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I. INTRODUCTION

In June 1985, the Council of the European Communities (Council) favorably received the White Paper on the achievement of the internal market, prepared by the Commission of the European Communities (Commission).¹ The White Paper presents the measures that the European Economic Community (EEC) should take in order to eliminate by 1992 all physical, technical, and fiscal barriers between member states of the Community. The adoption of a flexible approach to methods of harmonization and the rejection of all solutions which maintain exchange controls at internal borders will eliminate barriers. The Single European Act (SEA), in force since July 1, 1987 in all the member states,² modified the Treaty of Rome (EEC Treaty)³ and created institutional procedures to eliminate barriers between member states. The member states may now decide by qualified majority vote all coordination measures necessary for the creation of an internal market except decisions relating to taxation, the free circulation of persons, and the rights and interests of salaried workers.⁴ This reform permits an appreciable acceleration of legal harmonization.

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¹ Completing the Internal Market, White Paper from the Commission to the European Council, COM (85) 310 final, at 4.
² Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA]. Article 33 of the SEA provides that the Act is in force on the first day of the month following the deposit of ratification instruments by all signatory states. Ireland was the last state to approve the SEA and deposited its ratification on June 24, 1987.
⁴ SEA, supra note 2, at art. 18.
It is already clear that by 1992 the twelve nations of the EEC will have created an economic force to match those of Japan and the United States. The advantages of a 320 million strong consumer market are self-evident for those inside the European market. It is equally clear, however, that external markets, particularly those of the United States and Japan, are increasingly concerned that free trade within the single European market will be accompanied by protectionism outside the Community. A strong and united European economic market will be able to negotiate with third countries more effectively than each member state could do in isolation. While it is an overstatement to describe the Community as anything more than an economic federation, the fact that the Community has its own legal system should not be underestimated. Each day the EEC promulgates new Community law that has ramifications beyond Community frontiers.

Whether or not the results of 1992 will become synonymous with free trade or a trade war is unclear at this time. It is certain, however, that the single market will have profound effects in the United States. These effects are already evident in a number of areas. It is far too early to draw long-term conclusions for the United States, but over the last few years some basic areas of potential conflict have emerged between the United States and the EEC. The purpose of this Article is to provide practitioners with an overview of the main areas of harmonization achieved so far and highlight potential problems for western investors. First, this Article briefly outlines the decisionmaking processes in the EEC and the machinery which politically autonomous member states use to achieve the common goals of the Community. The next section details areas of progress towards the single market. The final section examines some possible areas of conflict for trade between the Community and the United States.

II. The Legal Means of Creating the Internal Market

The EEC Treaty is the basis of the Community's economic freedom and the foundation of its laws. This Treaty sets out the framework for the free circulation of goods, persons, services, and capital. The EEC Treaty forbids discriminatory practices and unfair competition and contains the legal machinery for the member states to adopt common policies. On the basis of these provisions, Community institutions have enacted common policies in the areas of agricul-

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5 Indeed, it will be less costly for a producer to sell its products on a unified market than on twelve markets which have their own rules and characteristics. The single market implies scale economies, more competition and mutual stimulation within the Community, and increased cooperation between European companies.

6 See generally EEC Treaty, supra note 3.

7 Id. at art. 3.

8 Id. at arts. 7–8.
The aim of Community law generally, therefore, is the creation of an internal market. Community law has organized its own legal structure to implement such a market.

The Community's legal system is characterized by two principles developed through the jurisprudence of the Court of Justice of the European Communities (European Court). The first principle is the primacy of Community law over national law within, of course, its field of applicability. The second principle involves the idea of “direct effect” which gives individuals the right to invoke Community law in their own national courts directly. It is this individual right of private citizens of member states within the Community which gives Community law a supra-national dimension.

The member states, however, have not lost their legislative and regulatory jurisdiction. The coexistence of Community law and national law can give rise to new jurisprudential obstacles and barriers. Conflicts between national and European law also create fundamental dangers to the practicability of the Community. For this reason, the EEC Treaty provides legal tools to aid in the creation of a single market. At this point it is useful to review briefly the legal tools which the Community institutions may use to establish the internal market.

A. Regulations

Under article 189 of the EEC Treaty, a regulation has general applicability and is binding in all member states. A regulation’s direct applicability is such that member states are forbidden to reproduce the regulation as domestic national law. Regulations, in general, are used to implement common policy, for example in farming, transport, and competition policies. Regulations contain rules which often lead to the creation of Community concepts such as the European company and the European trademark, two ideas in the process of development. Since the Leonisio case in 1972, it is clear that regulations have immediate effect and convey individual rights for citizens which the national courts are obliged to protect. In this respect, the Simmenthal case held that

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9 Id. at arts. 38-47.
10 Id. at arts. 74-84.
11 Id. at arts. 85-90.
13 EEC Treaty, supra note 3, at art. 189. Article 189 states: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” Id.
national judges should not apply any national law in conflict with Community law whether or not the national law was instituted prior or subsequent to the Community regulations.  

B. Directives

Article 100 of the EEC Treaty provides for the adoption of directives. A directive is the classic method of integrating Community policy into the national law of the member states. Directives harmonize national, legislative, and administrative provisions which have a direct influence on the functioning of the Common Market. Under article 189 of the EEC Treaty, a directive obliges each member state to implement the purpose of a directive. The exact form of the national legislation and how it is achieved, however, are left to the discretion of the national governments. Nevertheless, the transposition of Community directives into internal national law is obligatory. The European Court has declared that the member states are obliged to adopt all dispositions contained in a directive in their entirety. No member state can justify non-application of a directive on the grounds of domestic difficulties or legal rules, even when the rules deal with constitutional issues. An essential difference between the regulation and the directive is that the latter by itself is incapable of conveying individual rights to citizens of member states. An individual can invoke the directive before the courts against member states only in cases of bad implementation or non-implementation by that member state.

C. Decisions

A decision is a Community stipulation that binds the recipient—either a member state or a private individual. Decisions are used particularly in competition policy and control of state subsidies. Contrary to directives and regulations, a decision is not a real policy instrument but more an instrument applied to specific and individual situations.

