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The Single European Act†

by Jules Lonbay*

I. INTRODUCTION

Dreams of supranationality in Western Europe have faded in the face of an inter-governmental reality. The dream lives on though, as an inter-governmental Community¹ and could not of itself provide sufficient political strength to achieve a true internal market.² This aim is a common minimum³ accepted by all who wish the Community well, for at the heart of the Community system lies the goal of a true common market with all the accruing trade benefits.⁴ Although a great deal has been achieved, there is still a long way to go.⁵ It is

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² Even though aspects of decision-making are intergovernmental in character, the output is legally capable of being enforced and having a supranational character.
³ This aim was recognized most recently at the following summit meetings: Brussels (1985), Fontainebleu and Dublin (1984), and Copenhagen (1982). See Commission White Paper, Completing the Internal Market, 1984–1985 EUR. PARL. DOC. (COM No. 310 Final) 3 (1985) [hereinafter White Paper].
⁴ The benefits of a large, unified home market (approximately 320 million people), even greater in size than the United States, is considered essential if European manufacturers are to compete with those from Japan and the United States. See D. SWANN, THE ECONOMICS OF THE COMMON MARKET (4th ed. 1981) for an analysis of the economic advantages of customs unions. Basically, optimal resource allocation under a market mechanism provides the rationale for a common market. Id.
⁵ For example, a customs union has already been established. Individuals can now also directly enforce their Community-granted rights in national courts. The Community has doubled its size and today comprises twelve nations. For an overview of the Community's achievements to date, see COMMISSION OF THE EUROPEAN COMMUNITIES, 20TH GENERAL REPORT OF ACTIVITIES OF THE EUROPEAN
clear that there is a great need for intra-community coordination, particularly in information science and other technological areas. Coordination in research and the establishment of common technical standards are necessary to allow true exploitation of the Community-wide market. This and other new policy initiatives and their implementation depend critically on the institutional makeup of the European Community and its ability to cope with the political pressures inherent in deciding policy matters and in creating as a practical matter a new internal market. Moreover, the Community has ambitions beyond establishing a common market. A true common market coupled with common policies and economic policy convergence are written into the original Community treaties. This already necessarily implies a relatively high level of formal institutional coordination and political cohesion. Because the Single European Act (SEA) takes the Community beyond these objectives, some institutional adjustment is clearly needed.

This Article briefly sets out the major problems facing the European Community in its internal development, and assesses whether the latest reform attempt, the SEA, achieves the changes necessary to overcome the difficulties. The Article summarizes both the positive and the negative aspects of the SEA and lays out the essential reforms that have taken place, concentrating on the efforts to establish a single European market. The first part elaborates the difficulties encountered in the institutional decision-making process and the effects these have on establishing a unified market. It then looks at how the current reforms came about and what they hope to achieve. The second part assesses the SEA's likely impact and effectiveness in achieving its aims.


6 See infra notes 111 and 259 and accompanying text where the need for a unified market in this field is further explained. See also note 262 and accompanying text for the Single European Act's treatment of research and development policy.

7 Other areas of policy also need attention, including the reform of the Community's Common Agricultural Policy.

8 Although it could be argued that the political strength provided by European summity (nourished by economic and political interdependence and domestic politics) would be sufficient, the mechanisms already in place are insufficient for the implementation of any policies so agreed. It is also clear that even when a policy is agreed upon at a summit meeting the promises often remain unfulfilled; for example, the 1969 promise of an economic and monetary union by 1980.

9 Traditionally, the notion of a common market means that all the factors of production (workers, entrepreneurs and capital) must freely move in addition to the free movement of goods, thus helping ensure optimal resource allocation.


11 These objectives may be met by, inter alia, providing the Community the legal competence to cope with the various areas of policy previously dealt with through only a marginal delegation of jurisdiction.
II. THE INTERNAL DEVELOPMENT PROBLEMS OF THE EUROPEAN COMMUNITY

A. The Decision-making Difficulties

The founding fathers of the Community envisaged a "spill-over" effect: The more the economies of the member states became integrated, the more necessary political and economic cooperation would become, which in turn would lead to an increasing deposit of political power with European institutions. Member states would seek common solutions as they realized that cooperation was essential to make the Community work for their mutual benefit.12 The increasing enmeshment and resulting common policies have occurred, but the concomitant strengthening of the Community institutions has not. The member states have managed to wrest decision-making power from the community executive and reduce the decision-making process to a species of inter-governmental haggling.13

The decision-making process of the Community, as originally envisioned, required cooperation between the European Commission (representing the Community interest) and the Council of Ministers (representing the member state interest). Whilst the Commission proposed,14 the Council of Ministers disposed. This "balance" in practice never truly worked. The causes of the institutional ills of the Community are catalogued and well known.15 They mainly flow and ebb around the democracy deficit in the decision-making process.16 The directly elected European Parliament (EP),17 originally graced with only a consultative role, had managed to claw additional powers within the decision-making process before the creation of the SEA. Its opinions18 must be awaited where they are required by the treaties. It may bring an action under

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12 This is also a neo-functionalist notion. See P. Taylor, The Limits of European Integration 9 (1983).
14 The Commission has the exclusive right of initiative. EEC Treaty, supra note 1, at art. 155.
16 This was recognized in the 1972 Vedel Report which suggested inter alia an increase in the powers of the European Parliament.
17 Throughout the Treaties, most references to the European Assembly are replaced by references to the European Parliament.
article 175, and some of its acts have legal effects within the meaning of article 173. It also has substantial budgetary powers including the ability to block adoption of the budget. Its budgetary powers have enabled it to put its foot in the door of the decision-making process via the conciliation procedure. The member states restrain this source of Community power by keeping a strong grip on the purse strings and by adopting supplementary budgets outside the parliamentary process. The EP is now consulted by the Commission in the early stages of draft proposals. However, its opinions, whilst they must be received, can be ignored. Thus the only democratic control is indirect through the responsibility of the ministers in the Council of Ministers to their national parliaments.

The resultant lack of political legitimization has weakened the power of initiative of the Commission and helped accelerate the rise of both COREPER and more importantly the European Council. The requirement of unanimous voting in the Council of Ministers in certain key provisions and the use of the political veto in areas where a qualified majority vote is called for has distorted

20 See EEC Treaty, supra note 1, at art. 155. The Council of Ministers has also excessively used its rights under Article 152 of the EEC Treaty.
21 This indirect democratic control has exacerbated the use of the political veto by giving it some legitimacy; the ministers being the one “democratic link” in the decision-making chain.
25 The Commission seeks inter alia some “democratic” legitimacy for its proposals.
29 See EEC Treaty, supra note 1, at art. 106.
30 This is the Luxembourg Compromise, sometimes referred to as the Accords of Luxembourg. This “agreement to differ” was hammered out in 1966 and allows a member state to plead “vital interests” and thus block a decision by what amounts to a veto. It has been criticized in many of the reports cited above. See, for example, note 15 and accompanying text. See also Nicoll, The Luxembourg Compromise, 23 J. Comm. Mkt. Stud. 33 (1984). See infra note 169.
the Commission's role. This in itself would not be an entirely negative factor if the necessary legislation were still forthcoming. However, the degeneration of the decision-making process to inter-governmental haggling and the resultant lack of legislation necessary to coordinate laws sufficiently to assure a true common market are the crux of the problem.

New policy and policy reforms need, as a prerequisite, a lessening of resort to consensus politics in the Council of Ministers. The rise of inter-governmentalism can also be attributed to the fact that as the Community adopts laws in any given area, the member state competence in that area withers, eventually to be replaced by Community competence. This phenomenon, sometimes referred to as preemption, has led to a reduction in the number of decisions agreed to by the Council of Ministers in the Community forum and to an increase in policy initiatives outside the Community forum. Such outside initiatives are more amenable to member state control, but only indirect democratic control.

Although there is minimal democratic control and the decisional power lies in the hands of the Council of Ministers, there is no shortage of new policy initiatives, though many decisions creating them have been taken outside the framework of the original treaties and at least some of them have had little or no juridical basis in the original treaties. For example, the Community, at the end of 1986, does have a European Monetary System, but it is not a creature

31 The use of unanimity where a qualified majority is called for diminishes the Commission's bargaining power with the Council of Ministers. This is so since if the Council of Ministers can achieve unanimity it can also amend Commission proposals. See Article 149(1), of the EEC Treaty (as amended by the SEA). Moreover, the Commission has the power to alter its proposal at any time up until a decision is taken.

32 This is best illustrated in recent years by the annual budget crisis, some issues of which have now been legally settled. See supra note 21.


... [T]he relationship between ... directly applicable measures of the [Community] institutions ... and the national law of the Member States ... [is to] ... preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power ... had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of Community law. 1978 E. Comm. Ct. J. Rep. 629, at 651–52.

of the treaties, nor do all the member states adhere to all its elements.\textsuperscript{55} The Community does have a foreign policy coordination system, but it falls outside the original treaties. There is a European University Institute, but it too exists outside the treaties. Tugendhat considers that there is no harm in this type of European integration, which can be viewed as a series of concentric circles with the European Council at the epicenter.\textsuperscript{56} The inner circle comprises Community integration; the next represents Community-related reforms (such as the European Monetary System); and in the outer circles are placed the various joint ventures (e.g., the European airbus) and joint efforts, such as the European Space program, where not all the member states are parties.\textsuperscript{57}

There are then numerous policies established but many of them have a tenuous legal basis in the treaties.\textsuperscript{58} The "harm" to the Community, with all due respect to the Tugendhat, is twofold. It lies in the diminishment of democratic control over the future development of European integration and in the weakening of the position of the Commission of the European Community at the expense of the member states.\textsuperscript{59} The result is the multi-speed Europe.

B. Problems in Establishing the Common Market

One of the key areas where the lack of a policy\textsuperscript{40} or lack of political will to implement a policy\textsuperscript{41} (as a result of the political difficulties described above) has had a deleterious effect is in the establishment of the Common Market.\textsuperscript{42} The creation of a common market is a major objective of the European Community and its importance is underlined by its recognition in Article 2 of the Treaty of

\textsuperscript{55} See generally P. Ludlow, The Making of the European Monetary System (1982).
\textsuperscript{56} C. Tugendhat, Making Sense of Europe (1986).
\textsuperscript{57} Non-member states are also parties to joint efforts.
\textsuperscript{58} Although the Treaty did not directly ordain a regional policy, an energy policy, an environmental policy, a research policy, or an educational policy, the European Communities are blessed with all of these, largely at the initiative not of the Commission but of the European Council, a body not recognized by the Treaties. See infra note 170 and accompanying text for the effects of the SEA on the European Council.
\textsuperscript{59} This may also effect the individual directly, as well, since the legal output of the policy creation will often result in direct legal obligations on individuals (and governments). This effect will depend on whether the policy is brought within the Community legal order.
\textsuperscript{40} For example, the lack of true transport policy causes difficulties and distortions in the Common Market. See European Parliament v. European Council, supra note 19.
\textsuperscript{41} For example, the lack of common intellectual property rights causes difficulties and distortions in the Common Market. See Lonbay, The Free Movement of Goods and Intellectual Property Rights, 1983 HOLDS. L. REV. 54.
\textsuperscript{42} This notion is wider than that of an "internal market" and includes the four freedoms as well as common policies and actions to prevent distortion of competition. The idea of an internal market relates primarily to the four freedoms that were to have been achieved by 1970 under the original EEC Treaty. See the new Article 8A infra note 228 and accompanying text.
Rome (Treaty). Part Two of the Treaty, headed "Foundations of the Community," has four titles. Title One is headed "Free Movement of Goods." It covers the establishment of the customs union and the elimination of quantitative restrictions on trade. Title Two is entitled "Agriculture." Title Three covers the free movement of persons, services and capital, and Title Four covers transport. Part Three of the Treaty covers Community policies. The difficulties experienced by the Community can be gauged by the success of these provisions. For example, hardly a voice is raised in defense of the Common Agricultural Policy (CAP) and its distortion of the budget of the Communities. The Council of Ministers was recently hauled before the European Court of Justice (ECJ) by an irate European Parliament for failing to fulfill its obligations under the Treaty in regard to the establishment of transport policy. That a revision of the treaties was considered necessary to implement the goal of an internal market speaks for itself. It is on Titles One and Three of Part One of the EEC Treaty that the following analysis will be based.

