

# FRAMEWORK FOR THE APPROXIMATION OF NATIONAL LEGAL SYSTEMS WITH THE EUROPEAN UNION'S ACQUIS: FROM A VAGUE DEFINITION TO JURISPRUDENTIAL IMPLEMENTATION

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*Summary: In order to achieve the objectives of integration policies, one of the crucial activities of the European Community was to ensure the approximation of laws of the Member States to the extent necessary for the functioning of the common/internal market. In this field, the adoption of the Lisbon Treaty has not brought along any significant changes. The substantive provisions conferring competence may be added, deleted or modified, as part of another common policy that contributes to the functioning of the internal market, without requiring changes in the procedural rules of the law approximation policy itself. Moreover, primary law includes several provisions on law approximation, without giving sufficient indication of any comprehensive definition of this concept, providing only a general and vague normative framework. For this reason, it was the judicial interpretation of the rules of cross-community policy of the approximation of legislation that came to complete the provisions of the treaties in a creative and evolutionary manner. In order to explain and analyse this evolution, this paper will first focus on the nature of the provisions on law approximation set by the treaties and then examine how those provisions were interpreted and completed by the Court of Justice.*

## 1 Introduction

From the very beginning of international relations understood as inter-state relations, there has been a need to put into concordance or, at least, to ensure the peaceful coexistence<sup>1</sup> of various provisions of dif-

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<sup>1</sup> Some authors expressly underline the need to coordinate national legal systems: Henry Schermers and Denis Waelbroeck, *Judicial Protection in the European Union* (6<sup>th</sup> edn, Kluwer Law International 2001); Joël Rideau, *Droit institutionnel de l'Union et des Communautés européennes* (5<sup>ème</sup> éd, LGDJ 2006); Maksymilian del Mar and Zenon Bankowski, *Law as Institutional Normative Order* (Edinburgh Centre for Law and Society 2009). On the other hand, certain authors give preference to the use of terms 'harmonisation' or 'approximation': Willem Molle, *The Economics of European Integration: Theory, Practice, Policy* (Dartmouth Publishing 1990); Mark Van Hoecke and François Ost, *The Harmonisation of the European Private Law* (Hart Publishing 2000); Jean Carbonier, *Droit civil – Introduction* (27<sup>ème</sup> éd, Presses universitaires de France 2000); Yvon Loussouarn, Pierre Bourel and Pascal de

ferent legal orders. The process of European integration has additionally accentuated this necessity. Moreover, the difficulties in distinguishing between the notions of ‘approximation’ and ‘harmonisation’ of national legal systems, besides the fact that they gave rise to important theoretical problems, can also make it very complex to define the crucial intentions of the European legislature in this field. Of course, the definition of these two notions undeniably applies for an analysis of harmonisation as a necessary precondition for unification as the highest degree of concordance, but it has no operational value for an analysis of the provisions of treaties that led to the creation of the European Union.<sup>2</sup> Even though the objective of this paper is not to perform an historical analysis of primary law, in the first part we will focus both on the Treaty Establishing the European Community (TEC)<sup>3</sup> and on the provisions of the Lisbon Treaty.<sup>4</sup> The reason for this choice is clear: the Court of Justice of the European Union (previously the Court of Justice of the European Communities – CJEC) interpreted the general principles of harmonisation/approximation mostly on the basis of the TEC, while the Lisbon Treaty (Title VII, chapter 3 of the Treaty on the Functioning of the EU) has brought some changes which, in spite of their limited scope, can be the starting point for an evolutionary interpretation.<sup>5</sup>

Reference to the notion of ‘harmonisation’, in most cases accompanied by the specification ‘of laws and regulations of the Member States’,<sup>6</sup> has appeared in fourteen articles of the TEC, of which ten concerned the

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Vareilles-Sommieres, *Droit international privé* (8<sup>ème</sup> éd., Dalloz précis 2004); Carine Doutrépeont and Lucette Defalque, *Théorie générale du rapprochement des législations - partie I* (ULB 2006).

<sup>2</sup> For the topic under examination, it is important to find out how the principles of law approximation policy evolved from their definition in the Treaties to being interpreted and completed by the Court of Justice. For this reason, the term ‘European Community’ will be used when we analyse the legal grounds (and their interpretation) adopted before the entry into force of the Lisbon Treaty.

<sup>3</sup> Consolidated version of the Treaty Establishing the European Community [2002] OJ C325/33.

<sup>4</sup> Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C83/13.

<sup>5</sup> See section 3 and n 69.

