Chapter 1

FEDERALISM AND RESPONSIBILITY

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Contents

PART ONE: THE NATURE AND PURPOSE OF THE RESEARCH PROJECT

I. Product Emergencies: The background to the research

The thesis which underpins the broadening of the project holds that product safety has its own intrinsic importance, but that it also acts as a window on broader issues in the development of the Community. In particular, the material gathered in connection with the case studies raised questions about the

possibilities and limitations of "Europeanisation" of enforcement practice. Both case studies had a cross-border element which presented problems for enforcement agencies which were simply insoluble without reference to the wider, integrating market. Through this lens, it is possible to see national structures undergoing a process of change. It is no longer feasible to focus exclusively on the national State as the sole protector of its citizens from unsafe goods in the light of the legal and economic developments which have denied national, regional and local authorities in the Member States competence to influence trade flows at their borders or even within their territories. Administrative structures too are driven to embrace the consequences of market integration. That might be summarised as a process bearing overtones of "federalism", in so far as that emotive and elusive term denotes a pattern of functions distributed among different levels in an organisation. The national State is changing its contours and simultaneously contours at a European level are slowly becoming better defined. If this is by nature "federalist", as the book's chosen title suggests, then it also demands a sense of accompanying "responsibility." A process which dissolves long-established State structures in favour of a European Community and, indeed, a European Union implies a need to allocate responsibility for at least some of these undermined traditional State functions to new (quasi-federalist) institutions.

These are questions which may be traced in fields as diverse as, for example, Environmental Policy, Social Policy and Industrial Policy. They are also questions which are pertinent to the difficult notion of the rights which may be enjoyed by the Citizen of the European Union, a status introduced but little elaborated by the Treaty on European Union[1]. This book identifies the recurring question as the need to specify which levels of government, Community, national and local, are empowered and obliged to offer protection to the Citizen. The Citizen should not be left vainly to strive to identify his or her source of protection as the process of market integration dissolves traditional State structures. The process of Market integration creates a need for the evolution of (at least) a kind of European administration. Structures of this nature are beginning to emerge. Yet, although piecemeal developments are occurring, the Treaty structure holds out only limited hope of planned development in that direction, even after the coming into force of the Treaty on European Union on 1 November 1993. In sum: the Market has altered more rapidly than the State; how can this gulf be supervised? Here is the core of Federalism and Responsibility.

1 Art. 8 EC.

II. Research Design and Methodology

II.i. Part II of this Book; the Four Steps in the Original Project

The original project was obliged to provide the Commission with very specific information about the identity, budget, telephone numbers etc. of agencies at the statutory, regional and local level which have competence in the field of product safety. At a more general level, the original project had to reconstruct the flow of information once an emergency situation occurs and to determine the criteria which influence the decision making process. The execution of the project was broken down into four steps, which are reflected within the national reports assembled in Part II of the book.

1. An elaboration of the legal mechanisms which are employed to regulate product safety in emergency situations. This had already been achieved in the previous ZERP project for three of the countries (UK, Germany, Netherlands), but it remained to be accomplished for Portugal and Spain.

2. An elaboration of the administrative structure and the organisation of the flow of information in the five Member States in cases of emergencies. A set of graphs has been worked out, which illuminates the way the law defines the structures, the flow of information and the decision-making process.

3. The execution of case studies in emergency situations: it was the purpose of the case studies to contrast the "should-be structure" of the organisation, established at stage 2) above, with the "as it is structure" in concrete emergency situations — the gap between law and practice. One case study was undertaken in the field of technical consumer goods ("exploding office chairs"), the other in the field of foodstuffs ("contaminated Austrian wine"). The case studies reconstructed events from the first information about a possible risk up to the ultimate decision. The case studies are integrated into the national reports and the events are presented in flow charts.

4. Based on the preceding stages in the investigation of the "should be" and the "as it is" structure, interviews were conducted with competent officials in order to discover discrepancies between law and practice. The purpose was not simply to isolate such discrepancies where they occur, but also to begin to explain them. The accumulation of this "personal" data in addition to the information already assembled through the national reports, including the case studies, ensures a broader and deeper perception of developing practice in risk management in the five Member States, much of which escapes formal a priori legal categorisation.

II.ii Part I of this Book; the European Level of Product Safety

After the completion of the project we felt the need to extend the project design beyond its comparative borders and to integrate systematically the European dimension. The idea was to apply the same methodology at European level, with one exception; we were not able to prepare a fully developed case study. The extension of the project unfolded its own dynamics. The results can be found in Part I of this book which is built on the data accumulated in the national reports, but is devoted to a much broader field of inquiry.

Therefore, this book contains in Part I a much broader appreciation of the nature of European law applicable to product safety. "Federalism in Process" describes and analyses how and why the management of product safety contributes to the building of a European State. Existing organisational structures within the Member States are overruled by means of emergencies. They break the legal and administrative structures and pave the way for a redistribution of competences. The appearance of a quasi-federalist structure is accompanied by a reshaping of responsibilities between the Community and the Member States. The means to verify this leading hypothesis is a re-interpretation of Arts. 30/36 and a close analysis of the Directive on General Product Safety.

II.iii The Supporting Graphs

Presentation of data in the form of graphs ought to facilitate understanding of the several elements in the study. They draw together data gleaned from both national reports and interviews. The graphs are designed to permit comparison between theory and practice in the management of emergencies. They are also a basis for comparison between the States chosen for investigation. Moreover they

permit the reader to concentrate on particular aspects which are of major concern to him or her, simply by identifying a specific topic and tracing its appearance graph-by-graph, with the assistance of the explanatory legend.

There are two types of graphs which have been employed; the ORGANISATIONAL GRAPH and the FLOW CHART. The Organisational Graphs concentrate on the relationships between individual organisations. In combination, these graphs make clear the networks of communications, procedures for information exchange and accumulation of information and decision making. These graphs include presentation of the hierarchical structures and issues of competence. The Flow Charts should be read against the background of the Organisational Graphs. The Flow Charts demonstrate how the organisations contribute to the management of a problem at different points in time throughout the process.

Although the national reports in Part II of this book will provide the reader with an adequate picture of the significantly different approaches taken by the Member States to product safety law and practice, the graphs will serve to highlight these differences in a more immediate and accessible form. This in turn will make it easier to grasp the background to the federalist notions which are the subject of examination in Part I of the book.

III. How we have used Product Safety as a Window on broader Issues

The general perception that product safety law and policy offered a window on to broader issues of Citizens' Rights and European State-building was the motivation to those involved in the accumulation of the material necessary for this project to pursue the project beyond the realms of information gathering. The case studies played a key role here. They made the "Europeanisation" of enforcement practice visible and comprehensible, due to their cross-border character and their cross-border cooperation. The development of product safety law and policy allows an appraisal of the allocation of responsibility for the management of product safety law and policy in an integrating market. State structures change under the influence of market restructuring. Whether that change is planned or not, willing or not, its occurrence has a direct impact on the citizen. This points towards broader questions which we feel are nothing less than the foundations of any current research into the law and practice of integration in Europe. This is Federalism and Responsibility.