The barriers to the establishment of an internal market for the movement of goods are physical, technical and fiscal. Since the SEA is primarily aimed at breaking down the technical barriers, this analysis will concentrate on them, but the physical and fiscal barriers will also be discussed.

The progress in creating a single internal market has been due in large measure to the rulings handed down by the European Court of Justice. One
can divide the rulings of the ECJ into those that established the effective legal order that allowed individuals directly enforceable rights,52 and those that heralded progress in the substantive law on the free movement of goods.53 Damage to the case law established by the former category of rulings would have a much greater impact on the development and progress of the Community than damage to the latter case law. One cannot lightly dismiss the impact of over 180 harmonizing directives issued under Article 100 (in the area of technical harmonization), but these have, in the main, tackled particular narrow technical barriers to trade, whereas the Court's case law has had a much greater and wider effect. Naturally, the ECJ alone cannot establish the standards and regulatory structures necessary to create a true internal market.54

1. Physical Barriers

Physical barriers to intra-community trade comprise, in the main, problems relating to customs formalities. They are one of the most obvious reminders that the European market is not yet unified.55 Although the thrust of the Commission's legislative program in this field is to simplify and finally remove altogether customs formalities, the questions of national safeguard measures approved by the Community under Article 115 remains a significant obstacle to finally removing frontier controls. The Commission also recognizes the particular problems posed by the control of terrorism and the drug trade which matters, stricto sensu, do not fall within the Community competence, but considers that there are adequate alternatives to strict frontier controls.56 The removal of frontier controls has clear implications also as regards fiscal barriers.57 The Single Administrative Document (a new customs form)58 will come into use on January 1, 1988 and will replace over seventy forms currently in use, thus...
greatly facilitating internal transit. Recently the Commission has proposed measures to increase the amount of duty-free diesel fuel a lorry may contain in its fuel tanks on crossing frontiers.\textsuperscript{59} Numerous legislative initiatives are in hand to remove customs formalities and health checks from frontier posts to departure or destination locations.\textsuperscript{60} Additionally, customs administration is slowly being computerized under the Caddia program.\textsuperscript{61} The ECJ has not taken a prominent role in removing physical barriers to trade. In 1979 the ECJ held that frontier checks were permitted only where allowed under article 36, or for levying internal taxes, or for transit controls or statistical purposes: "These residuary controls must nevertheless be reduced as far as possible so that trade between member states can take place in conditions as close as possible to those prevalent on a domestic market."\textsuperscript{62} In the Denkavit Futtermittel case the ECJ ruled that "the member states have a duty to cooperate with each other to facilitate and minimize frontier checks."\textsuperscript{63}

2. Technical Barriers

Apart from the physical barriers to trade there are also technical barriers. These are obstructions to the establishment of a common market caused most notably by national rules governing environmental, health, and safety protection where diverse rules and practices in different member states form severe barriers to intra-community trade. The creation of Community rules in these areas has been possible because the objectives of the original Treaty of Rome are drawn widely enough to accommodate much creativity within the system. In particular, Article 100 allows for the approximation of member states' provisions that "directly affect the establishment or functioning of the Common Market."\textsuperscript{64} Article 235 provides another basis for action.\textsuperscript{65} Such legislation, however, must

\textsuperscript{59} Charging duty on fuel in truck tanks at frontiers is a classic example of an unnecessary hindrance to Community trade. See 20TH REPORT, supra note 5, at 104.

\textsuperscript{60} Id. at 101.


\textsuperscript{65} Article 235 reads:

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 and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take appropriate measures.

EEC Treaty, supra note 1, at art. 235.
be approved by a unanimous Council of Ministers, and herein lies a political problem of great dimensions.66

The demolition of technical barriers to trade has not yet fully been achieved by Articles 30 through 36 of the Treaty of Rome. Article 30 prohibits all "quantitative restrictions on imports and all measures having an equivalent effect. . . ." This prohibition was broadly construed in the Dassonville case to cover "[a]ll trading rules67 enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade . . . ."68 Article 3669 does not reserve certain matters to member state jurisdiction70 but rather allows the member state to justify its actions on the grounds specified. It must use the least restrictive method possible to achieve the desired objective.71 A fundamental principle is that recourse to Article 36 is no longer possible once the Community has adopted rules.72

Besides the narrow leeway granted by Article 36, member states are allowed to take "reasonable measures" to regulate trade "in the general interest." In the Cassis de Dijon73 decision the ECJ declared:

Obstacles to movement within the Community resulting from the disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy the mandatory requirements relating in particular to the security of financial supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.74

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66 See supra text discussing institutional problems of the Community.
69 Article 36 provides:
... articles 30–34 shall not preclude prohibitions and restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.
EEC Treaty, supra note 1, at art. 36.
72 Denkavit Futtermittel, supra note 63.
74 Id. at 662.
This "judicial" list is nonexhaustive but is only available to member states as a justification to nondiscriminatory rules. Only "necessary" measures are allowed. The assessment of necessity amounts to a "rule of reason." If the test is passed then the measure is permissible under Community law. All other measures equivalent to quantitative restrictions to intra-community trade must be justified under Article 36.

The ECJ's case law, then, does not cover internal (i.e., national) general trade rules necessary to protect public health or the environment in the general interest. It establishes a "rule of recognition." Member states are required by the rule to recognize each others' technical requirements as equivalent. This rule, though, is tempered where health or safety are involved. Thus in an Article 169 action against France for refusal to allow German woodworking tools to be used in France, the Commission's complaint was dismissed. The ECJ considered that the Commission had not shown that the German rules concerning protective devices for woodworking machines guaranteed to users the same level of protection as the French rules on that subject. There is clearly a high level of proof required even in direct actions.

It is also evident from recent cases that the ECJ is giving the member states considerable leeway if they plead "scientific uncertainty" in relation to public health matters. There is no requirement to accept each others' health-related tests. The apparent redundancy caused by the fact that "public health" was enumerated in the Cassis de Dijon list of "mandatory requirements" that may justify a member states' nondiscriminatory (equally applicable) commercial measures (under Article 30), when it already exists as an available justification for measures that hinder trade under Article 36, may perhaps be explained by the fact that Article 30 is not as broad as the "integrationist" writers believe. Moreover it seems that, at least in the field of health and price control, Article

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77 This article allows the Commission to bring member states before the Court of Justice for violations of the EEC Treaty. See generally H. Schermers, Judicial Protection in the European Communities 244 (3d ed. 1983). See also H. Smit & P. Herzog, 5 The Law of the European Economic Community 377 (1986) [hereinafter Smit & Herzog].
81 The "rule of reason" test allows member states to take "necessary" action in the "general interests" if "mandatory requirements" compel it to do so.
82 See, e.g., Gormley and Oliver, supra note 53.
30 does allow member states discretion to adopt national commercial rules unless actual "discrimination" is shown.83

A recent illustration of this in the field of price control is shown in Nederlandse Bakkerij Stichting v. Edah B.V.84 The action in these two cases arose from proceedings taken in the Netherlands against Edah B.V. for selling Dutch-made bread at a price lower than the minimum selling price fixed by Dutch law. Edah justified its action by relying on Articles 785 and 30 of the EEC Treaty. As the Dutch rules differentiated between Dutch-made bread and imported bread, the government was not able to rely on the Cassis de Dijon mandatory requirements exceptions, but was the Dutch price maintenance system itself in violation of Article 30? The ECJ held that the legislation would be contrary to Article 30 if it was likely to affect adversely, in any manner whatsoever, the sale of imported products.86 If, however, it had no discriminatory effect, then it would not be contrary to Article 30.87 The court thus clearly required a discriminatory effect before considering a national rule to be contrary to Article 30. It would have perhaps been clearer if the ECJ, instead of ruling that the scope of Article 30 depended on the effects that the national regulation had on intra-community trade, had stuck with its initial finding that because of the differential treatment meted out to imports and domestic products, the Dutch rules were ipso facto measures equivalent to a quantitative restriction. The ECJ could then have gone on to advise the national court about the application of Article 36.88 It is clear from the case that Article 30, in the case of price control measures, requires a discriminatory effect before it comes into play; it does not cover all trading rules that potentially affect trade.


84 Nederlandse Bakkerij Stichting and Others v. Edah BV, No. 80 & 159/85 (Nov. 13, 1986).

85 This article prohibits any discrimination on grounds of nationality.

86 The pertinent part of the holding reads: "... une telle réglementation différencié pour les deux groupes de produits doit être considérée comme mesure d'effet equivalent à une restriction quantitative dès qu'elle est susceptible de defavoriser, de quelque façon que ce soit, l'écoulement des produits importés." No. 80 & 159/85 (Nov. 13, 1986).

87 The cases conveniently provided a fact situation that allowed the Court to specifically deal with this issue since the Dutch had reformed the price control system so that in the second of the joined cases no price discrimination was in fact possible.

88 The Court in an Article 177 action cannot rule on the validity or otherwise of national measures. What it seeks to do is furnish the national court with an interpretation of Community law that will help the national court decide the case before it. One gets the impression that this task sometimes overrides requirements of theoretical consistency.
This argument is contradicted by Gormley, who prefers to consider that Article 30 does in fact cover all trade rules, and that the exceptional cases such as Blesgen and the price control cases are explained by saying that the ECJ adopted a U.S. approach to noncommercially motivated trading rules. The utility of adopting the U.S. approach, however, is not readily apparent. The very wide integrationist approach of the ECJ, it is argued, allows for member state action as an equitable principle until the Community adopts harmonized rules. It seems, however, that the real motive for limiting the application of Article 30 for such nontrading reasons lies in that fact that the ECJ is unwilling to assess a state's noneconomic motives, especially those that relate to health and safety, the more so where there is some scientific uncertainty. When the action arises under Article 177, it is not the ECJ's job in any event, and the court is really in no position to assess the efficacy of various scientific tests. When the matter is brought to the ECJ by the Commission under a direct Article 169 action, the court has required a high standard of proof from the Commission, although blatantly protectionist measures have been struck down. The variable scope given to Article 30 in the case law, unsatisfactorily resolved by conflicting theoretical approaches, is probably due to "unknown" conflicts in the court itself as to the extent of its reach.

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89 See Gormley, supra note 53, at 251.
90 See also Oliver, supra note 53.
91 Blesgen v. Belgium, 1982 E. Comm. Ct. J. Rep. 1211. This case involved the Belgian law that regulated the distribution of alcoholic beverages. The Belgians successfully argued that these nondiscriminatory regulations were necessary to protect public health. The ECJ did not decide the issue on those grounds however. Instead it found that the Belgian rules were of such a nature as to have no effect on intra-community trade. This decision flew in the face of its previous case law as the Court provided no Cassis de Dijon analysis of the necessity of the Belgian rules. It was clear, prima facie, that they did "effect trade between member states." The case is considered an aberration, but one explanation for the ruling may be that the Court did not wish to get involved in an analysis of the Belgian methods of combating alcoholism. The ECJ itself played up the fact that only certain outlets were forbidden and others (including supermarkets) were free to distribute the higher alcohol content drinks. The Commission had prepared a detailed study of all the different methods that the member states used to the same end, but having asked for this information the Court declined to use it overtly in its judgment. The explanation that the ECJ was introducing a de minimis rule here was scotched by Van der Haar, E. Comm. Ct. J. Rep. 1797 (1984).
93 Gormley, supra note 53, at 55-56 and 252. The author argues that the Blesgen decision follows the American tradition of distinguishing between the "police powers" of the states and the "commercial regulation" of states; the former being permissible, the latter not.
94 See cases cited in notes 79 and 80. See generally Gormley, supra note 53, at 166.
98 The recent case, Cinéthèque, 1 Common Mkt. L.R. 365 (1986), which applied the "pure" Cassis de
A descriptive approach adopted from the ECJ's case law dealing with the question of intellectual property rights aptly summarizes the current situation. The member states retain the right to regulate commercial activities, but the exercise of the right will be overseen. Community law will not permit the fundamental principle of free movement of goods to be jeopardized by member state regulation. Yet it must allow such regulation, for otherwise there would be very little protection of vital interests of the European citizen.99 This comes close to what Waelbroeck100 has termed "pragmatic preemption" where the member states are permitted to act unless in doing so they defy the aims of the Community policy.