<sup>6</sup> This, for example, was the case of the following articles of the TEC: 13 (belonging to the first part of the TEC dedicated to the general principles), 129 (Title VIII – Employment), 137 (Title XI – Social policy, education, vocational training and youth, Chapter 1 on social provisions), 149 and 150 (Title XI – Social policy, education, vocational training and youth, Chapter 3 on education, vocational training and youth), 151 (Title XII – Culture), 152 (Title XIII – Public health) included the full expression ‘harmonisation of the laws and regulations of the Member States’; the wording of Art 133 (Title IX – Common commercial policy), in French, mentioning ‘harmonisation des dispositions’ makes a lexical variation without any substantial legal significance, while its wording in English is exactly the same as in other articles.

harmonisation of national legal provisions. However, most of the provisions of these articles (eight of ten) mentioned harmonisation only in order to prohibit it, using mostly the same wording ‘the Council shall/may adopt measures/incentive measures (...) excluding any harmonisation of the laws and regulations of the Member States’,<sup>7</sup> while only two articles treated some procedural matters, enabling the harmonisation of national legislations. On the other hand, the notion of ‘approximation’ was present in four articles of the TEC,<sup>8</sup> always in a context that allows ‘the establishment and functioning of the internal market.’ It should also be emphasised that Article 3 TEC mentioned ‘the approximation of laws of the Member States to the extent required for the functioning of the internal market’ as one of the activities of the Community in order to achieve its mission as defined by Article 2. In turn, the TEC has devoted an entire chapter to law approximation, of which the quasi-totality of provisions concerned procedural matters and were included in the part of the Treaty which defines the policies of the Community. Consequently, the study of primary sources cannot give a definitive response to the operational distinction between the notions of ‘approximation’ and ‘harmonisation’; therefore, only a holistic and purposive analysis of the Union’s legal order can provide the answer to this question.<sup>9</sup>

The process of European integration is determined by its functional and dynamic character; therefore, the Community’s/Union’s<sup>10</sup> legal system, missions and institutions have evolved in line with their crucial objectives of ‘harmonisation’ and ‘approximation’. Given that ‘the concept of approximation is not defined and that various terms are used in the TEC (...) it is permissible to ask how the concepts of “coordination”, “harmonisation”, “unification” and “coexistence” (...) can be defined and is there any hierarchy between them?’<sup>11</sup> Although there was no reference to ‘unification’ in the TEC, its definition poses no theoretical or practical

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<sup>7</sup> This was the case of Arts 13, 137, 149, 150, 151, 152 TEC; Art 129(2) introduces the interdiction, while Art 133 included paragraph 6, which provided that ‘an agreement (with third countries) cannot be concluded by the Council if it includes provisions which would go beyond the Community’s internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation’.

<sup>8</sup> Arts 3, 94, 95 and 136 TEC. Moreover, Art 29 TEU introduces the obligation to ‘ensure that their national policies conform to the Union positions’, while Art 34 obliges Member States to ‘coordinate their actions’. In both cases, these two articles do not concern the approximation of legislation, given the fact that they set the framework of police and judicial cooperation in criminal matters.

<sup>9</sup> Given the importance of the case law of the Court of Justice for the evolution of the Community’s/Union’s legal order, such purposive analysis must be based on evolving interpretations given by the Court.

<sup>10</sup> See n 2.

<sup>11</sup> Doutreloup and Defalque (n 1) 9.

problem. It is the same with ‘coordination’: the Treaty repeatedly refers to the ‘coordination of Member States’ policies’,<sup>12</sup> while only one article mentions ‘the coordination of the provisions laid down by law, regulation or administrative action in Member States’.<sup>13</sup> Therefore, it is clear that this notion has only limited importance for the study of the law approximation process, since it is more about political than legal coordination. On the other hand, the Treaty included several provisions on legal harmonisation, without providing sufficient indication of a comprehensive definition of this concept, as it has ‘no specific content and includes any action that tends to associate or combine various elements to bring them together (...)’ and approximation appears ‘in the treaty only as a general concept’.<sup>14</sup> Despite their general character and their position in the TEC, the wording of Articles 94 to 97 and the case law<sup>15</sup> of the Court showed that ‘approximation’ is the single legal term suitable to serve as a basis for the study of the Union’s policy whose aim is to eliminate the inconsistent differences in national legislations. In order to clarify and corroborate this doctrinal approach and terminological choice, the paper will first focus on the provisions of primary law dedicated to law approximation (section 2), and then examine how they are interpreted and completed by the Court of Justice (section 3). Given that Articles 114 and 115 of the Treaty on the Functioning of the EU (TFEU) have not brought any changes in the complex relation between the notions of harmonisation and approximation, the position the author endeavours to defend remains of the same legal relevance after the adoption of the Lisbon Treaty. Many examples could be given in support of this observation, but the following seems to be the most conclusive: Article 114(1) TFEU refers to the ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States’, while paragraphs 4, 5, 7, 8 and 10 of the same Article mention ‘harmonisation measure(s)’, exactly as was the case in Article 95 TEC.<sup>16</sup>

<sup>12</sup> For example, Arts 4, 99, 114, 117, 130 and 202 TEC.

