

THE IMPACT OF THE EUROPEAN ECONOMIC COMMUNITY ON THE MOVEMENT FOR THE UNIFICATION OF LAW

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I

THE TREATY BASIS FOR APPROXIMATION OF LAWS

The general provisions of article three of the Treaty establishing the European Economic Community (E.E.C.) include a directive that Community activities should include the "approximation of . . . municipal law to the extent necessary for the functioning of the Common Market."¹ This general mandate for "approximation of law" is further detailed by the Treaty in two different ways:

- i. By express Treaty provisions relating to:
 - a. customs and tariff matters;²
 - b. a number of different situations within the scope of rules envisaging the free movement of persons, services, and capital within the Member States;³
 - c. mutual regulation of transport matters;⁴
 - d. rules governing competition;⁵
 - e. certain fiscal matters;⁶
 - f. measures to assist the exports from Member States to nonmember countries;⁷
 - g. labor legislation and social security;⁸
 - h. the situations within the purview of article 220.⁹

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¹ "For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty: . . . (h) the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market." E.E.C. Treaty art. 3.

² *Id.* art. 27.

³ *Id.* articles 54, 57, 58, and 66 deal with the need to eliminate obstacles to the "right of establishment" and to the free flow of services, so that those engaged in non-wage-earning activities are not restricted to a single country. Article 56 deals with the coordination of special rules which limit the activities of persons or companies from non-Member States and are based on reasons of public order, public safety, and public health.

⁴ Article 75.

⁵ Articles 85, 86.

⁶ These relate to turnover taxes, excise duties, and other forms of indirect taxation, including compensatory measures applying to exchanges between Member States. Article 99.

⁷ Article 112.

⁸ Articles 117, 118.

⁹ This article provides for negotiations between Member States to coordinate rules relating to the

2. A broad authorization, set forth in articles 100-102, for direct intervention by institutions of the E.E.C. to reconcile the legislative and administrative rules and regulations of Member States when:
 - a. the existence of a disparity in the legal systems of Member States directly affects the establishment and functioning of the Common Market;¹⁰
 - b. an existing disparity in the legislative or administrative provisions of the Member States distorts conditions of competition within the Common Market;¹¹ or
 - c. it is feared that a Member State's enactment or amendment of a legislative or administrative provision may distort conditions of competition in the Common Market.¹²

Much attention¹³ has been devoted to articles 100-102 of the E.E.C. Treaty—three articles which together comprise a chapter, entitled "Approximation of Laws."¹⁴ It is interesting, however, that in the Treaty itself, although article 3(h) refers to the objective of approximating municipal law¹⁵ and article 117 contains a general reference to "the approximation of legislative and administrative provisions," only in article ninety-nine, which deals with taxation, is there a specific cross-reference to the procedures authorized by articles 100-102.¹⁶ The express Treaty provisions relating to approximation of laws in certain specified matters are subject to a more or less rigorous schedule for taking different steps towards the goal.¹⁷ On the other hand, the application of articles 100-102 is unlimited as to subject matter¹⁸ and indeterminate as to time—and clearly the approximation of laws cannot be limited as to time, since it may occur at an advanced stage in the realization of European economic integration.

To what extent was it intended by the Treaty's draftsmen that resort to the procedures of articles 100-102 should be permissible even in instances where the

protection of citizens vis-à-vis the state, the elimination of double taxation, mutual recognition of companies, and reciprocal recognition and execution of judicial decisions and arbitral awards.

¹⁰ Article 100.

¹¹ Article 101.

¹² Article 102.

¹³ DEUXIÈME RAPPORT GÉNÉRAL SUR L'ACTIVITÉ DE LA COMMUNAUTÉ PARAS. 125-26 (1959); MONACO, *Le rapprochement des législations nationales dans le cadre du Marché Commun*, 3 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONALE 558 (1957); commentary of Thiesing, in VON DER GROEBEN & VON BROECKH (Eds.), HANDBUCH FÜR EUROPÄISCHE WIRTSCHAFT 3 (1959).