Member state competence withers where the Community has adopted measures.101 However, many Community measures set up a minimum standard, and allow the member states to establish higher standards on grounds inter alia of public health.102 The ECJ generally allows the member state the benefit of the doubt in cases of a disputed national rule. Moreover, even where one might think the Community rules are fairly comprehensive, the ECJ has found certain member state actions to be allowable.103 In the recent Motte case104 the Belgian rules on permissible colorants required authorization before the additive could be imported. The court held that such a system was compatible with the Treaty as long as the authorization was granted when the substance corresponded to a "real need" for consumers. In assessing the health risk posed by food additives the member states had to take into account the results of international scientific research. This, it seems, is the extent of the member states' duty to cooperate.105 The court in Motte allowed a prior restriction (requirement of authorization)
on trade between member states. This latitude, to what amounts to a licensing system, is in stark contrast with its earlier rulings relating to licenses in general, and is explained by the subject matter of the Motte dispute.

Harmonization of these areas using Article 100 has proved extremely slow, and Article 100 is not available for all the measures that are necessary to ensure a true common market. Recently the Council and Commission have adopted a new twofold approach to harmonization of technical standards. They acknowledged that mutual recognition of different national standards was not enough. They urged the creation of a genuine trading market, a true continental market with pan-European companies and cooperation, especially in the new technologies. As regards health and safety standards, they proposed to use minimum Community-wide standards. Thus mutual recognition, an ECJ-led move, was considered a transitional and secondary stage only.

Under directive 83/189, in force since January 1, 1985, member states must inform the Commission before they introduce new technical standards or regulations, and must offer an explanation justifying them. If the Commission or another member state objects to a regulation on the grounds that it would create a barrier to free movement of goods, the member state must delay its implementation. Clearly this legislation is a major step forward and the Commission recognizes as much in its First Report on the White Paper. Moreover, the directive establishes a standing committee of member state representatives, which must meet at least twice a year. The representatives may in turn appoint

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107 See also Minister Public v. Xavier Mirepoix, 2 Common Mkt. L.R. 44 (1987).
108 Harmonization is also very cumbersome since it is difficult to enforce implementation of the directives adopted. This occurs largely because of a lack of sufficient manpower. For example, enforcement of the EC fishing quotas relies upon six inspectors for the entire Community. Elaborating technical rules is further complicated by the difficulty in upgrading adopted standards in the light of scientific advances.
109 The European Community has had to design a new European Patent Convention to cope with the barriers to trade caused by intellectual property rights. See Lonbay, The Free Movement of Goods and Intellectual Property Rights, 1983 HOLDS. L. REV. 54. The proposed trade mark regulation could not be made using Article 100 because Article 100 only allows the approximation of matters already regulated at the state level. Further, the use of Article 235 has been challenged. See Cornish, Intellectual Property: Copyright, Trademarks and Allied Rights 581 (1981). See also Currall, supra note 64.
110 White Paper, supra note 3, heralded the move from harmonization (which requires unanimity under Article 100) and mutual recognition of equivalence of different national standards to the new approach. See also First Report from the Commission on Completing the Internal Market, 1986–1987 EUR. PARL. DOC. (COM No. 300 final)(1986) [hereinafter First Report].
113 In the case of regulations. See Article 8 of Dir. 83/189.
114 See Article 9 of Dir. 83/189. Emergency health or safety reasons may justify a member state introducing regulations without notice.
115 See supra note 110.
116 See Articles 5 and 6 of Dir. 83/189.
experts or advisors. The value of such an institutionalized forum for exchange of views cannot be overstated, and it seems to have stemmed the tide of "protectionist" or "obfuscating" national standards and regulations.  

Under the second element of the new policy, health and safety standards will be harmonized to a basic "essential" European level by directive. Manufacturers relying on this standard will have guaranteed access to the entire European market. The standard would not be compulsory, but manufacturers not using it would have the burden of proving that their product meets the "essential requirements" standard in the directive. The detailed implementation of the technical standard is to be left to standards committees such as the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (Cenelec). Examples of the new approach that also reflect the results of the SEA reforms are the recent Commission proposals on foodstuffs. The member state powers of derogation have been removed by the new proposals.

3. Fiscal Barriers

The fiscal barriers to internal Community trade are indirect barriers to free movement of goods. They revolve around the differential rates of indirect taxation in the member states and the collection of such tax at the frontiers. It is the latter fact that causes the Commission to distinguish them from other indirect barriers to trade such as distortion of trade caused by abuse of a dominant market position. The Community currently applies the destination principle of taxation, thus necessitating frontier formalities for the collection and remission of tax on goods. The advantage of this system lies in the fact that there is no tax distortion of the destination market and each country pays its own taxes. An alternative method of dealing with the problem of tax burdens in international trade is to adopt the origin method. This has the advantage of

117 First Report, supra note 110, at 13. Thirty two draft national regulations were suspended under these provisions in 1985, and as a result of this suspension, the Commission proposed ten Community directives designed to replace the national provisions. The Commission states: “The policy of preventing potential barriers from being set up has already had an impact on the number and type of complaints received by the Commission.”

118 White Paper, supra note 3, at 21.

119 5 EUR. COMM. BULL. 10 (1985); 3 EUR. COMM. BULL. 18 (1986).


122 See EEC Treaty, supra note 1, at arts. 85 & 86. See generally Whish, Competition Law (1986). These articles are not concerned with such indirect effects on the functioning of the common market as anti-competitive behavior, state subsidies to industry or state monopolies. The rules in these areas are not affected by the passing of the SEA.
eliminating the need for customs formalities, but causes tax distortion of the markets unless there is harmonization of tax types, bases, and rates.

As in other areas, the progress of the decision-makers has been fairly slow, but this is perhaps more understandable in the sensitive area of tax harmonization. The Treaty provides in Articles 95 and 96 some directly effective provisions. Article 95 is designed to prevent member states from discriminating against the products of other member states in their tax rules. The ECJ has interpreted this article broadly and inventively. While the essential equation of Article 95 requires a balance between the levels of indirect taxation imposed on domestic goods and on similar imported goods, the court has managed to restore an element of traditional state sovereignty in this field by allowing member states to adopt differential schemes of taxation for similar products provided they have justifiable and objective socioeconomic rationales to support such differentiation and provided that the effect of the tax is nondiscriminatory (has no protective effects) as regards imports. This line of case law enables the ECJ to inspect member states' socioeconomic tax related objectives to ensure

124 Article 95 states:
No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

EEC Treaty, supra note 1, at art. 95.
126 In Finct Frucht, 1968 E. Comm. Ct. J. Rep. 223, the Court considered that:
Similarity between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be.
In Rewe, 1976 E. Comm. Ct. J. Rep. 181, involving the German Spirits monopoly, the ECJ had to consider what was meant by the phrase "similar products." The implementation of Article 95 implies the application of criteria by which the presence or absence of such similarity may be judged. If products have "similar characteristics and meet the same needs (e.g. raw materials) from the point of view of consumers ... then they might be considered as similar from the point of view of Article 95. The products must have comparable uses ... they needn't be identical." (Emphasis added). In Rewe, the Court elaborated that the products should be compared at a similar stage of production. The second sentence of Article 95 covers indirect protection of other non-similar products. This has lead to a complex case law, a good example being Commission v. U.K., 1980 E. Comm. Ct. J. Rep. 417. That case was litigated for seven years and required three Advocate General Opinions as well as several judgments to decide whether the British tax regime offered indirect protection to British beer as opposed to continental wine.
that they are in conformity with the spirit of the Treaty and have no deleterious trade effects.\textsuperscript{128}

The ECJ has also managed to extend the scope of Articles 95 and 96 to cover not only export subsidies\textsuperscript{129} but also taxes on exports that exceed the level imposed on goods sold on the domestic market.\textsuperscript{130} Although the court has been adventurous in this field, it cannot deal with the establishment of common tax rates nor cause the fiscal frontiers to vanish.\textsuperscript{131}

Article 99 allows the Commission to consider how indirect taxation can be harmonized "in the interest of the common market."\textsuperscript{132} Its proposals can fall under either Article 100 or Article 101.\textsuperscript{133} Tax harmonization is underway\textsuperscript{134} with over twenty value-added tax (VAT) directives having been proposed by the Commission. The fiscal frontier problem is potentially dealt with by the fourteenth VAT directive\textsuperscript{135} which essentially provides for an accounting shift to allow internal tax offices to cope with the tax collection. Interstate transfers would be dealt with by the institution of a new computer based clearinghouse.\textsuperscript{136}

\textsuperscript{128} A side effect of the application of differential tax rates is that the member state's socio-economic policies are exported by encouraging all EC firms exporting to that country to gain the tax advantages so offered, thus causing tax distortion of the market. This is ironic result considering that the aim of Articles 95 and 96 has been to guarantee the neutrality of systems of internal taxation with regard to intra-community trade. Statens Control med Aedle Metaller v. Larsen, 1978 E. Comm. Ct. J. Rep. 1543.

\textsuperscript{129} This extension may be expected since Article 96 provides:
Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them, whether directly or indirectly. EEC Treaty, supra note 1, at art. 96.

\textsuperscript{130} Van der Hulst Zonen, 1975 E. Comm. Ct. J. Rep. 79. In both Larsen and Kjævelff, the Court, in recital 24, stated that in light of the fact that in some circumstances a member state may wish to inhibit exports, the aims of Article 95-96 were tax neutrality.

\textsuperscript{131} The ECJ did rule that
It must be remembered that the purpose of creating a common market in which goods move freely in undistorted conditions of competition in accordance with articles 2 and 3 of the Treaty is to eliminate such entrenchment of habits of consumption by ensuring that all consumers have as far as possible equal access to all community products. Commission v. Italy, 2 Common Mkt. L.R. 531 (1983).

\textsuperscript{132} EEC Treaty, supra note 1, at art. 99

\textsuperscript{133} These rarely used articles allow the Council to adopt measures designed to overcome distortion of competitive conditions in the common market through qualified majority voting. See EEC Treaty, supra note 1, at arts. 100 & 101.

\textsuperscript{134} It has the added advantage that currently Community "own resources" are based on a fixed percentage of VAT receipts. The member states collect the tax and pass over 1.4 percent, retaining 10 percent of the sum collected to cover their costs. This source of own resources has the disadvantage that the fixed percentage rate is kept low by the member states who can restrain the burgeoning expenditures of the European Communities. Raising this tax threshold requires member state unanimity. In these circumstances, it is not surprising to see the Commission now proposing an alternative source of EEC financing based on a percentage of GDP.

\textsuperscript{135} This has yet to be adopted. 1982 EUR. PARL. DOC. (COM No. 402) (1982).