17 EEC Treaty, supra note 3, at art. 100.
18 Id. at art. 189. Article 189 states that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the national authorities the choice of form and methods." Id.
19 Id. at art. 189. Article 189 states that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the national authorities the choice of form and methods." Id.
22 EEC Treaty, supra note 3, at art. 189. Article 189 states that "[a] decision shall be binding in its entirety upon those to whom it is addressed." Id.
D. Recommendations

For the sake of completeness, it is appropriate to mention recommendations, which are available to the Council and the Commission. A recommendation, unlike a regulation or a decision, does not bind the member states to which they are addressed. It consists merely of an indirect instrument of policy and is similar to a directive in form except that its adoption is not obligatory.23

E. Conventions

The convention, the transactional tool of private and public international law, plays only a subsidiary role as regards harmonization and unification of Community law. As we shall show hereafter, however, there are some examples of major importance such as the Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters24 and the Convention for the European Patent for the Common Market (Community Patent Convention).25

F. Decisions of the European Court

This brief outline of legal tools available to create an internal market could not be complete without reference to the numerous decisions of the European Court, an essential source of Community law. In many areas, the Court, through its jurisprudence, has refined and defined the dispositions of the EEC Treaty while maintaining respect for the Treaty at the same time. In the context of the creation of the internal market, the European Court has often anticipated future Community legislation or filled holes in Community law by remarkable jurisprudential decisions.26 The Court has particular influence in the field of free circulation and free establishment of persons, merger control, and the provision of services in the insurance sector.

23 Id. Article 189 states that “[r]ecommendations and opinions shall have no binding force.” See, e.g., Recommendation, 20 O.J. EUR. COMM. (No. L 212) 57 (1977).
III. AREAS OF PROGRESS TOWARD THE SINGLE MARKET

A. Elimination of Physical Frontiers

1. Control of Merchandise

An internal market implies the common administration of commercial relations with third countries and the reinforcement of the customs union. The construction of a single European market is already quite advanced in these two areas, following the transfer to Community institutions of exclusive competence in tariff policy and the abolition of customs rights between member states. The numerous Community regulations governing commercial relations with the rest of the world were reinforced by a harmonized system of designation and codification of goods that came into force on January 1, 1988.27 Outside of tariff policy, the exclusive competence of the Community, in both the general system and the exceptional measures that the Community may deem necessary, enhances the system of importation from and exportation to third countries. For example, certain texts permit the Community to forearm itself against dumping28 and to defend itself politically.29 The New Instrument of Commercial Policy permits the EEC to react against illicit commercial practices by third countries against Community businesses.30 On January 1, 1988, the EEC enacted a regulation establishing measures aimed at preventing the circulation of counterfeit goods and permitting the Community to defend itself against unfair competition by third countries.31

The Community effort, however, has not been directed solely against conflicts of interest. The Community has concluded many cooperation agreements with different countries, including those of Eastern Europe.32 The Community has also undertaken the abolition of controls relating to intra-Community exchanges.33

29 For example, the EEC took measures against Argentina during its occupation of the Falkland Islands. See Community Solidarity in the Falkland Islands Conflict, 15 BULL. EUR. COMM. (No. 4) 7–8 (1982).
The Community, however, has not yet suppressed all formalities and border controls. Since January 1, 1988, the "single administrative document" has replaced several types of national forms used for the passage of goods.\(^{34}\) In the framework of the International Road Transport Convention,\(^{35}\) the Community eliminated the customs formalities required at the time of crossing a common border of two member states.\(^{36}\) Further, a recent regulation will introduce substantial flexibility into the Community system of guarantee of transit.\(^{37}\) In the realm of intra-Community exchanges, however, certain obstacles, incompatible with the objective of an internal market, persist. These include sanitary controls, different vehicle safety standards, and the multiplicity of access authorizations to market or transport goods by road, given by the Council or, in a bilateral fashion, by agreement between member states.\(^ {38}\)

2. Control of Persons

The Community has made little progress with respect to the control of persons at present. In order to do so, the Community must attain a real legal convergence in an area where the states insist on guarding their traditional prerogatives.\(^ {39}\) It is imperative to standardize national legislation on arms and drugs and to reinforce controls against terrorism at the external borders of the Community. Therefore, the member states must coordinate rules concerning persons coming from third countries, including visa policies, and ameliorate cooperation between police forces of member states.

B. Elimination of Technical Frontiers

1. Free Circulation of Goods

The free circulation of goods demands the harmonization of technical standards which are frequently the greatest hurdles to international commerce. The work undertaken by the Community institutions has resulted in the adoption of nearly three hundred very precise directives concerning, for example, the


following areas: industrial products, such as motor vehicles, tractors, and engines; metrology; textiles; fertilizers; electricity;\textsuperscript{40} foodstuffs, including colorings, preservatives, materials intended to come into contact with foodstuffs, labeling, packaging, advertising, and the sale of mineral waters;\textsuperscript{41} pharmaceuticals;\textsuperscript{42} and cosmetics.\textsuperscript{43} These directives also deal with specific areas, such as hazardous substances, by setting forth rules relative to the classification, packaging, and labeling of hazardous substances, detergents, and solvents.\textsuperscript{44} The directives also restrict the sale and use of certain hazardous substances and dangerous preparations, such as pesticides, and restrict testing of chemical substances.\textsuperscript{45} Finally, the directives provide rules governing insurance liability resulting from vehicular traffic and the lead content of gasoline.\textsuperscript{46}

The aim of these directives is to standardize national technical norms with the stated purpose of protecting the health and safety of people and the environment. In reality, the technical norms are frequently used to protect national producers.\textsuperscript{47} The Commission, nevertheless, has accorded particular attention to the issues of consumer\textsuperscript{48} and environmental\textsuperscript{49} protection, two areas which

\textsuperscript{40} See, e.g., Directive 76/889, 19 O.J. EUR. COMM. (No. L 336) 1 (1976) (regarding electrical troubles caused by electric household goods, portable tools, and similar equipment).


\textsuperscript{42} See, e.g., Directive 65/65, 8 J.O. COMM. EUR. 369 (1965).

\textsuperscript{43} See, e.g., Directive 76/768, 19 O.J. EUR. COMM. (No. L 262) 169 (1976).

\textsuperscript{44} See, e.g., Directive 67/548, 10 J.O. COMM. EUR. 1 (1967) (hazardous substances).

\textsuperscript{45} See, e.g., Directive 76/769, 19 O.J. EUR. COMM. (No. L 262) 201 (1976) (restrictions on marketing and use of dangerous substances).