¹⁴ This is chapter 3 of Part three, Title 1.

¹⁵ The chapter on approximation of laws, note 14 *supra*, provides the rules for the realization of the objective stated in article 3(h), just as the objectives stated in other paragraphs of article 3 have corresponding groups of rules elsewhere in the Treaty.

¹⁶ Article 99 specifies that the proposals submitted by the Commission to the Council under its authority shall be "without prejudice to the provisions of Articles 100 and 101."

¹⁷ Unlike the European Coal and Steel Community (E.C.S.C.) Treaty, the E.E.C. Treaty envisages different stages of activity and makes the attainment of the ultimate goal of European integration dependent on several successive phases of development.

¹⁸ Monaco, *supra* note 13, at 560, states with reference to article 100: "The scope of this article is most comprehensive, because it not only covers legislative enactments, but also administrative regulations, both for the execution and the application [of statutes], as well as all administrative acts emanating from each government." [Ed. transl.]

Treaty contained other express provisions relevant to approximation of laws? One should not rule out the possibility that articles 100-102 are not rendered inoperative with respect to matters that the Treaty has subjected to express provisions for approximation of laws, even if those provisions include a timetable for taking the different steps necessary. Of course, under this view articles 100-102 would not be construed in any case to impose a more difficult and complicated procedure for approximation of laws than would be available in the absence of these articles. However, the procedure prescribed in these articles would be applicable in those rare cases, like that of article 220, in which the Treaty, while outlining new fields of activity in the task of approximating laws, does not define the method by which E.E.C. institutions shall achieve this approximation.¹⁹

II

APPROXIMATION (RAPPROCHEMENT) OF PROVISIONS HAVING DIRECT INCIDENCE ON THE COMMON MARKET—ARTICLE 100

In so far as the E.E.C. Treaty's chapter on "approximation" of laws is concerned, the provisions in article 100 are by far the most important. According to this article, the Council, acting by unanimous vote on a proposal of the Commission, and after previous consultation with the Assembly and the Economic and Social Committee, shall issue directives for the approximation of such legislative and administrative provisions of Member States as have a direct incidence on the Common Market. In substance, then, there is recognized a prerogative of the Community to ensure within the field of the Member States' domestic legal systems the conditions for realizing the Common Market—either by promoting legislation to give effect to the pledges contained in the E.E.C. Treaty or by causing the removal of obstacles interposed by domestic legislation to such a realization.²⁰

The measures made available to the institutions of the E.E.C. to implement this prerogative offer a more effective means to accomplish the objective than any based on a general obligation or pledge of loyalty undertaken when the Treaty was drawn up. Thus, the procedure authorized in article 100 really puts teeth in article five, wherein the Member States pledge generally to take all action appropriate to attain the objectives of the Treaty.

The procedure for intervention by the Community pivots on the directives of the Council—directives which would be preceded by a pronouncement of the Assembly concerning the political opportuneness of the measures the Commission has proposed and by an expression from the Economic and Social Committee as to probable repercussions of such measures on the Common Market.²¹ The com-

¹⁹ Article 220 directs that the Member States "shall, in so far as necessary, engage in negotiations with each other" in pursuit of certain objectives.

²⁰ As is hereafter discussed, the literal meaning of "approximation (rapprochement) of laws" implies the idea of alignment with a pre-established model. In this connection, see Monaco, *supra* note 13, at 568.

²¹ Article 100. With reference to the Assembly, see articles 137-44; as to the Economic and Social Committee, see articles 193-98.

plexity of the procedure to be employed is justified by the fact that the intended result impinges upon the sovereignty of the Member States. Directives of the Council, simply by virtue of their existence, have a forcefulness and persuasiveness generally sufficient to ensure compliance with their terms. Nevertheless, under article 189 of the Treaty, a directive lacks direct legislative effect, in that domestic agencies, while bound as to the result to be achieved, retain their competence as to form and means. Thus, the measures utilized by the various Member States to achieve the intended result may vary in form in accordance with the differences in the constitutions of Member States and in their various laws ratifying the E.E.C. Treaty.²²

The approximation of laws envisaged by article 100 is not designed to operate in specified areas of the juridical systems of the Member States seen in their entirety, but only with respect to those rules that affect the establishment and the functioning of the Common Market. This limitation furnishes a decisive argument against too broad an interpretation of the tasks of the Community in order to promote a uniform law among the Member States.²³ Of course, it remains to be seen which legal and administrative rules will have the effect on the Common Market required to invoke article 100.