The Commission White Paper plans for indirect tax approximation\(^\text{137}\) of bases, rates, and level of rates primarily to cope with the problems of fraud and evasion that the solution to frontier collection would open up.\(^\text{138}\) The ECJ has not been entirely silent on VAT harmonization: "The requirements of Article 95 are of a mandatory nature and do not allow any derogation by a measure adopted by an institution of the Community. . . ."\(^\text{139}\) Using its teleological methods of interpretation based on articles 2 and 3 of the Treaty and its objective of achieving a single market, the ECJ made it clear that the Community market should be as close as possible to a "genuine internal market."\(^\text{140}\) "It is important that not only commerce but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of the Common Market."\(^\text{141}\)

The ECJ proceeded, in effect, to rewrite a section of the sixth VAT directive that allowed private persons to be taxed on import even though tax had not been remitted on export:

> It may be observed that at the present stage of Community Law the member states are free, by virtue of Article 95, to charge the same amount on importation of products as the VAT which they charge on similar domestic products. Nevertheless, this compensation is justified only insofar as the imported products are not already burdened with VAT in the member state of exportation since otherwise the tax on importation would in fact be an additional charge burdening imported products more heavily than similar domestic products.\(^\text{142}\)

The importer would have to prove the amount of tax paid.\(^\text{143}\) The ECJ, it seems, was urging the legislature on, and the Commission, in enacting the SEA, lost no time in adopting the court’s new position.\(^\text{144}\) Whether the SEA signals advances in the area of tax harmonization will be analyzed in part two.

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\(^{137}\) *White Paper*, supra note 3, at 47.

\(^{138}\) The same logic applies to excise taxes which the Commission also proposes to approximate.


\(^{140}\) *Id.*

\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) *Gaston Schul*, 1 Common Mkt. L.R. 559 (1986). The Secretary of State for Finance appealed the ruling of the lower court in response to the ECJ’s judgment in the first *Gaston Schul* case. The ECJ, in a very specific ruling, held that the VAT already paid and remaining in the value of the article must not be included in the taxable amount. It then gave a formula for working out the VAT owed. This is a case of judicial creativity on a high scale.

4. Services and Establishment

It is essential for a common market that the transfrontier services be unhindered, and a right of establishment for businesses (including the liberal professions) in other member states be effected. As in the field of free movement of goods, there was initially some debate as to whether the Treaty required, in Article 59, the mere elimination of discriminatory measures aimed at nonnationals or more widely the removal of all "restrictions" on the provision of services by those not established in the state where the service was being provided. Did the foreigner have to comply with nondiscriminatory national restrictions imposed equally on all providing the service?

The ECJ has applied a rule of reason to this question, similar to that found in its article 30 jurisprudence. The least restrictive (proportionate) nondiscriminatory measures applied in the general interest are permitted provided that the general interest so protected is not already covered by analogous measures in the provider's state (principle of equivalence). The recent insurance cases confirmed this approach:

The freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment. In addition, such requirements

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145 See EEC Treaty, supra note 1, at art. 52.
149 Articles 55 and 56 of the Treaty (via Article 66) and Article 61 provide exceptions to the right to provide services and the right to establishment.
151 See, inter alia, measures to regulate television advertising in Procureur du Roi v. Debave, 1980 E. Comm. Ct. J. Rep. 833, and Commission v. Germany, 2 Common Mkt. L.R. 69 (1987), where the ECJ stated that national regulatory measures in the insurance services sector might be compatible with Articles 59 and 60 of the EEC Treaty only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules.
must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.\textsuperscript{151}

The court found that in the absence of Community measures, Germany was justified in requiring that insurance companies comply with its rules on technical reserves\textsuperscript{152} as long as these were not excessive. Authorization was only permissible if it did not duplicate equivalent statutory conditions that the company had already complied with in its state of establishment. The German requirement that insurance companies must establish in Germany was considered by the court to be the very negation of the freedom to provide services and thus contrary to Community law.

The Commission has used the idea of mutual recognition in the sphere of free movement of services and right of establishment. In particular requirements for national diplomas, certificates, and degrees have hampered free movement in these fields. Modest liberalization has been achieved in, \textit{inter alia}, the medical,\textsuperscript{153} legal,\textsuperscript{154} architectural,\textsuperscript{155} and insurance\textsuperscript{156} sectors. The Community is pressing ahead with plans for a general recognition of higher education diplomas for vocational courses.\textsuperscript{157}

5. Capital

The right of establishment\textsuperscript{158} also requires liberalization of capital movements, a link recognized by the ECJ in the \textit{Casati} case.\textsuperscript{159} Similarly, the other rights of free movement would be rendered nugatory should “means of payment”\textsuperscript{160} and

\textsuperscript{151} See, e.g., Commission v. Germany, 2 Common Mkt. L.R. 69 (1987). Here, German rules requiring that direct insurance providers be established and authorized in Germany and forbidding insurance brokers in Germany from placing insurance with other Community insurers were challenged by the Commission. See Chappatte, \textit{Freedom to Provide Insurance Services in the European Community}, 9 EUR. L. Rev. 3 (1984) for the situation prior to these cases.

\textsuperscript{152} Reserves designed to meet potential contractual liabilities.


\textsuperscript{154} 20 O.J. EUR. COMM. (No. L 78)(1977).


\textsuperscript{156} Chappatte, supra note 151.


\textsuperscript{158} The second sentence of Article 52 of the EEC Treaty subordinates the right of establishment to the prior liberalization of capital.


transfer of funds not be allowed.\textsuperscript{161} This has been recognized by the ECJ in narrowly defining capital under Article 67 to mean in effect “investment capital,” to be distinguished from “means of payment” under Article 106(1).\textsuperscript{162} The language of Article 71,\textsuperscript{163} however, is considerably weaker than that found in the articles relating to free movement of goods, persons, and services. Given the important role that capital plays in national economic and monetary policy, it is not altogether surprising that there has been little progress in implementing liberalization of capital, except in the spheres of current payments which are essential to the free movement of the other factors of production. There has been recent action in this sphere\textsuperscript{164} mainly relating to liberalization of capital movements for transactions involving securities.

Similarly, stable exchange rates, valued by all states, are more critical to states participating in a common market where exchange-rate-induced distortions could cause much more competitive havoc as other barriers to trade have been dismantled. The Treaty of Rome was even more cautious on exchange-rate policies than on the movement of capital where the provisions are hedged around with safeguards.\textsuperscript{165} Article 107(1) obliges member states to treat rates of exchange “as a matter of common concern.” No powers are granted to implement any sort of policy whatsoever. The European Monetary System does help stabilize exchange rates, but this has grown up largely outside of formal Treaty arrangements, and not all member states are parties to it.\textsuperscript{166}

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\textsuperscript{161} Thus, the directives on free movement of capital allow workers to remit wages. See, e.g., 20 O.J. EUR. COMM. (No. L 332/22)(1986)(Directive 86/566).

\textsuperscript{162} Article 106(1) provides:

Each Member State undertakes to authorize, in the currency of the Member State in which the creditor or beneficiary resides, any payments connected with the movement of goods, services or capital, and any transfers of capital and earnings, to the extent that the movement of goods, services and capital and persons between Member States has been liberalized pursuant to this Treaty.

EEC Treaty, supra note 1, at art. 106(1).

\textsuperscript{163} Article 71 states:

Member States shall endeavor to avoid introducing within the Community any new exchange restrictions on the movement of capital and current payments connected with such movements, and shall endeavor not to make existing rules more restrictive.

They declare their readiness to go beyond the degree of liberalization of capital movements provided for in the preceding articles in so far as their economic situation, in particular their balance of payments, so permits.

The Commission may, after consulting the Monetary Committee, make recommendations to Member States on this subject.

EEC Treaty, supra note 1, at art. 71.

\textsuperscript{164} Directive 86/566, supra note 161.

\textsuperscript{165} Exchange rates were in fact “fixed” under the Bretton Woods Agreement so the matter was undoubtedly of less significance when the EEC Treaty was adopted in 1957.

\textsuperscript{166} One of the European Monetary System’s more interesting components is the trade-weighted European Currency Unit (ECU), which can be used as a means of settlement between the monetary authorities of the participant states, and is increasingly used by the private commercial sector. The Belgian authorities issued a monetary coin the ECU in celebration of the thirtieth anniversary of the signing of the EEC Treaty. The ECU is potentially a future Community currency.
C. The Reform Possibilities

It had been recognized for some time that the Community needed a reform.\textsuperscript{167} The increase in the size of the Community from ten states to twelve in 1986 was a tribute to its success but also provided an opportunity to reform and relaunch the Community so that it could achieve at least some of its original objectives. Despite the general gloom about the lack of progress\textsuperscript{168} in achieving the objectives of the Community,\textsuperscript{169} the Community and European integration cannot be considered to have entirely stopped their forward progress.

Although the center of political gravity may be moving to the European (as opposed to national) stage, this has not enhanced the legitimacy of the Community institutions in Brussels.\textsuperscript{170} The member states have managed to hijack the political high ground. This is symbolically evidenced by the rise of the European Council and the fact that it meets in the national capitals. The resulting slowdown and ineffectiveness of decision-making in the Community has caused severe problems for the creation of the internal market, which is the centerpiece for any European integration and vital to European economic health in a competitive world. The ECJ through its judgments has ameliorated these problems to some extent. The court alone, however, cannot establish a set of common standards. The court's limitations are illustrated by its jurisprudence on free movement of goods and indirect taxes.\textsuperscript{171} The Commission, however, has made some positive strides toward the creation of an internal market as illustrated by its actions with regard to technical harmonization.

It has not been clear how to press forward. In the European Parliament there were two main schools of thought about the appropriate way to tackle these issues. The "Crocodiles"\textsuperscript{172} wished to have a wholesale reform sweeping over the existing Treaties and reinforcing them with a brand new vision leading to

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\textsuperscript{168} See supra note 15.

\textsuperscript{169} These are formally set out in the EEC Treaty, arts. 1–3; the EAEC Treaty, supra note 1, at arts. 1–3; and the ECSC Treaty, supra note 1, at arts. 1–3, but many sought for a "supranational" Europe or United States of Europe. Measured against these broader aspirations, there is some cause for gloom. See generally The European Community, Past, Present and Future (L. Tsoukalis ed. 1983), reprinted in 21 J. Comm. Mkt. Stud. After the implementation of the Treaty obligations to be achieved by the end of the transitional period (stipulations which were quite clearly set out: traité loi) the decision-making procedures came under great pressure to implement common policies and other not fully stipulated requirements (traité cadre). This pressure led to a crisis in 1965 that was resolved by the Luxembourg Compromise whereby states won the right to block decisions if a "vital interest" was at stake. See supra note 30 and accompanying text.

\textsuperscript{170} See supra text accompanying notes 12–39.

\textsuperscript{171} See supra text accompanying notes 121–144.

\textsuperscript{172} A group founded by Altiero Spinelli in 1980 to promote European union.
European Union. The “Kangaroos,” in contrast, wished to reform the present Treaties so as to “leap over” the barriers that currently exist to full and free intra-community trade. A further possible solution would have been to follow the trends being set and thus be content with a multi-speed Europe, a Europe in which not all the member states participate in all the policies. The SEA does not promote a two-speed Europe in the sense that the EP’s Draft Treaty of European Union might have permitted. Article 82 of the draft treaty envisaged the treaty coming into force even without adhesion of all the member states. This prospect is ruled out for the SEA, as Article 236 requires ratification by all member states before it can come into force.

The specter of Europe à la carte is only a frightening prospect if the menu relates to activities mandated by Community law proper. There is no harm at all in a two-speed or multi-speed Europe as long as the two-speed element is not within the framework of Community law itself. In a multi-speed Europe, core common policies could not be the object of choice by member states. If a multi-speed Europe was created within these areas, then the system of Community law itself would be threatened, for the edifice of uniformity, so necessary for a true and effective legal order, would be shattered. Ehlermann has pointed out that there are within the Treaties, and even within Community secondary law, some sanctioned elements of differentiation. The examples that he cites, however, are all related to actual differences and difficulties of a strong political nature (and agreed to by all the member states). Those that are not of a strong political nature are temporary aberrations without prejudice to


174 The Kangaroos are a rival European parliamentary group dedicated to fully implementing the existing treaties and particularly to finalizing the establishment of the internal market.


176 See Jacqué, supra note 173, at 41; and CAPOTORTI, supra note 167, at 305.

177 See generally Europe à la Carte, Jean Monnet Lecture, presented by R. Dahrendorf at the European University Institute, Florence, Italy (1979).

