HARMONIZATION OF COMPANY LAW UNDER THE COMMON MARKET TREATY

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I. INTRODUCTION

The goal of the European Economic Community is economic integration. This is to be achieved through the creation of a Common Market and the approximation of the Member States' economic policies.

The document denominated "Treaty Establishing the European Economic Community" has created and developed an institutional phenomenon whose powers, activities and effects belie its title. While it fulfills the requirements of the standard definitions of "treaty", realistic analysis of the expressed aims, institutional structure and delegated powers leads to the conclusion that the document is closer to a constitution of an organic entity. The opinions of legal scholars are supported on this issue by well known decisions of the Court of Justice of the European Communities.

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1. Treaty Establishing the European Economic Community (hereafter cited EEC Treaty), Art. 2: "It shall be the task of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States." No official English translation of the EEC Treaty has been published. An unofficial English translation, from which all quotations in this article are taken, can be found in 1 C.C.H. COMM. MKT. RPT.

2. Id.

3. J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 320 (5th ed. 1963): "A treaty may be defined as an agreement whereby two or more States establish or seek to establish a relationship under international law between themselves."

4. P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS (1966) [hereinafter cited as Hay]; Hallstein Angleichung des Privat—und Prozessrechts in der Europäischen Wirtschaftsgemeinschaft, 28 RABELS ZEITSCHRIFT 211, 229 (1964) [hereinafter cited as Hallstein].

5. N.V. Algemene Transport en Expeditie Onderneming van Gend & Loos c. Administration Fiscale Néerlandaise, 9 C.J.C.E. 1 (1963): "It must be concluded that the Community presents a new legal order in international law for the benefit of which the Member States have, albeit to a limited extent, surrendered their sovereign rights..." (C.C.H. translation § 8008). Flaminio Costa c. Ente nazionale Energia elettrica impreca
The nature of the document creating the Common Market is not the only aspect with hidden significance. The aim of economic integration is of far wider scope than the term suggests. It is inseparably bound to social and political policies. In addition, economic integration necessarily involves problems of legal technique. Obstacles to integration based on national differences must be eliminated. Thus is born the problem of methodology in achieving the goal of economic integration.

The obvious fact that economic integration requires a certain degree of uniformity in the legal framework within which it is to occur is expressed in the treaty provisions affecting various economic sectors. The purpose of this paper is to examine the provisions which could affect the harmonization of the legal framework within which business associations are created and operated.

Companies are the most important instruments of international trade. The treatment accorded to companies when their activities cross national boundaries has a direct impact on the ultimate success of European economic integration. If transnational operations are unduly restricted, trade will suffer. In recognition of this simple fact the "founding fathers of the Community" inserted both specific and general provisions in the Rome Treaty designed to eliminate those differences in the laws of the Member States pertaining to the creation, operation, rights, duties and liabilities of companies which could hinder the realization of economic integration.

II. THE SCOPE OF HARMONIZATION UNDER THE ROME TREATY

A. PROBLEMS OF TREATY TERMINOLOGY

Unification of law has been a goal of public and private entities.
and individuals for a long time. Unification of law, as a concept, encompasses a range of possible variations. It includes uniformity achieved through the multilateral enactment of identically worded statutes or the adoption of a regulation or directive by the Commission of the Council of the European Economic Community.

The Common Market Treaty provisions create a further problem affecting the methodology of unification of law in the member countries. Various treaty provisions concerned with "unification" of law employ different terms, such as harmonization, approximation, coordination and assimilation.

If there is any unanimity among writers and Common Market officials it is to the effect that no absolutely certain idea of the intended methodology can be gleaned from the Treaty terminology. One problem is the fact that the translations of the Treaty in the four official languages of the Community are not uniform. Thus, as has been shown in one detailed study of this problem, concepts denoted by two different words in one version of the treaty may be expressed by only one word in another version.

But apart from this more or less technical difficulty is the

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Countries' Plans For Harmonization of Law, 9 AM. J. COMP. L. 351, 352 (1960) [hereinafter cited as Stein].


9. EEC Treaty, Art. 189: The Council and the Commission shall, in the discharge of their duties and in accordance with the provisions of this Treaty, issue regulations and directives, take decisions and formulate recommendations or opinions. Regulations shall have general application. They shall be binding in every respect and directly applicable in each Member State. Directives shall be binding, in respect of the result to be achieved, upon every Member State, but the form and manner of enforcing them shall be a matter for the national authorities.


12. Lochner, Was Bedeuten die Begriffe Harmonisierung, Koordinie-rung und Gemeinsame Politik in den Europäischen Verträgen? 118 ZEIT-\richt für die GESAMTE STAATSWISSENSCHAFT 35 (1962) [hereinafter cited as Lochner].
further problem of whether and how much differentiation in method and scope was intended by the employment of such terms as harmonization, approximation, coordination and assimilation. Early attempts to evolve a hierarchy among these terms based on how much similarity was required in the end product have largely been rejected by later writers. Lochner, for instance, concludes that such a ranking of the various concepts on the basis of the word used is impossible. But neither does he ascribe a static meaning to any particular term or a common meaning to all these terms. His main argument is that the scope of each term is determined by the goals which are set by the Treaty, and that the particular article must be interpreted in the light of such expressed goals. Thus, no matter which particular term of those listed above is used in a treaty article, its scope may include true unification if the goals of the Treaty require it.

Not all writers agree with this extension based on the Treaty aims. Some voice objection to the inclusion of complete unification of laws within the scope of the terms referred to, while agreeing that otherwise there is no valid basis for distinguishing between the various terms. These terms

have all been used more or less indiscriminately, either as the notion covering all the various methods employed, or have been assigned to merely one of these methods. All this has happened without too much regard to the semantic differences of the words thus utilized. Especially when these words are used to designate specific methods falling short of complete unification of existing domestic legislations they are all employed more or less as synonyms.

This exclusion of "unification" from the meaning of the other terms has been justified on the basis that the provisions of the Rome Treaty dealing with legislative harmonization, either generally or as applied to specific subjects, call for adoption of a uniform policy by Community institutions while its implementation is left to the national legislatures. This process, it is generally agreed, is best


15. Seidle-Hohenveldern, supra note 11, at 247. Stein, supra note 7, at 353: "These terms mean adjustments in national law short of complete 'unification' which may not be necessary as measured by the hardstick of the politico-economic objectives of the Treaty."
described by the term "harmonization."\textsuperscript{16} It will be employed in this sense in this paper.

