

EDITORIAL COMMENTS

Scrutinizing the legal scope of Article 100 of the EEC Treaty

In the United Kingdom the prospect of English law being adapted to rules essentially conceived in continental Europe has never been popular. Fears that harmonisation of laws is bound to result in the disappearance of the English language or British beer may have abated, but there is a persistent lack of sympathy for the so-called harmonising habit. Recent evidence of this critical attitude can be found in the *Report on Approximation of Laws under Article 100 of the EEC Treaty*, prepared by the House of Lords' Select Committee on the European Communities.¹

In this report, the Scrutiny Committee recapitulates a number of its earlier reports on recent Commission proposals for the harmonisation of laws in areas such as environmental protection, consumer protection ("doorstep selling", liability for defective products), general education, certain sectors of the law of contracts, *etc.* In its opinion, some of these proposals present serious defects of substance, presentation and drafting; other proposed directives are considered to be *ultra vires* Article 100 and wholly outside the scope of the Treaty. These detailed criticisms make for interesting reading, but no less interesting is what the Select Committee has to say about the general nature of the approximation of laws contemplated by Article 100.

Two points are emphasized. The first is that approximation of laws does not constitute one of the objectives of the EEC Treaty. It is merely an instrument for achieving those objectives. The second point is that approximation of laws should be confined to the economic field with only such excursions into other spheres, such as social affairs, as are ancillary to economic policy.

With the first point one can have no quarrel. Harmonisation for harmonisation's sake is pointless.² The second statement is far more controversial. The Report makes reference to the White Paper of May 1967 on Legal and Constitutional Implications of UK Membership of the European Communities. This document stated that under Articles 99 and 100 the

1. 22nd Report of the Committee, 18 April 1978, H.L. (1977-78) 131.

2. See also Dr. Ehlermann's lecture "Community Policy with regard to the Approximation of Laws" given at Edinburgh on 18 November 1977. This lecture is reproduced in Appendix 36 to the Select Committee's Report. Cf. also the Editorial Comments in 15 C.M.L.Rev. 1978, 4-8.

scope for the creation of Community Law is confined to the economic and financial field.³ The White Paper on the UK and the European Communities of 1971 took the view that "the English and Scottish legal systems will remain intact. Certain provisions of the Treaties and instruments made under them, concerned with economic, commercial and closely related matters, will be included in our law. The common law will remain the basis of our legal system... All the essential features of our law will remain, including... the law of contract and tort..."⁴

Of course, White Papers are important documents. However, the Community's development may not be hampered by restrictive views taken by individual Member States in regard to their commitments under the Treaty. In asserting that approximation of laws should be confined to measures whose dominant purpose is economic, the Report places an excessively narrow interpretation on Article 100. This provision contains no limitation as to the nature of the provisions susceptible to approximation. Approximation of laws is called for whenever legal provisions in the Member States directly interfere with the establishment and the smooth functioning of the common market, thereby endangering the attainment of the Treaty's objectives. It is true that the common market pursues an economic object but it cannot be maintained that the only measures standing in the way of the full achievement of the four freedoms and the establishment of a system of undistorted competition are those whose primary function it is to regulate economic matters. Therefore, it would seem wrong to assume that national provisions in fields such as the law of contracts, torts, civil procedure or even penal law are entirely outside the scope of Article 100. It is, of course, perfectly legitimate to dispute that national measures in a specific field are of such a nature as to directly affect the operation of the common market. It would seem unjustified, however, to deny to the Community the power to move into spheres of the law that were originally of no concern to it but which, because of the dynamic nature of the common market and the evolution of the law itself, now are felt to cause it to function in a less than optimal way.