178 Community law, though, does allow temporal differences in the implementation of Community policies. Thus, for example, transitional arrangements are sanctioned by the Treaties.


180 The safeguard clauses, e.g. Article 224, the special status accorded to East Germany and the New Zealand butter protocol.
the unity of Community law and not threatening the fundamental principle of free intra-community trade.\textsuperscript{181} The multi-speed elements do not presently pose a threat to the Community's aims. Whether the SEA threatens the structure of Community law uniformity by allowing a "negative" type of Europe à la carte will be assessed below.

The inter-governmental conference that spawned the SEA was called by the European Council in June 1985.\textsuperscript{182} The European Parliament had a major role in motivating the member states to sit around a negotiating table.\textsuperscript{183} Although the European Parliament's draft Treaty of Union has very little in common with the final SEA adopted. The Commission had also been very active\textsuperscript{184} in trying to stimulate the member states to confront the compelling challenges facing the European Community, one of its major contributions being Lord Cockfield's White Paper on completing the internal market.\textsuperscript{185} The European Council itself had set up two ad hoc committees, the first on institutional affairs (Dooge Committee)\textsuperscript{186} and the second on a "People's Europe" (Adonnino Committee),\textsuperscript{187} which reported to the March Council although their reports were not fully considered until the Milan Summit.

The Luxembourg Conference was primarily designed to do two things: to revise the Treaty of Rome and to incorporate into the Treaty of Rome or into a separate treaty, provisions on political cooperation and European security.\textsuperscript{188} The outcome was the SEA, signed on February 17 and 28, 1986.\textsuperscript{189} Both matters

\footnotesize{\textsuperscript{181} Grabitz & Langeheine, supra note 179. In this note, the authors point out that in the context of establishing the common market "the possibilities of differentiation between member states are rather limited" and that exceptions must be limited to those provided by the Treaty (e.g. Article 36), and time extensions on implementing Community law. \textit{Id}. at 42.

\textsuperscript{182} This was called by a majority (seven to three) vote. The United Kingdom, Denmark, and Greece voted against the measure.


\textsuperscript{184} See, e.g., 29 O.J. EUR. COMM. (No. 222/17) (1986)(Comett).

\textsuperscript{185} \textit{White Paper}, supra note 3.

\textsuperscript{186} 3 EUR. COMM. BULL. 102 (1985). The pertinent passage states: "The Committee has placed itself firmly on the political level, and ... proposes to set out the objectives policies and institutional reforms which are necessary to restore to Europe the vigour and ambition of its inception." \textit{Id}. at 102. It proposed negotiation of a draft Treaty of Union based on the \textit{acquis communautaire}, its own report, and the Stuttgart Solemn Declaration on European Union. It also proposed to be "guided" overall by the EP's draft Treaty.

\textsuperscript{187} Report of the Ad Hoc Committee. \textit{Id}. at 111.

\textsuperscript{188} Two separate bodies were charged with these tasks. The Working Party (\textit{Groupe Préparatoire}) on Revising the EEC Treaty was composed of members of COREPER with the addition of M. Dondelinger (the chairman, Luxembourg holding the European Council Presidency), and M. Noel (the secretary general of the EC Commission) representing the Commission. The Political Committee on drafting a Treaty on Political Co-operation consisted of directors of political affairs of the member states with a Commission representative. \textit{See generally} De Zwaan, supra note 183, on the progress of the negotiations.

\textsuperscript{189} The entire drafting of the SEA was completed between September and December 1986. See De Zwaan, supra note 183, for a detailed account of the history of the negotiations.
were treated in a single document which has now been ratified by all the member states.\textsuperscript{190}

In the negotiations leading up to the signing of the SEA, it was clear that some member states were more willing than others to move ahead.\textsuperscript{191} Spain and Portugal took full part in the negotiations of the SEA and their impact, and the increased weight of the "Southern" states, were clearly felt and are visible in the final outcome.

The outcome of the negotiations was a "kangaroo" style reform.\textsuperscript{192} It is no great surprise that the Kangaroos won, given the treatment meted out to the Genscher-Colombo proposals in 1983.\textsuperscript{193}

### III. The Single European Act

The SEA is divided into four titles. Title I establishes the objectives of the European Community and European political cooperation:\textsuperscript{194} "to mak[e] concrete progress towards European unity." European political cooperation is explicitly based on Title III of the SEA and "the practices gradually established among the Member States."\textsuperscript{195} This ensures, when combined with Article 3(2) of Title I of the SEA, that the European political cooperation process remains outside the main treaty process, and is not amendable to any action in the ECJ.\textsuperscript{196} Article 2 confirms the place and existence of the European Council and ensures that the institution will meet at least biannually. Article 3(1) establishes that the institutions of the European Community are governed by the Treaties establishing them (as amended). Title II of the SEA substantially amends some aspects of the operation of the institutions of the European Community.

Title III of the SEA formalizes the existing European political cooperation\textsuperscript{197} arrangements. It does not bring them within the scope of Community

\textsuperscript{190} Comm'd 9758, reprinted in EUR. COMM. BULL. (Supp. 2/86). All the member states have now ratified the new treaty. Poetically, Lord Denning has now embraced the rising European SEA. The Times (London), Nov. 3, 1986, at 20, col. 2. In a famous judgment, Bulmer v. Bollinger, [1974] 2 All E.R. 1226, he likened Community law to an incoming tide.

\textsuperscript{191} Italy felt that the final outcome was not taking the Community far enough and threatened to block ratification. The Danes, on other hand, feeling that the SEA went too far, almost refused to ratify the SEA.

\textsuperscript{192} The European Parliament created the SEA with grave misgivings, Mr. Spinelli considering it a "miserable stillborn mouse". 29 O.J. EUR. COMM. (No. C 36)(1986).


\textsuperscript{194} SEA, supra note 10, at art. 1(1).

\textsuperscript{195} As exemplified in the (nonbinding) Declarations of previous European Council meetings specified in Article 1(3) of the SEA.

\textsuperscript{196} Articles 31 and 32 in Title IV confirm this.

law, but it does not give them a firm footing in international law. The procedures remain inter-governmental.

The novelty in Article 30 lies in the inclusion of security matters as a matter for coordination of policies. The SEA additionally provides for a secretariat to service the Presidency. This is a welcome step. Everything in the SEA concerning Title III seeks to ensure that the whole procedure remains beyond the scope of the European Community proper. Title IV of the SEA contains general and final provisions.

To be considered a success the SEA should refashion the decision-making process to make it more democratic and effective, and, ideally, demolish the member states' ability to use the Luxembourg compromise veto. It should also ideally incorporate the advances made by the European Community in areas of policy where the European Community has acted outside the Treaties, or within the Treaties, but with a marginal attribution of competence. The SEA should also add new areas of competence in fields in which the Community wishes and needs to act. Critically, it should also open the way to full free movement of goods by knocking out the remaining nontariff barriers to trade. Remediing the decision-making defects to enable the necessary advances and decisions to be made would amount to a great achievement.

Attached to the Single European act, in a Final Act, are two lists of declarations: those adopted by the inter-governmental conference and those noted by the conference. The former category must be considered likely to have a strong effect on the interpretation and operation of the SEA, though they do not form an integral part of the SEA as they are not subject to ratification. The latter category are comprised of declarations made by individual parties at the conference. As these are "noted by" the conference, one may assume that they will have less of an effect than those "adopted by" the conference. However, where they are applicable, and relied on by the states that made them in the political process, they are potentially very damaging to the practical operation and

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198 This results from Article 3, combined with Articles 31 and 32 of the SEA. See SEA, supra note 10.

199 SEA, supra note 10, at art. 30(6). This led to an injunction in the Irish courts delaying the depositing of the Irish Instrument of Ratification to the SEA. Crotty v. An Taoiseach, 49 Common Mkt. L.R. 666 (1987).

200 Such areas include environmental law, energy policy, regional policy, health and safety at work. The Dooge Committee report called for, inter alia, action to encourage a technological community, and to strengthen the EMS, and for measures to protect the environment, promote common cultural values, achieve a European social area (employment considerations), promote a European judicial area, and encourage a stronger external identity for Europe.

201 Toth, The Legal Status of the Declarations Annexed to the Single European Act, 23 COMMON MKT. L. REV. 803 (1986), makes a convincing argument that the ECJ would not be able to use these Declarations as an interpretive guideline as to the effects of the Declarations. This follows from Article 31 of the SEA which explicitly confers competence on the ECJ as regards Title II and Article 32 of the SEA only. Jacqué, L'Acte unique Européen, 22 R.T.D.E. 575, 581 (1986), agrees.
application of the SEA. These declarations are considered below in their context. The only reform that concerns all three Communities is that dealing with the ECJ.

A. Institutional Matters

1. The European Court of Justice

The SEA provides for the ECJ to have attached to it a court of first instance.\textsuperscript{202} The court is to be set up by the Council of Ministers at the request of the ECJ, and will have jurisdiction to deal only with cases emanating from “natural or legal persons.”\textsuperscript{203} There will be a right of appeal to the ECJ on points of law.\textsuperscript{204} When this is implemented, it will mean at the very least a dramatic increase in speed for the ECJ. The new court of first instance is likely to dispose of all staff cases,\textsuperscript{205} and might possibly provide an initial forum to deal with the complex and time-consuming competition and antidumping litigation as well.\textsuperscript{206} It may well also mean that actions by individuals challenging Community legislation directly will be squeezed through the new court. The new court will thus potentially save the ECJ from the bulk of cases that involve a heavy load of fact-finding, leaving the ECJ the sweeter task of laying down the law.\textsuperscript{207}

Moreover, the provisions on the composition of the new court differ from the original in that, while independence is still required, the persons appointed need only “have the ability required for appointment to judicial office . . . ” as opposed to “the qualifications required for appointment to the highest judicial offices . . . .”\textsuperscript{208} This opens up the possibility of (legally trained) specialists in nonlegal fields being appointed to the new court. Thus, the new court may sport specialists in arbitration, social security, or a host of other fields. This is likely to be a major advantage in complex economic cases.

Sensibly, the new court of first instance will not be able to deal with Article 177 references.\textsuperscript{209} A two-tier structure for these cases would diminish the benefits of a more efficient system of justice and possibly create conflicting opinions

\textsuperscript{202} Article 4 of the SEA adds Article 32D to the ECSC Treaty, supra note 1; Article 26 of the SEA adds Article 140A to the EAEC Treaty, supra note 1; and Article 11 of the SEA adds Article 168A to the EEC Treaty, supra note 1.

\textsuperscript{203} ESCS Treaty, supra note 1, at art. 32d(1); EAEC Treaty, supra note 1, at art. 140A(1); EEC Treaty, supra note 1, at art. 168A(1).

\textsuperscript{204} The exact way that this will work is not set out; whether the ECJ will exercise some control over which appeals it hears is not yet known.

\textsuperscript{205} Presently comprising one of the bulkiest classes of the court’s caseload. See infra note 210.

\textsuperscript{206} See Glaesner, L’Acte Unique Européen, 1986 REVUE DU MARCHÉ COMMUN 307, 310.

\textsuperscript{207} Rasmussen, Why is Article 173 Interpreted against Private Plaintiffs, 5 EUR. L. REV. 112 (1980).

\textsuperscript{208} ESCS Treaty, supra note 1, at art. 32d(3); EAEC Treaty, supra note 1, at art. 140A(3); EEC Treaty, supra note 1, at art. 168(3).

\textsuperscript{209} See supra notes 88 and 95 and accompanying text.
on interpretation, which the current system of collegiate judgments keeps to a minimum.

Regardless of the jurisdictional attributes that the new court of first instance will be given, any court of first instance will be welcome since the ECJ's heavy workload has created severe delays.\(^{210}\) One criticism of the provisions on the court, made forcefully by a former celebrated member of the ECJ,\(^{211}\) is that it makes it easier for the Council of Ministers to revise Title III\(^{212}\) of the court's statute.\(^{213}\) He feared that the Council of Ministers might exercise their powers to threaten certain essential procedural guarantees.