B. Functional Harmonization

The aim of the Rome Treaty is essentially an economic one—to create a Common Market in which no such obstacles as quotas, tariffs, restrictions on movement of labor or capital shall prevent realization of the benefits to be obtained from large-scale production and trade.\textsuperscript{17} This economic goal, though involving fundamental changes in social and political conditions, also sets a limit beyond which harmonization efforts may not step. As expressed in the Treaty, "the activities of the Community shall include, under the conditions and in accordance with the time-table envisaged in this Treaty . . . the approximation of their respective national laws to the extent required for the Common Market to function in an orderly manner."\textsuperscript{18}

Thus, there supposedly can be attempted no harmonization activities simply for the sake of harmonizing. It must be shown that the lack of similarity in the area sought to be harmonized does, in fact, prevent the full attainment of the Treaty objectives.\textsuperscript{19} A further limitation seen in this Treaty language is that the approximation provisions which are found in subsequent articles cannot be used to justify unification of legislation, i.e., drafting of identically worded legislation.\textsuperscript{20} Supporting this conclusion is the further argument that no unification of domestic legislation was intended and that it would be contrary to the federalist\textsuperscript{21} aims of the Community.\textsuperscript{22}

In spite of these stated limitations, it seems inevitable that the development of the Common Market will bring about a great impetus towards uniformity of laws. The historical process of the legislative unification movement in Europe,\textsuperscript{23} based on a common

\textsuperscript{16} Polach, supra note 11, at 154.
\textsuperscript{17} EEC Treaty, Art. 2.
\textsuperscript{18} EEC Treaty, Art. 3(h) (emphasis added).
\textsuperscript{19} Polach, supra note 11, at 154. Markert & Wirner, Aktienrechtsreform und EWG-Vertrag, 14 JURISTEN-ZEITUNG 627, 628 (1959): "Demgemäß unterliegt das innerstaatliche Recht der Mitgliedstaaten der Angleichungspflicht . . . nur insoweit, als sich aus der bestehenden Rechtsverschiedenheit eine effektive Behinderung des Gemeinsamen Marktes ergibt" [hereinafter cited as Markert & Wirner].
\textsuperscript{20} Seidle-Hohenveldern, supra note 11, at 250.
\textsuperscript{21} Hay, supra note 4.
\textsuperscript{22} Seidle-Hohenveldern, supra note 11, at 250.
\textsuperscript{23} W. Strauß, Fragen der Rechtsangleichung im Rahmen der Europäischen Gemeinschaften 10-12 (1959).
Roman and natural law tradition, suffered more from a lack of central coordination than from divergences based on national differences in culture, politics or social conditions. The institutional framework of the Common Market fills this need for unified and purposeful supervision. In its treaty-given powers to legislate directly and to implement the approximation provisions, Community institutions are far more likely to give reality to the dreams of prior generations.

It has been consistently argued that, because of the "functional" nature of Treaty-based harmonization, only public law comes within its sphere. A far-reaching argument to the contrary has been made by the former President of the Common Market Commission, Walter Hallstein. His basic argument is that private law as well as public law can affect the functioning of the Common Market. Furthermore, some areas of law cannot be clearly assigned to only one classification. Another difficulty is the fact that some problems which are considered to involve public law in one country are regarded as private law matters by its neighbor.

Thus, while Hallstein accepts the functional limitation of harmonization, he would extend its scope by enlarging the functional sphere. The specific application of this approach to problems of harmonization of company law in the Member States is of far reaching consequence and will be considered in the appropriate part of this article.

C. CHOICE OF LAW

There remains the question of what particular rule should be adopted from those available when harmonization efforts are undertaken in a specific area. Several possibilities suggest themselves. It could be that rule which has been accepted by the largest number of Member States in their domestic legislation. Or a compromise based directly on the varying national rules could be negotiated. Or a completely new rule could be formulated. No express provision in the Common Market Treaty suggests any particular method, and no such static prescription should be expected. Again, the functional character of the intended harmonization provides a meaningful standard when applied to this problem. It is

24. Polach, supra note 11, at 164.
26. Id. at 213-14. E.g., a transaction between a private seller and a governmental institution is regarded as a private (civil) law matter in Germany but as a public (administrative) law problem in France.
simply that that rule should be the basis for the harmonizing principle which is best designed to further the achievement of the Treaty goals. As put very concisely by one of the few writers who has examined this aspect of harmonization: 27

A prime objective of the treaty is to accommodate and to stimulate the economic evolution toward the 'post-maturity stage' marked by harmonious economic growth with social progress, and based on mass production, mass markets, intensive scientific development, outward-looking foreign economic policy and greater economic freedom. This treaty objective dictates the selection of the most modern and most progressive rule which would be conducive to the structural changes taking place in the European societies.

III. METHODS OF HARMONIZATION

One of the essential prerequisites of economic integration at the Community level is freedom to do business across national boundaries. In Title III of the Common Market Treaty, the founders sought to outline the basic rights which needed to be secured in order to assure this freedom. Article 52 provides that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages." This right of establishment, implemented by the General Program for the Removal of Restrictions on the Right of Establishment, 28 is made applicable to companies by Article 58 of the Treaty. 29

Freedom of establishment, while basic, is not sufficient, however. It merely allows a company to come into and do business in another Member State. It does not prevent the second country from requiring the company to submit to domestic laws which could be used to hinder its operations. To prevent the application of divergent national laws to the ever-increasing number of companies

27. Stein, supra note 14, at 33.
29. EEC Treaty, Art. 58:
Companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purpose of applying the provisions of this Chapter, be treated in the same way as individual nationals of Member States. Title I(d) of the General Program grants the protection of the right of establishment to companies having only their registered office within the Community only if "their business activity . . . show(s) a continuous and effective link with the economy of a Member State."
engaging in transnational business activities, the Common Market Treaty contains provisions for the harmonization of domestic laws in two specific categories of company law. In addition, other provisions of a general character also could be employed to harmonize differing domestic rules in the company law area.

A. PROTECTION OF SHAREHOLDERS AND THIRD PARTIES—
   ARTICLE 54(3) (g)

   Because some business entities are entrusted with funds invested by the public, and because creditors generally have no recourse to anyone but the corporation for corporate obligations, the protection of shareholders and creditors has been an area of universal, but by no means uniform, legislation. To bring about a more similar body of substantive law within the legal systems of the Member States, Article 54(3) (g) of the Treaty provides:

   The Council and the Commission shall carry out the duties devolving upon them under the above provisions, in particular: . . . by coordinating to the necessary extent and rendering of equal value the guarantees which Member States require of companies . . . so as to protect the interests both of members and outsiders . . .

   This section has been cited by writers in support of their contention that the Treaty does not seek to impose identical provisions upon the Member States.30 Rather, it is intended to secure the enactment of legislation in the individual countries which provides adequate protection to shareholders and creditors on the basis of Community-developed standards of adequacy.31 It seems questionable, however, whether, in view of the potential scope of functional harmonization, this is truly a limitation.

