismen", *Archiv für Sozialwissenschaft und Sozialpolitik*, 46, pp. 1-39.

Sen, Amartya ( (2000), *Development as Freedom*, New York: Anchor Books.

Simon, Denys (1998), *Le système juridique communautaire*, Collection *Droit fondamental,* Paris: PUF.

Simon, Rita, and James Lynch (1999), "A Comparative Assessment of Public Opinion toward Immigrants and Immigration Policies", *International Migration Review*, Vol. 33, n° 2, Summer, pp. 455-467.

Soete, Luc (2002), "The Challenges and the Potential of the Knowledge-Based Economy in a Globalized World", in M. J. Rodrigues (ed.), *The New Knowledge Economy in Europe. A Strategy for International Competitiveness with Social Cohesion*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar.

Stéclebout, Eloïse (2000), *Une analyse du lobbying informationnel: une application à la construction européenne*, Master's Thesis, "Analyse et politique économique", EHESS, Paris.

Stiglitz, Joseph (2006), "Global public goods and global finance: does global governance ensure that the global pubolic interest is served?", in J.-P. Touffut (ed.), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, pp. 149-164.

Streeck, Wolfgang and Philippe Schmitter (1996), "Organized Interests in the European Union", in G. Kourvetaris and A. Moschomas (eds), *The Impact of European Integration: Political, Sociological, and Economic Changes*, Westport (Conn.) and London: Greenwood Praeger, pp. 169-199.

Tondl, Gabriele (2000), "Fiscal Federalism and the Reality of the European Union Budget", in C. Crouch (ed.), *After the Euro*, Oxford: Oxford University Press, pp. 227-256.

Touffut, Jean-Philippe (ed.) (2006), *Advancing Public Goods*, Cheltenham, UK, and Northampton, MA, USA: Edward Elgar.

Wolf, Charles Jr. (1990), *Markets or Governments: Choosing Between Imperfect Alternatives*, Cambridge, MA, USA, and London, UK: The MIT Press.

Wyplosz, Charles (2004), "La Banque centrale européenne en quête de maturité", Rapport du *Conseil d'Analyse Économique*, Paris: La Documentation française.