2. Decision-making

Articles 6 through 8 of the SEA establish a new "co-operation procedure" in the legislative process that essentially gives the European Parliament more influence in the process of legislation.\(^ {214}\) It does not amount to a decisive influence, however. Only in the fields of Articles 237 and 238 is the Parliament given a true power of co-decision. Article 237 deals with applications for membership in the Community,\(^ {215}\) and Article 238 deals with association agreements. The provisions relating to international commercial agreements are left unchanged.

The new cooperation procedure (described below) does not replace the old procedure in every instance.\(^ {216}\) This new procedure is used when the Council is required to act by qualified majority, except in relation to decisions concerning the free movement of capital and the common transport policy. The decisions to be taken under Articles 70 and 84 are now to be by qualified majority rather than by unanimity. There are also, however, several steps backwards. For ex-

\(^{210}\) The general increase in the workload of the court has lowered staff cases as a percentage of the court's work. In 1985 the three top categories of decided cases were

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
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<tbody>
<tr>
<td>Free movement of goods</td>
<td>51</td>
</tr>
<tr>
<td>Agriculture</td>
<td>50</td>
</tr>
<tr>
<td>Staff cases</td>
<td>49</td>
</tr>
</tbody>
</table>

The total number of cases decided was 254. See Synopsis of the Work of the Court in 1985, reprinted in COMMISSION OF THE EUROPEAN COMMUNITIES, NINETEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 392 (ch. 4 annex 1986).


\(^{212}\) This title deals with the court's procedure.

\(^{213}\) This originally was made part of the EEC Treaty, and was thus amenable to revision only through Article 236.

\(^{214}\) Lodge, supra note 183, at 213–215, for background to these proposals. See also Bieber, Pantalis & Schoo, Implications of the Single Act for the European Parliament, 23 COMMON MKT. L. REV. 767, 779 (1986).

\(^{215}\) Turkey, however, has applied for membership. The Times (London), Apr. 15, 1987, at 6, col. 4.

\(^{216}\) Article 6(1) of the Single European Act specifies in which instances the new co-operation procedure is to be used. SEA, supra note 10.
ample, decisions under Article 49, previously to be taken by majority, must henceforth be taken by qualified majority. The new addition to Article 70(1) even contemplates the deliberalization ("steps backwards") of capital movements.

The cooperation procedure itself is set out in revised Article 149, paragraph 2. The process commences in the same way as previously: that is, the Commission proposes, the European Parliament gives an opinion, and then the Council, instead of adopting a decision takes up a "common position." The common position is sent to the European Parliament along with the reasons for its adoption, and the Commission's attitude towards it. The Parliament must then act within three months. It may (1) do nothing, or (2) approve the common position, or (3) by an absolute majority of its component members propose amendments to the common position, or (4) by an absolute majority of its component members reject the Council's common position.

The results of the European Parliament's action are sent to both the Council and the Commission. In cases (1) and (2) above the Council "shall definitively adopt the act . . . in accordance with the common position." In cases (3) and (4) the Commission must reexamine the proposal within one month, in the light of the European Parliament's amendments. The Commission is, of course, allowed to alter its proposal at this stage. The Commission then forwards its reexamined proposal to the Council, which must act within three months. The Parliament must also send the European Parliament's amendments, and its opinion on the amendments if it has not accepted them, to the Council. The Council may now adopt the European Parliament's amendments by unanimity, or accept the Commission's reexamined proposal by qualified majority. It may still amend the Commission's proposals if unanimous. This means that there is no particular incentive to adopt the European Parliament's position, for if it can muster unanimity it can amend the proposal as it will. But the European Parliament now at least has a chance that its legislative proposal may be acted on. Previously the Commission had the exclusive right in amending its proposals to decide whether to accept, modify, incorporate or ignore the Parliament's suggestions.

The time limits in this decision-making process may be extended by one month if the Council and Parliament both so agree. The time limits are enforced on the Council by Article 149(2)(f) which effectively kills the proposal if the time limit is exceeded.

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217 Under the new Article 149(1), as before, the Council may not amend the Commission proposal except by unanimity. SEA, supra note 10.
218 The Inter-governmental Conference adopted a Declaration whereby the presidency undertook to "complet[e] the work in question as soon as possible." See EUR. COMM. BULL. Supp. (2/86).
There is clearly greater scope for delay under these proceedings and simple decisions will take longer than before. The effects of the reforms, apart from the above, will probably be to cause the Council and Commission to give more weight to the European Parliament's opinion, while still leaving the Commission, and more particularly the Council, with the whip hand. It has hardly democratized the decision-making process, but must be regarded only as a small and time-consuming reform. Arguably, it might now be more worthwhile to lobby members of the European Parliament concerning worrying proposals, as the Parliament's amendments do stand a chance of being adopted, if not by the Commission then by a unanimous Council of Ministers. The automatic cut-out caused by the strict time limits is likely to increase the ability of the member states to block unwanted legislation. Manipulation of the Council of Ministers' agenda will increase in importance, thus strengthening the hand of the member state holding the Presidency.

The position of the Luxembourg compromise (being a nonlegal or even unlawful convention) is in no way mentioned or affected by the provisions of the SEA. It is likely to be more difficult, politically speaking, to use it because of the political momentum built up by a proposal having the support of the Commission, a majority of the European Parliament, and a qualified majority of the Council of Ministers. On the other hand, it may be cogently argued that because the SEA does not allow the EP a true role, the Luxembourg veto will continue to be used as an expression of the national democratic will, via national ministers responsible to national Parliaments. In sum, the reforms neither democratize the decision-making procedure nor reduce the inter-governmental aspects of the procedure. They can be seen as a step on the way to such ends, however, since the European Parliament will have a higher profile.

3. Delegation of Power to the Commission

Article 10 of the SEA, by altering Article 145, allows the Council to confer implementation powers on the Commission. This merely consolidates current Community practice, and does not necessarily mean that there will be a true delegation of power. The Council may still recall the decision to itself. The rules relating to the modus operandi of this arrangement are to be decided by

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220 The Commission had considered that an amendment to Article 155 would be more appropriate.
221 Management Committee and Regulatory Committee procedures are likely to continue as before. See Einfuhr- und Vorratsstelle v. Koster, Berodt & Co., 1970 E. Comm. Ct. J. Rep. 1161; and Scheer v. Einfuhr- und Vorratsstelle, 1970 E. Comm. Ct. J. Rep. 1197, where the legality of the management committee procedure including the right of the Council to make its delegation of power conditional was upheld by the Court.
the Council acting unanimously on the proposal of the Commission, after receiving the opinion of the European Parliament.

The Commission has proposed three types of procedures for implementing delegated powers. The first of these is an advisory procedure, which gives the Commission the greatest leeway in that the Commission sets up the committee. As no votes are taken (its function being advisory), the Commission is afforded great discretion as to what measures to take. The second method of delegation provides for the familiar management committee procedure where representatives of the member states may vote by qualified majority against a Commission measure. This causes the measure to revert to the Council, which may then take an alternative decision. The third procedure provides for a regulatory committee. Under this method of delegation, the Commission measure will have no effect unless it is supported by a qualified majority of member state representatives. The European Parliament has suggested deleting the latter type of committee and written itself a role in the management and advisory procedures. The Commission favors the Advisory Committee procedure and has already put forward several significant proposals that use this method in accordance with the declaration adopted by the inter-governmental conference. If the Council agrees to this method of delegation, then it will mark a truly amazing step forward in the decision-making process. Whole sectors of the market could be harmonized without great political trauma.

B. Internal Market Matters

Section II of Title II of the SEA deals with the internal market. The provisions of the SEA in this field have been criticized as retrograde, as they peel back the *acquis communautaire* and herald the beginning of a two-speed Europe.

Article 13 incorporates a new Article SA into the Treaty of Rome. This commits the member states to bring in measures to “progressively establish” the
internal market by the end of 1992. The internal market is then defined as compromising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.”

At first sight this provision is most alarming. Does it undo what has already been achieved? Does it open up a new transitional period ending in 1992? The terms of the article itself give some relief from this fear. The measures to be adopted to “progressively establish the internal market” are measures “in accordance with” the newly added competence of the European Community and are expressed to be “without prejudice” to the other provisions of the Treaty of Rome. The amendments, although giving some new explicit competencies in other areas confirm the weakness of the Treaty. One must note that the member states in conference adopted a declaration reserving their right to maintain frontier controls “for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in art or antiques” as the member states thought necessary.

The 1992 deadline is expressly declared to have no legal effect by a further declaration. This, the member states hope, will ensure that the ECJ cannot

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228 The use of the terms “internal market” and “area without internal frontiers” is apparently all that remains of the Commission’s attempt to open up a citizen’s Europe without boundaries. Statement of Claus Diefer Ehlermann at 1986 B.I.C.L. meeting.
229 The original transitional period for establishing the common market expired at the end of 1969.
230 This was in accordance with Articles 8B, 8C, 28, 57(2), 59, 70(1), 84, 99, 100A and 100B.
231 See infra text accompanying notes 262–63.
232 See e.g., SEA, supra note 10 at art. 70(1) (regarding capital movements). The article introduces qualified majority voting, but then states that “unanimity shall be required for measures which constitute a step back!” The contemplation of steps back in an area where there have been hardly any steps forward is hardly reassuring, and indicative of the mood of the member states as they drafted this amendment.
233 The terms are also narrower in some matters as the definition does not include, inter alia, transport, agriculture or competition policies as does the original Article 3 of the EEC Treaty.
234 This list does not extend what the ECJ felt was permissible in Commission v. Italy, 1979 E. Comm. Ct. J. Rep. 3247. The Court found that frontier checks were permitted only where allowed under Article 36, or for levying internal taxes, or for transit controls or statistical purposes, declaring that residual controls must be reduced as far as possible “so that trade between member states can take place in conditions as close as possible to those prevalent on a domestic market.” Id. Note also the effect of the Commission Proposal on combating counterfeiting: 1984–1985 EUR. PARL. DOC. (COM No. 705)(1984).
235 The Conference’s Declaration of Article 8A reads as follows: The Conference wishes by means of the provisions in Article 8A to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission’s programme described in the White Paper on the Internal Market. Setting the date of 31 December 1992 does not create an automatic legal effect.

See EUR. COMM. BULL. (Supp. 2/86).
declare article 8A to be of direct effect at the end of 1992. The member states clearly feel that article 8A extends the competence of the EEC or they would not have felt it necessary to take this precaution. Even without the above qualifying declaration, the combined effects of Articles 8B and 8C would have probably dissuaded the court from any declaration of direct effect. This interpretation is reinforced by Article 100B which foresees a lack of complete success under Article 100A and provides a means to achieve it.

The effects of Article 8A are further weakened by a new Article 8B which requires the Commission to report to the Council by the end of 1988 and again before the end of 1990 on the progress achieved towards the internal market. The Council, acting by qualified majority on a proposal from the Commission, is to set out "guidelines and conditions necessary to ensure balanced progress in all the sectors concerned." The Commission, moreover, in drawing up its proposal, is required by Article 8C to take account of "the effort" that the different economies will have to sustain while the internal market is being established. Article 8C allows the Commission to propose "temporary" derogations that "must cause the least possible disturbance to the functioning of the common market." This concession was presumably necessary to get the member states to agree to the reform at all, but may mean that all nontariff barriers may not be knocked down by January 1, 1993. Article 8C certainly seems to allow an element of the multi-speed Europe, though such differentiation is to be temporally limited.

Article 8C talks of "certain economies showing differences in development." The avoidance of the term "member state" implies that the European Community is bowing to regional pressures, although a member state's economy as a whole is not excluded. As Glaesner suggests, there is a link between this provision and the new Title IV provisions on economic and social cohesion, which really amount to a new title for commitment to regional policy. The fact that Spain, Portugal, Greece, Ireland, and Italy can now combine their weighted votes to block Community legislation that would otherwise diminish the role of regional policy will be a significant factor in the decision-making process where it calls for a qualified majority vote.