\textsuperscript{46} See, e.g., Directive 73/404, 16 O.J. EUR. COMM. (No. L 347) 51 (1973) (control of the duty to provide civil liability insurance for motor vehicles).


\textsuperscript{49} In the domain of environmental protection, the Community texts treat a vast array of problems. See, e.g., Directive 85/377, 28 O.J. EUR. COMM. (No. L 175) 40 (1985) (the assessment of the effects of certain public and private projects on the environment); Directive 75/442, 18 O.J. EUR. COMM. (No. L 194) 39 (1975) (waste); Directive 76/464, 19 O.J. EUR. COMM. (No. L 129) 23 (1976) (pollution caused
have incited much discussion in Europe. The two most important directives in these areas are a directive on products liability and a directive on the risks of major accidents resulting from certain industrial activities, known as the Post Seveso Directive. Further initiatives are expected in the fourth program of Community actions concerning the environment (1987–1992) which will deal with the principle of polluter-payer, the integration of environmental policy with other Community policies, the best administration of resources, and international cooperation.

With respect to the harmonization of technical norms, the Community encountered specific problems which demanded a new approach. Eighteen years of experience showed that the method of attempting harmonization by means of detailed technical specifications resulted in slow and difficult adoption procedures. For this reason, in 1985 the Commission adopted a new approach which resulted from the case known as Cassis de Dijon in the European Court. According to that case, any product legally produced and sold in a member state must, in principle, be admitted to the market of any other member state.


51 Post Seveso Directive, supra note 49.
through the adoption of directives that set forth the essential norms (consumer safety or other collective interest) which the manufacturers must respect in order to benefit from the right of free circulation within the Community. The competent organs with respect to industrial normalization, such as the European Normalization Committee, have the task of elaborating the technical specifications which professionals will need to adopt in order to comply with the directive. The implementation of these specifications is voluntary rather than obligatory in nature, but the member states are obliged to give products made in conformity with these specifications a presumption of conformity with the essential requirements established by the relevant directive. Nevertheless, Community legislation may not be necessary if, from the moment a national standard is recognized by the Commission and published in the Official Journal of the European Community (Official Journal), all member states accept the goods which meet the standard.

In order to prevent the reappearance of new technical obstacles, the EEC enacted a directive which established an information procedure for norms. This procedure permits the examination of drafts of national technical rules to determine their compatibility with the principle of the free circulation of goods within the Community. Member states are obliged to provide such drafts to the Commission. National norms and technical regulations adopted in violation of this directive are not enforceable against third parties. On the other hand, if a national standard is recognized by the Commission and published in the Official Journal, all member states must accept the goods which conform to the standard.

2. Public Works

The opening of the public markets is the second aspect of the effort towards an internal market. In 1971, the Community adopted a directive intended to harmonize the procedures for the award of public works contracts. In 1976, the Community adopted a directive to coordinate procedures for the award of public supply contracts. A directive enacted in July 1972 specified the condi-

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55 The proposed directive concerning the harmonization of member states' legislation relating to machines is a good example of the new approach. See 31 O.J. EUR. COMM. (No. C 29) 1 (1988) (proposed directive).
57 Directive 83/189, supra note 56, at 9–11.
tions for publication of requests for bids and the awarding of contracts. In addition, in 1984 the Council adopted a recommendation preparatory to the opening of public works in the telecommunications sector. The goal of these directives was to organize competition on a Community level, but their impact has not been as great as had been hoped. Generally, member states have not respected the letter nor the spirit of the directives.

In order to realize the objectives set forth in the White Paper on the achievement of the internal market, the Commission took two initiatives in 1986 aimed at reinforcing the directives of 1971 and 1976. A proposed directive transmitted to the Council in July 1987 would reinforce the control mechanism for the application of Community rules. The proposed directive would enable the Commission to suspend procedures for awarding public works contracts which are shown to be discriminatory in order to prevent all damage resulting from an illegal award. Furthermore, at any stage of the award of a public contract, the wronged companies would have the possibility of efficient and rapid legal or administrative recourse. The wronged companies would also be able to obtain the annulment of the illegal decision made by the public authorities and reparation of any damages they sustained. Furthermore, the Commission submitted to the Council a proposition to include in the field of application of directives certain uncovered sectors, notably energy, transport, and water supply.

3. Free Circulation of Workers and Professionals

Until now, member states have resisted strongly the objective of free circulation of workers and professionals. Nevertheless, the free circulation of salaried employees is generally effective in the Community. The right of establishment for professionals continues to encounter numerous obstacles because of serious delays in the harmonization of professional qualifications. For the moment, the greatest progress has occurred in the areas of health and architecture. The right of establishment and free rendering of services, including the mutual

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63 See Opening up public procurement to free competition within the Community, 20 BULL. EUR. COMM. (No. 3) 11 (1987); Guide to the Community rules on open government procurement, 30 O.J. EUR. COMM. (No. C 358) 1 (1987).
recognition of diplomas, certificates, and other titles, is guaranteed for architects,\textsuperscript{66} doctors,\textsuperscript{67} nurses,\textsuperscript{68} dentists,\textsuperscript{69} veterinarians,\textsuperscript{70} midwives,\textsuperscript{71} and pharmacists.\textsuperscript{72} The Directive of September 15, 1986 governs specific training in general medicine.\textsuperscript{73} The directives concerning other independent professions, such as commercial agents\textsuperscript{74} and lawyers,\textsuperscript{75} are limited to questions of freedom to render services. In this area, the cases of the European Court have always anticipated Community legislation.\textsuperscript{76} The Council has adopted a directive that will institute a general system of mutual recognition of diplomas of higher education.\textsuperscript{77} This directive illustrates the Community's new approach of granting complete approval to the elimination of internal barriers as opposed to the prior practice of granting approval on a piecemeal basis.

4. A Single Market for Services

The EEC has achieved more progress with the free circulation of goods than with the free circulation of services. Numerous national regulations, often very complex, still block the rendering of services from one country of the Community to another. The Commission's liberalization program applies both to traditional services such as transport, banking, and insurance and new services such as telecommunications.