III

ELIMINATION OF DISTORTIONS OF COMPETITIVE CONDITIONS—ARTICLE 101

The circumstances under which E.E.C. Treaty article 101 will apply appear more recognizable than those for invoking article 100, since at first glance they refer to a more restricted field. However, in light of the aims of the Treaty, this impression could be misleading. In many ways, the tasks of the Community in maintaining conditions of competition—even though encompassed within a more specific range of competence—are no less vast or binding than those envisaged in article 100.

For article 101 to apply, there must be a difference in the rules of the Member States' domestic laws that is capable of producing a "distortion" in the conditions for competition in the Common Market. In common with other terms borrowed from the language of multilateral economic agreements, the concept of "distortion" has no distinct, strict juridical meaning; nor does the Treaty illustrate its meaning or limits.²⁴ In its natural sense, the word has implications so wide that it clearly

²² The German law of ratification of July 27, 1957, imposes a duty on the Government to inform the Chamber of every provision of the Community in relation to which active measures of compliance will need to be taken. See Thiesing, *supra* note 13, at 4. In Italy, in the absence of a special ratifying law, the directives may be complied with either by a special law passed to that effect or by delegation by law of the necessary powers to the Government. See Monaco, *supra* note 13, at 562.

²³ See, e.g., Willemetz, *L'harmonisation des législations*, *Le Droit Européen*, Dec. 5, 1958, p. 176.

²⁴ An exact idea of its implication may, nevertheless, be obtained from the preliminary documents from which the E.E.C. Treaty was drawn up and from the very aims the Treaty expresses. Indeed, the concept of distortion derives from the conviction that similar competitive conditions should prevail in the Common Market once the economies of the Member States react upon one another. Distortion could arise, with the same consequences as an involuntary discrimination, from factors implicit in the economies of the Member States, such as natural resources, the level of production, fixed responsibilities, etc. On this point, see Tinberger, *Les distortions et leur correction*, in *LE MARCHÉ COMMUN ET SES PROBLÈMES* 256 (1958) [a special issue of the *Revue d'Economie Politique*].

cannot coincide with the concept of distortion in article 101 of the E.E.C. Treaty. In fact, it would be futile to attempt to eliminate some phenomena, which might be labeled "distortions" of competition under an all-inclusive interpretation, resulting from the variations in the political and economic structures of the Member States. Nor should one rule out the possibility that ultimately a general state of equilibrium will be reached whereunder a "distortion," which it is feared will result from one element in a Member State's economy, will be offset through the combined effect of other factors in that same economy.²⁵

The aims to which the "harmonizing activity" of the Community are directed by article 101 appear to have regard solely to those disturbances of competitive conditions in the Common Market that, in the language of the Treaty's draftsmen, are described as "specific distortions."²⁶ Causes of such specific distortions would be, for example:

1. Variations among the Member States with respect to systems of social security, whose effect on industry may vary according to the basis of the system (which may, for instance, be supported by the State out of the general taxes or be based on contributory payments out of wages);
2. Differences among the fiscal systems of the Member States in the extent of utilization of a graduated or progressive tax—of the principle that the greater tax burden should fall on the more profitable sources of production.