   Certainly the substantive scope of Article 54(3)(g) is of far reaching effect. The protection of shareholders and third parties includes a multitude of subsidiary legal problems: regulation of

31. Arnold, supra note 30, at 221: “Eine starke Beschränkung der Aufgabe ergibt sich daraus, dass Artikel 54(3)(g) als Ziel der ‘Koordinierun’ die ‘Gleichwertigkeit’ der Schutzbestimmungen stellt. Die Angleichung soll also nicht zu einer Rechtsvereinheitlichung führen, sie braucht auch nicht eine inhaltlich gleiche Ausgestaltung der gesellschaftsrechtlichen Institute zur Folge haben; es genügt vielmehr, wenn der Schutz, den die einzelnen nationalen Rechtssysteme— wenn auch mit verschiedenartigen Konstruktionengewährleisten, in allen Ländern ein ausreichendes Mass erreicht.”
the sale of corporate shares, payment of share subscriptions, liability of promoters, control over corporate financial records, voting rights, dividend rights, liability of management, authority of corporate officers to act for the corporation, validity of the corporate personality, etc. ad infinitum. In fact, it has been suggested that the whole sphere of company law could reasonably be brought within the scope of this Treaty article.32

Because of the seemingly limitless scope which this Treaty article encompasses, Community action to coordinate national legislation in this area has been intentionally limited. After initial examination showed the quantitatively overwhelming legislation affected by this Treaty provision, the Community institutions decided to achieve coordination of the most important and pressing rules by concentrating their efforts in selected narrow areas.33 Yet despite this self-imposed restriction the goal of effecting needed coordination measures in the selected initial areas by the end of 1964 was not attained.34

Community action commenced with the publication in 1964 of a “Proposed Directive on the Coordination of the Protective Provisions of the Member States Concerning Companies, in the Interest of Shareholders and Third Parties.”35 The revised directive, binding on the Member States as a statement of policy to be implemented by domestic legislation,36 was issued by the Council of the Eur-

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32. Leleux, supra note 30, at 31. And, see Ianuzzi, L’Évolution du Droit des Sociétés par Actions dans le Territoire du Marché Commun, 34 ANNuario DI Diritto Comparato E DI Studi Legislativi 77, 79 (1960): “Pour comprendre la vaste portée de cette norme, il suffit de considérer qu’il n’y a pratiquement aucun aspect de la réglementation des sociétés par actions qui ne se traduise par une détermination de garanties à l’avantage des associés ou des tiers.” It has even been suggested that the provisions in German law providing for labor representation on the Board of Super-visors of stock corporations come within the scope of Article 54(3) (g) since workers can be considered “third parties” under the terms of this article. See Bärmann, Einheitliche Gesellschaftsform für die Europäische Wirtschaftsgemeinschaft, 160 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 97, 122 (1961).


34. General Program for the Removal of Restrictions on the Right of Establishment, Title VI: “It is intended that any co-ordination needed to equalize the guarantees which Member States require from companies, in the interests both of shareholders and of third parties, shall be carried through before the expiration of the second year of the second stage of the transition period.” The second stage commenced on January 1, 1963.


The scope of this First Company Law Directive is limited in its applicability to specific types of business associations and also in the subject matters affected. Thus, Article 1 provides that the coordinating measures prescribed in the directive are applicable to the legislative, regulatory and administrative provisions of the Member States with respect to stock corporations, limited liability companies and partnerships limited by shares.\textsuperscript{38} As to substantive scope, the directive is limited to three specific problems in company law regarded as most in need of timely coordination: publicity requirements, validity of company obligations and invalidity of companies.

1. **Publicity**

Article 2 of the First Company Law Directive specifies the items which must be subject to mandatory publicity under the domestic laws of the Member States. These include the act constituting the company and the by-laws, if they are the subject of a separate act, and any subsequent amendments to these. Mandatory publicity must also be given to the appointment, the termination of duties, as well as the names of persons who, as a legally constituted organ of the company or as members of such an organ have the power to bind the company, to represent it both in and out of court, or take part in the administration, supervision or control of the company. The publicity must show whether the persons who have the power to bind the company may represent it alone or must do so jointly.

The directive also calls for mandatory publicity, at least once per year, as to the amount of the capital subscribed for, where the act constituting the company or the by-laws refers to authorized capital, and in the event an increase in the capital subscribed for does not require an amendment of the by-laws.

Prior to the publication of the proposed draft directive considerable controversy existed about the rumored requirement that the balance sheet and the profit and loss statement of companies would be subjected to mandatory publicity. It was argued that lim-


\textsuperscript{38} For a discussion of the legal characteristics of these and other forms of business associations in Europe, see Hay, supra note 6.
limited liability companies, which generally are family-owned enterprises and do not seek capital from the public, should not be subjected to such disclosure of their financial condition. The proposed draft directive reflected a compromise by providing that only limited liability companies with a total capital balance of $1 million or more had to publish their financial reports. By setting this dividing line, companies which would engage in transnational business activities would for the most part have been subject to financial disclosure requirements while smaller companies which operate only within their national boundaries would generally have been freed from such obligation. This provision was also intended to assure that "a flight to the limited liability company in order to avoid the provisions relating to publicity in the corporation" could be averted.\footnote{39}

The directive as finally issued, however, omitted this financial dividing line and instead provides that the mandatory publicity requirement as to financial statements would be deferred for limited liability companies "until the time of application of a directive concerning the coordination of the content of balance sheets and profit and loss statements and exempting from the publicity requirement for all or a portion of the documents those of such companies whose balance sheet total is below an amount which it shall determine."\footnote{40}

Additional items required to be disclosed include transfer of a company's registered office; dissolution of the company; judicial decisions declaring a company to be null and void; the appointment and names of a company's liquidators, as well as their powers, to the extent that such powers do not result expressly and exclusively from the law or the by-laws; the termination of liquidation; and the cancellation of the company in the Commercial Register, in the member countries where such cancellation has legal effects.\footnote{41}

Article 3 of the First Company Law Directive provides that in each member country "a record shall be kept, either in a central register or in a commercial register or a register of companies, for each of the companies entered therein." All documents and entries required to be made public under Article 2 must be deposited in this record or entered in such register. Upon written request, copies of such documents or entries must be furnished. In addition, such documents and entries must be published in an official government

\footnote{39. Fikentscher & Grossfeld, supra note 35, at 267.}
\footnote{40. First Company Law Directive, Art. 2. 1 C.C.H. COMM. MKT. RPT. § 1357.}
\footnote{41. Id.}
publication, and until such publication occurs the documents and entries may not be used by the company against a third party unless the company can prove that such third party had actual knowledge of such information.42

One aspect of the publicity requirement in the proposed draft directive which incurred the opposition of the Economic and Social Committee43 was the requirement under Article 5 that all company letters, bills, purchase order forms and price lists must not only indicate where the official file of the company is kept and available for inspection, but must also include the legal form of the company, the location of its seat, the amount of its capital and, if applicable, the fact that the company is being liquidated. Opposition centered around the requirement for disclosure of capital on these instruments, on the basis that without a standard concept of “capital” such information could be misleading and more harmful than beneficial. Since legal provisions in the Member States differ in their definition of capital, the Committee suggested that at the very least the draft directive should be changed to require disclosure only of “actually paid-in capital” in order to eliminate dissemination of misleading information.44

As finally issued, the directive specifies that company letters and order forms identify the register where the documents required under Article 2 have been filed and the company’s registration number. Letters and order forms must show the company’s legal form, its registered office, and the fact that it is in liquidation if such is the case. Mandatory disclosure of capitalization has been eliminated, with a substitute provision that if the capitalization is indicated, the amount of capital subscribed for and paid in must be given.45

Although the directive imposes an obligation on Member States to impose sanctions for violations of the disclosure duties, no specific mention is made of the nature of such sanctions.