The EEC has enacted many directives in the banking sector to liberalize the initiation and development of credit institutions,\textsuperscript{78} facilitate the supervision of credit institutions on a consolidated basis,\textsuperscript{79} and establish the legal regime for credit institutions' annual and consolidated accounts.\textsuperscript{80} Other directives are

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\textsuperscript{67} Directives 75/362, 18 O.J. EUR. COMM. (No. L 167) 1, 14 (1975).
\textsuperscript{68} Directives 77/452, 77/453, 20 O.J. EUR. COMM. (No. L 176) 1, 8 (1977).
\textsuperscript{69} Directives 78/686, 78/687, 21 O.J. EUR. COMM. (No. L 233) 1, 10 (1978).
\textsuperscript{70} Directives 78/1026, 78/1027, 21 O.J. EUR. COMM. (No. L 362) 1, 7 (1978).
\textsuperscript{71} Directives 80/154, 80/155, 23 O.J. EUR. COMM. (No. L 33) 1, 8 (1980).
\textsuperscript{74} Directive 86/653, 29 O.J. EUR. COMM. (No. L 382) 17 (1986).
\textsuperscript{77} The directive on higher education diplomas was adopted on December 21, 1988 and has not yet been officially published.
envisioned to ameliorate Community rules, particularly in the area of publicity of accounting documents of branches created in a member state by institutions having their headquarters in another member state. Proposed directives also will deal with liberalization in the field of mortgage credit, the reorganization and winding up of credit institutions, and the reorganization of bank funds. In addition, the Commission adopted a recommendation to introduce common standards for monitoring and controlling large exposures by credit institutions. The recommendation is designed to avoid the concentration of risks by fixing a notification threshold and limiting the amount of risk.

In the insurance sector there are several directives that concern the initiation and pursuit of the business of direct insurance, provisions relating to Community co-insurance, credit insurance and suretyship insurance, and legal expenses insurance. Other proposed directives will deal with insurance contracts, liquidation of insurance businesses, the annual and consolidated accounts of insurance companies, and the rendering of direct insurance services other than life insurance.

In this area, the European Court anticipated the adoption of legislation. In a decision in 1986, the European Court decided that in the insurance sector in general, certain important factors, relating to the protection of consumers as purchasers of insurance and as insureds, could justify restrictions on the free rendering of such services. The authorities of the destination state may require a separate consent under certain conditions. But the requirement of an establishment in the country where insurance activities would be performed—a practice which would negate the free rendering of services—goes beyond that which is indispensable to attain the desired objective. Such a requirement is

contrary to articles 59 and 60 of the EEC Treaty.95 In the area of co-insurance, the European Court went even further and decided that neither the requirement of the existence of an establishment nor the consent of the destination state can be regarded as compatible with articles 59 and 60 of the EEC Treaty.96

In addition to the insurance sector, the EEC has enacted directives involving stock exchanges and negotiable securities. The coordination directives in these domains concern the following areas: conditions for the admissions of securities to official stock exchange listings;97 requirements for the drawing up, scrutiny, and distribution of the listing particulars to be published for the admission of securities to official stock exchange listings;98 information to be published on a regular basis by companies with shares admitted to official stock exchange listings;99 and undertakings for collective investment in transferable securities (UCITS).100 In 1989, the Council should complete this coordination effort with the adoption of proposed directives concerning the following issues: the prospectus to be published when securities are offered for subscription or sale to the public;101 information to be given during acquisitions and large transfers of capital shares of companies listed on a stock exchange;102 insider trading;103 and the elimination of indirect taxes on securities transactions.104 As to financial services in general, the formulation of Community legislation favoring the exchange of financial products such as insurance policies, deeds, savings contracts, and contracts for consumer credit will fill a large void.

Transportation services pose a number of complex problems, but the development of a Community policy for transport is a necessary corollary to the free circulation of goods and people. It is essential for the Community to progressively dismantle the system of national quotas still applied to merchandise transported over the road.105 In addition, the Community should liberalize bus

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95 Id. at 143–48.
105 See, e.g., 5 J.O. COMM. EUR. (No. L 70) 2005 (1962) (transport of goods by road for someone’s behalf); Directive 65/269, 8 J.O. COMM. EUR. 1469 (1965) (standardization of rules concerning the authorization for the transport of goods between the member states); Regulation 3164/76, 19 O.J. EUR. COMM. (No. L 357) 1 (1976) (common quota for goods transported by road between the member states).
services, coordinate the system for fixing prices, and stimulate competition in the civil aviation sector.

In the maritime transport sector, the Community has achieved considerable progress since the adoption of a regulation in December 1986 which applies the principle of free rendering of services to maritime transport between member states or with third countries.\(^{106}\) The EEC will progressively eliminate the national restrictions in this area according to a precise timetable. The regulation also foresees the elimination or adaption at the Community level of arrangements for dividing freight which appear in bilateral agreements concluded between member states and third countries.\(^{107}\) The EEC also adopted a regulation to establish procedures for application of articles 85 and 86 of the EEC Treaty to international maritime transport services which originate in or are destined for a country in the Community.\(^{108}\) In addition, the EEC adopted a regulation concerning unfair pricing practices in maritime transport.\(^{109}\)

In the air transport sector, the EEC took a major step in December 1987 when it adopted several important texts. Two regulations established procedures for applying the rules of competition applicable in this area.\(^{110}\) The EEC also adopted a directive establishing common rules to define approval criteria for air fares.\(^{111}\) A Council decision allocated seat capacities between scheduled air transporters so that all transporters had access to regular liaisons between member states.\(^{112}\) These changes should increase competition, stimulate the development of the air transport sector, and ultimately improve service for passengers.

Coordination in the trucking sector is less advanced than the air transport sector. The most important legal tool in this area is a regulation which involves the harmonization of certain social legislation in the domain of road transport.\(^{113}\) The Commission has proposed directives concerning conditions of access of nonresident transporters to national road transport in member states and common rules pertaining to the international transport of bus travelers.\(^{114}\) In the perspective of an intra-Community market of road transport of goods without quantitative restrictions, the Council decided to facilitate progressively the access

\(^{107}\) Id. at 2–3.
of nonresident transporters to internal liaisons and, during a transition period, to adapt the system of bilateral authorization.\textsuperscript{115}

The real challenge for the Commission is the liberalization of services related to new technologies. In this area, progress has been limited. In the domain of telecommunications, the Commission adopted a directive on the mutual recognition of standards for telecommunications terminals.\textsuperscript{116}

In the area of free rendering of audiovisual services, the Commission transmitted a proposed directive to the Council which was aimed at coordinating certain national provisions relating to radio and television transmission.\textsuperscript{117} The essential object of that directive will be to promote within the Community the diffusion of radio and television programs conceived by the member states as well as the production of audiovisual programs. The directive strives to abolish certain legal obstacles to free transmission, notably in the areas of advertising and copyright. It further proposes to promote the creation of markets large enough for television programs produced in the member states by defining the common rules as to the opening of national markets.\textsuperscript{118}

5. Movement of Capital

The free circulation of capital must be paired with that of goods, services, and persons and must necessarily accompany the liberalization of financial services. The free circulation of capital will permit European companies to mobilize savings and invest under the most efficient conditions. The EEC enacted a directive in 1960 which contained some provisions regarding the application of the principle of free circulation of capital as provided by article 67 of the EEC Treaty.\textsuperscript{119} That directive distinguishes four categories of capital for which the obligations of the states were more or less strict.