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236 See Toth, supra note 201, at 812 (the author believes that such a hope is clearly misplaced).
237 See infra note 259 and accompanying text.
238 EEC Treaty, supra note 1, at art. 8B.
239 EEC Treaty, supra note 1, at art. 8C.
240 This impression is reinforced by Article 100B.
241 EEC Treaty, supra note 1, at art. 8C.
242 See infra note 267 and accompanying text.
243 Article 148(2) sets out the weighing of member states votes for purposes of qualified majority voting. 54 votes are needed for a Commission proposal to be adopted. The combined votes of Spain (8), Portugal (5), Greece (5), Ireland (3) and Italy (10) are sufficient to block a decision. SEA, supra note 10.
Having set out the objectives (and the derogations from those aims) the Single Act goes on to provide novel methods for seeking harmonization. Article 8A\textsuperscript{244} provides that “the Community shall adopt measures.”\textsuperscript{245} The new measures are to be decided in accordance with Article 100A.\textsuperscript{246} This article in derogation from Article 100 (which required unanimity) allows decision-making by a qualified majority in the Council using the new cooperation procedure.\textsuperscript{247} On the positive side, Article 100A(3) provides that the Commission must take as a base a high level of protection when dealing with health, safety, and environmental and consumer protection.\textsuperscript{248} This is an attempt to avoid the lowest common denominator effect of Community harmonization and to diminish the necessity for member states to avail themselves of their rights under paragraphs 4 and 5 of Article 100A. The use of a qualified majority to take approximation decisions is clearly preferable to the unanimity requirement. Arguably, parts of Article 100A represent a step backwards for the Community. Paragraphs 2, 4, and 5 place severe handicaps and limitations on this new provision.

First, in paragraph 2, fiscal provisions, free movement of persons, and the rights of employed persons are all excluded from its scope. The needed reforms in these areas must therefore follow the particular requirements applying to them under the amended EEC Treaty.\textsuperscript{249} The free movement of goods, services, and capital, being part of the newly defined internal market and not subject to this reservation, may have decisions taken under this new procedure where the institutions are not acting under specifically attributed powers.

Second, and far more serious, paragraph 4 allows member states to ignore the newly created Community measure and apply its own rules, not only on the grounds elaborated in Article 36,\textsuperscript{250} but also on the grounds of protecting the environment and the working environment. A member state may not simply ignore a Community rule. It must notify the Commission, which then assesses whether the national measure is an arbitrary discrimination or disguised restric-

\textsuperscript{244} This Article itself is not that strong. Although the Conference in a declaration on Article 8A declares its “firm political will” to take the decisions necessary to complete the internal market by January 1, 1993 it specifically declares that the 1992 deadline “does not create automatic legal effect.” See Eur. Comm. Bull. (Supp 2/86).

\textsuperscript{245} The Commission wishes these “measures” to be directives, thus allowing member states flexibility. See Declaration 4 adopted by the Conference. This combined with delegation under Article 155 and the use of Advisory Committees would significantly enhance the decision-making progress in this field.

\textsuperscript{246} Article 100A refers back to Article 8A. SEA, supra note 10.

\textsuperscript{247} Id.

\textsuperscript{248} These matters currently cause grave problems for the free movement of goods. See supra text accompanying notes 63–120.

\textsuperscript{249} Articles 49, 54, 56, and 57 are amended to allow the Council of Ministers to decide, under the new cooperation procedure matters dealing with the free movement of workers, the implementation of the programme on freedom of establishment, the harmonization of safeguard measures, the rights of the self-employed, and the recognition of diplomas.

\textsuperscript{250} See supra note 69.
tion on trade between the member states.\(^{251}\) Another control measure allows the Commission or another member state to bring any suspected abuse of this provision directly to the ECJ for a ruling. This procedure is expressly stated to be in derogation from the normal Article 169–170 requirements.\(^{252}\)

Under paragraph 5 the harmonization measures may include a safeguard provision allowing member states to derogate from the new measures for any of the (noneconomic) reasons set out in Article 36 of the Treaty of Rome, subject to a “Community control procedure.”

As mentioned above, Article 100A(4) at first sight seems to indicate that a two-speed Europe is nigh.\(^{253}\) Undeniably it extends the scope of Article 36 by adding two further grounds for member state noncompliance. More critically, it overturns a jurisprudence constante to the effect that once harmonization measures have been adopted, member states may no longer rely on the grounds laid out in Article 36 to justify their own national measures.\(^{254}\) As health and safety barriers have not been overcome so far, the member states presumably considered, in adopting this paragraph, that some progress was better than none. The *acquis communautaire* has not yet extended to deny member states the right to protect the health and safety of their populations.\(^{255}\)

But even though the measure does represent an advance in this sense, beware, for a Community measure, because of this provision, may not be applicable in some member states. This is despite the fact that it may be addressed to all member states, with strict temporal limits for implementation,\(^{256}\) and despite its unconditional, clear, and precise language.\(^{257}\) The principle of uniformity of Community law has been breached, and the related concepts of direct effect and supremacy also suffer a blow. Thus, the damage potentially wreaked by Article 100A is not in the substantive law field but in the more important foundations of Community law. Whether the advances generated by Article 100A justify this weakening of the Community legal order remains to be seen.

\(^{251}\) A similar test is found in the second sentence of Article 36 of the EEC Treaty, *supra* note 1.

\(^{252}\) Undoubtedly an aggrieved individual could also bring an action before his national court and seek a reference under Article 177 of the EEC Treaty, *supra* note 1.

\(^{253}\) Pescatore, *supra* note 211.


\(^{255}\) See Campus Oil, *supra* note 103. See also Van Bennekom, 1983 E. Comm. Ct. J. Rep. 3883 and C.M.C. Melkunie, *supra* note 80. The ECJ will test the member state rules to ensure that they are not disproportionate to the aims sought, but as we have seen above, the Court has given great leeway to states pleading public health or environmental safety.

\(^{256}\) Directives will only have “direct effect” once the time limit for implementation has expired. See Publico Ministero v. Ratti, 1979 E. Comm. Ct. J. Rep. 1629.

\(^{257}\) All conditions necessary before Community law including directives will be directly effective. See, e.g., Defrenne v. Sabena, 1976 E. Comm. Ct. J. Rep. 455.
It is made all the more serious in that there is no time limit imposed upon the reserving member state.\footnote{The EP's draft Treaty on European Union allowed such non-application only subject to strict temporal limitations (Article 35). See Capotorti, supra note 167, at 142.}

The provisions of Article 100A(4) only apply to Community harmonization measures taken under Article 100A. If no measures are taken, the rules contained in the *acquis communautaire* remain in force. The objectives of Article 8A are to be achieved using Article 100A measures. As the objectives take the European Community beyond their current position, there is no damage done to the *acquis communautaire*, so the provisions do not take the European Community backwards in the substantive field of law. They do, however, deal a serious blow to the structure and uniformity of Community law. On the bright side one could view Article 100A as a taming of the Luxembourg Compromise. A member state's invocation of "limited" vital interests is now being reviewed.

Article 100B provides a "fail-safe" that is designed to fail under member state pressure. In 1992, an inventory of national laws still to be harmonized under Article 100A is to be drawn up by the Commission in conjunction with the member states. The Council, acting under the Article 100A(1) process, with Article 100A(4) applying by analogy, *may* then decide that these remaining measures must be recognized as equivalent. There are several points worth noting. First, the article is not likely to be amenable to an Article 175 action, given its weak wording. Second, even if it were, member states would still have an option not to let any particular measures apply to them, as per Article 100A(4). Third, the provision may prevent the use of the original Article 100 in relation to matters covered by Article 100A, which might be considered a *lex specialis* in relation to this type of potential harmonization. Fourth, as a matter of substantive law, the only effects of Article 100B will be to enforce mutual recognition. Although this may free the circulation of goods, it will not allow a true internal market to develop. Hypothetically, while the French may now not be able to prevent Italian pasta from entering France, since their standards would be recognized as equivalent, the market would still not be unified. The Community will not be able to achieve the uniformity between the different national markets necessary to reap economies of scale. This is particularly so in the currently trendy area of high technology, where standardized Euro-measures are vital for true world competitiveness.\footnote{In this sense, the adoption of common telecommunications standards for direct satellite broadcasting is a good step forward. 1986–1987 EUR. PARL. DOC. (COM No. 321 final)(1986). See also O.J. EUR. COMM. (No. L 311) (1986).} A plethora of competing standards in the Community will make the idea of a true internal market a mockery.

In this respect, the European Community may be better off using some legislation already passed.\footnote{See supra note 112 and accompanying text.}
As mentioned above, the free movement of goods is also hindered by lack of tax coordination and resultant fiscal barriers. The SEA specifically excepts fiscal matters from the ambit of Article 100A qualifies majority voting and revises Article 99 to incorporate the cooperation procedure while still retaining the requirement of unanimity. It dictates that the Council shall take measures to harmonize excise duties and other indirect taxes within the 1992 time limit. The original version of Article 99 provided that decision-making in this field was “without prejudice to the provisions of Articles 100 and 101.” Article 101, although it has not been resorted to in this context, allows for a qualified majority vote to eliminate “distortion of conditions of competition” caused by difference in member states’ laws, regulations, or administrative actions. The SEA apparently removes this possibility and thus could be said to be making fiscal harmonization more difficult.

C. Other Policy Matters

As noted above, the Community has established certain policies where there is a marginal attribution of jurisdictional competence, or, in some cases, no competence to act at the Community level. The SEA seeks to bring these activities within the fold of Community law proper. The likely success of these efforts in the fields of economic and monetary policy, regional policy, research and technical development policy, and environmental policy is assessed below. The substance of these policies is beyond the scope of this paper, but the remaining discussion places these SEA reforms in the context of the new decision-making processes. The effects that the inclusion of these policies are likely to have on the establishment of the internal market are also examined.

1. Economic and Monetary Policy

To achieve European Union, it is clear that further steps must be taken to unify monetary and economic policy. The free movement of capital has not yet been achieved. Economic and monetary union is still far away. The SEA’s
sole step in this area has been to formally recognize the European Monetary System (EMS). The original Treaty of Rome had weak provisions in regard to economic and monetary union. Progress in this area has been by political fiat of the European Council largely outside the formal treaty structure. The new Article 102A which directs the member states to use article 236 to implement any institutional changes is not a significant advance. The existing system will remain in effect and any alterations are to be confirmed only by political action at the highest level and with the agreement of the national Parliaments.

2. Regional Policy

A new Title V, entitled “Economic and Social Cohesion,” has been added to Part III of the EEC Treaty. The aim here is to reduce disparities between the various regions. Article 130A makes the reduction of the backwardness of the least favored regions an object of Community policy. The objectives of Article 130A and 130C are taken into account by Article 130B in coordinating economic policy and in establishing the common policies and the internal market. The structural funds are to be overhauled to rationalize their tasks and make them conform to the objectives contained in Articles 130A and 130C. Decisions relating to the Regional Development Fund are to be taken by qualified majority in accordance with the new cooperation procedure. When these provisions are matched with the requirements set out in Articles 8C and 100A, one can clearly see that Spain and Portugal were no idle bystanders during the negotiations on the SEA. The regional policy gains great political and legal weight through these reforms. Measures integrating the market can now legally be “bought” as regards those states most in need of regional aid. In a separate declaration, the Conference aspires to increase the money available to the Funds “within the limits of financing possibilities.” Given the predicted exhaustion of community resources, this promise may amount to very little.