2. Binding Effect of Acts by Agents

When dealing with companies operating across national boundaries, it may be difficult to ascertain whether that company’s agent has in-fact-authority to bind his company by his acts. Such information may depend on provisions of that company’s charter or of statutes which are not readily available. In Articles 7 to 9, the

42. Id. at § 1358.
43. 1964 J.O. 3252.
44. Id.
First Company Law Directive seeks to establish Community-wide standards which would cure the presently divergent domestic rules in this area.

Article 7 deals with company obligations incurred prior to the formation of the company. It establishes that the domestic laws of the Member States must provide for the joint and several liability without limitation on the part of individuals who carry out dealings in the name of the company prior to it having attained legal personality if the company does not subsequently assume the obligations resulting from such transactions. The parties may, however, enter into agreements absolving the individuals from such personal liability if the domestic law of the Member State in question so provides.\footnote{46}

Article 8 provides for a Community standard of company liability for obligations entered into by company officials whose appointment turns out to have been defective. The company must be held liable under the domestic law of each Member State for such obligations once the formalities of publicity relating to the tenure of persons who, as an entity, have the power to bind the company have been carried out. Only if the third party dealing with the defectively appointed company official had actual knowledge of such defect can the company be absolved from liability.\footnote{47}

Despite statements by some writers that the doctrine of \textit{ultra vires} is not a part of the substantive law of specific European countries,\footnote{48} statutes generally provide that the charter of the company must specify the purpose or object of the company.\footnote{49} In German law, this purpose limits the permissible scope of action of management as far as internal affairs of the company are concerned; it cannot be asserted against a third party.\footnote{50} In France, acts done by the board of directors in excess of its powers do not incur corporate responsibility unless the stockholders have ratified the act or the corporation has derived a profit therefrom. Otherwise, “when the board has exceeded its powers the directors are personally liable to third persons, unless the third person contracted at his own

\footnotesize{\begin{itemize}
\item \textit{48.} E. Steefel, \textit{German Commercial Law} 92 (1963).
\item \textit{50.} H. Würdinger, \textit{Aktienrecht} 133 (1959). And, see R. Godin & H. Wilhelmi, \textit{Aktiengesetz Kommentar} § 74, Anm. 1 (2d ed. 1950).
\end{itemize}}
peril subject to ratification by the stockholders’ meeting, or unless the third person was given 'sufficient knowledge' of the limits of the director's power.” Generally,

The act creating the company and the charter may determine the purpose, i.e. the sphere of activity, of the company, as well as the kind of business transactions, for which it was founded. According to general principles of law, the company may not act outside the limits set by this purpose. In practice, however, such limits are of little significance since for practical considerations it is customary to list in the charter, in addition to the main activities, all transactions which stand in direct or indirect relation to them.52

This situation is very familiar to one acquainted with the traditional American practice of drafting purpose clauses in the days when the ultra vires doctrine was still a forceful factor in American corporation law.53

Article 9 of the First Company Law Directive makes it mandatory for the Common Market countries' legal systems to provide that a company shall be held liable to third parties for acts of its organs even if such acts are not related to the company purpose, unless such acts exceed the power given to such company organs by law. The Member States may, however, provide that a company shall not be held liable for acts exceeding the company purpose if the third party had knowledge of the fact that the transaction exceeded the company purpose.54

Limitations on the powers of company organs set forth in the company by-laws or adopted by appropriate company organs may not be allowed to be invoked by the company against third parties even if such limitations were given publicity.55

If the national law of a Member State provides that the power to represent a company may, notwithstanding any statutory rule, be delegated in the by-laws to a single person or to several persons acting jointly, such Member State may also provide that such a by-law provision may be invoked against third parties to the extent that it concerns the power of representation in general. The publicity requirements set forth in Article 3 of the directive must have been observed in such a case, however.56

52. 1964 J.O. 3254 (trans.).
53. See 1 G. Hornstein, Corporation Law and Practice § 106 et seq. (1959); N. Lattin, Corporations 201-38 (2d ed. 1971).
55. Id.
56. Id.
3. **Nullity of the Company**

The remaining provisions of the directive set out the conditions under which a company may be decreed to be a nullity. Such a declaration of company nullity must be in the form of a judicial decree. Company nullity may only be decreed for the following reasons:

a. where an act constituting the company is lacking, or where either the formalities of prior supervision or the form of public certification has not been complied with;

b. where the true purpose of the company is illegal or violates public policy;

c. where the act constituting the company or its by-laws fail to show the name of the company, the contributions, the amount of capital subscribed for, or the company purpose;

d. where the provisions of national law relating to the minimum amount of paid-in capital have not been complied with;

e. where all the founding partners or shareholders lacked capacity;

f. where, in violation of the provisions of national law applicable to the company, the number of founding partners or shareholders was less than two.

A judicial declaration of a company's nullity must be followed by the institution of liquidation proceedings. Article 12 of the directive protects third parties by providing that obligations incurred by the company towards them are not affected by the declaration of company nullity. The regulation of the legal effect of a declaration of nullity as between the partners or shareholders is left to the Member States, except for the requirement that shareholders and interest holders must be obligated to pay in any remaining sums owed for their shares or interest to the extent necessary to satisfy demands of creditors.

In Article 13 of the directive an obligation is imposed upon the Member States to "inform the Commission of the substance of essential provisions of national law adopted by them that relate to the subject matter of this directive."

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57. *Id.*, Art. 11. 1 C.C.H. COMM. MKT. RPT. § 1366.

58. *Id.*

59. *Id.*, Art. 12. 1 C.C.H. COMM. MKT. RPT. § 1367.