In 1986, the Commission adopted a directive reinforcing the obligations of member states to liberalize the movement of capital, thus realizing the first stage of the program to liberalize financial flow.\textsuperscript{120} The directive authorized residents of member states to acquire all securities, whether or not traded on a stock exchange, and introduced placement of such securities on the financial markets of the Community. Thus, residents may acquire securities in the same manner as they acquire direct investments, investments in real property, commercial...

\textsuperscript{118} Id. at 11–13.
credit, and capital movements of a personal nature. There are, however, certain exceptions. Presently, four member states—Spain, Portugal, Greece, and Ireland—are still authorized to maintain restrictions on the movement of capital.\footnote{121}

The EEC has continued to liberalize capital movements. Since the adoption of Directive 88/361 in 1988, short-term financial transactions have benefited from the unconditional liberalization of capital.\footnote{122} This directive is aimed at expanding the obligation of liberalization to all movements of capital. The text contains a specific safeguard permitting the reintroduction, for brief periods, of certain controls on the movements of short-term capital—for example, in the case of a serious shake-up in the monetary policy of a member state. A second proposed directive concerns the regulation of international financial flow and the neutralization of its undesirable effects on internal liquidity.\footnote{123} A regulation adopted together with Directive 88/361 sets up a mechanism for medium-term financial support for the balance of payments of member states requesting it, by combining the existing Community loan and medium-term financial assistance mechanisms.\footnote{124} This instrument could be utilized to accompany the efforts of liberalization of capital movements.

6. The Creation of a Favorable Legal Environment

The creation of a legal environment favorable to industrial cooperation is among the essential concerns of the Community. In the area of company law, harmonization projects have had some significant results. The Commission has adopted directives concerning the following areas: the disclosure, validity of obligations entered into, and nullity of companies;\footnote{125} the formation of public limited liability companies and the maintenance and alteration of their capital;\footnote{126} mergers;\footnote{127} division of public limited liability companies;\footnote{128} structure and content of the annual accounts of certain types of companies;\footnote{129} consolidated accounts;\footnote{130} and qualifications of persons responsible for carrying out the statutory audits of accounting documents.\footnote{131}

Several proposed directives are pending, but their adoption is not anticipated in the near future. These proposed directives concern the following issues: the

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\begin{itemize}
  \item \footnote{121}{Id. at 22–24.}
  \item \footnote{125}{31 O.J. Eur. Comm. (No. C 26) 12 (1988) (proposed directive), COM (87) 550 final.}
  \item \footnote{126}{Directive 68/151, 11 J.O. Comm. Eur. (No. L 65) 8 (1968).}
  \item \footnote{130}{Directive 83/349, 26 O.J. Eur. Comm. (No. L 193) 1 (1983).}
\end{itemize}
structure of limited liability companies and the powers and obligations of their organs;\textsuperscript{132} cross-border mergers;\textsuperscript{133} and publicity of branches created in one member state by a company existing under the law of another member state.\textsuperscript{134} Another proposed directive involves the scope of accounts and the information and consultation of workers in enterprises with complex structures.\textsuperscript{135}

Along with these propositions, the Commission has taken action to create specifically European legal forms. One of these propositions resulted in the adoption by the Council of a regulation creating the European Economic Interest Groupings, an entity which is a flexible structure of transnational cooperation with a legal personality.\textsuperscript{136} The Commission is unlikely to adopt the proposed regulation creating the “European Company” because member states continue to discuss the issue of representation of workers.\textsuperscript{137}

In the area of social law, which has important implications for businesses, the Commission has issued several directives concerning the following problems: collective redundancies;\textsuperscript{138} safeguarding of employees’ rights in the event of transfers of undertakings, businesses, or parts of businesses;\textsuperscript{139} protection of employees in the event of the insolvency of their employer;\textsuperscript{140} and equal pay.\textsuperscript{141} The Commission has also issued directives to implement the principle of equal treatment for men and women as regards access to employment, vocational training, promotion, and working conditions\textsuperscript{142} and to protect workers against risks associated with exposure to certain hazardous substances while working.\textsuperscript{143} Proposed directives exist concerning part-time work and safety on the work-site.\textsuperscript{144} The “social work” of the Community is not as negligible as sometimes asserted.

In the domain of competition law, the Community has exclusive competence to enact rules applicable to agreements. The general rules are incorporated in articles 85 and 86 of the EEC Treaty. These EEC competition rules apply to any cartel which affects the European market even when companies involved

\textsuperscript{137}See COM (88) 320 final.
are not based in, or have no subsidiaries in, the Community.\textsuperscript{145} Several texts have applied the basic principles laid down in the EEC Treaty. Regulation 17, enacted in 1962, requires notification of all agreements falling within the scope of article 85, in order to benefit from an individual exemption in that article.\textsuperscript{146} The Commission has enacted exemption regulations by category for the following agreements: distribution and exclusive purchasing agreements;\textsuperscript{147} distribution agreements in the automobile sector;\textsuperscript{148} specialization agreements;\textsuperscript{149} research and development;\textsuperscript{150} patent licenses;\textsuperscript{151} franchising;\textsuperscript{152} and licensing of know-how.\textsuperscript{153} These regulations have not always produced the legal certainty that business people seek. In addition, the policy of the Commission toward common undertakings has not always been clear. Many practitioners hope that the Commission will adopt a less strict application of article 85, in the same fashion that the “rule of reason” tempers anti-trust law in the United States.