The "Emergency" provides the focus for this study. The category of the emergency is enormously valuable as a motor for institutional restructuring. It has its own inherent momentum. Systems require perpetual revision because they cannot prepare in advance to cover all possible occurrences. So the system contains within itself an unavoidable, though in detail unseen, capacity for change. Because the emergency, by its very definition, demands a new response, it carries with it the potential for challenging and changing existing institutional arrangements. Reform is then directed by the need for change generated by the emergency and the pressures brought to bear on the system. We thus describe the emergency as capable of BREAKING the system — of forcing a re-systematisation.

That makes the process all the more challenging when a cross-border element is involved, because of the need to draw local, national and Community institutions into the process of re-definition. The cross-border emergency carries within it enormous potential for the generation of new solutions no longer confined by assumptions founded on and shaped by national institutional structures. The national systems are forced into a process of self re-evaluation where their experience in a European market context reveals inadequacy in existing national arrangements.

This issue as developed in Part I of the book is important in itself; it is also important for its role as a window on much broader issues of Federalism and Responsibility. We insist in this book on a process of renewal which public authorities (governmental, administrative and judicial) must confront for themselves when affected by the climate of European market integration. That nature of that renewal at national level will in turn heavily influence how the European State is built.

We examine the potential clash between the flexibility required in "hands-on" product safety management and the more technical approach which the Member States themselves take to drawing up legal rules. The national reports reveal some very specific examples of gulfs between theory and practice in product safety management. Professionals involved in risk management are opposed to rigid rules which circumscribe their autonomy in dealing with particular issues. Yet, in elaborating a Community dimension to management, that resistance to rigid rules may come into collision with State concern to define exactly and cautiously what happens at Community level. There is here a close connection to

the modern deeper sensitivity to questions of Community competence among many Member States.

The process of "Europeanisation" continues. Product safety has the potential to provide further insights. The next test will centre around the implementation of the General Directive on Product Safety[2]. That measure requires that only safe products shall be marketed within the Community. It envisages that Member States shall have at their disposal a range of enforcement powers. The Commission too shall have certain, albeit limited, powers. The Directive also establishes permanent procedures for the rapid exchange of information. Already that Directive has provoked a challenge to its validity. Even the relatively narrow competence to act conferred on the Commission has led to a challenge by Germany[3]. Germany disputes the competence of the Council acting under Article 100A to establish Community powers of the nature envisaged under the Directive. Germany considers that Article 9, the relevant provision, can be based only on Article 235. This would convert the voting rules in Council from qualified majority (Article 100A) into unanimity (Article 235). Even before a study of the national response to implementation of the Directive is fully feasible, the Directive will have yielded a Court decision of potentially significant constitutional impact. In short, the litigation will yield further insights into the limits of European State-building against a background of a well-developed European Market. That is, it is litigation which touches on the constitutional limits of State-building amid the economically inevitability of Market liberalisation.

The next challenge to the establishment of a European product safety has already taken shape. Again Germany is taking the lead. It refuses to implement the Directive because the Council has acted ultra vires in adopting the directive. As a defence Germany refers to the subsidiarity principle. The implementation of the directive would lead to an improvement of product safety in Germany. The subsidiarity principle is used here, as a means to escape the establishment of a European safety level and to maintain the lower national level. The federalist impact of the subsidiarity principle is striking and again it is product safety which is at the core of the issue.

The disputes, once resolved, will act as another building brick in the reshaping of the European State in response to the re-shaping of the European Market. Legal decisions of this nature have an important role to play in this process. At the

2 Dir. 92/59 OJ 1992 L228/24.
3 Case C-359/92 OJ 1992 C288/10.

same time, the process is also driven by the activities of professionals, including risk managers, at national level. Their response to emergencies, which break existing structures and demand renewal of institutional arrangements and habits, also form part of the broad pattern of State-building. It is a pattern which is strikingly well viewed through the window of Product Safety law and policy.

PART TWO: FEDERALISM AND RESPONSIBILITY — THE BROADER PICTURE

I. Introduction — why "Federalism and Responsibility"?

It is increasingly appreciated that an adjustment of responsibility for regulating the market must follow the restructuring of the market itself through integration. If the Community is taking clear shape as a Market, its shape as a State is far less well-defined — and much more controversial.

The perception that the market is changing and that such change demands an adjustment of the functions of public authorities responsible for regulating the market is, however, not more than a starting point. In fact, it is not more than the perception that has been plain to astute observers of the nature and purpose of the European Community for decades. Economic integration carries with it inevitable consequences for long-established assumptions about the "sovereignty" of nation States.

This leads into discussion of issues which are conveniently grouped under the heading of "Federalism". Integration causes a redistribution of functions between different levels of government. Member States and the Community itself enter into a relationship which will be characterised, albeit frequently by implication only, by sharing out areas of action. That implies that each will have distinct responsibilities. The construction of a federalist structure drives one to ask where the location of responsibility may lie. These are responsibilities for the proper performance of governmental and/or administrative tasks; and they are responsibilities which are owed to individuals. In the Community, individuals are, since the coming into force of the Treaty on European Union on 1 November 1993, both nationals of a particular Member State and also simultaneously Citizens of the European Union. This suggests a sharing of responsibility — perhaps even a doubling of responsibility. Yet, despite this rather grand dual status for over 350 million Europeans, federalism in Europe remains a rather nebulous, ill-defined concept in specific terms. The risk arises that responsibility too will lack a sharp outline. If that occurs, then both nationality and citizenship will be difficult to transform into specific, enforceable

rights. The Market will be dominant; the State, at whatever level, will be diminished. This is the inquiry denoted by Federalism and Responsibility.

II. Markets and Legal Systems

The thesis of this book is that all limbs of the Member States of the Community are obliged to undergo reassessment of their roles in the light of the steady emergence of a Community Market and the rather more erratic emergence of a quasi-federalist Community State. This reassessment affects legislative, administrative and judicial arms of the State. An inquiry is demanded into all manifestations of State activity. Yet such an inquiry would overextend an essay of this nature. Accordingly examination will here be limited to the change in the role of the national judiciary in response to the development of the Community. The obligations cast on national judges provide a fine illustration of the renovation of traditional national approaches which follows from the evolution of the Community. Yet this serves as no more than an illustration, for such renovation is called for in all areas of State activity. Judges, like product safety managers and many other public officials, find their autonomy within the State compromised by the process of Community integration. Accordingly, it remains implicit, and on occasion explicit, in this inquiry that the State beyond its judicial structure is confronted by parallel questions about how to adapt to the process of economic integration.

In the Community's legal order, the process of change which is naturally involved in consequence of membership of the Community has been strikingly reflected for well over thirty years. In Costa v ENEL[4] the Court explained that the very nature of the Community dictates the need for a legal system which is supreme:

> The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty...
>
> ... 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

4 Case 6/64 [1964] ECR 585.

> Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail..."