Other special factors that might be conducive to distortion include differences among the Member States with respect to use of direct or indirect taxation, systems of financing social welfare, certain price controls, and policies regarding credit and work conditions.²⁷

The task of eliminating distortions of competitive conditions requires examination of the most apt means to deal with these special factors conducive to distortions. This task does not necessarily involve juridical measures, and it can be divorced from the process of *rapprochement* of the laws. To a considerable extent the special factors conducive to distortions can be coped with simply by the adoption of mutual economic measures.²⁸

²⁵ *E.g.*, differences between the commitments of the various economies deriving from public expenditures, or systems of social security, are usually compensated for by opportune variations of a tax on exchange. National underevaluation, like overevaluation, can act as an incentive to the flow of imports and exports, and, with the tax variations, can contribute to an even balance of payments. Differences in the cost of production attributable to different salary levels may be offset by variations in the index of productivity. On this whole problem, see COMITE INTER-GOUVERNEMENTAL DE MESSINE, RAPPORTS DES CHEFS DE DÉLÉGATION AUX MINISTRES DES AFFAIRES ÉTRANGÈRES tit. 2, ch. 2 (1956) [hereinafter cited as REPORT OF THE MESSINA COMMITTEE].

²⁶ *Ibid.*

²⁷ "Work conditions" would include relationship between male and female salaries, hours of work, overtime, paid holidays, and so on.

²⁸ The Commission may take suitable economic measures to safeguard industries otherwise placed at a disadvantage. Instead of a system of subsidies, the *Report of the Messina Committee* prefers that the E.E.C. remit customs duties prejudicial to poorly located industries—together with the prompt compliance by all Member States with the rules of the Treaty. On the other hand, direct or indirect subsidies to compensate for heavy burdens created by the Treaty's provisions may be considered inconsistent with the Treaty.

However, differences in the juridical systems of the Member States can themselves promote distortions of competitive conditions; and for these distortions the remedy must be sought in juridical measures—the basis of which would be article 101. Indeed, article 101 of the E.E.C. Treaty—and the whole system of approximation of laws which it envisages—may be regarded as a simple appendix to the chapter prescribing “Rules Governing Competition.”

The procedure authorized by the Treaty reflects the difficulty of the subject matter and the arduous tasks that the institutions of the E.E.C. will find in discovering means to resolve such complex problems. As a first step in the process, the Treaty provides for consultation between the Commission and interested Member States—as is also required by article 118, which seeks to “promote close collaboration between Member States in the social field.” Should the consultations not achieve their objective, then article 101 authorizes the Council to issue directives. This procedure is considerably simpler than that employed in article 100, no doubt because here the issuance of the directives follows consultations that in themselves are presumably rather complex.

IV

APPROXIMATION OF FUTURE PROVISIONS—ARTICLE 102

Article 102 complements its preceding article by authorizing measures to meet the threat of “distortions” that might reasonably be feared as a result of legislative or administrative provisions enacted after the E.E.C. Treaty came into effect.²⁹ This article takes on greater importance because, like article 100, it is intended to apply to future stages in the development of the Common Market. Article 101, on the other hand, refers to the juridical conditions prevailing in the different Member States on the effective date of the E.E.C. Treaty. Accordingly, ever-increasing reference to article 102 is to be expected as the Common Market progresses, with a corresponding decline in recourse to the preceding article.

Whenever a Member State proposes to pass a new law or modify an old one so that a “distortion” is to be feared, it is bound to consult the Commission in order to discover probable repercussions on the Common Market. Then, after consulting with other Member States, the Commission will, in turn, recommend the best measures to avoid such a distortion. This procedure differs from that of article 101, both in the duty of Member States to be wary lest their intended new provisions tend to cause a distortion—and, in such event, to inform the Commission of their plans—and in the provisions for the Commission’s intervention. The Council is not involved; and no directives are issued—merely nonmandatory recommendations, whose binding power is limited.

²⁹ “Where there is reason to fear that the enactment or amendment of a legislative or administrative provision will cause a distortion within the meaning of the preceding Article, the Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the particular distortion.” Article 102.

