# EDITORIAL COMMENTS

## Judicial harmonisation

Of course the compromise on the budget and agriculture had to be reached. If not in Brussels, then in another capital. That the compromise would be the result of a painful process – as all previous occasions for decision-making of this kind – was evident from the outset. The governments as centralised powers of the Member States are confronted with equally centralised forces as political parties and pressure groups, some of which are both powerful and not too benevolent towards (further) European integration. In an earlier comment we pointed to the silent integration brought about by the activities of individual persons and enterprises all over the Community. It is a slow, "creeping" integration, but a steady one where the grip of governments, political parties and pressure groups is being diminished as a result of the innumerable separate actions of millions of individuals. In our opinion this development is as important as the major steps taken at summit meetings. We even believe that the progress integration sometimes makes on such occasions can largely be ascribed to this silent development, as any attempt to undo it would meet with mass resistance. Creeping integration is a constant breeze at the backs of European policy makers. How to stir up the breeze?

In the same earlier comment we stated that the legal vehicle of creeping integration is mainly private law. In that field the greatest contribution to creeping integration is the removal of obstacles arising from the diversity of law by way of unification or the harmonisation of legal

regulations. Unhappily, this procedure more or less meets the same difficulties as integration by summit decisions: interest groups clinging to their own favourable, familiar national regulations, political parties cherishing the rights and freedoms laid down in their national legislation. We said "more or less", because in most cases the Commission can take the initiative to harmonise and in fact has done so with considerable success, in a few, but important, fields of private law, *e.g.*, company law. There (alas!) we meet with other difficulties from the same source. Member States with strict provisions in their law will seldom allow persons in other Member States to be exempted from such measures and will demand the introduction of such requirements in the legislation of the other states as well. As a consequence, harmonisation tends to be in the nature of a lowest common multiple of the hardships of all Member State laws on the subject.

There is, however, another, more simple, more gradual and even older method of harmonisation. It is the *idée fixe* of this era that harmonisation (unificiation) should happen in the form of treaties, statutes, decrees, directives, in short by written regulations. This however would not have been the favourite idea of our medieval rulers striving after a uniform law for their subjects. Confronted with a variety of local or regional laws they simply sent their judges to apply them in the justified hope that these orderly minds would not seek to interpret all kinds of different customary rules and that they would slowly but persistently "judge out" diversities in law, bringing about, in the long term, an integrated body of law for the realm as a whole: creeping harmonisation. To unify the law first and then set up a court to guarantee its uniform interpretation seems to be quite logical. It is not the logic of history.

The European Community has its Court of Justice. It is a court with a wide and long experience. Why not entrust it with the above-depicted judicial harmonisation? It can very well go hand in hand with the legislative activities of the Council and the Commission. In fact this had already begun to happen long ago – in the coal and iron age. Under the scrap equalisation rules issued by the High Authority, enterprises had to pay contributions for every transfer of ownership in scrap effected by them. The Court would not admit that deliveries of scrap were considered as a transfer of ownership by the law of one Member State, while

the law of another allowed them to be constructed as a pure delivery not being such a transfer. The Court could not even admit such a possibility as it was inconsistent with the very nature of an equalisation system and implied discrimination between enterprises of different Member States. Of course, such situations can occur on a much larger scale in the European Community as it stands now, the Treaties, regulations and directives containing, to a large extent, provisions of private law. These provisions never stand alone. In the law of the Member States they form part of more embracing fields. As law functions as a coherent whole the effects of the harmonised provisions are determined accordingly.

Thus, the provisions of company law of a Member State on the powers of the organs of the company remain under the influence of the general doctrine of agency of that particular state, even when these provisions have been harmonised under Article 9 of the first directive on company law. Even adjacent parts of the Member State law can influence the meaning of the harmonised rules. Let us give an example. Under the above mentioned Article 9, limitations on the powers of the organs in the articles of a company can never be invoked against third parties, even when those limitations are published. So, when a diretor enters into a contract on behalf of the company, the company is lawfully represented even if that particular contract is not allowed by the articles and if the other party to the contract knows this. Nevertheless, the Dutch *Hoge Raad* (Supreme Court) has held in such a case that the contract was not binding upon the company. It was considered to be void under the Dutch *law of contract* as the other party had acted contrary to "good faith" – because it knew about the limitations! Similar disharmonising effects will present themselves, when – for instance – insurance law is harmonised. The harmonised provisions will have different implications in the Member States, because the adjoining law of torts will not be harmonised.

It will be clear that owing to the surrounding, non-harmonised law, harmonised regulations can and will have disharmonious implications. The question is: has the Court of Justice to accept this consequence? The answer has to be in the negative for the same reasons as in the old coal and steel days. The consequence will be that the Court has to harmonise the surrounding law as much as is necessary to guarantee the

equivalent implementation of the harmonised provisions in all the Member States. As a result the harmonised provisions will be surrounded by a growing body of secondary harmonised law. Harmonised company law will generate such secondary law in numerous fields. Harmonised provisions that regulate the (result of the) transfer of shares and debentures will ultimately affect the general principles of transfer of property in Member States. Harmonised rules on appointment and dismissal of directors and other company officials cannot fail to have a harmonising influence on the law of master and servant. And as we stated, the general principles of the law of contract can have a disharmonising effect on harmonised provisions on the powers of company organs, which can only be counterbalanced by a "harmonised interpretation" of the law of contract itself. The question is, of course, how long the Member States will abide this split in their respective private laws and will take steps to further harmonisation themselves.

Perhaps it would be prudent to watch these developments and familiarise oneself with the idea of judicial harmonisation before even suggesting the step to what may seem an utopia now: the harmonising powers of the Court over and above the harmonisation of law flowing from provisions of directives. For instance: the adoption of the rule that when a conflict arises between inhabitants of two or more Member States or between enterprises established in two or more Member States on a matter which comes within the Treaties, where the parties have not agreed upon the law applicable in the case, the Court will define the rule(s) governing the case, taking into account the domestic laws of the Member States in question and more generally of all the Member States.[1] Utopia? A half century ago the European Community was a most unlikely dream itself – just as English Common Law was at Hastings, 1066.

1. See, *e.g.*, Lando, "A contract law for Europe", *International Business Lawyer* (1985), 17.