60. This provision touches on a subject which has received limited attention from writers: the competence of national legislatures to enact domestic legislation in fields subject to the harmonization provisions of the Common Market Treaty. One exchange of views on this problem relates to the specific question whether the reform of German corporation law, officially proposed in 1958 and finally adopted in 1965, was permissible.
B. Article 220 of the Rome Treaty—Harmonization of Specific "Private International Law" Problems

Article 220 of the Common Market Treaty provides for the harmonizing machinery with regard to three specific problems of company law having private international law implications:

Member States shall, in so far as necessary, enter into negotiations with each other with a view to ensuring for the benefit of their nationals... the mutual recognition of

See Bärmann, *Ist eine Aktienrechtsreform überhaupt noch zulässig?* 14 JURISTEN-ZEITUNG 434 (1959) and Markert & Wirner, *Aktienrechtsreform und EWG-Vertrag*, 14 JURISTEN-ZEITUNG 627 (1959). The basic argument was that Article 5 of the Rome Treaty (Member States "shall abstain from any measures which could jeopardize the attainment of the objectives of this Treaty") is violated by any domestic legislative action which causes or retains divergences from the laws of other Member States. Bärmann maintained that logical necessity required the application of this principle to legal materials which, under the Treaty provisions, would eventually be harmonized. Thus, he argued, even though extensive areas of company law may not be covered by the specific harmonization provisions of the Treaty, they undoubtedly would eventually come within the scope of Article 100, one of the general approximation provisions ("The Council shall... issue directives for the approximation of such legislative and administrative provisions of Member States as directly affect the establishment or operation of the Common Market"). The opposing argument did not direct itself to the interpretation of Article 5, unfortunately; the authors were content to refute the broad interpretation of Article 100 by maintaining that the principle of functional harmonization requires that internal law remain within the exclusive competence of the Member States' legislatures. This argument ignored the main issue and failed to consider the relationship between domestic company law and Community trade and development. As far as theoretical analysis is concerned, Professor Bärmann's view seems the sounder of the two. As far as its practical application is concerned, however, it does not consider the difficulty of enforcing the observance of duties imposed by Article 5. Articles 169 and 170 of the Common Market Treaty do provide for action by the Commission or a Member State where another Member State has failed to fulfill a Treaty obligation. The inference to be drawn from the Commission's approach in the First Company Law Directive discussed above, however, is that it, in effect, is applying a "preemption" doctrine under which Member States are under a duty of consulting the Commission with regard to domestic legislation in areas already harmonized. This limited view may be necessitated by political and diplomatic considerations; its practical effect is to minimize the possibility of action by a Member State against another Member State for domestic reform of a legislative area which has not been the subject of Community harmonization efforts. For further support for the position that Member States are under a duty to submit information to, or consult with, Community institutions before enacting domestic legislation in areas subject to eventual harmonization, see Lochner, *supra* note 12, at 57. With respect to the enactment of legislative or administrative provisions which might create a minor risk of possible distortion of the conditions of competition, Article 102 of the Treaty imposes a duty on the Member States to consult the Commission. See Flaminio Costa c. Ente nazionale Energia elettrica impresa già della Edison Volta (E.N.E.L.), 10 C.J.C.E. 1141 (1964) (C.C.H. translation § 8023).
firms or companies . . . , the maintenance of their legal personality, if their registered office is transferred from one country to another, and the possibility of mergers between firms or companies, which are subject to different domestic laws.

It seems unfortunate that with regard to the harmonization of these areas of company law initiative for action is left in the hands of the Member States. The delay in positive action to date is to be regretted, since these areas are of vital concern to Community trade and development.

This delay in negotiations among the Member States raises the interesting question whether the Community institutions may initiate any action if they are of the opinion that harmonization of national laws in these areas is in order. To the extent that Article 220 imposes a duty to negotiate on Member States, it would seem that the Commission of the European Economic Community could initiate action under Article 169 of the Treaty by asking for an explanation from the Member States and then issuing an opinion to the effect that failure to negotiate constitutes a violation of Treaty obligations. Since Commission opinions have no binding force, further reliance would have to be placed on the provision in Article 169 that, "If the State concerned does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice." But to have to submit to time-consuming judicial process to achieve negotiations which hopefully will lead to harmonization seems an unsatisfactory substitute for direct Community action. It is suggested that such direct action is permissible under the general approximation provisions of Article 100 of the Treaty which will be discussed in a subsequent section.

61. A preliminary draft convention on the mutual recognition of companies and legal persons has been completed. 2 C.C.H. COMM. Mkt. Rpt. §§ 6083-6107. Preparatory work for the negotiation of conventions concerning the transfer of a company's seat without loss of legal personality, and concerning mergers between companies in different Member States, is under way.

62. EEC Treaty, Art. 169: If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall issue a reasoned opinion on the matter after giving the State concerned the opportunity to submit its comments.

63. EEC Treaty, Art. 189.

64. Somewhat similar procedures are available where a Member State asserts that another Member State has failed to fulfill a Treaty obligation. Article 170 permits referral of the matter to the Court of Justice after referral to the Commission, which must issue an opinion after receiving written and oral comments from the affected country. It would seem, however, that a direct refusal by one country to negotiate would be a prerequisite before another Member State could invoke Article 170.
1. Mutual Recognition of Companies

A harmonization of the rules regulating the recognition of the legal personality of a company created in another country would seem to result merely in a restatement of presently applicable norms. All the Member States give such recognition at the present time.\(^6^5\)

The application of Hallstein's interpretation of the scope and purpose of harmonization,\(^6^6\) however, would have far-reaching new implications. On the basis of his argument that ever-increasing quantity of laws and regulations results in difficulty and confusion he suggests that, since harmonization results in fewer rules which, however, are applicable over a wider geographic area, the scope of harmonization be taken at its broadest possible interpretation in order to get clarity in the law. Because of its economic objectives, it has always been held that only profit-making companies are included under the provisions of Articles 58 and 220 of the Treaty. Yet, he suggests, the differentiation between profit-making reasons is difficult to apply in practice. To eliminate such distinction, he advocates that the substantive rules on recognition of legal personality include all economically active associations, whether profit-making or not.\(^6^7\) This proposal, though novel in its application to the Common Market Treaty, is nevertheless not new, having been incorporated in the 1956 Hague draft convention on Recognition of Companies.\(^6^8\)

Article 1 of the Convention Relating to the Mutual Recognition of Companies and Legal Persons,\(^6^9\) signed by the representatives of the Common Market countries on February 29, 1968, provides that companies and cooperatives formed under civil and commercial law of a Contracting State which accords them the capacity to have rights and obligations, and which have their seats, as designated in their charter, in the territories covered by the convention, shall be recognized as a matter of law. Articles 2 and 3 of the Convention provide:\(^7^0\)

Besides the companies referred to in Article 1, recognition as a matter of law shall also be granted to legal persons under public and private law which meet the conditions of

\(^{65}\) Leleux, supra note 30, at 32. And, see E. Wohlfarth et al., supra note 13, at § 220 Anm. 6.
\(^{66}\) See text accompanying note 25.
\(^{67}\) Hallstein, supra note 25, at 215-17.
\(^{68}\) Conférence de la Haye de Droit International Privé, Actes de la 7e Session tenue du 9 au 31 octobre 1951 (La Haye 1952).
\(^{69}\) 2 C.C.H. COMM. MKT. RPT. § 6085.
\(^{70}\) Id. at §§ 6086-87.
Article 1, if their principal or secondary purpose is to engage in an economic activity that is normally conducted for compensation, or if they in fact continuously engage in such activity without thereby violating the law under which they were established.