In the perspective of a large international market, the Commission seeks to have the means to act on structures which are both pertinent and efficient in order to control better the phenomenon of concentration. A proposed regulation on this subject was transmitted to the Council, which failed to adopt it at its meeting of November 30, 1987. In an important decision rendered on November 17, 1987, however, the European Court approved the Commission’s intervention on the basis of article 85.\textsuperscript{154} This case involved Phillip Morris’ acquisition of 50 percent of the capital of Rothmans Tobacco Holding. In the maritime and aviation sectors, the regulations of December 22, 1986, and December 14, 1987, respectively, determine the procedures of application of articles 85 and 86 of the EEC Treaty.\textsuperscript{155}

In the area of intellectual property, other than the regulation concerning the categorical exemption of patent licenses and the proposed regulation of know-how mentioned above, the coordination activities of the Community have remained limited. A directive of December 1986 relative to the legal protection


\textsuperscript{146} See Regulation 17, 5 J.O. COMM. EUR. (No. L 13) 24 (1962).


\textsuperscript{148} Regulation 123/85, 28 O.J. EUR. COMM. (No. L 15) 16 (1985).

\textsuperscript{149} Regulation 417/85, 28 O.J. EUR. COMM. (No. L 53) 1 (1985).

\textsuperscript{150} Regulation 418/85, 28 O.J. EUR. COMM. (No. L 53) 5 (1985).


\textsuperscript{154} This regulation was adopted on November 30, 1988, but has not been published yet. See Know How Licensing Agreements Exempt from Competition Rules, 4 Comm. Mkt. Rep. (CCH) ¶ 95,025 (1988) (new development).

of topographies of semiconductor products is important. For many years, the Commission tried to bring about the establishment of rules governing Community patents and trademarks. The Commission utilized two completely different approaches—the harmonization of national rules and liberalization based on reciprocity—but neither has brought concrete results.

As to the Community patent, the member states (with the exception of Spain and Portugal) have signed the Luxembourg Convention of 1975. This Convention defines the rights attached to the future Community patent which would be granted in conformity with the procedure established by the Munich Convention of 1973. But the Community has not yet completed the conditions of application of the Luxembourg Convention. The Community patent will be the first patent in the history of intellectual property to benefit from protection in a territory larger than that of a single state.

In the area of trademarks, the Commission presented two proposals to the Council in 1980. One proposal is a directive to coordinate national legislation on trademarks. The other proposal is a regulation on the creation of a Community trademark office. The goal of these two proposals is to guarantee that exchanges of products and trademark services within the Community benefit from the conditions analogous to those existing in national markets. The proposals were modified to take account of opinions given by the European Parliament and the Economic and Social Committee.

In 1986, the Commission transmitted to the Council a proposal relative to the execution of a regulation on Community trademarks. This proposal sets forth application procedures, such as filing formalities, as well as procedures for opposition, appeal, forfeiture, and invalidation. The Commission also sent to the Council two proposed regulations concerning administrative appeals within the Community trademark office and the taxes payable to that office. Overall, however, the establishment of a Community trademark will probably not occur rapidly.

The Community has put into place a framework favoring industrial cooperation by initiating European research programs. These research programs concern computer technology, telecommunications, industrial technology, biotechnology and innovation, and transfer of technologies. In addition, the

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158 See G. Bonet, Chroniques Propriétés Intellectuelles 142 (1981); see also Convention on the Grant of European Patents, 1976 Gr. Brit. T.S. No. 20 (Cmd. 7090) [hereinafter Munich Convention].
Community has decided upon a program of action for small and medium-sized businesses. It is intended to offer them a legal, fiscal, and administrative environment as favorable as possible.

In order to create a large European market, however, it is equally necessary to harmonize a good number of major legal principles. The Community has completed the first stages in this area. For example, the Rome Convention of 1980 is intended to govern the choice of law applicable to contractual obligations.163 Drafted by experts of the national governments and of the Commission, all the member states except Spain and Portugal have signed this Convention. Presently, France, Italy, Denmark, Luxembourg, Germany and Belgium have ratified the Convention. The Convention will apply when one more nation ratifies it. The goal of the Convention is to introduce into the national laws certain uniform rules concerning the law applicable to contractual obligations, which is important in litigation cases. The Convention is an important step in the attempt to unify private international law within the Community.

The Brussels Convention of 1968 is concerned with judicial competence and enforcement of civil and commercial decisions.164 This Convention has an important role in the solution of jurisdictional conflicts and the enforcement of judgments within the Community. It creates a veritable common judicial jurisdiction. Bankruptcy, however, is excluded from its scope of application. In order to complete it on this point, a draft Convention is being prepared.165 On September 16, 1988, the EEC member states and the European Free Trade Association countries signed a convention to extend the application of the Brussels Convention to the latter countries.166 It is important to remember that the interpretation of these Conventions is the responsibility of the European Court whose role as innovator is frequently forgotten.

C. Elimination of Fiscal Frontiers

The elimination of fiscal frontiers is the third dimension of the harmonization effort. No convergence of the internal market is possible if the Community does not take into account tax problems. Thus, the EEC has taken steps to deal with the problems of indirect and direct taxation.

165 The draft embodies the principles of unity and universality of bankruptcy in the EEC, the guarantee of equality for creditors, and the security of exchanges. See 30 O.J. EUR. COMM. (No. C 175) 2 (1987) (resolution).
1. Indirect Taxation

Indirect taxation is one of the principle challenges posed by the realization of an internal market. Following numerous directives, all the member countries of the Community have adopted the same system of value-added tax (VAT).\(^{167}\) The number of rates and their levels, however, diverge from one country to another. This is equally true for excise taxes on hydrocarbons, alcohol, and tobacco. These differences in tax rates and levels provoke competitive distortions and require border controls. As long as important differences between the national systems of indirect taxation exist, each member state will want to guarantee that imported merchandise has satisfied these national taxes. In the White Paper on the internal market, the Commission emphasized the need to eliminate fiscal frontiers in order to realize the objectives of an internal market. Elimination of fiscal frontiers implies a pronounced rapprochement of the VAT rates and excise taxes. Proposals on this subject were sent to the Council in September 1987.\(^{168}\)