The Community is a new legal order. It has had transferred to it powers from national level. Accordingly and by way of corollary, national legal orders have also been subjected to a transformation. Their application is subject to the demands of the Community legal order. The search for sources of legal authority can no longer be directed solely at institutions internal to a State.

Inevitably such change in the perception of the place of the national legal order poses fundamentally important questions about the institutional make-up of the State. The impact of the Community goes far beyond constitutional legal questions. State structures which were built against a background assumption that a State has a degree of autonomy from pressures from outside the State's boundaries are plainly subjected to direct questions about their utility once the State's independence in legal, economic, political and perhaps even cultural terms is seen to be on the wane.

The growth of a Community Market has plainly forced adjustment in the national State. But does a Community Market imply a Community State? There are many differing visions of precisely how the Community should respond to the process of market integration. These visions range from deregulatory preferences which would emphasise the elimination of national intervention in the market (a "no-State" at Community level) to a readiness to see the development of replacement Community-level regulatory instruments and institutions (the Community State). There are many nuances which would need to be addressed in such an inquiry — neither Community "no-State" nor "State" are sufficiently sophisticated answers to the challenge of the Community Market. There is no need here to descend into the detail of such a debate to appreciate that membership of the Community forces a fresh examination of the nature and purpose of State functions and institutions.

III. The Court and the Development of the Constitutional Principles of the European Community

The European Court has played a major role in moving the Community along a continuum from Market towards State. A well-known yet illuminating instance is supplied by the development of the constitutional principles of the Community legal order in a manner which has maximised their effective application through national procedures and fora. Although in Comet v Produktschap[5] the Court declared that

> "it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law...",

that principle of "national procedural autonomy" has recently come to be perceived as subject to the increasingly prominent principle of "effectiveness". Drawn from Article 5, that principle requires authorities of Member States to act in support of Community objectives. In the case of courts, that means that the national judiciary must effectively protect claimed Community law rights. National procedural autonomy has been steadily eroded. EC law increasingly dictates what is required of national law in support of EC law rights. This EC influence dictates a need for adjustment of national legal approaches[6].

For example, in Factortame[7] UK courts were held competent as a matter of EC law to award interim relief against the Crown, despite the absence of such a power under national law. The English House of Lords responded by disapplying an Act of Parliament, which represented an enormous break with English constitutional tradition[8]. This "effectiveness" jurisprudence has been developed by the European Court's November 1991 ruling in Francovich v Italian State[9]. Directive 80/987 required States to set up guarantee funds to compensate workers in the event of their employers' insolvency. Italy failed to implement the Directive. Francovich was a worker who would have been protected had the

5 Case 45/76 [1976] ECR 2043.

6 Bridge, Procedural Aspects of the Enforcement of EC Law through the Legal Systems of the Member States (1984) 9 ELRev 28; Barav and Green, Damages in the national courts for breach of Community law (1986) 6 YEL 55.

7 Case C-213/89 [1990] ECR I-2433.

8 [1991] 1 All ER 70, [1990] 3 CMLR 375. Gravells, Effective Protection of Community Law Rights: Temporary Disapplication of an Act of Parliament [1991] Public Law 180.

9 Cases C-6, C-9/90 Francovich v Italian State judgment of November 19, 1991 [1993] 2 CMLR 66.

Directive been implemented. No claim arose via direct effect, because the Directive did not satisfy the conditions for direct effectiveness. Nonetheless the Court was prepared to countenance a claim for compensation brought directly against the defaulting State. The Court observed that

> "... the full effectiveness of Community provisions would be affected and the protection of the rights they recognise undermined if individuals were not able to recover damages when their rights were infringed by a breach of Community law attributable to a Member State."

How wide the ruling in Francovich will prove to be remains a matter of conjecture[10]. But, at the very least, it seems inconceivable that it will apply only to failure to implement Directives. The European Court will have the chance to elaborate on such matters in Factortame (the sequel) and Firma Brasseries du Pecheur[11], which concern violation of primary Treaty articles. The major test may prove to be the question of fault required for the purposes of Francovich liability. In any event, national legal orders will be obliged to rethink their rules relating to the financial liability of public authorities. The decision represents a further important element in the construction of the Community legal order and it demands a corresponding adjustment at national level.

Two observations arise from this brief survey of the "principle of effectiveness" which are of particular relevance to the subject matter of this book. The first relates to the pains taken by the European Court to give real vitality to the EC legal order at national level. Direct effect, supremacy and, latterly, the principle of effectiveness, all underpined by the Article 177 preliminary reference procedure, testify to the Court's vigorous concern to maximise the impact of EC law rights and obligations. The second, albeit related point, concerns the observation that the European Court is quite unafraid to demand in turn a vigorous response at national level. The Court expects national authorities — here, judicial authorities — to act in the context of their EC law obligations. They are not able to retreat into national patterns of behaviour as an excuse for failure to support the Community. It is Article 5 EC which forms the cornerstone of this obligation. It supplies a vivid illustration of the changes required at national level as a result of the growth of the Community.

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10 Eg Caranta, Government Liability after Francovich [1993] 52 CLJ 272; Steiner, From Direct Effects to Francovich (1993) 18 ELRev 3; Ross, Beyond Francovich (1993) 56 MLR 55; Fischer, Staatshaftung nach Gemeinschaftsrecht 2/1992 EuZW 41; Schockweiler, La responsabilité de l'autorité nationale en cas de violation du droit communautaire (1992) 28/1 RTDE 27.

11 Joined Cases C-46 & 48/93 OJ 1993 C94/13.

IV. Constitutionalization — the Broader Picture

The Court has latterly taken to declaring its hand. It has become ever bolder in its depiction of the ambitious scope of the legal basis of the Community's objectives. In Opinion 1/91 on the Draft Agreement on a European Economic Area[12], delivered on December 14, 1991, the European Court declared that

> "... the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. [Emphasis added]

The Court's use of the language of constitutions instead of international treaties is of the highest significance.

In Opinion 1/91, the Court continued in terms which were plainly an "updating" of the observations made thirty years before in the earliest major Community constitutional cases. Whereas in 1963 the Court referred in Van Gend en Loos[13] to States joining the Community having limited their powers "albeit in limited fields", in 1991, in Opinion 1/91, it continued (after the comment mentioned above) to insist instead on the States having "limited their sovereign rights, in ever wider fields". The Court was drawing attention here to a dynamic expansion in Community competence for which the Court itself can claim significant responsibility.