Each Contracting State may, however, declare that it will not apply this Convention to the companies or legal persons referred to in Articles 1 and 2 whose actual seat is located outside of the territories to which this Convention applies, if such companies or legal persons do not have a genuine link with the economy of one of these territories.

2. Transfer of a Company's Seat

All the Member States of the Common Market have in their domestic law the concept of siège réel, or “seat.” The location of a company's seat determines its nationality, i.e., to which law it is subject; statutes uniformly provide that a company must be formed under the laws of that country in which its seat will be located. But since “seat”, in a somewhat imprecise definition, means the place where the company's central management is located and where control is exercised and decisions are made, serious and difficult factual questions can arise as to where a particular company's seat is, in fact, located. If, for example, a company incorporated in Germany expands its operations, establishes a branch in France, experiences great success and growth, and eventually finds that it has, over a period of time, relocated its management and decision-making officials to France, it could have serious legal difficulties. Since its seat is now in France, Germany may no longer regard it as a German corporation having the protection of corporate personality and limited liability, and France would not consider it a French corporation since the procedural formalities of incorporation never took place in France (and could not be attempted, since dissolution must occur in Germany before incorporation in France could commence). Under such circumstances, the need for harmonized legislation for the maintenance of a company's legal personality when moving its seat to another country seems obvious. The fact that the seat rules have not been strictly enforced is not sufficient assurance against enforcement in the future when company activity across national boundaries will increase and when efforts to regulate their conduct are bound to increase as well. The strong interest on the part of Europeans in certain phases of

71. Leleux, supra note 30, at 32.
American corporation law, such as the doctrine of "piercing the corporate veil," suggests that present disregard of rules affecting the legal personality of companies may not last forever.

Preparatory work for negotiations among the Member States for harmonization in this area has occurred. In the meantime two countries have enacted domestic legislation designed to help solve this problem. A French ordinance of January 7, 1959, allows a company to transfer its seat on approval of the shareholders and dispenses with the need for dissolution "provided an international convention concluded with the receiving country ensures that the legal person continues to exist in the latter country." Since no such convention has been concluded, however, no practical benefit can be realized from the existence of the statute. Italian law permits a company to change its charter to provide for a foreign seat for the company upon approval of a majority of the shareholders. But while under the terms of this statute the company would be assured of continued recognition of its legal personality in Italy, its legal status in the country to which it has transferred its seat is as much in doubt as ever. In addition, neither the French nor the Italian solution is of help to a prospering company which has moved its seat to another country over a period of time without knowing at what point in time the transfer occurred, indeed without realizing that a seat transfer was taking place. It is this phenomenon of the transfer resulting from profitable business expansion, undoubtedly to be encountered with increasing frequency as Common Market economic development progresses, which makes suggestions for unilateral legislation somewhat less than practical.

3. Mergers

The difficulties inherent in the theory, recognized universally in Common Market countries, that a company must be created by the State in which it has its seat makes the merger of companies formed in different countries legally impossible without dissolution of both and "re-creation" in one country. Yet, again, the availability of legal techniques to accomplish such mergers more easily is an essential ingredient of Common Market development.

Apart from "seat" problems, other difficulties in substantive law are encountered which need to be eliminated by harmonization.

74. Civil Code art. 2437.
75. Markert & Wirner, supra note 19, at 629.
One of the most basic of these problems involves divergences in present tax consequences of mergers. Thus, accumulated reserves become subject to income tax liability upon a merger of companies in Germany, while no such consequences result in other Common Market countries. The divergent tax laws in general would have to be harmonized to prevent the creation of a "tax haven" in one country to which merging companies would be attracted.\textsuperscript{76}

A resolution of a fundamental split in the area of commercial law would also be necessary. In France and Belgium, the merged company retains a legal existence within the framework of the acquiring company and remains liable for its debts until the final liquidation which occurs only upon fulfillment of all of its obligations. The other Common Market countries regard a merger as a complete fusion of legal personalities, resulting in the liability of the acquiring company for all debts of the acquired company.\textsuperscript{77}

C. **General Harmonization under Article 100 of the Rome Treaty**

In addition to the provisions calling for harmonization of specific areas of company law the Treaty also contains general approximation provisions. The most important of these is Article 100:

The Council shall, by a unanimous decision, on a proposal of the Commission, issue directives for the approximation of such legislative and administrative provisions of Member States as directly affect the establishment or operation of the Common Market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives the implementation of which would involve amending legislation in one or more Member States.

The degree to which harmonization can be attempted has already been discussed. Article 100, implementing the policy expressed in Article 3(h)\textsuperscript{78} must also be regarded as a limitation on harmonization activities to the extent that it does not permit harmonization of domestic provisions which do not "directly affect the establishment or operation of the Common Market."\textsuperscript{79} Apart from

\textsuperscript{76} Beitzke, Fusion von Gesellschaften über die Grenze? 1961 AUSSENWIRTSCHAFTSDIENST DES BETRIEB-BERATERS 288.

\textsuperscript{77} Id. at 289.

\textsuperscript{78} EEC Treaty, Art. 3(h): "[T]he activities of the Community shall include . . . the approximation of their respective national laws to the extent required for the Common Market to function in an orderly manner . . . ."

\textsuperscript{79} This does not prevent harmonization or unification of rules having no such direct incidence, of course; Article 100 only prevents Community
this reference to functional harmonization, however, this Treaty article raises the interesting point already mentioned of whether Community institutions have competence to initiate harmonizing proposals in areas subject to the specific harmonization provisions of the Treaty. What little consideration has been given to the problem has for the most part concluded that Community action under the general approximation provisions may be permissible under these circumstances. These discussions, however, have failed to differentiate between two possible factual settings which could lead to different conclusions. Areas of law which are subject to specific approximation provisions giving exclusive jurisdiction over such approximation to Community institutions, for example Article 54 (3) (g), may very well be harmonized by invoking Article 100. No greater scope of harmonization is thereby achieved, no power not already given to the Community is exercised. The only practical difference would be that the preamble of the directive refers to Article 100 instead of another treaty article.

But where the Common Market Treaty ascribes initiative for harmonization to the Member States, as Article 220 does, a more serious issue of conflicting spheres of jurisdiction is encountered. Action by the Community under Article 100 would seemingly impinge directly on an area of activity arguably reserved to the Member States. It is suggested, however, that where "establishment or institutions from initiating it. Traditional international procedures, such as multilateral conventions, can be utilized by Member States to achieve harmonization of such bodies of law. This has been done in the area of patent law, for example. See Convention for a European System for the Grant of Patents, 2 C.C.H. COMM. MKT. RPT. §§ 5503-5636. In addition, the Common Market Commission has appointed a working party which has prepared a Draft Convention Relating to a European Patent for the Common Market. 2 C.C.H. MKT. RPT. §§ 5751-5870.

