EDITORIAL COMMENTS

Harmonisation for harmonisation's sake?

> "But sometimes one has the impression that there are Directives which deal with harmonisation for harmonisation's sake alone. It seems as if some conscientious civil servant in Brussel, not having enough to do, takes it into his head, or is perhaps persuaded by some lobby... that there is some branch of the law which it would be fun to alter; and having started on that course it is difficult getting him to turn back."
> Lord Diplock, House of Lords, November 22, 1977.[1]

The approximation of laws produces more problems and is subject to more severe and fundamental criticism in the United Kingdom than in any other Member State of the European Community. This criticism goes to both the methods and the principles of the approximation of laws. As far as the methods are concerned, the criticism would appear, in some cases at least, to be justified. But the most serious—and, for the Community, least justified—objections touch upon the very foundations of the Community; they can be explained only on the basis of a certain conception of European unification.

Before looking more closely at the United Kingdom criticisms, it is useful to give a brief sketch of the place and role of the approximation of laws in the Treaties.

According to the Treaties, there is no common policy on the approximation of laws. In fact, only in the EEC Treaty are a significant number of provisions to be found on this subject, provisions which do not, moreover, constitute one of the objectives of the Treaty. Approximating laws is merely an instrument for achieving those objectives; it is therefore subordinate in nature. The instrumental, subservient nature of the approximation of laws emerges clearly from Article 100 of the EEC Treaty, the main instrument of harmonisation: under Article 100, the purpose of approximation is to help ensure the establishment or the functioning of the common market.

Approximation of laws in the Community is thus somewhat different

1. House of Lords Official Report, Vol. 387, no. 9, p. 822 (Motion on the Report of the European Communities Committee on (Self-Employed) Commercial Agents).

from the approximation—or unification—of laws carried out for many years in international bodies and organisations. It is not an end in itself; it is not as such intended to facilitate international cooperation. Approximating laws in the Community context is intended to help achieve the objectives of the EEC Treaty, to create a common market.

To these ends, it is the task of the approximation of laws to eliminate or reduce difficulties which arise from differences between the national legal systems. It is not designed to improve the national legal system. Nevertheless, in approximating laws, efforts to secure the highest possible quality are surely legitimate. The rules of law to be approximated must continue to fulfil the purpose for which they were created, and the better they do this, the more acceptable they are to the Member States. Approximation of laws and improvement of national law are therefore certainly not incompatible; on the contrary, an improvement in quality should be the normal by-product of any approximation of laws.

To return, after these more general reflections, to the criticisms directed in the United Kingdom against the approximation of laws: these criticisms are, as mentioned above, concerned with both the methods and the principle of approximation.

As far as the methods are concerned, part of the criticism is directed against the Commission's manner of formulating proposals. This applies both to the conclusion that approximation is necessary in the sector in question, and to the solution adopted. It is submitted that this criticism is basically unwarranted. At the same time, however, it should be taken to heart, since even where the Commission has obtained the best advice from all the parties concerned, it does not perhaps make this sufficiently clear. The Commission should indicate more clearly whom it has asked for advice and what material it has examined. It should not be afraid to refer to a greater extent than hitherto to the statements made by the industries affected and by trade unions, consumer associations and the like. This would also make the influence of governments more relative; it is arguable that the influence of national bureaucracies on the Community bodies is already strong enough. Intensified consultation of those concerned means more hearings and more "white" or "green" papers and in this connection the Commission can only learn from United Kingdom examples.

Another part of the criticism is directed against the number and scope of approximation plans. The harmonisation plans are, it is said, too ambitious; hence the quality of the proposals must suffer also. However unjustified this criticism may have been originally, it is certainly justified today. Approximation of laws has in fact proved much more difficult than was originally assumed. This applies in particular to the decision-making process in the Council. The political and economic climate is not what it

was in the early 'sixties; each Member State feels itself impelled to defend its national interests more resolutely than before. Against this background, the programmes for the approximation of laws do appear over-ambitious today. But all concerned, the Commission, the Council and the national governments have laboured under the illusion of possible faster progress. The stone should therefore not be cast at the Commission alone.