The Court's "constitutionalisation" of the Treaty in Opinion 1/91 was a culmination of other important early developments in this direction. For example, in Parti Ecologiste Les Verts v European Parliament[14] the Court broadened its judicial review function beyond the textual limitations in Article 173. The Treaty did not explicitly allow review of acts of the Parliament; the Court nonetheless invoked the rule of law and allowed such review on the basis that Community institutions should not be able to avoid review of the validity of measures against the "basic constitutional charter, the Treaty"[15]. Even in the light of these earlier developments, Opinion 1/91 was a major advance, both in its broad commitments to the notion of the Treaty as Constitution, but also in the

12 [1992] 1 CMLR 245.
13 Case 26/62 [1963] ECR 1.
14 Case 294/83 [1986] ECR 1339.
15 Post-Maastricht, this loophole has been partially plugged; Art.173 EC now envisages review of the Parliament's acts where adopted jointly with the Council or where intended to produce legal effects vis-a-vis third parties.

impact made by the specific outcome of the Opinion. The Court ruled that the draft Agreement on the European Economic Area was incompatible with the acquis communautaire because of its capacity to dilute the integrity of the Community legal order. The Court thus took a high-profile opportunity to demonstrate its determination not to see a weakening of a constitutional structure which it had spent many years enlarging and strengthening. Accordingly the Agreement had to be renegotiated[16].

In sum, in the celebrated terms of Eric Stein, the Court has construed the Treaties "in a constitutional mode rather than employing the traditional international law methodology"[17].

The description of the Treaty as a Constitution carries with it the implication that there are too Constitutional Courts. Naturally, one of them is the European Court itself. The Court finds itself increasingly subjected to examination as a Constitutional Court[18]. It carries out functions of constitutional review. These include the defence of individual rights in challenges to the validity of acts made by Community authorities. They also include the determination of debates about competence between States and the Community. But national courts too become constitutional courts by virtue of the principles of direct effect and supremacy. National courts are expected to uphold Community law rights, if necessary refusing to apply conflicting rules emanating from national authorities. Rights deriving from the apparently "non-State" source which is the European Community have a very real impact within the systems of the individual Member States. Nationals of Member States may invoke Community norms to confine the freedom of action of States. Those nationals of the Member States are after all simultaneously Citizens of the European Union! Through this process the European Community begins to develop characteristics typically found in more traditional States, whereas the States themselves lose the "sovereignty" associated in the past with Statehood. In fact, there is a rearrangement of functions between different levels of government, international, national and indeed regional or local. It is this recurrent issue of division of function which leads naturally to contemplation of the modern Community from the perspective of federalism. It is once again apparent that the

16 The renegotiated agreement was approved by the Court in Opinion 1/92 [1992] 2 CMLR 217, 10 April 1992.

17 Eric Stein Lawyers, Judges and the Making of a Transnational Constitution (1981) 75 Amer J Int L 1.

18 eg Weiler, The Transformation of Europe (1991) 100 Yale LJ 2403; Jacobs, Is the Court of Justice of the European Communities a Constitutional Court? in Curtin and O'Keeffe Constitutional Adjudication in European Community and National Law (1992); Lenaerts, Constitutionalism and the Many Faces of Federalism (1990) 38 AJCL 25; Rinze, The role of the European Court of Justice as a Federal Constitutional Court [1993] Public Law 426.

development of the Community forces re-thinking of the nature and purpose of the State in Europe.

V. The Community: Beyond the Economy

The impact of such questions has become ever more profound as the Community has developed. The perception of the scope of the Community's functions has shifted. It was long perceived that economic integration was the core of Community activity. It was, after all, the "European Economic Community" which was the most important of the three Communities established during the 1950s[19]. The Community was above all a market. True, the original Treaty contained a Social Policy Title[20]. However, this was severely limited in its scope. The focus of the Community was the development of market integration.

Latterly, however, the Community has become much more closely associated with discourse resembling Statehood rather than simply a market. The alteration in the title of the European Economic Community to simply "European Community", achieved by the Treaty on European Union which came into force on 1 November 1993, is symbolic of that shift[21]. So too, in turn, is the status of the European Community as one pillar in the European Union. The Treaty on European Union has created a three-pillar structure, under which the Union comprises the European Community and two areas of inter-governmental cooperation, in Common Foreign and Security Policy and Justice and Home Affairs[22].

There are more concrete manifestations of the Community's rising profile. The Community has taken a much more active role in developing common policies. The additional competences conferred on the Community by the Single European Act, such as Environmental Policy, represent a clear manifestation of the Community's expansion. In fact, as is well known, such express additions to the Community's competences were no more than recognition of much that was already happening in practice[23]. The Community has long been prone to

19 The other two were the European Coal and Steel Community and the European Atomic Energy Community.

20 Articles 117-128 of the original EEC Treaty, encompassing a Chapter on Social Provisions and a Chapter on the European Social Fund.

21 Art. G.A Treaty on European Union.

22 Titles V & VI Treaty on European Union respectively.

23 Usher in Smythe and White (eds.), Current Issues in European and International Law (1990), Ch.1.

embellish the apparent Treaty focus on market integration with activity in wider fields. Both political and judicial arms have contributed to this evolution[24]. Parallel observations may be made about the Treaty on European Union, where, similarly, new competences, such as Consumer Policy, are to a significant extent reflections of existing practice[25].

Here too the Community is moving into fields which cannot be separated from functions associated with Statehood. Once again, this commentary need not occasion surprise. One can go back to the early perspectives on Community development and identify an awareness that the Community would develop far beyond a process of economic cooperation and integration. In a rather well-known comment in May 1950, Robert Schuman, then French Foreign Minister and a major impulse in the early development of European integration, declared that

> "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes to take action immediately on one limited but decisive point. It proposes to place Franco-German production of coal and steel as a whole under a common higher authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe...The solidarity in production thus established will make it plain that war between France and Germany becomes not merely unthinkable, but materially impossible..."

This has been characterised as a "functionalist" view — that the EC will develop function by function, rather than according to some elaborate pre-set agenda. For many early functionalists the whole point of the Community process was that once started, it could not be stopped. The spillover process was bound to lead to a further redistribution of functions between the Community and its Member

24 Environmental Protection provides a good example; the Single European Act inserted a title on Environmental Protection, but the Court in Case 240/83 ADBHU [1985] ECR 531 had already declared that environmental protection is "one of the Community's essential objectives". Already too the Community was developing environmental legislation on the basis of Arts.100 and 235.

25 Art.129a EC. Weatherill and Micklitz, Consumer Policy in the European Community: Before and After Maastricht (1993) Journal of Consumer Policy, 285 et seq.

States resulting in a curtailment of the latter's powers in an evolving international environment. Not only was the steady incremental growth the whole point, its inevitability was the whole attraction.

Functionalist perspectives embraced appreciation of economic imperatives in the integrative process and - the neofunctionalist gloss - political imperatives too[26]. However, one certainly did not need to be a functionalist to accept that market integration through law would pose vital and complex questions about the future of political structures in Western Europe. However one prioritised the roles of political and economic impulses in developing the Community[27], it was plain that institutional and constitutional change was afoot from the very early days of the Community. However, the comment that fierce debate, at the very least, is historically inevitable is little comfort to those who have to find practical solutions!