As a first step, it is planned to transfer payment procedures for the VAT from the border to the interior of the countries. This system already functions in the Benelux nations. The measures of fiscal convergence are more ambitious. The Commission proposed that the member states prepare themselves to align the national systems progressively, basing its action on the uniformization of excise taxes and on the definition of permissible variation in the VAT. The proposals apply special treatment to luxury goods. The VAT brackets do not allow rate differences of more than five or six percent. Such an alignment poses considerable problems for certain member states. For example, since the United Kingdom applies a zero rate to certain goods, the Community may need to allow limited exceptions. Furthermore, certain technical provisions will complete the alignment, such as a compensation mechanism permitting the attribution of VAT receipts coming from taxpayers to the respective destination countries. Members of the Council expressed sharply different points of view during the debates on these propositions. Nevertheless, the Community adopted several directives concerning indirect taxes on the raising of capital\(^{169}\) and tax exemptions for individuals.\(^{170}\)

2. Direct Taxation

Direct taxes have remained somewhat outside of these efforts at harmonization. With the exception of a directive in 1977 on mutual assistance by the


competent authorities of the member states, the Community has not done anything in particular in this area. The Commission, however, has proposed directives concerning the following issues: harmonization of company taxes and systems of withholding dividends at the source; the common fiscal regime applicable to mergers, spinoffs, and contributed capital between companies of different member states; harmonization of provisions concerning taxation of revenues in relation to the free circulation of workers within the Community; and harmonization of national laws relative to the reporting of losses for tax purposes. The adoption of any of these proposed directives in the near future is unlikely.

IV. THE SINGLE MARKET AND TRADE IN THE UNITED STATES

Many of the EEC's trading partners fear that the unity created by the harmonizing legislation is likely to lead to what has become known as "fortress Europe." Some of the recent EEC legislation may result in a period of negotiation and conflict between the EEC and its trading partners. This section reviews potential problems in the following areas: anti-dumping; new commercial instruments; counterfeit goods; patents; the legal protection of chips; products liability; consumer protection; and public markets.

A. Anti-Dumping

In the absence of anti-dumping duties on components, the Commission feared that businesses might evade an anti-dumping duty on an end-product if the product was imported in semi-finished form (parts, components, assembly-kits) and assembled in an EEC member state. The Commission, therefore, undertook an analysis of the ways to prevent circumvention of anti-dumping duties by such practices. Both the Commission and the Council considered that businesses were creating assembly plants exclusively to avoid anti-dumping duties under the basic anti-dumping regulation. For example, from 1970 to 1987, the EEC initiated or reopened four hundred anti-dumping proceedings, among which there were thirty-three cases against imports originating from the United States. In response to this problem, the Commission adopted an amendment to the anti-dumping legislation in 1987.

According to the new legislation, the Community will collect definitive anti-dumping duties on products that are introduced into the commerce of the

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Community, after having been assembled in the Community, if the following conditions are fulfilled: (1) such assembly or production is carried out by a party which is related to or associated with any of the manufacturers whose exports of the like product are already subject to an anti-dumping duty; (2) the assembly or production was started or substantially increased after the opening of the anti-dumping investigation; and (3) parts or materials used in the assembly or production operation originate in the country of exportation of the product subject to the anti-dumping duty and their value exceeds the value of all other parts used by at least 50 percent, taking into account variable costs and research and development expenses. One critic claimed that this legislation exceeded what was necessary to prevent circumvention of anti-dumping regulations.

B. New Commercial Instrument

In addition to the anti-dumping legislation, the Community has another legal framework to protect its industry against illicit commercial practices. This framework is called the new commercial instrument (NCI). The NCI is modeled on section 103 of the U.S. Trade Agreements Act and is designed to respond to any illicit commercial practice of a third country.

The NCI ensures full exercise of the Community’s rights with regard to the commercial practices of third countries. If an industry files a complaint on the grounds of injury to Community interests, the Community may pursue three types of action. First, the Community may initiate international consultation or dispute settlement procedures. Second, the Community may accept unilateral undertakings offered by third countries. Finally, the Community may take commercial measures. It is perhaps this third option of retaliatory measures which gives the NCI clout and which third country competitors will view cautiously.

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The first application of this legislation concerned a U.S. measure which excluded imports of certain aramid fibers into the United States.\textsuperscript{179} In this case, the Commission supported the complaint by a Community producer, Akzo, which alleged that the application of section 337 of the U.S. Tariff Act of 1930 in the matter of "certain aramid fibers" constituted an illicit commercial practice by the U.S. government. The producer further alleged that the U.S. International Trade Commission order to exclude from the U.S. market unlicensed importations of certain forms of aramid fiber manufactures—those outside the United States by a Community producer—was causing or threatening to cause injury to a Community industry. As a result, the Commission initiated the procedure for consultation and dispute settlements, referred to in article XXIII of the General Agreement on Tariffs and Trade, concerning this practice. Since the settlement of this case, the Commission has appeared willing to make more use of the NCI.\textsuperscript{180}

C. Measures Against Counterfeit Goods

A third set of rules which the EEC may use against illicit commercial practices is that provided for by a Commission regulation in 1986. This regulation laid down measures to prohibit the release for free circulation of counterfeit goods and applies exclusively to goods originating from non-EEC countries.\textsuperscript{181} The regulation concerns any goods which bear, without authorization, a trademark which is identical to a trademark validly registered to such goods in a member state in which these goods are in free circulation, or a trademark which cannot be distinguished in its essential aspects from such a validly registered trademark. The regulation permits the trademark owner to initiate a procedure which may lead to the prohibition of the release for free circulation in the EEC of goods recognized as counterfeit.\textsuperscript{182}

D. Community Patents

The Luxembourg Community Patents Convention of 1975 is not yet in force because Denmark, Ireland, Greece, Spain, and Portugal have not yet ratified


\textsuperscript{180} See, e.g., 30 O.J. EUR. COMM. (No. L 335) 22 (1987) (illicit commercial practices concerning the unauthorized reproduction of sound recording in Indonesia). Cf. 30 O.J. EUR. COMM. (No. C 96) 8 (1987) (relating to certain illicit commercial practices of the Argentine Republic in regard to the export of coarse soy bean meals, where the Seed Crusher's and Oil Processor's Federation (FEDIOL) started a proceeding against the Commission's decision before the European Court).

\textsuperscript{181} Regulation 3842/86, 29 O.J. EUR. COMM. (No. L 557) 1 (1986) (measures to prohibit the release for free circulation of counterfeit goods).