Criticism of the programmes for the approximation of laws brings to light a further, structural problem to which there is virtually no solution. The approximation of laws serves to make the common market function and thus to secure the objectives of the Treaty. But the appreciation of these objectives alters with time and the conception of the common market is also subject to change. As the goal changes, the means must also be reassessed. Any project in the field of the approximation of laws should therefore be examined at specific intervals to see whether it still corresponds with the Community's current priorities. Such an examination will, however, come up against practical difficulties in that the approximation of laws, like complicated research projects, requires years of investment.

The accusation of unsatisfactory working methods is closely connected with the criticism of the content of proposals. The Commission is told that its proposals do not take sufficient account of United Kingdom legal concepts and approaches, that they are not sufficiently flexible (*i.e.* they are in many cases too detailed), that they are not practicable, or too costly, *etc.*

In view of the time involved in projects of harmonisation, the criticism that United Kingdom law is not sufficiently taken into account may have been justified in the first few years after accession; but it is certainly not justified in the case of more recent proposals. If it were, one might indeed ask in how far this is the fault of United Kingdom government officials, since Commission proposals are always formulated in close—often, perhaps, too close—cooperation with government experts.

The complaint of lack of flexibility is not voiced solely by the United Kingdom: it corresponds to the general and well-known criticism that the Commission's proposals are too detailed. In regard to this objection, a number of observations can be made. In the first place, some proposals, such as, for example, the elimination of technical barriers to trade, by their very nature require to be precise and detailed. On the other hand, other proposals could be less detailed; but if they leave the Member States little room for manoeuvre, it is often because the Member States themselves require greater precision, greater detail. The Community is unfortunately not always a Community of trust.

But in spite of these difficulties, the Commission should do everything to avoid accusations of lack of flexibility or excessive detail. The approximation of laws, as mentioned above, has no intrinsic and no absolute

value, but serves to make the common market function. Consideration should, moreover, be given to the fact that for most of us uniformity or homogeneity is undesirable; we cherish our differences, which are part of our cultural heritage, part of our wealth. Approximation of laws should therefore not eliminate differences to the fullest extent possible, but only to the extent that is necessary. Where there are several possible ways of achieving a specific objective, then these ways should be left open. What is needed is a maximum of imagination. Only in this way will it be possible to carry out the approximation of laws where the divergencies, and thus the opposition, are the greatest.

Flexibility cannot, however, mean approximation of laws at the lowest level. Proposals which result in the watering down of national legislation, for example in the field of environmental protection, are acceptable neither to the Member State concerned nor to the Community as a whole. This means that the approximation of laws will on occasions involve considerable expenditure; but this is the case with any progressive national legislation.

After these criticisms, which are directed essentially at the methods used in the approximation of laws, the most weighty objection remains to be dealt with, namely, the criticism that the approximation of laws in the Community forces changes in United Kingdom law which are legally binding and thus result in a loss of sovereignty for the United Kingdom. In answer to this, it must be said, in the first place, that it is the essence of any approximation of laws that it leads to changes in national laws: the Treaty provides (with the single exception of Article 27) only for binding legal instruments, namely directives, for the approximation of laws. Further, it should be remembered that the approximation of laws based on Article 100 requires unanimous decisions by the Council. This allows each Member State to make felt its views on the optimal structure of the common market and the extent and degree of the approximation of laws.

But the United Kingdom has in relation to Community legislation a special psychological problem. To "civil law" lawyers, law enacted by the State is something wholly familiar; membership of the Community merely means that the originator of the enacted law changes. The United Kingdom, on the other hand, is proud of its historically developed common law. If even the statute law enacted at Westminster is regarded with scepticism, the institutions in Brussels are all the more certain to be faced with mistrust, even aversion.

This can, however, serve as an explanation only where approximation of laws affects common law, which in many areas is not the case. If the binding approximation of laws is rejected in principle in the sphere of statute law also, then ultimately a fundamental Community instrument is

called into question. It then becomes clear that, in certain circumstances, the criticism of methods conceals a fundamental conflict, namely, divergent conceptions of the final purpose of the Community.

These differences of opinion are a political rather than a legal problem, and a political solution should therefore be sought. But at the purely technical level of the approximation of laws, a response is also possible: The Community should learn from the United Kingdom criticisms and so improve its efforts that the methods used for the approximation of laws no longer occasion justified criticism. Secondly, and more importantly, the Community should give priority to tackling problems which even its opponents can hardly deny need to be solved on the Community level. Of such problems there is certainly no lack.

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