VI. The Treaty on European Union — the hidden State outside the EC

The three-pillar structure of the Treaty on European Union deserves brief further attention from the perspective of the shifting notion of the State. The European Union comprises the European Community and two areas of inter-governmental cooperation, in Common Foreign and Security Policy and Justice and Home Affairs. The Title on Justice and Home Affairs is especially intriguing. It envisages cooperation between States on matters relevant to security. Terrorism and drug trafficking were widely cited as principal reasons for the need for deeper cooperation. The absence of intra-Community borders offers the opportunity for free movement of not only "economically desirable" migrants but also "politically undesirable" individuals. The States have accordingly set up control mechanisms at the European level to ensure monitoring; to ensure public control of the Market.

Initially, this appears comparable to the question of how to control "undesirable" (unsafe) products in an integrated market - a question of "Europeanisation" of State structures in response to the maturing of the Market. However in fact there are major distinctions which must be drawn. The EC structure, within which

26 Eg Lindberg, The Political Dynamics of European Economic Integration (OUP, 1963); Haas, The Uniting of Europe: Political, Social and Economic Forces, 1950-1957 (Stanford, USA, 2nd Ed., 1968).

27 A matter intensely analysed by many theorists; for a valuable overview see Pinder, European Community (Oxford, 1991).

product market regulation is being developed, is by no means a fully-fledged State, but it has certain elements which are of a recognisable quasi-State nature. For example, the Commission has supervisory and administrative powers. Both it and other institutions are subject to the control of the European Court, a court of constitutional review. The European Parliament provides a democratic input into the EC structure, albeit that it has a rather weak voice in the legislative procedure. Yet in the area of Justice and Home Affairs what has been created at European level is rather mysterious. The intergovernmental pillars of the Treaty on European Union are not inserted into the EC structure and are not subject to the direct control of the EC institutions[28]. The institutional arrangements for monitoring people which are undoubtedly growing at European level in response to Market integration seem intransparent.

The three-pillar, rather ungainly structure of the European Union highlights the multi-facetted and frankly peculiar nature of the job done at Maastricht[29]. The Union envisaged at Maastricht is not yet a coherent blueprint for a "European State". The perplexing structure built at Maastricht is neatly exemplified by the fact that Citizenship of the Union is inserted into the Community Treaty[30].

It is far from clear how the Citizens of the European Union can effectively exercise rights in the environment of intergovernmental cooperation in Justice and Home Affairs. It is an area where the European Court of Justice, the Constitutional Court, has no clear jurisdiction. That exclusion, coupled to the intransparency of the whole process of cooperation, seems likely to weaken the practical value of the commitment made by the Union to respect fundamental rights as guarantied by the European Convention for the Protection of Human Rights and as drawn from constitutional traditions common to the Member States[31]. The European Constitution here looks rather ragged! Equally, the development of intergovernmental cooperation in the field of Justice and Home Affairs raises questions about how to supervise conformity with the European Convention by the individual Member States. This is another testing ground for evaluating the growth of Federalist structures in Europe; it seems that it is an area where Responsibility will be even more difficult to allocate than in the field of product market integration.

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28 For some arguments that they should be see Vercher, Terrorism in Europe: An International Comparative Legal Analysis (Oxford: Clarendon Press, 1992).

29 For a powerful critique, see Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces (1993) 30 CMLRev 17.

30 Art.8 EC.

31 Art.F(2) Treaty on European Union.

VII. The Market without a State

What has been portrayed above is the State and the Market in flux at national and at Community level. This book is presented on the premise that there remains a process which is incomplete. The short historical survey provided above reveals no more than the persistence of questions about how to reorganise institutions in response to the process of integration. The label "Market without a State" helpfully encapsulates the problem[32]. The process of negative integration is rapidly creating a European market. The application of provisions such as Articles 30, 48 and 59 undermines the pursuit of traditional State functions in favour of a liberalised, deregulated market at European level. In some areas Community legislative activity has set up institutions of a proto-State nature at the European level. In other areas little or nothing of this nature has been undertaken. The details need not be pursued here. The point is that even in so far as some institutional features have emerged which might be associated with European State-building, that process lags far behind the construction of the Market.

Where and how should a European State begin to emerge? Where does it link to a European Market? How much beyond the European Market must the Community extend in order to fulfil its tasks? This is the great debate in the Community. Many observers have adopted fiercely opposing positions in assessing the appeal of the many proposed models of institutional and constitutional restructuring. Yet none would doubt the fundamental need to confront the question.

As already elaborated above, this has always been the great debate in the Community. Rather excitingly, it has latterly become a very high-profile issue discussed by millions of people outside the political elites of the Member States and the Community. As is well known, the debate which followed the agreement on the Treaty on European Union at Maastricht in December 1991 became heated. It fuelled a fierce and often ill-tempered examination of the future of Europe and of the individual States within it. Pressure groups "Europeanised" themselves even as part of a strategy of opposing Europeanisation. British opponents of the Treaty travelled to Denmark to support the "anti-Maastricht" campaigners in the Danish referendum[33]. Ultimately, by the late summer of

32 Joerges, Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik, in: Wildenmann (ed.) Staatswerdung Europas? Optionen einer Europäischen Union, 1991, 254 et seq.

33 It is a moot point whether this intervention helped or hindered the cause of Danish opposition.

1993, eleven Member States had ratified the Treaty. Attention turned to the twelfth, Germany, specifically to the Bundesverfassungsgericht, its Federal Constitutional Court.

VIII. Bundesverfassungsgericht/ Federal Constitutional Court

VIII.i. The Decision in Context

It is difficult to know how much weight to attach to the ruling of the German Federal Constitutional Court on October 12, 1993 which paved the way for German ratification of the Treaty on European Union and its subsequent coming into force on 1 November 1993. On a strict legal reading, it is no more than a court in one of the twelve Member States expressing its view on the validity of ratification of the Treaty with that State's constitutional order. On this minimalist view, the outcome favourable to German ratification[34] has no formal repercussion beyond Germany, apart from the simple fact that Germany was then enabled to ratify the Treaty, thereby allowing it to come into force. Formally the Court was speaking for the German constitutional legal order alone.

Politically, the decision is likely to exert an effect of a rather broader, if intangible, nature. The Constitutional Court had much to say about its perception of the present state and the future potential of the Community. This is likely to be digested by a range of consumers. The German government will have to plan its future strategy for Community development with an eye to the comments of its Constitutional Court. That will inevitably spill over into the wider political environment of the Community, in so far as it affects Germany's negotiating stance. Indeed, some of the views expressed by the Constitutional Court may find adherents among Germany's partners.

The addressees of the Constitutional Court's decision were doubtless not only political. The European Court of Justice is intimately aware of the need to maintain the support of national courts in order to ensure the continued practical observance of Community law. In this sense the European Court, in building a workable judicial structure for the Community, has no choice but to accept inputs from national level and, to some extent, to adjust its jurisprudence to

34 For a similar position of the French Cour de Cassation, cf. Oliver, The French Constitution and the Treaty of Maastricht, International and comparative Law Quaterly, (43) 1994, 1 et seq. 15.

accord with what national courts are prepared to support. The views of the German Constitutional Court are bound to be read with care in Luxembourg.

