# EDITORIAL COMMENTS

## Creeping integration

Editorial comments in 1984 and 1985 issues show some resemblance to weather forecasts in a bad summer: clouds over Athens, rain in Brussels, no sunshine over the priceless wheat in Europe. The gloomy predictions are more than justified given the particulars to which the Member States have fallen prey, vetoing in turn urgent decisions. Still, comfort can be gained by looking away from the high ground where policies are made to everyday common market life where producers produce, distributors distribute, workers work and investors invest outside their Member States, and increasingly so. Their activities have created during the past quarter of a century a densely woven ply of lasting inter-European economic and social relations. This common market exists, it cannot be undone. It grows slowly but steadily. While the giants sit irresolute on their respective hills, the brownies are busily moving on: the creeping integration.

The law that governs this integration is mainly private law – law of contracts, law of industrial property, company law, *etc.* It is Member State law too, and it is obvious that this diversity can seriously hamper the process of integration. In the field of contract law, parties can in most cases achieve unification by drafting standard clauses which void inconvenient regulations of the applicable domestic law. Parties are often free to choose the most convenient forum and here and there they will find international uniform regulations. In one field of company law, the Community has successfully used – as it is still using – its

powers to harmonise the law. Clearly these efforts did not stumble upon the political disagreement that wrecked, for instance, the common price of wheat. The detailed directives on company law created law that is formally Member State law but European (private) law in fact. The influence of this harmonisation on tacit integration can hardly be overestimated. It can even be expected to bring about a creeping integration of its own kind.

The fact is that, by its nature, private law cannot stand much distortion. To give an example: when the Dutch legislature framed the chapter on legal persons in the (new) Civil Code, it implemented article 9 of the First Directive on Company Law with regard to the powers of the directors of the company. In Parliament the question arose why the powers of the administrators of an association or foundation should still be regulated by national law. The result was that also the powers of board members of associations and foundations are regulated by the Civil Code in conformity with said article 9, though there was no obligation for the Dutch legislature to do so. Other Member States may sooner or later follow this example to avoid misunderstandings and cracks in their codifications. Furthermore, all Member State company laws follow the article 9 procuration rule: limitations on the powers of the directors in the articles of the company have no effect against third parties, but with regard to other officers of the company, the Member States' agency rules remain in force. Consequently, in most Member States, limitations of the powers of second level officers (division managers, *etc.*) can be raised against third parties, even when stipulated in the articles. This illogical split in the powers of the managing summit of the company cannot fail to cause misunderstanding, dispute and annoyance. The more integration of the common market proceeds, the louder – we think – will be the claim for unified "*prokura*" rules for company officers throughout the common market.

There is mutual influence between the creeping economic and social integration of the Community and that of private law. Private law affects the numerous relations between individuals, not the relations between States or the relation between some authority and the individuals depending upon it. As Etienne Portalis put it in his

*Discours Préliminaire*: "l'Expérience prouve que les hommes changent plus facilement de domination que de lois". The efforts of the Community to harmonise law has met with fierce resistance but once performed, the resistance against change works in the opposite direction.

There is no turning back unless the law becomes obsolete. For as all law, common market private law will sooner or later lag behind developments, the very developments to which it contributed. We know from experience that Community legislation takes time. The dangers are that Member State legislatures, finding it impossible to leave outmoded regulations as they are, will circumvent them by issuing domestic law. A better alternative could be that the national courts interpret the outmoded regulations in accordance with their original intention, but in a way fitting to new developments, and that the Court of Justice, following their example, will maintain unity. Does not Article 189 of the EEC Treaty impose such a way of interpretation as "the result to be achieved" is not only the specific wording of the directive but also the general aim of harmonisation? Could not even legislation of Member States be challenged when contrary to directives interpreted in this way?

Of course a swift adaptation by the Community itself is preferable; integration by action is preferable to creeping integration. The impatience of our former comments was wholly justified. It is the impatience of the truck driver tarrying at the inner frontier: no more looking respectfully upon the customs as the authorities of a foreign State, but rather as bureaucrats spending his time and barring the road through his common market. His impatience has more in common with the annoyance of the coachman of the *ancien régime* in France, having to stop at tolls and customs on the provincial borders, paying *gabelle* for the importation of salt from Normandy to Britanny. With respect to the common price for wheat, *l'histoire se repète*: in the same old France there was a dispute over the creation of a French common market for wheat, a dispute between the rigid bureaucrat Vergennes and the forward-looking Turgot, both striving after the favour of Louis XVI, the first winning, the second losing, the third losing too, in the end: his head. May the rulers of the Community in the most proverbial sense not lose their heads but use them.