<sup>13</sup> Art 47 TEC.

<sup>14</sup> Doutrelepoint and Defalque (n 1) 11.

<sup>15</sup> See n 67. However, given its transversal character, the term ‘harmonisation’ remains important for an analysis of the harmonisation of national legislations as a phase (and precondition) for the process of unification.

<sup>16</sup> Moreover, as was the case in the TEC, numerous provisions of the TFEU not belonging to Title VII Chapter 3 (Approximation of Laws) refer to the ‘harmonisation of the laws and regulations of the Member States’ (Arts 19(2), 79(4), 84, 149, 153(2), 165(4), 166(4), 167(5) etc) or the ‘harmonisation measures’ (Art 83(2), 191(2)).

## 2 The nature of the provisions on law approximation set by primary law

Taken together, the provisions of the TEC aimed to provide the Community with the necessary competences and procedures to carry out its mission, as defined by Article 2.<sup>17</sup> Given that ‘the activities of the Community shall include (...) the approximation of the laws of Member States to the extent required for the functioning of the common market’,<sup>18</sup> the elimination of divergent national legislations can be seen as a genuine policy. The content analysis of the TEC supports this assertion: even a brief overview<sup>19</sup> of its structure is sufficient to conclude that the approximation of laws enjoyed the status of a common policy. Chapter 3 of the sixth title (Articles 94-97) was entirely dedicated to the approximation of national legal systems, but most of its provisions were procedural in nature. Therefore, the rules governing procedural matters of the law approximation policy were generally grouped in one chapter of the Treaty, while the rules empowering the Community to adopt measures that would lead to such approximation could be found in various provisions dedicated to the various Community policies.<sup>20</sup> In other words, there has always been a provision clearly defining the competence to perform the approximation of the Member States’ legislations in certain fields.

Pursuant to Article 5 TEC, ‘the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’. However, since the CJEC/CJEU insists on its role as the ‘final institutional arbiter in matters of conflicts of competence in the legal order of the Community’,<sup>21</sup> in its Opinion 2/94 the Court made some important clarifications:

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<sup>17</sup> The Community shall have as its task (...) to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States’, Art 2 TEC.

<sup>18</sup> Art 3 TEC.

<sup>19</sup> The TEC included 314 articles, of which more than half (159) were dedicated to the policies of the Community. Similarly, the third part of the Treaty included the largest number of titles (21) with provisions defining the competences and activities of the Community. The provisions on the approximation of laws (Arts 94 to 97) were in Chapter 3 of the sixth title (Common rules on competition, taxation and approximation of laws).

<sup>20</sup> This leads to the conclusion that the law approximation policy is a cross-community policy that can contribute to the realisation of many other EU policies relevant for the internal market.

<sup>21</sup> Kosmas Boskovits, *Le juge communautaire et l’articulation des compétences de la Communauté européenne et des États membres* (UDS 1998) 573.

[I]t follows from Article 3b (now Art. 5 TEU) (...) that it has only those powers which have been conferred upon it (...) The Community acts ordinarily on the basis of specific powers which are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.<sup>22</sup>

As Valérie Michel pertinently remarked, ‘although this judicial recognition of the principle of conferred powers does not change the legal regime of Community competence, it undoubtedly reflects a new policy of the Court’.<sup>23</sup> Therefore, given that law approximation is clearly a cross-community policy, the substantive provisions conferring competence may be added, deleted or modified, as part of another policy that contributes to the ‘functioning of the common market’, without requiring changes in the procedural rules of the law approximation policy itself. It is therefore necessary to examine the substantive rules conferring competence for law approximation (subsection 2.1) before turning to the question of the process of the adoption of approximation measures (subsection 2.2).

### **2.1 Substantive rules conferring competence for law approximation**

Given the cross-cutting nature of the law approximation policy, the provisions conferring competence could be found in Articles 94 and 95 (general provisions), but also in several other provisions of the TEC, dedicated to other Community policies (special provisions). In other words:

the competences necessary for the achievement of the objectives of common policies can be conferred by the Treaty either by general or by specific provision, which may include directly or indirectly the use of law approximation measures, when objectives defined by these policies make it necessary.<sup>24</sup>

The adoption of the Lisbon Treaty has not made any significant changes regarding the substantive provisions conferring competence for law approximation: Articles 94-97 TEC became Articles 114-117 TFEU while, even though it is not relevant to our topic, the European Parliament became co-legislator with the Council and ‘the procedure referred to in Article 251’ became ‘the ordinary legislative procedure’. Finally, the new Article 118 TFEU does not confer competence for law approximation *stricto sensu*, but concerns measures ‘to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements’.

<sup>22</sup> Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, paras 23-25.