In the not unlikely event that a State ignores the Commission's recommendations, article 102 precludes resort by that State to the terms of article 101 in order to persuade the other States to eliminate the distortion by modifying the provisions of their own laws. However, this would not appear to prevent the use of measures available to the Commission and Council under article 102(2)—*i.e.*, economic measures that do not call for modification of any juridical provisions. Even so, this article seems inadequate in that it permits a Member State to create a "distortion" prejudicial to other states, but removable only by a modification of their own laws. In fact, in these cases the distortion remains, and there is given merely the satisfaction of stating that the blame for it belongs to the State that fails to comply with the Commission's recommendation. One additional sanction provided by article 102 against the non-complying Member States is its elimination of recourse by that Member to the provisions of article 101 should the non-compliance with the Commission's recommendation redound only to the detriment of this Member State.³⁰

Article 102 may apply, of course, when the obligation to give notice of proposed legislation is not observed by the Member States; thus, the Commission would be authorized to make recommendations concerning the proposals if it acquired notice from some source other than the State concerned that enactment of the new law might prejudice competitive conditions in the Common Market. In practice, however, it is quite possible that the Commission, if not notified by the Member, may hear of the new statute or administrative regulation only after its adoption—and when the resultant distortion has become apparent. This contingency is not specifically covered by article 102; and so it would probably be necessary to consult article 101, which would seem to apply whenever a State fails to notify the Commission of a legislative or administrative proposal in the erroneous belief that it will have no bearing on competitive conditions in the Common Market, and when the Commission fails to hear of the proposal by some other means.

This conclusion would seem valid, since there is no bar to a broad interpretation of article 101. Article 102(2), which envisages the grave case of a distortion produced in contradiction to a recommendation by the Commission, would lead to recourse, at least in important cases, to the provisions of article 101. Only when the distortion operates solely to the prejudice of the State responsible is the operation of that article entirely excluded. Article 102 seeks to prevent a distortion; but it must yield to article 101 when the existence of a distortion is in fact confirmed.

To adopt, on the other hand, an alternative strict interpretation of article 102, which would lead to recourse to the Court of Justice on the basis that every failure to give notice is itself a violation of the E.E.C. Treaty would, in practice, only

³⁰ "If the State desiring to enact or amend its own provisions does not comply with the recommendations made to it by the Commission, other Member States may not be requested, in application of Article 101, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the Commission's recommendation causes a distortion to its own detriment only, the provisions of Article 101 shall not apply." Monaco, *supra* note 13, at 567. [Ed. transl.]

complicate matters, rather than solve them. Indeed, reference to the Court should only be the last resort for the most flagrant violations of the Treaty—violations which may not be resolved in any other way. It can scarcely be justified in this less critical situation of failure to give notice.

Sometimes it may occur that a Member State will not recognize the full consequences of its legislative proposals—will not foresee their possible impingement on competitive conditions in the Common Market. In this event, the State probably will be prepared to make the necessary changes in its new or proposed legislation without being required to do so by either the Council or the Court; indeed, probably then there will be no need to go any further than the consultative procedures envisaged by both articles 101 and 102.

V

DELIMITING THE SCOPE OF ACTION BY E.E.C. INSTITUTIONS

In the field of European cooperation, the principle of reconciling and harmonizing the laws and regulations of the Member States has been accepted in preference to the impracticable task of achieving complete uniformity.³¹ The difficulties of drafting uniform laws to be ratified simultaneously by several different States are well known. It would be too ambitious to expect States which signed the E.E.C. Treaty, after giving the institutions of the Community the sizable task of promoting European economic integration, to add thereto the task of fostering a uniform European law.

Even a first reading of the Treaty confirms this interpretation. The term “uniformity” is conspicuously absent from the various formulae used to express the tasks of the Community in this field; instead, references are made to “coordination,”³² “harmonization,”³³ “establishment of common rules,”³⁴ “abolition of restrictions,”³⁵ “coordination through negotiation,”³⁶ and “approximation (rapprochement).”³⁷ The choice of expressions with respect to the varying methods of intervention by the E.E.C. institutions—and in different degrees—seems, indeed, to be greatly concerned to fix limits well short of the promotion of projects of uniform law, even in the fields of economics and commerce.