\textsuperscript{182} See also Regulation 3077/87, 30 O.J. EUR. COMM. (No. L 291) 19 (1987) (provisions for the application of Regulation 3842/86).
This Convention is the EEC’s necessary complement to the Munich Convention on European Patents of 1973. The Munich Convention is not limited to the Community; sixteen European states adhere to it. The Luxembourg Convention aims at creating a uniform patent law at the Community level by guaranteeing that the application in the Community of a patent granted according to the procedure laid down in the Munich Convention (European patent) will not be hindered by the existence of patent laws which differ from one member state to another. Therefore, once the Luxembourg Convention is in force, the application of the two Conventions will allow inventors to obtain a European patent which is valid throughout the Community and which has the same legal effect in every member state. For the same reason, the Commission proposed a regulation for a Community trademark which would guarantee the legal protection of a trademark throughout the Community.

E. Legal Protection of Chips

In 1987, a Community directive on the legal protection of topographies of semi-conductor products came into force. The conception and development of chips (topographies of semi-conductor products) are subject to research which do not always guarantee the expected result. Moreover, competitors may appropriate existing topographies to manufacture semi-conductor products in competition.

The problem of chip legal protection became particularly urgent since the adoption by the U.S. Congress in 1984 of a law which guarantees such protection in the United States to non-Americans only in case of reciprocity. The purpose of a Community directive adopted in 1986 is to ban the divergence between legislation in the member states. The inventor of an original topography benefits from exclusive rights for ten years. The Council also expressly confirmed the right of U.S. nationals and companies to protection under the directive.

F. Products Liability

In 1985, the Council adopted the Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products. This directive provides for the strict
liability of the manufacturer, seller, or importer of defective products. Its most noticeable feature is the adoption of a regime of product liability which facilitates the plaintiff’s establishment of his case and provides an extensive definition of the liable person.

A victim of a defective product shall only be required to prove the damage, the defect, and the causal link, but never the producer’s fault. The directive defines a producer as “any person who, by putting his name, trademark, or another distinctive feature on the product, presents himself as its producer.”\(^\text{190}\)

It is possible to claim against two or more responsible parties for the same damage. They will be held jointly and severally liable. If the victim is unable to claim against the producer or to identify him, the directive provides that the person who imported the product into the Community is a producer for the purpose of the directive. In fact, the directive even deems the supplier a producer unless the supplier identifies the producer or the importer. A product is defective if it does not provide the safety that one may legitimately expect. It is the “lack of safety which the public at large is entitled to expect” which makes the product defective.\(^\text{191}\)

Member states were supposed to enact laws, regulations, and administrative practices necessary to comply with the directive before August 1, 1988. Only the United Kingdom, Greece, and Italy have fulfilled their obligations. The Commission may consider commencing legal action in the European Court against the other member states in 1989.

Although the practice will remain quite distorted, the implementation process is very important for the future of products liability in Europe. The member states are free to adopt or not adopt any of the three options which the directive provides. Moreover, the directive laid down a system which does not replace all other remedies available to persons injured by defective products. Although at first sight it would appear that injured parties may choose to take action against importers, foreign producers may find themselves joined as a party as a supplier while importers look for indemnity.

G. Internal Market and Consumer Protection Measures

In the context of the elimination of technical obstacles to the realization of the internal market, in June 1987 the Council adopted an important directive concerning products which endanger the health or safety of consumers because of deceptive appearances.\(^\text{192}\) In most of the member states, legal provisions are in force concerning such products, but these provisions differ considerably from

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\(^{190}\) Id. at 30.

\(^{191}\) Id. at 29.

one member state to another. This situation creates significant barriers to the free movement of goods and unequal competitive conditions within the EEC without ensuring effective protection for consumers, especially children. The EEC adopted this directive in order to eliminate these obstacles to the establishment and operation of the Common Market and to insure adequate protection for consumers. The directive makes it possible to prohibit the marketing, import, production, and export of products which, because of their similarity to foodstuffs, jeopardize the health or safety of consumers. Such dangerous products will be withdrawn from the market. Member states are obliged to adopt their respective legislation no later than June 26, 1989. 193

H. Public Markets

Public contracts are a major economic area in the EEC because total purchases by public administrations and government companies in the member states amount to nearly 400 billion European Currency Units. Theoretically, competition among suppliers in this field is already governed by two main directives: one involves public supply contracts194 and the other involves public works contracts.195 The current situation, however, is incompatible with a true internal market because the member states do not respect the existing Community legislation. Important fields, such as telecommunications, transport, energy, and water supply are not yet included. For these reasons, the Commission is pushing the Council to adopt a new measure to ban any discrimination based on nationality. The purpose of this initiative is to reinforce the monitoring of the respect for these directives by making recourse against abusive government practices effective and efficient.196 Non-EEC companies will also benefit from the non-discriminatory measures provided for by the proposed Community directives. These non-EEC companies, however, must have a subsidiary in one of the member states, and their products, subject to a public tender, must freely circulate within the Community.

V. Conclusion

It remains to be seen whether the SEA will achieve its aim of creating an internal market, in which free movement of services and capital is ensured, by December 31, 1992. The measures achieved so far, as the half way point is approached, do suggest that a single market will eventually have the unity and economic strength to negotiate with the Japanese and North American markets

193 Id. at 49-50.
on an equal footing. Indeed, there have already been worrying signs for the Community's third party traders that the member states will compensate any drawbacks in breaking down internal barriers by adopting protectionist policies outside the Community. What concerns the third countries most is that the single market is likely to have the economic force to match its inclination to drive a harder bargain with foreign traders.

The trend in the measures taken toward the creation of an internal market to date suggests that the U.S. commercial transactions within the Community are likely to be increasingly subject to Community regulations. Quantitative trade restrictions previously adopted by individual member states may become Community policy after 1992. The anti-dumping policy of the Community suggests there will not be any easy way for non-EEC companies and their products to cross the single European market border. Whether the fear of a trade war is justified remains to be seen, but the Community's latest suggestions to negotiate reciprocity of trading opportunities with third countries means that the advantages to third countries of trading in a single market may have a price attached to them. In reality, the Community will merely be redressing the balance by compensating for protectionist measures taken against its member states by third countries in the past. The Community is coming of age, but whether it will elect a policy of protectionism or free trade with its third country counterparts remains to be seen.