For the present purposes, we approach the ruling as another contribution to the debate on Statehood in Europe. From that perspective it is an intriguingly multi-layered decision.

VIII.ii The Competence of the European Community

The overriding feel of much of the ruling is that the German Constitutional Court has taken a remarkably narrow approach to the Community's competence. It approaches the Treaty very much as a technical document which confers powers on the Community only in defined areas. The ruling is based firmly on the key role of the notion of enumerated powers as the basis of Community competence; "Der EU-Vertrag und insbesondere der EG-Vertrag folgen dem Prinzip der begrenzten Einzelermächtigung"[35].

Yet it is a much remarked-on phenomenon that the practice of the Community is to treat the notion of enumerated powers as rather flexible. It serves as a theoretical limit on Community competence which plays a rather hidden role in practice. The Court has steadily broadened the interpretation of the principles of primary Community law. Articles 5 EC and 7 EEC/6 EC, for example, have a pervasive effect in national legal orders. In the realm of secondary legislation, the confining principle that the Community has limited, enumerated powers under the Treaty holds true in theory. In practice the Community's enumerated powers are very wide. Article 235, linked to Articles 2 and 3, in particular, but also Article 100 and later Article 100A, have been used as the basis of wide ranging expansion of Community competence[36]. The Treaty has been transformed by word and deed into the Constitution of a Community based on the rule of law. It is only partly comprehensible as a structure confined by enumerated powers. Yet the ruling of the German Constitutional Court strikingly avoids recognition of the dynamic and evolving nature of European Court jurisprudence and broader Community policy making.

35 Weiler, Transformation of Europe, (1991), Yale LJ 2403.

36 Usher, The Continuing Development of Law and Institutions in Academy of European Law (ed.), Collected Courses Vol.II, Book I, pp148-150, 163-165 (Art.100), pp160-162 (Art.100a), pp150-153, 163-165 (Art.235); Weatherill, Beyond Preemption?: Shared Competence and Constitutional Change in the European Community in O'Keeffe and Twomey (eds.), Legal Issues of the Maastricht Treaty (Chancery, 1994).

It would not be difficult for the EC lawyer to be rather critical of the pale reflection of EC law and policy which emerges from this ruling. That might be to overlook the subtle structure of the ruling. The result should not be ignored. The Constitutional Court ruled in favour of ratification by Germany. The Court thereby ensured the ratification of the Treaty by the last of the twelve Member States and secured the coming into force of the Treaty. It brought to life aspects of the Treaty on European Union such as Citizenship of the Union, Economic and Monetary Union and enhanced areas of common policy making such as Consumer Protection. From the strategic point of view, one might reflect that the German Constitutional Court was obliged to take a rather technical approach in its description of Community competence, for it otherwise would have found it well-nigh impossible to resist the claim that the rights of the individual enshrined under the German Constitution were threatened by ratification of the Treaty.

This is not to suggest that the German Court chose to misrepresent the nature of EC law in order to secure the result it wished to achieve, namely ratification. The point made here is that this ruling has many nuances in its application to conceptions of the State and related phenomena at national and at international level. That itself is a pointer to the different imprints left on developing European Statehood by different actors.

Another layer to the decision of the German Constitutional Court is the sense that the Court is not simply describing an EC which it views as fettered behind strict bars of competence via the principle of enumerated powers. The Court also appears to be "warning" the Community (doubtless including the European Court) of the jurisdictional limits beyond which it should not step. Indeed the ruling observes that purported activity beyond competence limits will simply not be effective — "eine solche Auslegung von Befugnisnormen würde für Deutschland keine Bindungswirkung entfalten." The response in Luxembourg will of course be neither direct nor explicit. Yet such observations will not go ignored.

VIII.iii.Judicial Dialogue and the development of the European Community

It bears further repetition that even if one is correct to judge that the Constitutional Court is issuing a warning about future activity, there is no call to overstate the danger inherent in such tension. There are previous examples of national courts and the European Court engaging in a dialogue about the nature

and effect of Community law[37]. These deserve brief recollection as examples of the potentially creative process which may be initiated by an initially apparently serious difference of opinion.

The French Conseil d'Etat was notoriously unwilling to accept the European Court's view that Directives were capable of direct effect. In Cohn Bendit[38], a ruling of 22 December 1978, it simply refused to pay due heed to relevant European Court judgments[39]. It considered Directives incapable of indirect effect and declined to make a reference under Article 177(3) on the point. In (indirect) response, the European Court was necessarily astute to the limits of its capacity to cajole recalcitrant national courts into compliance. It responded in due course by offering partial appeasement. It maintained that Directives were capable of direct effect against the State, but ruled that they were not capable of direct effect in relations between private parties[40]. One may have one's doubts about the desirability of this distinction, which anomalously restricts the sphere of application of unimplemented Directives[41], but the result was the termination of rebellion at national level as the French courts have adjusted to the refined expectations of the European Court[42]. The Community legal order here developed perhaps erratically, but through a process involving conciliation.

A further example is provided by the background to the development of fundamental rights by the European Court as part of the Community legal order. In developing the implications of the doctrine of supremacy, the European Court ruled that Community law overrides even national constitutionally protected rights[43]. Such a ruling leaves the Community system vulnerable to charges that it strips away individual protection to a degree unacceptable in a modern democracy. This perception conforms to the thematic pattern of a Community Market which develops in a manner which diminishes the national State, where fundamental rights have been protected in the past, but which yearns in vain for the construction of a European State which would assume responsibility for fundamental rights protection[44]. The German courts, in particular, reacted with

37 See generally Rasmussen, On Law and Policy in the European Court of Justice (Martinus Nijhoff, 1986), especially Chapter 10.

38 [1979] Dall.Jur. 155; [1980] 1 CMLR 543.

39 Such as Case 33/70 SACE [1970] ECR 1213 and Case 41/74 Van Duyn v Home Office [1974] ECR 1337.

40 Case 152/84 Marshall v Southampton Area Health Authority [1986] ECR 723.

41 Cf., eg, comments by Reich, Europäisches Verbraucherschutzrecht (Nomos, 1993) para.198.

42 Summarised in Weatherill and Beaumont, EC Law (Penguin Books, 1993), pp.323-325.

43 Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125.

44 This in turn poses questions about the relationship between the European Convention on Human Rights and the expanding EC structure; a further aspect of the complexity of building a European

hostility to the European Court's contentious expansion of the implications of the doctrine of supremacy. In "Solange I"[45] they expressed an intent to reserve to themselves the competence to test Community law against German constitutional norms. On its face such a ruling represents a major threat to the supremacy of Community law and therefore to the integrity of the Community legal order. Yet the European Court subsequently developed a catalogue of fundamental rights as part of the Community legal structure to the point where in "Solange II"[46] the German courts expressed willingness to abandon their previous reservations in the light of the adequate protection of fundamental rights through the Community system. Both national and Community legal systems were renewed under the influence of participation in the Community structure.