In so far as articles 100-102 of the Treaty—which together comprise the chapter entitled “Approximation of Laws”—are concerned, it will be recalled that the initiative of the Commission is limited by the requirement that the legislative and admin-

³¹ “It is not possible to attempt to modify in some way by decree the fundamental conditions of an economy, such as those stemming from natural resources, the level of productivity, or the importance of taxation. Part of what is usually called harmonisation can be the result of the functioning of the market itself, of the economic forces that it activates, and of the contacts which it establishes between those affected.” REPORT OF THE MESSINA COMMITTEE 61. [Ed. transl.]

³² *E.g.*, articles 54(3)(g), 57(2), 70(1).

³³ *E.g.*, articles 99, 112.

³⁴ *E.g.*, article 75.

³⁵ *E.g.*, articles 49, 54.

³⁶ Article 220.

³⁷ In addition to articles 100-02, see article 27 and article 117—the latter referring to “harmonization of social systems” and “approximation of legislative and administrative provisions.”

istrative provisions as to which it seeks to act must, by reason of their conflicting content, affect the establishment and functioning of the Common Market or cause a "distortion" in the conditions of competition. It might be contended that article 3(h) of the E.E.C. Treaty authorizes a broader scope for approximation of laws. However, in light of the preface to that article,³⁸ and the use in article 3(h) of a word formula corresponding to that of the chapter composed by articles 100-102,³⁹ it would seem that these articles are the implementation of article 3(h).⁴⁰ Under this interpretation, article 3(h) does not provide any general residual authority for attempting approximation of laws not elsewhere authorized in the E.E.C. Treaty.

Once one abandons the idea that promotion of a comprehensive uniform law for the Community is implicit in all the subjects dealt with in the E.E.C. Treaty,⁴¹ it may be said that in the Treaty's context "approximation (rapprochement) of laws" imports the creation in the various juridical systems of the Member States of groups of similar rules in particular fields. In fact, however much the Member States are bound in terms of solidarity and cooperation, they do not lose their own individuality. The work of reconciliation will simply be a progressive elimination of the most marked juridical discrepancies through the mutual acceptance of common principles. For instance, in corporation or company law, even though article 100 might be invoked concerning a few subjects for which a certain degree of uniformity is required—such as the formalities necessary for incorporation, the principles for determining nationality, the currency law governing the rights of the respective classes of stock

³⁸ "For the purposes set out in the preceding Article, the activities of the Community shall include under the conditions and with the timing provided for in this Treaty. . . ." Article 3.

³⁹ Note 14 *supra*.

⁴⁰ In this connection it should be noted that articles 100-02 appear to provide a complete system for approximating the different laws to the extent necessary for the functioning of the Common Market. Other Treaty articles dealing with the divergencies in legal and administrative provisions to be reconciled should be deemed special cases in an area generally covered by articles 100-02.