<sup>23</sup> Valérie Michel, *Recherches sur les compétences de la Communauté européenne* (L’Harmattan 2003) 20-21.

<sup>24</sup> *ibid* 32.

According to Article 94 TEC, ‘the Council (...) issues directives for the approximation of laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market’. However, after introducing a special and functional derogation from Article 94, limited to the ‘achievement of the objectives set out in Article 14’, Article 95 TEC provided that ‘the Council shall (...) adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’. The wording ‘for the achievement of the objectives set out in Article 14’<sup>25</sup> clearly indicates that the scope of Article 95 was limited to the achievement of the objectives predefined in Article 14 TEC (now Article 26 TFEU), while Article 94 TEC was applicable whenever it was necessary to perform ‘the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market’.<sup>26</sup> The whole subtlety of this legislative solution is that Article 95 TEC (now Article 114 TFEU) can be used by the EU as the legal ground for the adoption of approximation measures aiming to *establish or ensure the functioning* of the internal market (goal-driven approximation<sup>27</sup>), while Article 94 TEC (now Article 115 TFEU) can be invoked to eliminate the disparities of national provisions in Member States that *affect the establishment or functioning* of the internal market (preventive approximation<sup>28</sup>). This is one of the reasons why the Lisbon Treaty inverted their order, so that Article 94 TEC is now Article 115 TFEU and Article 95 TEC became Article 114 TFEU, while Article 115 is applicable ‘without prejudice to Article 114’. In other words, the need to establish or make operational ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’<sup>29</sup> for the EU legislature comes logically before the requirement to prevent national legislative discrepancies that might affect the establishment or

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<sup>25</sup> *ibid.*

<sup>26</sup> Art 94 TEC.

<sup>27</sup> To the author’s best knowledge, so far the notion of ‘goal-driven approximation’ has not been used in legal literature in order to designate the approximation measures aiming to establish or ensure the functioning of the internal market.

<sup>28</sup> The notion of ‘preventive approximation’ was, for example, mentioned in the Opinion of Advocate General Kokott delivered on 22 September 2005, but without a direct reference to Art 94 and only in order to underline that this approximation ‘requires the creation of new provisions for which there is as yet no equivalent in the Member States’ (Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2006] ECR I-3771, Opinion of AG Kokott, para 24). On the other hand, some authors define ‘preventive harmonisation’ as ‘the creation of a concept that has not existed in any of the Member States before (...) as it suppresses differences between the legal orders before they even spring up’, Mads Andenas and Camilla Baasch Andersen, *Theory and Practice of Harmonisation* (Edward Elgar Publishing 2011) 295.

<sup>29</sup> Art 14(2) TEC and 26(2) TFEU.

functioning of this area. Moreover, goal-driven approximation requires an ordinary legislative procedure, while preventive approximation measures are adopted by the Council, acting unanimously in accordance with a special legislative procedure.

The special provisions conferring competences to the Community/ Union in the field of law approximation explicitly or implicitly empower its institutions to adopt measures in order to reduce disparities of national legislations. In several articles of the TEC devoted to competition,<sup>30</sup> tax<sup>31</sup> or consumer protection,<sup>32</sup> such authorisation was explicit, while some provisions<sup>33</sup> of the Treaty dedicated to other common policies included implicit authorisations. Finally, the provision of Article 352 TFEU (ex Article 308 TEC) known as the 'residual clause'<sup>34</sup> can be added to all the previous specific provisions. Its mission is to fill gaps in the Treaty 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community'.<sup>35</sup> This normative structure may seem to be achieved in terms of the attribution of competence to adopt law approximation measures, but the analysis remains incomplete without an examination of the procedural rules for their adoption.

## **2.2 Procedural rules for the adoption of law approximation measures**

Each substantive provision of the TEC granting competence to the Community in the field of law approximation was accompanied by a provision specifying procedural rules for the adoption of the act to serve as a legal basis for this approximation. The adoption of the Lisbon Treaty has not made any significant changes regarding those procedural rules. Therefore, each of the two general provisions conferring competence requires a special procedure (the procedures of Articles 94 and 95 TEC, now Articles 115 and 114 TFEU), while special provisions conferring competence refer to the procedure under one of the two articles mentioned above. To these two specific procedures must be added, firstly, the particular procedure in the event of a disparity 'between the provisions laid down by law, regulation or administrative action in Member States'<sup>36</sup> that is 'distorting the conditions of competition in the common market

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<sup>30</sup> Art 96 TEC (belonging to the chapter on the approximation of laws) explicitly conferred competence to the Community, while the provision of Art 83 (chapter dedicated to the rules on competition) performed it implicitly.

<sup>31</sup> Art 93 TEC.

<sup>32</sup> Art 153 TEC.

<sup>33</sup> Arts 71, 133, 136 and 175 TEC.