80. Grisoli, The Impact of the European Economic Community on the Movement for the Unification of Law, 26 LAW & CONTEMP. PROBS. 418, 420 (1961) [hereinafter cited as Grisoli]; Stein, supra note 14, at 6. For a contrary conclusion, see E. Wohlfarth et al., supra note 13, Art. 100 Anm. 2. The authors here conclude that those specific harmonization provisions which refer to substantive areas for which the Treaty envisions the formulation of a common policy (transportation, agriculture, foreign trade) preclude recourse to Article 100. They except, however, those provisions which call for a general rather than specific coordination, such as Article 105. They would permit harmonization under Article 100 of areas subject to specific harmonization provisions, such as Article 54(3) (g), where the Treaty provision selects only a very limited substantive area for harmonization. As previously mentioned, however, Article 54(3) (g) is capable of extremely broad interpretation and may cover most of the field of company law.

81. EEC Article 190: The regulations, directives and decisions of the Council and of the Commission shall be fully reasoned and shall refer to any proposals or opinions which this Treaty requires to be obtained.
operation” of the Common Market is directly affected by the existence of divergent national laws, Community harmonization efforts under Article 100, in conjunction with Article 3(h), are permissible in the absence of action by the Member States. Such direct action is preferable to the time-consuming alternative of instituting procedures against Member States under Article 169 for failure to fulfill Treaty obligations. A procedural safeguard is provided by the requirement of consultation with both the Assembly and the Economic and Social Council where amendment of legislative provisions would be necessary in any of the Member States. It is strongly suggested that the achievement of goals set by the Common Market Treaty should not be thwarted by a restrictive interpretation of jurisdictional principles. Once it has been established that a lack of negotiations among the Member States has in fact created a situation which adversely affects the functioning of the Common Market, the essential jurisdictional basis under Article 100 would seemingly exist.

The activities of the Community to date in implementing Article 100 would seem to indicate a trend toward a rather liberal interpretation of the scope of that article. The greatest number of directives under this Article actually in force are in the area of public health. A number of directives relating to standards of purity and marketing of seeds and vegetable products have also been adopted. The expanding scope of harmonization efforts under Article 100 is illustrated by the fact that a number of technical provisions have been dealt with by the Community on the theory that they constitute obstacles to trade and thus impede the creation of a common market. Most of these technical requirements relate to motor vehicles, although a variety of miscellaneous products have also been considered candidates for Community harmonization, such as measuring instruments, electrical equipment, pipelines, glass, textiles and wood. In addition, the Common Market Commission has prepared and submitted to the Council a proposed directive dealing with the tax treatment of mergers, split-ups, and transfers of assets, and a proposed directive dealing with a common tax system for parent companies and subsidiaries of different

82. The directives to date limit coloring materials in foodstuffs for human consumption, harmonize laws governing preservatives that may be used in foodstuffs for human consumption, establish criteria for purity of preservatives added to foodstuffs for human consumption, and deal with proprietary drugs, livestock and fresh meats.

member countries. These latter projects, while not involving any conflict of jurisdiction over harmonization, do indicate the broad substantive applicability assigned to Article 100 by the Community institutions. An early analysis of the scope of this Treaty Article, has now been substantiated by current developments. According to this analysis:

The sphere of legal and administrative provisions which have a direct incidence on the establishment and functioning of the Common Market will have to be limited narrowly during the first stage of the transitional period, but will be extended during the subsequent development of the Common Market especially after the termination of the transitional period. It is therefore conceivable that the procedures provided by Art. 100 will lead in time to an approximation of legal provisions in the area of private law, especially in the area of trade and economics.

It is therefore arguable that domestic laws affecting companies, and thus having a direct incidence on Common Market development, could be harmonized in the future under the provisions of Article 100.

D. HARMONIZATION OF DISTORTIONS OF CONDITIONS AFFECTING COMPETITION—ARTICLES 101 AND 102 OF THE ROME TREATY

Of special concern to the framers of the Common Market was the maintenance of competition in a market which would tend to encourage the growth of individual enterprises and lead to mergers resulting in dominance of the market. Articles 85 and 86, implemented by Council Regulation No. 17, provide the substantive antitrust law in force in the Community and its Member States. Articles 101 and 102 provide for the harmonization of legislative


85. EEC Article 99 provides for approximation measures by the Commission and Council only with respect to indirect taxation, such as turnover taxes and excise duties.

86. Groeben & Boeckh, Kommentar zum Europäischen Wirtschaftsgemeinschaftsvertrag, Art. 100 Amn. 3a (1959).


88. EEC Treaty Art. 189: "Regulations shall have general application. They shall be binding in every respect and directly applicable in each Member State." Prior to the promulgation of Regulation No. 17, Article 85 was "self-executing" and directly applicable in each country. Kleindingsverkoopbedrijf de Geus en Uitdenbogerd c. Robert Bosch GmbH, 8 C.J.C.E. 97 (1962).

89. EEC Art. 101: Where the Commission finds that a discrepancy exists between the legislative or administrative provisions of Member States and is
and administrative provisions which distort or threaten to distort the conditions of competition in the Common Market.

Most of the discussions about the applicability of these two Treaty articles has centered around the meaning of the term "distortion," which "has no distinct, judicial meaning,"91 is not defined in the Treaty, and "in its natural sense . . . has implications so wide that it clearly cannot coincide with the concept of distortion in Article 101."92 A general definition is, however, possible on the basis of the travaux préparatoires, principally the so-called "Spaak Report."93 Here, the thrust of Article 101 is explained as being directed at "specific distortions,"94 that is, distortions arising from governmental legislation or regulation rather than from inherent conditions of the national economy. Thus, the impact of different systems of social security may affect conditions of competition since in some countries appropriations from public funds support such a program while in others it is financed by employers' and employees' contributions. Other possible specific distortions may arise from differences in tax laws and regulation of working conditions and hours. To be contrasted are the basic conditions of inequality, such as divergencies in natural resources and levels of productivity.95

It cannot be doubted that domestic legislation affecting companies engaged in a specific kind of economic activity96 can cause specific distortions. Practically all regulation of companies, such as

90. EEC Treaty Art. 102:
Where there is reason to fear that the introduction or amendment of a legislative or administrative provision may cause distortion . . ., 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 void the distortion in question . . .
91. Grisoli, supra note 80, at 421-22.
92. Id.
94. Id. at tit. 2, ch. 2. See also Grisoli, supra note 80, at 422 and Markert & Wirner, supra note 19, at 629.
95. See Stein, supra note 14, at 6.
96. In determining the existence of a "specific distortion," comparison is made of a specific economic activity in one country with the corresponding activity in the other countries to determine whether their burdens under domestic law affect their ability to compete. See Hallstein, supra note 4, at 211, and Stein, supra note 14, at 6.
requirements of publicity and liability for acts of agents, may affect ability to compete. So could the conclusion of a bilateral treaty between France and one of the other Member States by which such Member State would obligate itself to recognize the legal personality of a company incorporated in France which moves its seat from France to that country in accordance with the French statute discussed earlier.97

Because of the imprecision of the definition of "distortion" no action has been taken by the Community so far under Article 101. If that difficulty is ever overcome, the substantive scope of the provision may be expected to be interpreted broadly. The possibility of a dispute over the feasibility of harmonization under Article 101 of areas covered by one of the specific harmonization provisions arises again. With respect to those areas for which harmonization initiative is given to the Member States (e.g. Article 220), it is again suggested that Community action is justifiable if the divergencies in the national laws of the Member States interfere with competition in the Common Market.