⁴¹ As Monaco, *supra* note 13, points out, this allows one to discount as irrelevant the copious bibliography devoted to the theory and practice of uniform law, even though those contributions dealing with the special field of reconciling legislative systems are now growing in number and importance in view of the increasing attention given to studies devoted to the E.E.C. Treaty. One may, therefore, cite, in addition to the works mentioned by Monaco, *supra*, and Thiesing, *supra* note 13, R. BERTRAND, PRIN, CONCURRENCE ET HARMONISATION DANS LE MARCHÉ COMMUN (1958); N. CATALANO, LA COMMUNITA ECONOMICA EUROPA E L'EURATOM ch. VII, at 158 *et seq.* (1959); CEASRE COSCIANI, PROBLEMI FISCALI DEL MERCATO COMUNE 81 (1958); ROGER DUPAGE, DENIS CÉPÈDE & MAURICE LENGELLÉ, LE MARCHÉ COMMUN 26 *et seq.* (1957); H. EICHNER, ANNÄHERUNG DER RECHTSSYSTEME FÜR DEN GEMEINSAMEN MARKT, INSBESONDERE AUF DEM GEBIET DER WIRTSCHAFTS-, FINANZ- UND STEUERPOLITIK IM GEMEINSAMEN MARKT 39 *et seq.* (1957); W. GANSER, HARMONISIERUNG DER STEURSYSTEME IN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (1957); R. HELLMAN, SOZIALHARMONISIERUNG MIT ZWEI GESICHTERN (1958); FRITZ W. MEYER, HANS WILLGERODT & J. HEINZ MÜLLER, INTERNATIONALE LOHNGEFÄLLE; WIRTSCHAFTSPOLITISCHE FOLGERUNGEN UND STATISTISCHE PROBLEMATIK (1956); UNIDROIT (INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ), OBSERVATIONS PRÉLIMINAIRES SUR LE RAPPROCHEMENT DES LÉGISLATIONS DANS LE CADRE DU MARCHÉ COMMUN 1-23 (1957); Marchesano, *Armonizzazione dei regimi fiscali nel quardo di un mercato unico*, in *Mondo Aperto*, Oct. 1957, p. 301; Mattei, *Armonizzazione delle legislazioni*, A.B.J. (Rome) (1958); Mesenberg, *Zu den steuerlichen Fragen des europäischen Gemeinsamen Marktes*, 12 *EUROPA ARCHIV* 962 (1957); Di Carrobbio, *Armonizzazione delle legislazioni*, in *COMMUNITA ECONOMICA EUROPA* 27 (1958); Raulin, *L'unification du droit privé et l'unification européenne*, in *L'EUROPE NAISSANTE* 21 (1955); Willimetz, *L'harmonisation des législations, Nécessité d'unifier les règles de conflit de lois concernant l'existence et la fonctionnement des sociétés commerciales*, in *LE DROIT EUROPÉEN* 177 (1958).

and bondholders, and the rules governing conflicts of laws—this article could not be brought to bear on the great bulk of corporation law, because any disparity existing in domestic rules of law would have no bearing on the establishment and functioning of the Common Market.

Apart from the approximation (*rapprochement*) of laws already examined in connection with articles 100-102, the competence of the E.E.C. institutions with respect to the special, more limited cases dealt with in other parts of the Treaty cannot be defined simply by reference to the terms—such as “coordination,” “harmonization,” and “abolition of restrictions”⁴²—used by the Treaty in describing what action the Community institutions are authorized to take. One must also look at the procedures provided for intervention by these institutions. A careful examination of these procedures reduces, and often eliminates, many differences that, at first, might be inferred from the use of different terms—especially when these procedures are considered in relation to one another in the special cases to which they apply, and in contrast to the omnibus procedures under articles 100-102.

When intervention by the institutions of the Community ensues—as it usually does—in the issuance of a directive by the Council, the result is the promotion of the necessary amendments to bring the legislative and administrative provisions of the separate Member States to a point consistent with the terms of the E.E.C. Treaty. Yet, in every case, in accord with the provisions of article 189 concerning directives, the competence of the various institutions of the Member States, in harmony with the provisions of their individual constitutions, is safeguarded so far as the form and means of applying the directives are concerned.⁴³ Whether the Treaty speaks of “coordination,”⁴⁴ of “harmonization,”⁴⁵ or in slightly different terms,⁴⁶ the directives, when used as the means for implementing the Community policy, will have the same effect on the domestic juridical systems of the Member States under article 189.

Of course, under the Treaty there still remain some cases where differences in laws are not dealt with by means of “approximation (*rapprochement*) of laws” undertaken through directives of the Council. These cases may vary from the standard model of approximation (*rapprochement*) in the form and mode of intervention by E.E.C. institutions or with respect to the institution that intervenes. The variations may be better examined by means of the following list of instances in which the Community is empowered to intervene to reduce or eliminate differences in the legislative and administrative provisions of the Member States:

⁴² See notes 32-37 *supra*.