These are merely illustrations and both are admittedly somewhat simplified. Nonetheless they demonstrate that the national courts and the European Court are capable of embarking on an indirect dialogue about points of concern which may be resolved to mutual satisfaction by adjustments on both sides. National courts and European Court can develop a kind of savoir-vivre.

This is no sense to treat the ruling of the Constitutional Court as a minor matter. Its implications are hard to foresee, however optimistic one may be about the capacity of the Community legal order to absorb and to respond to the concerns expressed therein. Yet here there is evidence that the courts of the States and of the Community are capable of engaging in a process of renewal to meet each other's concerns. The legal order can be reshaped as problems arise. That is a perception which we in this book wish to translate beyond the field of the legal order alone. It touches administrative structures. The developing process of reshaping can be examined in the specific field of product safety management. Much more broadly, it can be observed in the general phenomenon of European State-building.

VIII.iv. States and Democracy

Perhaps the Bundesverfassungsgericht deserves the final comment in this sub-section. If its principal message involves an instruction to national and to

State. Yet further complication is offered by the role of cooperation on Justice and Home Affairs, outside the EC but within the EU.

45 [1974] 2 CMLR 549.

46 [1987] 2 CMLR 225.

Community authorities to take care in an attempt to transform a non-State entity into a quasi-State entity, then it is a message that deserves to be heard. That point is indeed one closely linked to the message of this book; that the creation of a type of Federal structure in Europe must be accompanied by an appreciation of the importance of the allocation of Responsibility[47]. These are the closing comments in the Constitutional Court's ruling:

> "Entscheidend ist somit sowohl aus vertraglicher wie aus verfassungsrechtlicher Sicht, daß die demokratischen Grundlagen der Union schritthaltend mit der Integration ausgebaut werden und auch im Fortgang der Integration in den Mitgliedstaaten eine lebendige Demokratie erhalten bleibt."

IX. Beyond the Treaty on European Union

This debate may have run out of steam in the specific context of the Maastricht Treaty on European Union. The gap of almost two years between agreement being reached on the Treaty in Maastricht in December 1991 and its eventual coming into force on 1 November 1993 lead to weariness and a kind of "Maastricht-fatigue". The Treaty is in force and that has, superficially, closed that part of the debate. But the issues have absolutely not been resolved. The Treaty on European Union has readjusted the nature of the Community and, as inevitable corollary, the nature of the Member States too. Yet it is not a final readjustment. Indeed, it cannot be a final readjustment, because the process of economic and political integration does not stand still. In fact, the process carries its own momentum. One alteration in the constitutional or institutional framework immediately creates fertile ground for the next alteration. The process must be repeated, because the structures of the European and the national state continue to fluctuate and therefore continue to demand attention.

That is a perception which held true in a Community of six Member States and which applies with all the more force in the Community of twelve. The process continues. The Community is on the threshold of yet further expansion, which will itself force further institutional and constitutional reconsideration.

The process of establishing Monetary Union provides an illustration of a matter which appears in need of renewed attention. This seemed to have been planned

47 Cf. For a similar position of the French Cour de Cassation, Oliver, loc.cit. 14.

in the Maastricht Treaty, with a timetable leading smoothly to a single currency by, at the latest, 1 January 1999[48]. Yet the plans are now badly disrupted. The Treaty commitment seemed unfeasible in practice even in advance of the coming into force of the Treaty as a result of the turmoil on international currency markets through 1992 and 1993 which destabilised the Exchange Rate Mechanism of the European Monetary System. It is probable that the whole issue will have to be reopened at the 1996 Intergovernmental Conference, with Treaty amendment highly likely.

In other areas, an amendment in one round of Treaty negotiation may conclude the pursuit of a particular aspect of a policy. Yet that may itself open up future possibilities for wider activity in the field in question. For example, the Single European Act finally established the place of Environmental Protection in the Treaty framework. Inevitably, that was but a start. In the Treaty on European Union the Environmental provisions have been developed still further[49]. The lesson is that the Community does not stand still. Policy shift breeds further policy shift.

However, there are threads which link such debate about the development of the Community. We have identified as one of those threads Federalism and Responsibility.

X. Competence, Subsidiarity, Federalism and Responsibility

X.i. Competence

The question of the respective competences of the Community and its Member States was mentioned above in connection with the ruling of the German Federal Constitutional Court. It is possible to chart a general drift by which the Community has developed an enhanced competence[50]. This drift has been induced by a broad interpretation by the Court of the ambit of many Treaty provisions in combination with a willingness among the political institutions to adopt legislation in very many fields rather distant from the Community's "core" economic activities.

48 Arts.102a - 109m EC.
49 Arts.130r-t EC.
50 Part VIII.ii, infra XXVI.

Article 235, in particular, has been used as the basis for legislation which might appear rather remote from the Community's objectives. Nevertheless, a challenge to the competence of the Community to use Article 235 has never been initiated before the Court[51]. The principal reason probably lies in Article 235's requirement of a unanimous vote in Council. Each State retains a political check on the Community's legislative ambitions in the shape of an effective veto in Council. However, the increasing availability of legal bases which require only qualified majority voting has deprived States of a check on Community competence through a veto in Council. Article 100A, the internal market provision inserted by the Single European Act, is highly significant in this regard. Accordingly questions of competence have become increasingly sensitive.

X.ii. Subsidiarity

Sensitivity over the scope of Community competence provoked the debate summarised by the slogan "Subsidiarity". Subsidiarity stands out as a key component of the agreement on the Treaty on European Union reached at Maastricht in December 1991. Indeed, a year later, it again played a major role in brokering agreement between the Member States at the Edinburgh European Council in December 1992. That meeting was designed to allay national (especially British and Danish) fears about the Treaty on European Union and to encourage ratification by all twelve Member States. The recurring invocation of the "magic word", Subsidiarity, is a powerful illustration of the suggestion made above that agreement at Maastricht settled some matters, but opened up many more for debate. Maastricht sowed seeds which will ripen and call for further attention.

Subsidiarity was reduced to a legal formula which was deemed appropriate for insertion into the EC Treaty. According to the new Article 3B EC

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of

51 Although there are instances of challenges to the validity of reliance on Art.235 in preference to other specific Treaty bases; eg Case 45/86 Commission v Council [1987] ECR 1493.

subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

This is magnificently evasive. An exhaustive examination of the issues raised by this new provision would be fruitless[52]. Indeed, it would be impossible. Subsidiarity under Article 3B opens up scope for a debate about competence, inter alia perhaps before the European Court of Justice. It does not resolve the debate. Nevertheless, the gaps in Article 3B which call to be filled might profitably be identified. They are gaps which reflect the gaps referred to in this book in the context of Federalism and Responsibility.

The first paragraph of Article 3B must be taken to refer to the notion of enumerated powers. The Community has limits to its competence and those limits are defined by the Treaty. Accordingly — and here one may note the sensitivity in this issue — the Member States' own competences are also defined by the limits of the Treaty. Yet this picture immediately raises the critical question — where precisely do those limits lie? It is well known that the Treaty lacks a specific list and that, moreover, the Community/Member State competence divide is not static. It shifts — typically in favour of the Community. The first paragraph of Article 3B simply rehearses a fundamental complexity in the Treaty structure without in any way resolving it.

