

Handout № 11

Harmonisation

1. Nature of harmonisation

- 'positive' (new standards: regulation at Community level; control by institution)
↔ 'negative' (removal of barriers: deregulation/regulatory gap; through the judiciary) harmonisation
- all areas of activity
- normally by means of directives
- contrast 'unification': the complete replacement of particular aspects of MS legal orders with new order

2. Types

- total: no scope for further independent action by MS (stricter standards covering the same ground as the directive: *Dim-Dip Lights* (case 60/86), *Com v. France* (C-52/00), *Sanchez* (C-183/00))
- with derogation (Art. 30 EC): if not conflicting with common provisions, not impairing the effective functioning or running counter to Art. 28 EC
- re-legislation: *British American Tobacco* (C-491/01)
- minimum: main objective is to reduce existing differences by narrowing the freedom to regulate particular aspects within MS territories (limited use for creating a level playing field), some directives contain *market access clauses*, i.e. stricter standards may not prevent the import of products complying with the minimum standard (yet permitting reverse discrimination: *Gallaher* (C-11/92))
- technical (initially a sector-by-sector approach, in 1985 'new approach': EC lays down essential safety requirements and standardisation bodies work out detailed rules → compliance is indicated by the CE marking): products must be in conformity with essential safety requirements (presumption created by the CE marking)

3. Article 95 EC

- **Article 94 EC** requires unanimity, Article 95 was introduced by the **SEA** in 1987 (no unanimity, co-decision procedure)
- two types of measures for the removal of competitive disadvantages relating to:
 - establishing the internal market
 - functioning of the internal market
- broad basis for legislation (clarified by *Germany v EP & Council* (C-376/98): only measures intended to improve conditions for above mentioned measures, not a basis for regulating the internal market in general (conflict with **Art. 5 EC**)
- possible basis for the prevention of emerging future obstacles to trade provided these are likely and measure is designed for their prevention

- ‘flanking policies’: degree of competence to harmonise all areas in which divergent MS laws may adversely affect the internal market, yet not beyond what is necessary to eliminate distortions of competition
- additional basis: multiple legal bases are only acceptable as an exception (‘purely formal defect’ unless it gives rise to an irregularity)
- derogation:
 - Art. 95(4) EC: *maintaining* national provisions on grounds of major needs (Art. 30 EC), the protection of the environment or the working environment (notify Commission, state reasons)
 - Art. 95(5) EC: *introducing* national measures – based on *new* scientific evidence – relating to the protection of the environment or the working environment on grounds of a MS specific problem
 - Commission decides within 6 months (measure must not constitute an arbitrary discrimination or disguised restriction)