<sup>34</sup> Michel (n 23) 32.

<sup>35</sup> Art 308 TEC.

<sup>36</sup> Art 96 TEC, now Art 116 TFEU.

and that the resultant distortion needs to be eliminated<sup>37</sup> and, secondly, the residual clause procedure (Article 308 TEC, now Article 352 TFEU).

The procedure of Article 115 TFEU (ex Article 94 TEC), intended for what we named preventive approximation, can only lead to the adoption of a Directive whose objective is to perform the approximation of national 'laws, regulations or administrative actions', while the procedure of Article 95 (114) leads to the adoption of 'measures for' such approximation (goal-driven approximation). Moreover, given the different scopes of the two articles, it is clear that the dissimilarity in procedural provisions is the result of their differences *ratione materiae*. Article 94 provided that the Council shall act unanimously 'on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee'. On the other hand, Article 95 specified that the Council 'after consulting the Economic and Social Committee'<sup>38</sup> should act in accordance with the procedure referred to in Article 251 TEC (co-decision procedure), which required, in principle, only a qualified majority<sup>39</sup> in the Council and fully involved the European Parliament in all stages of the decision-making process. In addition, two other procedural specificities of Article 114 TFEU deserve mentioning: firstly, the reference to scientific developments and, secondly, the right of the Member States to maintain or introduce, under specific conditions, certain justified national provisions partially not in compliance with an approximation measure.

Paragraph 3 of Article 114 TFEU urges all institutions involved in the decision-making process to take into account scientific developments in the fields of 'health, safety, environmental protection and consumer protection'. In the same vein, if a Member State, in the presence of an approximation measure already adopted, 'deems it necessary' to maintain justified national provisions,<sup>40</sup> it could notify the Commission of these

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<sup>37</sup> *ibid.*

<sup>38</sup> Moreover, the two procedures were also different with regard to the necessary prior consultation phase, since Art 95 (referring to the procedure of Art 251) fully included the European Parliament in the decision-making process (co-decision of the Council and the Parliament), while Art 94 included a simple consultation of the Parliament. When both legal grounds were applicable for the adoption of a Community act, an important judgment of the Court of Justice (Case C-300/89 *Commission v Council* [1991] ECR I-2867) privileged the procedure more favourable for the respect of the democratic process, that is to say, the one with the stronger involvement of the European Parliament.

<sup>39</sup> Under Art 251 TEC, the only situation when the Council must act unanimously was provided by paragraph 3: 'the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion of the Commission'.

<sup>40</sup> Art 95(4) specified that maintaining national provisions may be justified either 'on grounds of major needs referred to in Article 30' (reasons of public morality, public policy or public security, protection of health and life of humans, animals or plants, protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property) or 'relating to the protection of the environment or the working environment'. However, paragraph 5 indicated that the national provisions intro-

provisions and the grounds for their maintenance.<sup>41</sup> Within six months of such a notification, the Commission may approve or reject the national provisions, 'after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market'.<sup>42</sup> In the absence of a decision of the Commission within this period, the national provisions that are not in accordance with harmonisation measures could be considered as authorised. It is particularly important to underline that both the Commission and the Member States may appeal directly to the Court of Justice, without issuing a reasoned opinion (the obligation of the Commission, if it initiates the infringement proceedings pursuant to Article 258 TFEU) or bringing the matter previously before the Commission (the obligation of any Member State who initiates an infringement action against another Member State pursuant to Article 259 TFEU).

The specific procedure of Article 116 TFEU (ex Article 96 TEC) concerns exclusively competition in the internal market, if the Commission 'finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition (...) and that the resultant distortion needs to be eliminated'. In such a case, the Commission is obliged to consult the Member States in which the distortion may produce effects. This consultation may lead to an agreement that eliminates such distortion; otherwise, the European Parliament and the Council are entitled, 'acting in accordance with the ordinary legislative procedure',<sup>43</sup> to issue the necessary directives. Therefore, this situation can be seen as a residual law approximation, which may only occur in the absence of an agreement eliminating the distortion without the intervention of an EU regulatory measure. In this case, the European legislation encourages negotiation between the stakeholders, enabling creative solutions that respect the general legal framework. Finally, if the residual clause of Article 352 TFEU is the legal basis for the adoption of an approximation measure, the procedure is similar to the one intended for preventive approximation. Consequently, the analysis of this complex set of provisions leads to the conclusion that the procedural rules for the adoption of law approximation measures can be seen as a function of substantive rules. In other words, procedures differ exten-

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duced after the Community harmonisation measure must be 'based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure'.

<sup>41</sup> Art 95(8) TEC introduced an additional rule, *ratione materiae*, limited to public health issues.

<sup>42</sup> Art 95(6) subparagraph 1 TEC.