The first phrase of the second paragraph of Article 3B adds to the impression that the subsidiarity principle is being laid on foundations which are already unstable. That phrase refers to the Community's "exclusive competence"; yet no authoritative list of precisely what falls within the Community's exclusive competence exists. Nor, given the shifting margin of Community/State competence, could such a list exist!

52 Among a torrent of comment, see, eg, Emiliou, Subsidiarity: An Effective Barrier against "the Enterprises of Ambition"? (1992) 17 ELRev 383; Lord Mackenzie Stuart, Subsidiarity - A Busted Flush? Curtin and O'Keefe (eds.), Constitutional Adjudication in European Community and National Law (Butterworths Ireland, 1992); Subsidiarity: the Challenge of Change Proceedings of the Jacques Delors Colloquium 1991 (Maastricht, EIPA, 1991); Micklitz, The Maastricht Treaty, the principle of subsidiarity and the theory of integration, Lakimies, The periodical of the Finnish lawyers, special issue on European integration, 4/93, 508 et seq.

The second paragraph of Article 3B promises forbiddingly difficult calculation. The notion which underlies this paragraph is not difficult to grasp. It implies a kind of "efficiency" test; an assessment of the "best level" for action in a particular sector of activity. The application of such a test would seem to fall within the province of politicians and/or administrators. Yet its appearance in Article 3B offers it up to the judges as a legal norm against which the validity of Community acts may be tested. This is a legal "test" which seem scarcely capable of coherent application by a court.
Article 3B is evasive because it reflects the problem of dividing competences between Community and Member States instead of attempting directly to address it. This is the reason why it represents a continuation of the competence debate, not its resolution.

At the Edinburgh European Council of December 1992, the Conclusions of the Presidency included an Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3B of the European Union. This asserts that

> "subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified."

This observation deepens scepticism about the justiciability of the subsidiarity principle. It conforms much more closely to an expression of political concern about competence division, rather than to a constitutional legal norm[53]. Similarly, from the Edinburgh Conclusions:

> "Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well-established national arrangements and the organisation and working of Member States' legal systems..."

X.iii. Federalism

Questions of the respective competences of the Community and its Member States have thus assumed a dominant place on the Community agenda. These are

53 Cf. Case C-359/92 OJ 1992 C288/10.

classically questions addressed by all emergent federations. Subsidiarity is, in fact, itself a shorthand for questions about competence division, which is in turn inextricably linked with the federalist process. This renders all the more peculiar the determination of the UK at Maastricht to delete all reference to the term "federalism" from the Treaty on European Union while simultaneously seizing on the inclusion of the term "subsidiarity" as a major success[54].

It is not surprising that the evolution of the Community Market has forced attention to be devoted to such topics. Yet the inability to solve such problems in a convincing and clear manner means inevitably that they will have to be addressed on an ad hoc basis in particular areas of Community activity.

X.iv. Responsibility

The identification of allocation of competence as a key problem area establishes a connection with the problem area of allocation of Responsibility. It is plain from the discussion above that allocation of competence is not a precise science; nor is allocation of responsibility. There are areas where it is unclear precisely who may act. If it is not clear who has the competence to legislate to address a problem then it is not clear who bears responsibility should things go awry. Put simply, an injured party needs to know where the buck stops in order to seek redress. But where the fixing of responsibility is obscured by the imprecision of competence allocation, the buck may not stop anywhere. Responsibility may vanish into a "black hole", the chasm between State and market.

This picture throws up several layers of complexity. Community law of market integration may confine State competence to act, yet the Community itself may legally (because of lack of competence) or politically (because of the inability to secure a constitutionally adequate majority in Council) find itself unable to fill that gap. Even where the Community is able to act, there are important limits to the capacity for empowering Community institutions with "State" functions.

In such circumstances the notion that the "State" assumes responsibility for regulating the market breaks down. The "State" at national level is restricted in its capacity for action by obligations arising under primary Community law. For

54 Domestic perceptions explain this; for the present at least, "federalism" has assumed a pejorative flavour among the English (though perhaps not the non-English British) who seem wedded to their historically unitary State.

its part, the Community as yet lacks much of the familiar institutional apparatus of the modern "State".

There is a risk that the development of a quasi-federalist structure will lead to a breakdown in allocation of responsibility for State functions. Once more, the Market has a clearer shape than the State. In fact, the State has changed shape. It operates at different levels. This is a problem of policy which may be traced through, inter alia, Environmental Policy and Social Policy. It has already been mentioned above in the context of the protection of Fundamental Rights. It is addressed in this book in the context of Product Safety.

XI. Product Safety

Product safety fits well into an inquiry into the potential gap in responsibility brought about by the disharmony between negative and positive law. Acting alone, national authorities cannot effectively supervise product safety because of the process of market integration. The Community insists on an absence of physical frontiers[55]. Yet Community authorities cannot effectively supervise the market because of, inter alia, their institutional immaturity and the absence of adequately sophisticated communication links.

Product Safety raises squarely the challenge of regulatory responsibility in a developing federation. The Market has assumed a much clearer and more dependable shape than the State. This provides an opportunity to measure the gap between the two — the "black hole" of lost regulatory responsibility. It also provides the challenge of bringing light to that black hole; the challenge of shaping a State to accompany the Market.

The national reports in Part II of this book provide an intense impression of national law and practice developing against a background of the development of the Community market. The case studies, both of which examine emergencies with cross-border implications, provide a vivid feel of the potential disadvantages of market integration; not only safe but also unsafe goods are traded freely across borders. There are economies of scale but there are also risks of scale.

55 Art.8a EEC/7a EC.

The papers in Part I of the book attempt to provide a reshaping of the material accumulated on product safety in Part B. They are motivated by the desire to explore more fully the policy issues articulated above. They provide a bridge between an empirical study of product safety law and policy and Federalism and Responsibility, an inquiry into the nature of the European "State" which is emerging, perhaps belatedly, in partial response to the development of the European Market.

The Treaty on European Union has created the status of Citizenship of the Union[56]. The precise nature of Citizenship in this context remains to be elaborated. Yet the choice of this determinedly weighty title has evoked expectations. These must now be satisfied by both Community and by Member States. Here, in fact, is a yet further illustration of the momentum inherent in the process of Treaty revision. Conferral of Citizenship provokes an expectation of conferral of rights; rights with substance, rights which can be enforced. Yet what do rights really mean in the modern context of a European Community and a European Union? This presents itself as a major challenge for the Community. On its own, product safety is a rather small technical though deserving part of the inquiry; but, taken more generally and located in the broader context of "rights", it also reflects the totality of the inquiry. That is the pattern of this book. Part II presents detailed information. Part I uses that information to build towards a more general theory.

56 Art.8 EC.