According to the European Commission the term "approximation" should not be taken too literally. The object of the process of approximation of laws "is not to find an arithmetical average between the national legislations, but on the contrary to adapt them to the demands of the successful functioning of the Common Market. Where this is possible by virtue of

3. Cmnd. 3301, at p. 12, paragraph 35.

4. Cmnd. 4715, at p. 9, paragraph 31.

existing legislation, such measures can continue to apply after adaptation. But if new solutions are necessary these must be brought into play".⁵

The Select Committee does not share this wide view. It is rather inclined to stress that approximation means "the attempted assimilation of *existing* rules" and that Article 100 only provides a legal basis for some technical reparcelling of ground that has already been built on. It is not satisfied that the power under this provision may also be used in order to improve existing rules. It further doubts whether the process is to be described as "approximation" in cases where rules on a particular subject exist in some of the Member States but not in others.

The report therefore advocates a very cautious approach whenever harmonisation measures may result in the adoption of new and improved solutions, or standards outside the range exhibited by the existing national laws. It does, however, reluctantly admit that as long as there is a relevant legislative rule in only one of the Member States, approximation under Article 100 can be justified so as to require all the other Member States to come into line.

The Committee is less accommodating where it argues: "the Council do not, through having once adopted a directive for the approximation of the laws on a particular subject, thereupon acquire *carte blanche* to make any improvements they think fit in the rules concerning the relevant subject matter. This is outside the scope of the Article. A power of approximation is one which, from its very nature, must, if it is exercised, tend to become exhausted".

This seems too rigid a view. Obviously, in the light of new economic facts, technical developments, stricter health requirements, *etc.*, it must be possible to change legal provisions once they have been approximated. One needs only think of the desirability of raising the standards concerning the dumping of toxic waste at sea. The Committee itself points out that national legislative competence is removed in areas that are subject to Community legislation. Under these circumstances it is a task for the Community to control the further development of the relevant legal rules in consideration of the requirements of the Common Market. It would be odd if further directives for that purpose could no longer be based on the provisions of the Treaty which formed the basis of the original approximation. If one is disposed to accept the argument that Article 100 does not provide the necessary powers for up-dating the contents of approximation directives, one could, of course, use Article 235

5. Statement by Mr. von der Groeben to the European Parliament, E.P.Deb. November 1969, O.J. 1969, no. 119 (Annex), p. 151. See Appendix 3 to the Select Committee's Report.

for this purpose. Thus a narrow interpretation of the scope of Article 100 would inevitably lead to excessive reliance on Article 235. But this is not what the Select Committee favours. It points out that "action taken under Article 100 should be of a normal character; if the Council proposes to act under Article 235 it should become at once apparent that it is doing something out of the ordinary". In our view the legal basis of an effort to adapt harmonised rules to the demands of the common market can be correctly laid under Article 100. The suggestion that the Council in such a case is doing "something out of the ordinary" seems contrary to the reality of Community life.

The Select Committee does not conceal the fact that political considerations are at the root of its efforts to define the exact bounds of the power conferred under Article 100. It observes that the use of this power effects some transfer of legislative sovereignty from Member States to the Community. The issue by the Council of a directive under Article 100 takes out of the democratic process of the United Kingdom's Parliament a part of that country's legislative activity with no practical possibility of getting it back. Moreover, the Government Departments may be tempted to choose Article 100 as an easier way of securing legislation than by following the normal course of Parliamentary legislation. They might also trade in their agreement to a proposed directive which is *ultra vires* Article 100 in consideration of agreement on some other proposal which they favour."

Clearly one can have a lot of sympathy with the view that the transfer of legislative sovereignty and the absence of adequate forms of democratic control over legislative activities at the Community level, is a matter of great concern. One may even applaud the Committee's conclusion that the power of approximation should be exercised "legitimately, carefully, and with not too much zeal". On the other hand, no interpretation of the Treaty can be accepted which has the effect of stifling the Community's capacity to tackle the problems that need to be solved at the Community level. The continuing erosion of national sovereignty may for a long time remain a source of discontent, and not only in the United Kingdom. Admittedly, the fact that at the present time legislative powers transferred to the Community are not subject to direct democratic control at the Community level is equally worrying. It may be hoped that both the Government of the United Kingdom and that country's legislature will actively promote an increase in the powers of the European Parliament. Genuine democratic control at the Community level over the contents of approximation programmes might at least remove some of the objections to the exercise of powers under Article 100 of the EEC Treaty.