<sup>43</sup> Art 116(2) TFEU.

sively, depending on the intention of the European legislation to either establish or ensure the functioning of the internal market (goal-driven approximation) or to eliminate the disparities of national provisions in Member States that affect the establishment or functioning of the internal market (preventive approximation).

### **3 Jurisprudential implementation of primary law on law approximation by the Court of Justice**

In accordance with the overall political and legal originality of the EC/EU and its institutions, its highest judicial body has many unique features compared to international courts<sup>44</sup> and national supreme courts. The principles of enforceability of its judgments<sup>45</sup> and mandatory referral in matters of interpretation and application<sup>46</sup> make the Court of Justice unique in comparison to international justice. Moreover, the Court has played an essential role in the creation and development of the Community's/Union's legal system, a role that is widely different from the role of the national courts in the Member States' legal systems. With a mission to carry out 'the tasks entrusted to the Community',<sup>47</sup> ensuring that 'in the interpretation and application of the Treaty the law is observed'<sup>48</sup> and through its prerogative 'to give preliminary rulings concerning the interpretation of the Treaty',<sup>49</sup> the Court has had a complementary normative function. In other words, the judicial interpretation of primary law completes the provisions of the Treaty, which are often ambiguous because of their general formulation. It is the same with regard to the cross-community policy of law approximation.

The provisions of the founding treaties conferring competence to the Community in the field of law approximation have been constantly changing, and to be properly applied they often required judicial interpretation. On the other hand, 'full harmonisation is difficult to achieve (...) and management of the harmonised and the non-harmonised area

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<sup>44</sup> Of course, the place of the CJEC in the Community's legal order was a direct result of the numerous differences between the European Community/Union and federal states, on the one hand, and classical international organisations, on the other. Moreover, the Court of Justice, through its jurisprudential activity, deeply influenced the determination of its own role and prerogatives, given that only the general legal basis can be found in the Treaties, Statute of the Court and its Rules of Procedure.

<sup>45</sup> The judgments of the Court of Justice shall be enforceable under the conditions laid down in Article 256', Art 244 TEC (now Art. 280 TFEU).

<sup>46</sup> 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein', Art 292 TEC (now Art 344 TFEU).

<sup>47</sup> Art 7 TEC.

<sup>48</sup> Art 220 TEC.

<sup>49</sup> Art 234 TEC (now Art 267 TFEU).

go together'.<sup>50</sup> The mutual recognition principle, introduced by the Court of Justice, 'guarantees free movement of goods and services without the need to harmonise Member States' national legislation'.<sup>51</sup> This principle can also be applicable in other areas, such as, for example, for the recognition of professional qualifications,<sup>52</sup> judicial decisions<sup>53</sup> or protection measures.<sup>54</sup> Therefore, the study of how primary law on law approximation has been interpreted and completed by the Court of Justice must include, on the one hand, an analysis of judicial interpretation of the provisions conferring competence (subsection 3.1) and, on the other, an examination of the judicial elaboration of the mutual recognition principle (subsection 3.2).

### **3.1 Judicial interpretation of the provisions conferring competence**

A critical analysis of the substantive rules<sup>55</sup> conferring competence for law approximation reveals that the legal basis for the adoption of Community acts were Articles 94 and 95 TEC (general provisions), but also several other articles dedicated to other Community policies (special provisions). However, given the nature of these provisions, it is often difficult to make a clear distinction between their respective fields of application. Some rules are complementary *ratione materiae*, but often require different procedural solutions in the context of the divergent distribution of powers between the Community and the Member States. In addition, the intrinsic dynamism of the institutional structure of the ECs/EU requires an evolutionary interpretation, developed 'concerning its future policy'.<sup>56</sup> In its decisions regarding the questions related to the allocation of powers

<sup>50</sup> Rodolphe Muñoz, *Le principe de reconnaissance mutuelle et l'abrogation de la décision 3052/95* (EP 2007) 6-7.

<sup>51</sup> Official portal of the European Union – Internal Market: General Framework <[http://europa.eu/legislation\\_summaries/internal\\_market/internal\\_market\\_general\\_framework/l21001b\\_en.htm](http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/l21001b_en.htm)>accessed 8 September 2014.

<sup>52</sup> Art 47 TEC (now 53 TFEU) and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

<sup>53</sup> For example, the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L372/27.

<sup>54</sup> Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L118/4.

<sup>55</sup> Almost all the cases submitted to the CJEC concerned the interpretation of the substantive provisions of the TEC. However, some aspects of the case may indirectly affect the procedural provisions, but even then the issue is most often the choice between two substantive provisions (as it was, for example, in Case C-300/89 *Commission v Council* [1991] ECR I-2867). Therefore, here we will focus only on the judicial interpretation of the substantive provisions of the TEC.