⁴³ With respect to the directives, one must examine their effect on the internal legal system of the Member States. As to this problem, see generally, CATALANO, *op. cit. supra* note 41, ch. 2, at 45 *et seq.*; GIAN STENDARI, I RAPPORTI FRA ORDINAMENTI GIURIDICI ITALIANO E DELLE COMUNITÀ EUROPEE ch. 4, at 55 *et seq.* (1958); ANGELO SERENI, LE ORGANIZZAZIONI INTERNAZIONALI ch. 9, 2, nos. 8-13 (1958); Theising, *supra* note 13.

⁴⁴ See E.E.C. Treaty arts. 54(3)(g), 57, 57(2), 58, 66, and 70(2).

⁴⁵ See *id.* art. 112.

⁴⁶ Article 87(1) authorizes, in the alternative, the use of directives in applying the principles of

1. to promote approximation of customs laws and harmonization of labor laws by means of recommendations to the Member States under articles 27 and 117;
2. to issue directives for:
 - a. approximation (*rapprochement*) of laws under articles 100-102, as has been discussed heretofore in this paper;
 - b. coordination of laws concerning right of establishment and freedom of movement under articles 54(3), 57(2), 58, 66, and 70(2)—a coordination that may come about at the instance of the Member State in the circumstances provided for in article 220; and
 - c. harmonization of certain export measures under article 112; and
3. to publish common rules for application in the Member States concerning certain anti-competitive practices under articles 85-87 and transport policy under article 75. (In these cases, the Community institutions may fulfill their tasks by means of general regulations or by decisions addressed to specific addressees.)

The second category—both because it includes the cases covered by articles 100-102, the general authority for coping with significant differences in legal systems, and because it encompasses a far greater number of situations of legal divergence than the two other categories—would seem to provide the “normal form of intervention” by the Community. Or it may be said that the standard competence of the E.E.C. in reconciling different legal systems is by means of directives issued in those cases which come within the second category listed above. Of course, from the standpoint of a movement towards “unification” in the strict sense of the word, the most significant cases are those under the third category—cases in which there is activity similar to some extent to that undertaken by other international organizations.⁴⁷

A further and more detailed study of the E.E.C. Treaty could reveal that, in addition to the substantial differences in the mode of the Community’s intervention as

competition set out in articles 85 and 86. The Council is empowered to issue directives to eliminate obstacles to the free movement of workers and to the right of free establishment.

⁴⁷ A similar progress towards a uniform law is evident in the powers given to important agencies of other international organizations—like the Council of Europe. See, *e.g.*, Statute Instituting the Treaty of London, May 5, 1949, art. 1; Convention, annexed to the Benelux Treaty, of Nov. 5, 1955, art. 3 (creating an Interparliamentary Consultative Council). Yet here, in contrast to the E.E.C. Treaty, the process of creating a uniform law consists of embracing rules affecting whole institutions in a Convention. When the Convention is later approved by each Government (thus giving the rules binding power from the moment of acceptance) earlier inconsistent rules in the domestic systems of each State are replaced. By way of contrast, other international organizations aiming to promote a uniform law in certain matters, lack the binding power of the terms of the Convention on the legislation of the participating states that the decisions and the regulations of the Council of the E.E.C. enjoy. See, *e.g.*, International Labor Organization (which came into force on June 13, 1921); U.N. International Civil Aviation Organization (which came into force on April 3, 1947). The U.N. Economic Commission for Europe, with the goal of reconciling mercantile practices, has pursued many measures in the formation of a conventional law in the commercial field. A more rudimentary task is performed by article X of the General Agreement on Tariffs and Trade, which simply proposes the application and publication of rules relating to international commerce (laws, regulations, judicial and administrative decisions, and so forth) with the ultimate aim of attaining their uniform application.

traced above, there exist other important procedural differences in the methods for confronting divergencies in the legal systems of the Member States.⁴⁸ Further pursuit of this inquiry is, however, beyond the scope of the present article.

⁴⁸In some cases, the process of making a decision of the Council is furthered by a proposal of the Assembly or the Commission. Article 99. On other occasions, reference is made to the judgment of the Economic and Social Committee, articles 49, 57(2); sometimes in conjunction with the judgment of the Assembly. See, *e.g.*, articles 54(1), 56(2), and 70(1).