Article 102 is designed to prevent the enactment of new legislative or administrative provisions which would cause distortions of conditions of competition by providing for consultation with the Commission. Consultation is a legal obligation under the Treaty, even for "proposed legislation [which] might create even a minor risk of possible distortion," but failure to consult does not give a legal cause of action to any individual.98 The Commission must proceed against the offending State and can issue a directive to eliminate the distortion, except where only the offending country is adversely affected.

IV. THE "EUROPEAN COMPANY"

In recent years, European writers99 have given increasing attention to the possibility of developing a new form of business as-

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97. This statement is based on the assumption that such a treaty would come within the terminology of Article 101 referring to "legisla
tive" provisions.

98. Flaminio Costa c. Ente nazionale Energia elettrica impresa già

The interest in this area is based on the opinion that harmonization efforts require too much time to be of substantial benefit in the near future, and that some means should be found to allow companies interested in Community-wide activities to operate without the hindrance of divergent national laws.

The "international corporation" is not an entirely new phenomenon. Several have been formed in the past to fill specific needs. They include Eurofima, a corporation whose shareholders are the national railroads, formed to purchase rolling stock at advantageous prices, and the Société Internationale de la Moselle, a limited liability company engaged in the construction of the Moselle Canal between Thionville and Koblenz, formed by Germany, France and Luxembourg. Created by treaty between the countries involved, the company's charter is annexed to the treaty and is primarily determinative of the company's legal status and obligations. The national law of the country where the seat of the company is located is only secondarily applicable.

Based on the advantages seen in these companies, a proposal for the creation of a European Company form of business association voiced in 1959\textsuperscript{100} led to an inquiry to the Commission of the European Economic Community\textsuperscript{101} for its views. Its answer, favorable though noncommittal, was as follows:\textsuperscript{102}

The Commission welcomes the beginning of discussions about the possibility of creating a form for a universal European business association . . . . The Commission will support such initiatives as its powers permit. It will check how such plans can be put into reality through work with the Member States.

The original proposal for the creation of a "European Company" involved the conclusion of a convention containing a model charter for companies having a minimum capital which would leave out smaller companies not involved in transnational activities. This charter, integrated into the domestic law of the signatories, would be taken by a company as its charter. Upon completion of the necessary procedures specified in the convention, the company would be formed, and from then on be subject to the provisions of the convention and the charter. This form of business association would exist in addition to the present forms available under the domestic laws of the Common Market countries. To discuss the

\textsuperscript{100} Sanders, supra note 99.
\textsuperscript{101} 1959 J.O. 1272.
\textsuperscript{102} Id. (trans.)
details of such a convention, an international congress was summoned in June 1960 by the *Ordre des Avocats à la Cour de Paris.*103 Since everyone except the French delegates voiced opposition to the idea of instituting such a business association, no progress was made at this meeting.

The opposition rested on several factors. One was that the creation of a new type of company, to exist side by side with existing national forms, would further complicate substantive company law rather than lead to simplification. Another objection was that the idea of giving enterprises a choice of national or international formation is incompatible with the nature of the corporation, a form of business association which, because it solicits capital from the public, has special legal restrictions imposed upon it. Thus, it was argued, either the international company is subjected to the same duties, in which case potential users will be repelled, or it is freed from such obligations, in which case it will be used to escape the regulation of national law. Such an argument, of course, overlooks the fact that the imposition of regulations for protection of shareholders and third parties can be accompanied by concessions in other aspects of company law which would attract companies engaged in international trade. The elimination of "seat" and merger problems, for instance, would be valuable compensating factors.

During the last decade the Commission of the European Economic Community has actively pursued the eventual realization of a "European Company" form of business association. In 1966 it commissioned Dr. Pieter Sanders, Dean of the Law Faculty of the University of Rotterdam, to prepare a draft statute for an "European Company." Published in 1967, his text of a draft statute with an extensive commentary104 has since become the object of extensive analysis and discussion in the Common Market countries. The climate for the realization of such a project has drastically changed. The reasons for such change are expressed in the Commission's Preface to Dr. Sanders' work:105

As the Common Market approaches realization and competition on all markets increases, the need for such a "European company" becomes more pressing every year. Enterprises in the Common Market must be offered a form of organization that will enable them to choose their loca-

103. The protocol of the meeting is published in 1960 *RÉVUE DU MARCHÉ COMMUN, Suppl. au no. 27.*
105. *Id.*
tion within the Community on the basis of purely economic reasons and aside from legal considerations. In addition, this form should help enterprises to make structural adjustments to new conditions, as well as to improve and rationalize their production and distribution.

The best way to achieve these objectives would seem to be a company form, uniform throughout the Community, that would, because of the financial needs of the enterprises, have to be that of a stock corporation. This new form of stock corporation would permit an enterprise to transfer its domicile from one country to another without difficulty. It would make it possible or easier for enterprises from different Member States to merge and to form subsidiaries. Finally, it would promote the integration of production factors from all parts of the Common Market, encourage joint projects, and facilitate access to the European capital market.

V. CONCLUSION

The permanent success of the Common Market will depend in large measure on the extent to which companies are allowed to develop their activities freely. Such necessity of freedom does not refer to letting them operate without restraint. Control and regulation are necessary to protect investors and third parties dealing with them as well as to channel their activities in accordance with overall Treaty objectives. Rather, the freedom referred to is freedom from the obstacles to business activity and expansion created by the differences in the laws and regulations applied to companies in the individual Common Market countries.

The practical difficulties of eliminating such differences are great. Apart from the fact that until now no central institution has existed to supervise legislative unification efforts, other obstacles are presented by the enormous scope and quantitative content of company law, by the impact of company law in the general area of economic and social policy over which Member States would like to retain some measure of control, and by the differences among these countries in some of the basic theoretical approaches to company law which reflect national influences of culture and departure from the common historical background.

Against this background the Common Market Treaty provisions stand out as a workable, though not perfect, method of achieving substantial similarity of national company laws. The efforts to implement these provisions are increasing both in number and speed as experience becomes a basis for confidence and more ambi-
tious projects. Additional assistance in the harmonization process may be expected from the substantive body of Community law developed by the Court of Justice of the European Communities.\textsuperscript{106}