<sup>56</sup> Case C-52/00 *Commission v France* [2002] ECR I-3827, para 15.

and legal basis for Community action,<sup>57</sup> the Court of Justice has greatly enriched and deepened the existing legislation on law approximation.

Certain special provisions conferring competence for the adoption of approximation measures were inserted into the Treaty after the adoption of Community acts already operating a minimal approximation in the same field. As Michel underlined, ‘the coexistence, for matters within the scope of the Community, of the grounds for national and Community competence is articulated in a variety of modes’<sup>58</sup> given that ‘this polymorphism of Community competence is a reflection of the principle of variable and measured integration in different fields’.<sup>59</sup> In such a context, the Court has introduced an important clarification, the objective of which was to preserve the acquired level of law approximation. Notwithstanding that in the case before the Court it was about a special provision *stricto sensu*, the judgment of 25 April 2002 in the case *Commission v France*<sup>60</sup> offers a generally applicable solution:

Article 153 EC cannot be relied on in order to justify interpreting the directive as seeking a minimum harmonisation of the laws of the Member States which could not preclude one of them from retaining or adopting protective measures stricter than the Community measures,<sup>61</sup>

because this provision of the Treaty

is worded in the form of an instruction addressed to the Community concerning its future policy and cannot permit the Member States, owing to the direct risk that would pose for the *acquis communautaire*, autonomously to adopt measures contrary to the Community law contained in the directives already adopted at the time of entry into force of that law.<sup>62</sup>

Therefore, the Member States are not allowed to jeopardise the level of approximation already achieved by the Community legislature ‘pursuant to Article 95 EC in the context of attainment of the internal market with which in that respect the measures adopted under Article 94 EC

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<sup>57</sup> Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Case C-380/03 *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573; Joined cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451.

<sup>58</sup> Michel (n 23) 20-21.

<sup>59</sup> *ibid.*

<sup>60</sup> Case C-52/00 *Commission v France* [2002] ECR I-3827.

<sup>61</sup> *ibid.*, para 15.

<sup>62</sup> *ibid.*

must be equated',<sup>63</sup> even relying on a special provision<sup>64</sup> that allows them to retain or adopt certain stricter protective measures.

Given the concise formulations of Articles 94 and 95 TEC (Articles 115 and 114 TFEU) and the transversal nature of their objectives (establishment and functioning of the internal market), it is first necessary to specify the conditions for their invocation. Secondly, those conditions have to be accompanied by some clarification of the relationship between general provisions and special provisions conferring competence for the approximation of laws. As regards the first question, the precisions given by the Court were relative to the degree and the possible consequences of the differences in national legislations. As the Court underlined in its judgment of 12 December 2006 in the case *Germany v European Parliament and Council of the European Union*:

[W]hile a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.<sup>65</sup>

However, the nature of the above-mentioned national provisions is not sufficient; they must also have an impact on intra-Community trade with a considerable degree of predictability:

[I]t is also settled case-law that, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.<sup>66</sup>

Given the general and horizontal character of Article 95, the Court clarified the nature of the Community legislature's intervention when the adopted act is based on this provision of the Treaty:

[B]y the expression 'measures for the approximation' in Art 95 EC the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general

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<sup>63</sup> *ibid.*

<sup>64</sup> This was the case of Art 153(4).

<sup>65</sup> Case C-380/03 *Germany v European Parliament and Council of the European Union* [2006] ECR I-11573, para 37.

<sup>66</sup> *ibid.*, para 38.

context and the specific circumstances of the matter to be harmonized, as regards the harmonisation technique most appropriate for achieving the desired result.<sup>67</sup>

Moreover,

[A]n act adopted by the Community legislature on the basis of Art 95 EC, in accordance with the co-decision procedure referred to in Art 251 EC, may be limited to defining the provisions which are essential for the achievement of objectives in connection with the establishment and functioning of the internal market in the field concerned, while conferring power on the Commission to adopt the harmonisation measures needed for the implementation of the legislative act in question.<sup>68</sup>

On the other hand, the jurisprudence related to Article 94 TEC (now Article 115 TFEU) is much less abundant and does not bring enough elements to define what the Court designates as ‘settled case-law’. In one of its recent judgments (February 2015), the CJEU limits its observations to the fact that the harmonisation of national legislations pursuant to Article 115 TFEU is ‘gradual’,<sup>69</sup> without any additional specification.

The complex relationship between the provisions of the TEC conferring competence and the ability (for certain common policies) of their cumulative application also required a judicial interpretation.<sup>70</sup> In other words,

the existence of competing legal grounds and the selection of the appropriate legal basis by the institutions gave rise to substantial litigation resulting in particular in the introduction of a new Art 95 on the approximation of the laws increasing the competencies of the Community.<sup>71</sup>

When the competence in the field of law approximation is based on two (both general and special) provisions of primary law, the preliminary stage should consist of the selection of the appropriate legal basis, the decision having numerous political, procedural and technical implications.

