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Introduction

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Introduction

GEORGE A. BERMANN*

As recent pages of this journal¹ and any other number of indicators would suggest, legal developments in the European Community (EC or Community) have sparked unprecedented interest on the part of the American legal profession. That this journal, five or ten years ago, would have devoted an entire issue to these developments, while not unimaginable, was unlikely. Today, however, changes in the world legal community's focus make the choice of topic seem quite obvious. The question now seems not to be whether or even when to address the Community, but rather what specific areas to address and how to do so.

My own preference has been, and will likely continue to be, to examine the evolving constitutional framework of the Community, the relationship among its institutions and the reconciliation of Community interests with the potentially divergent interests of its Member States. From that perspective, seemingly infinite possibilities for comparison with the American legal system and its experience with federalism present themselves. Perhaps never before have the leaders of different nations come together so deliberately and self-consciously under the world's watchful gaze to produce a common governance regime of such ambitious scope. That interest in the larger questions regarding the political and economic design of an increasingly united Europe has not been exhausted seems evident from most recent events in Europe. As this topical issue goes to press, European leaders once again assemble to pursue those very questions, and they do so without the faintest belief that they are writing the final chapter.

The fact remains, however, that although profound political and constitutional changes have come and are yet to come to the Community, it is essentially the programmatic objectives—all that the terms "1992" and the "Single Market" conjure—that provided the critical

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1. See, e.g., Kennedy & Webb, *Integration: Eastern Europe and the European Economic Communities*, 28 COLUM. J. TRANSNAT'L L. 633 (1990); Westin & Chroczel, *Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings*, 28 COLUM. J. TRANSNAT'L L. 723 (1990); Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989); Note, *The EEC Legislative Process: An Evolving Balance*, 27 COLUM. J. TRANSNAT'L L. 679 (1989).

impetus for those changes. Moreover, the realization of those objectives has acquired an impressive momentum of its own. It is therefore entirely appropriate that a topical issue of the *Columbia Journal of Transnational Law* devoted to the Community have a programmatic focus.

The legislative agenda of the Community is remarkable in reach and complexity. As creation of a common market has eclipsed the lowering of formal barriers to trade as the Community's central economic objective, the sectors in which Community intervention is justified have multiplied in number. What is more, the variety of possible forms of legislation, degrees of intervention, and implementation patterns—not to mention the difficult policy questions that individual sectors present—give European policymakers a truly bewildering number of choices to make. At the very least, they must establish their programmatic priorities.

The articles in this issue reflect in some measure those priorities. A number of the articles deal with problems that have preoccupied the Community from the outset, but have assumed urgency given current economic conditions. No better illustration could be sought than the merger control initiatives proposed in recent years. In detailing the developments, Davidow demonstrates that the Commission's close attention to merger control—like its longer-standing attention to agreements in restraint of trade and abuses of dominant position—is less well explained by the exigencies of a common market than by the necessity felt by the political institutions of the Community to exercise the powers of economic control expected of an effective contemporary political regime.

Other articles in the issue also deal with traditional problems that need to be revisited, but less because of contemporary economic circumstances than because of the Community's recent commitment to perfecting the common market. Tax harmonization and the perfection of a value-added tax (VAT) in the interest of free movement of capital provide an important example. Another example can be found in the securities industry. A reader of the 1985 Commission White Paper would have anticipated remarkable legislative efforts to promote the free movement of financial services. The second banking directive and the investment services directive described in Reid and Ballheimer's article on the securities industry are the fronts on which the new legislative energy associated with 1992 is most palpably felt.

Other contributions to this topical issue address problems that troubled the founders of the Community little if at all but that now figure prominently in the modern administrative state. The Single

European Act of 1986 (SEA) asserted the Community's rightful interest in the establishment of a Community environmental policy, both as an instrument of closer economic integration and as an end in itself. This topic is even more important in light of the ongoing considerations and reservations regarding the feasibility of expanding the Community to include the newly liberalized territories of Eastern Europe. Similarly, the problem of protecting computer programs discussed by Lucas and the problem of insider dealing treated by Reid and Ballheimer—a new problem despite its affinity to aspects of company law with which the Commission has long been concerned—rise to the top of the Community agenda for the same reasons they have done so in all other advanced market economies. These are issues that any effective regime, responsive to problems of the 1990's and beyond, simply must address.

Although each article in the issue deals with a particular issue of Community law more or in less in isolation, the reader of any sampling of them will uncover several recurring themes. The first is a pervasive attachment to harmonization, a process that demands a core of commonality in Member State policy and that presupposes in the shaping of that core at least some respect for divergent national traditions and prerogatives. If the harmonization drive receives criticism at all in these pieces, it is only, as in the software protection directive, for its alleged insensitivity to certain well-established doctrinal traditions or, as in the VAT discussion, for its excessive demand for uniformity. The call for harmonization is otherwise clear and forceful. More than ever after promulgation of the SEA, harmonization represents the Community's central approach to legislative reform.

A second theme is that harmonization implies both a powerful measure of legislative judgment and creativity in charting the zones within which national divergences will be tolerated and an equally powerful sense of pragmatism in determining what will win acceptance in national circles. The McLennan article on VAT harmonization makes these points with particular clarity, as do the articles by Lasok on the professions and by Reid and Ballheimer on the financial services and securities industries. The legislative techniques of demanding mutual recognition of professional qualifications and of delineating the responsibilities of home and host state in the services area illustrate the positive and workable mechanisms that will prove essential to translating broad aspirations of a Europe without economic borders into a functional reality. Likewise, the insider dealing directive, while harmonizing the essential rules against such activity, openly acknowledges Member States' prerogatives to confine traders

even more narrowly if they choose, and to fix the penalties and procedures in the event of violation. Lastly, the authors call for renewed attention to problems of efficacy in the enforcement of Community policy. Nearly every author reports a lapse in the faithful or effective implementation of particular policies at the Member State level, ranging from the lax and inconsistent pattern of enforcement of Community environmental protection standards described in the piece by Crockett and Schultz, to what is simply the degree of resistance to lowering barriers to mobility in the professions described in the Lasok piece. All the authors believe the Commission remains the Community's best hope in securing execution of Community policy. To the extent basic enforcement functions continue to be lodged essentially in Member State hands—and Crockett and Schultz clearly would have it otherwise so far as environmental protection is concerned—the Member States may want to exploit more fully the possibilities of joint enforcement with which they have experimented in the securities regulation field. Indications are that non-member states, including the United States, are also discovering the virtues of joint national enforcement in public administration. Finally, Stoelting's comment on judicial remedies serves as a useful reminder that, while legislation has perhaps overtaken judicial activism as today's strategy of choice for building the European Community, the European Court of Justice remains a crucial player in ensuring respect for Community law principles and the vindication of Community-based rights.

From a survey of these programmatic developments, as well as from any number of other sectors that might have been sampled, one emerges with the impression of substantial change on a large number of important fronts. What heightens the impression, and surely makes it more powerful than the impression that a comparable survey of developments in American law would produce, is that these developments occur within a legal and political framework the very premises of which are at the same time being profoundly reexamined with a view to basic reform. The precise magnitude of changes still to come in the Treaty of Rome remains to be seen. The pace of economic and monetary union and the shape of political union are, likewise, as yet undetermined. For the foreseeable future, however, we have reason to expect that diverse programmatic developments, of compelling interest in their own right, will take on still greater interest as they unfold within a visibly changing constitutional environment. We can also expect that the Community's success in achieving its various programmatic objectives, and the prices both the private sector and the Member States now pay for them, will help shape the ultimate constitutional design that Europe adopts for itself.