3. Research and Technical Development Policy

A Title VI dealing with research and development has also been added to Part II of the Treaty of Rome. The aim of the European Community in this

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265 See the last two paragraphs of the Preamble to the SEA and the new Article 102A. SEA, supra note 10.
266 See generally P. Coffey, The European Monetary System—Past, Present And Future (1984). See also P. Ludlow, supra note 35.
267 This gives a legal basis to and establishes the purpose of the Regional Development Fund.
268 The European Agricultural Guidance and Guarantee Fund (EAGGF), the European Social Fund (ESF), and the European Regional Development Fund (ERDF).
269 It is not clear why the RDF is singled out in this way.
270 See supra note 239 and accompanying text.
field is to "strengthen the scientific and technological basis of European industry and to encourage it to become more competitive at [the] international level."\textsuperscript{271} This will be done through increasing research cooperation,\textsuperscript{272} the opening up of national public contracts, the definition of common standards, and the removal of fiscal and legal barriers to intra-community cooperation by firms, research centers, and universities. The Community wishes to enable economic actors to exploit the internal market. The internal market is not only an internal product market based on mutual recognition of standards (equivalence test), but an internal market with common scientific-technical standards. The addition of these articles thus reinforces the importance of Articles 8A and 100A.

Article 130G specifies the ways in which the Community can complement activities in member states to achieve these aims. Article 130H envisages coordination of national policies and programs through the Commission, and authorizes the Commission to initiate such coordination. This simply regularizes the situation that has in fact prevailed since at least 1974.\textsuperscript{273}

The financing provisions, however, are more novel.\textsuperscript{274} Article 130I provides that the Community shall adopt (by unanimity)\textsuperscript{275} a program setting out scientific and technological objectives by priority, with all costs fully calculated. This multiannual plan will yield specific subprograms,\textsuperscript{276} the fruits of which shall be disseminated as decided by the Council. Article 130L specifically foresees that not all member states need participate in these programs, and allows the possibility of some joint action by groups of member states with such programs being paid for by the member states concerned with the possibility of Community financing.\textsuperscript{277} A two-speed Community in technical research is endorsed.

\textsuperscript{271} Article 130F(1).
\textsuperscript{273} A glance at any recent \textit{EUR. COMM. BULL.} will show this to be the case. A plethora of research projects and initiatives are being supported by the Communities. \textit{E.g.}, \textit{The Espri Initiative}, 27 OJ. EUR. COMM. (No. L 67) (1984); \textit{The Race Programme}, 28 OJ. EUR. COMM. (No. L 210)(1985); and \textit{the Brite Programme}, 28 OJ. EUR. COMM. (No. L 85) (1985). For background to this mire of acronyms, see \textit{generally} Foighel \& Gulmann, \textit{Industrial Policy, Research and Training Policy, Investment Policy, in Commission of the European Communities, Thirty Years of Community Law} 477, 482ff (1983) and \textit{EUR. COMM. BULL.} (1987) under headings Research and Development.
\textsuperscript{274} Article 130P requires that detailed financing arrangements be established at the time of adoption of the programme. It envisages non-communautaire funds being used by alluding only to possible Community contributions and by leaving open the possibility of "other methods of Community financing" outside the budget process. This is clearly a blow to the European Parliament, whose one undisputed major source of power relates to the budget process.
\textsuperscript{275} \textit{SEA, supra} note 10, at art. 130Q.
\textsuperscript{276} \textit{SEA, supra} note 10, at art. 130K. These are to be adopted by qualified majority after consulting the ECOSOC and in cooperation with the European Parliament. \textit{See also} \textit{SEA, supra} note 10, at art. 130Q.
\textsuperscript{277} Some projects such as Eureka already have non-Community participants. Esprit is a shared cost project. \textit{See 1 EUR. COMM. BULL.} 20–21 (1986).
and the non-EEC financing envisaged reduces the extent of direct democratic control, through the European Parliament, on how research money is spent. The provisions of the SEA have provided the Commission with renewed enthusiasm in this sphere and it has wide ambitions. 278

Article 130M empowers the Community to participate directly in research. Article 130O authorizes joint undertakings. These provisions simply regularize what has already de facto occurred under the auspices of the European Council's initiatives since 1974. Cooperation with third countries and international organizations must be by Treaty, not by contract. 279 Given the current budgetary crisis and exhaustion of own resources, Community activities in this field may prove to be more limited than initially planned.

4. Environmental Policy 280

Provisions relating to the environment are added by a new Title VII in Part III of the Treaty. Article 100A(3) requires that the Commission, when dealing with health, safety, and environmental and consumer protection, take a high level of protection as a base in proposing harmonization in this field. The Articles in this title apply for actions going beyond "approximation" of member states' laws. The European Community has in fact dealt with the question of the environment since 1972. 281 Articles 130R–T repeat the principles set out in the action programmes. More importantly, Article 130R(2) inter alia provides that environmental protection requirements "shall be a component of the Community's other policies." 282 The European Community is not given a blanket attribution of competence, but is only allowed to act "to the extent to which the objectives . . . can be attained better at Community level than at the level of the individual Member States." 283 Moreover, member states are expressly required to finance and implement the non-Community measures. This limited attribu-

278 See 3 EUR. COMM. BULL. 7–10 (1986). The plan was initially dampened by Germano-British tightfistedness. The EC plan for a 5 billion ECU budget was stoutly resisted by these two states both of whom considered 3 billion ECU to be sufficient.

279 SEA, supra note 10, at art. 130N. The Commission proposes closer links with inter alia CERN and the European Space Agency. 5 EUR. COMM. BULL. 9 (1986).

280 The European Commission was strongly in favor of more action with regards to environmental policy. See Commission Memoranda to the European Community Council, in 3 EUR. COMM. BULL. 97, at 101 (1985).


282 This was insufficient to a critical European Parliament that demanded a "common policy" in this field. See 29 O.J. EUR. COMM. (No. C 68)(1986).

283 SEA, supra note 10, at art. 130R(4).
tion is further confirmed by Article 130R(5), dealing with cooperation with third countries and international organizations, especially its second paragraph which specifically reserves the member states' competence in this field. Again, a new policy area is endorsed while retaining significant member state control. This is achieved directly through the limited attribution of competence, and indirectly by ensuring that the financing of the policies undertaken remain under member state control.

Under Article 130S, the Council must act unanimously to decide in which areas the Community should take action. This framework is to lay out in which fields decisions are in the future to be taken by a qualified majority. Article 130T, however, gives most cause for concern. This article dictates that the adoption by the Community of protective measures shall not disallow member states' adoption of "more stringent protective measures compatible with this Treaty." The only saving grace here is that the most stringent measures must be compatible with the Treaty. The case law of the ECJ on the restriction of free movement of goods does currently allow member states to restrict the movement of goods under the rule of reason if it should be "necessary" on environmental grounds. This provision then potentially stops true integration within the European Community and allows a multi-speed Europe to develop in relation to environmental protection. This can hardly be considered a great step forward, though the environment is now formally within a limited Community competence.

IV. Conclusion

The SEA consolidates many existing practices and makes them law. For example, the European Council is made a creature of the Treaties. European Unity is formally recognized as being the aim of the Community, therefore the regional policy is formally endorsed. In these matters the SEA consolidates what had become practice though not the strict letter of the law. It thus confirms the Community competence and/or practice in these areas.

The SEA attempts, by innovations in the decision-making processes, to resolve some of the long-term problems that have bedeviled the Community. The general decision-making process is reformed in many instances but it is hardly made democratic. The new cooperation procedure is likely to slow down the legislative process without giving any "real powers" to the European Parliament. Moreover, Parliament's one true source of power, the financial input, is kept

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284 A separate Declaration of the Conference confirms however that the ERTA principles still apply.
285 EEC Treaty, supra note 1, at art. 130T.
286 Article 130P, see supra note 274; see also Article 130R(4), supra note 283 and accompanying text.
287 Though grudgingly, supra note 283 and accompanying text.
out of the Parliament's reach\textsuperscript{288} in the "new" areas of policy now within the domain of the Community legislator.\textsuperscript{289}

The decision-making process as regards trade barriers has been substantially altered by replacing the requirement of unanimity with a requirement for a qualified majority in the Council of Ministers. This is designed to break the logjam and enable the Community to speed through to a true "internal market." However, as pointed out,\textsuperscript{290} the results may be less than entirely satisfactory, as the aims of the Community are wider than having a mere "product" market (which Article 100B implies may be the result if the new decision-making process does not succeed). Moreover, in allowing member state derogation from Article 100A harmonization \textit{ex post facto}, the uniformity of Community law is threatened. Even though the member state may have been able to achieve the same substantive law result prior to the passing of the SEA (by using the rule of reason escape route) the legal outcome then did not mean that the writ of Community law ran in some states but not in others. Whether the partial advance of Community harmonization is worth this price will depend on how stringent the Commission and ECJ are in permitting derogation under Article 100A(4).

Other aspects of decision-making, for instance the Commission's law making role, are also formally endorsed. They are designed to help speed up the removal of nontariff barriers. However, the Council of Ministers has not yet adopted the proposed Advisory Committee method of delegation. If it does so, real progress may be forthcoming; otherwise one must conclude that the new approach to technical harmonization, adopted before the SEA, may prove more successful than the approach endorsed by the SEA itself. Moreover, the delegation of implementation competence to the Commission could easily have been achieved without a reform of the Treaty.

The SEA also seeks to advance the Community by conferring new jurisdiction in some areas (for example, labor-management relations,\textsuperscript{291} health and safety at work,\textsuperscript{292} research and technical development,\textsuperscript{293} and the environment).\textsuperscript{294} The

\begin{itemize}
\item \textsuperscript{288}See \textit{supra} note 111 and accompanying text.
\item \textsuperscript{289}A new Article 118B is added. See SEA, \textit{supra} note 10.
\item \textsuperscript{290}The effect of the SEA in this field is likely to be very marginal. Article 21 adds a new article 118A to the EEC Treaty. This permits legislation by the community in this field, using the new co-operation procedure, to establish "minimum requirements," but allows member states to "take more stringent measures" if they so wish.
\item \textsuperscript{291}See \textit{supra} note 271 and accompanying text.
\item \textsuperscript{292}See \textit{supra} note 280 and accompanying text.
\item \textsuperscript{293}This is especially so in the area of foreign policy coordination.
\item \textsuperscript{294}Especially as interpreted by some of the member states. See, \textit{e.g.}, the Danish reservation noted by the Conference: The Danish Government notes that in cases where a member state is of the opinion that measures adopted under Article 100A do not safeguard higher requirements concerning the
\end{itemize}
SEA attempts to provide new political motivation in other areas, for example, by endorsing the Cockfield White Paper. It has certainly renewed the political legitimacy of the Commission's initiatives to establish a true internal market, and one can but hope that the Council of Ministers will adopt the ensuing proposals. The new advances are often "minimalist" and explicitly allow the member states to take more stringent measures. This hardly bodes well for a "genuine internal market." Moreover, it seems that the idea of differentiated progression is endorsed. Thus Articles 8C, 118A, 130L, and 130T as well as 100A all allow for the differentiated application of Community law.

The Single Act creates no Eurovessel into which to pour Europolitical power. Instead, the European Council is confirmed as the dominant initiator of policy, and the Council of Ministers as the prime decision-maker. Inter-governmentalism will stay, except possibly in the core area concerning the creation of the internal market.

Overall, the Act must be welcomed, but with grave reservations as to the potentially disastrous effect of article 100A. At worst, this could damage the careful case law of the ECJ, built up over the years, to assure a uniform and supreme Community law.

The SEA shows that European integration does not progress in a smooth wave, but rather in a series of steps forwards and backwards. An advance conceded in one area is matched by retreats elsewhere. It was an ambitious scheme to reform the Treaty while at the same time enlarging the Community. The time will never be entirely ripe for all member states to agree on the necessary changes. The advances made here reflect a renewed political will at least on the part of some of the states, but it could be cogently argued that a reform of the Treaty was not necessary to achieve the results manifested by the SEA.

working environment, the protection of the environment or the needs referred to in Article 36, the provisions of Article 100A(4) guarantee that the member state in question can apply national provisions. Such national provisions are to be taken to fulfill the above mentioned aim and may not entail hidden protectionism.

See supra note 10.

295 See supra note 52 and accompanying text.