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<sup>67</sup> Case C-66/04 *United Kingdom v European Parliament and Council of the European Union* [2005] ECR I-10553, para 45.

<sup>68</sup> *ibid*, para 50.

<sup>69</sup> Joined cases C-144/13, C-154/13 and C-160/13 *VDP Dental Laboratory NV v Staatssecretaris van Financiën, Staatssecretaris van Financiën v X BV and Nobel Biocare Nederland BV* (CJEU, 26 February 2015) para 60.

<sup>70</sup> Case law on this subject is abundant. For the purposes of this paper, the analysis will be limited to the settled case law and major judgments.

<sup>71</sup> Michel (n 23) 38.

In order to solve this problem, the case law introduced a general criterion:

in the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure.<sup>72</sup>

Consequently, to justify the recourse to a specific article of the Treaty, the European legislature must take into account the overall context of the future act and interpret its contents in a systematic and purposive manner.

### **3.2 Judicial elaboration of the principle of mutual recognition**

The reasoning of the Court in its famous judgment in the case *Cassis de Dijon*<sup>73</sup> led to the introduction of a new rule, known as the principle of mutual recognition. This principle was widely deepened and complemented by subsequent case law and secondary legislation, such as, for example, Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008.<sup>74</sup> Moreover, ‘the principle of mutual recognition may have some utility in case of law approximation, especially when the harmonisation seems insufficient or in order to highlight certain links between various acts (for example in pharmaceuticals)’.<sup>75</sup>

Generally, the principle of mutual recognition is only applicable in the absence of common rules harmonising national legislations.<sup>76</sup> In other words, ‘mutual recognition applies to products which are not subject to Community harmonisation legislation, or to aspects of products falling outside the scope of such legislation’.<sup>77</sup> In addition,

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<sup>72</sup> Case C-271/94 *European Parliament v Council of the European Union* [1996] ECR I-1689, para 14.

<sup>73</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

<sup>74</sup> The Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC [2008] OJ L218/21.

<sup>75</sup> Michel (n 23) 12.

<sup>76</sup> ‘In the absence of common rules relating to the production and marketing of alcohol (...) it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory’, judgment in the case *Cassis de Dijon*, para 8.

<sup>77</sup> The Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, recital 3.

according to that principle, a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject,<sup>78</sup>

the only exception being ‘restrictions which are justified on the grounds set out in Article 30 of the Treaty, or on the basis of other overriding reasons of public interest and which are proportionate to the aim pursued’.<sup>79</sup>

The importance of the principle of mutual recognition is that it makes the concept of free movement operational in the absence (total or partial) of a measure for the approximation of legislation. Furthermore, the impact of this principle is such that the Court has also found its application appropriate, *mutatis mutandis*, in the field of freedom to provide services:

Articles 59 and 60 of the Treaty do not preclude a Member State from imposing national rules (...) on a business established in another Member State which provides services in the first Member State by posting workers for that purpose, on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued.<sup>80</sup>

Therefore, in the case of equivalence of national legislations (the protection provided is ‘essentially similar’), any economic operator established in a Member State providing services in another Member State shall not be subject, in the second State, to stricter national regulations. Even though the Court did not expressly mention the principle of mutual recognition, it is clear that in the above judgment all its crucial elements can be found (lawfulness of product/service, obligation of the State of destination to permit the marketing of the product/delivery of service, the possibility to invoke overriding public interest). Consequently, this jurisprudence introduces an extended application of the principle of mutual recognition to the freedom to provide services.

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<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831, para 53.

#### **4. Conclusion**

The inherent dynamism of the legal and political structure of the EC/EU has often had as a consequence the constant evolution of its terminology. Numerous common policies as well as the legal concepts accompanying them have not remained immune to the changing objectives assigned to the Community/Union. It is often almost impossible to define the concepts used by EC/EU legislation in a static, sufficiently precise and unconditional manner. The system of substantive and procedural rules governing the approximation of national legislations in all areas of EC/EU competence has its legal basis in the provisions of primary law. The analysis of those provisions has indicated that their purpose is either to establish or ensure the functioning of the internal market (goal-driven approximation) or to eliminate the disparities of national provisions in Member States that affect the establishment or functioning of the internal market (preventive approximation). These provisions, however, represent only a general and vague framework of the approximation policy. It has only been through the abundant interpretative jurisprudence of the Court of Justice regarding the questions related to the allocation of powers and the legal basis for common action that this framework has become relatively solidly established. Therefore, 'approximation' can be considered as a unique legal term suitable to serve as a basis for the study of the Union's policy whose aim is to eliminate the inconsistent differences in national legislations, while variable and measured supra-national integration in different fields of the Union's competence will continue to require adaptive jurisprudential interpretation.