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# EUROPE 1992 - THE QUIET REVOLUTION\*

Lynn S. Baker\*\*

## I. INTRODUCTION

“The 1992 Europe will not be a fortress Europe, but a partnership Europe.”<sup>1</sup> With this now famous pronouncement, European Community Commissioners Lord Cockfield and William DeClercq have sought to alleviate American concerns that the proposed completion of a single European Community (“EC”) market by December 31, 1992 will exclude products and services from the United States.<sup>2</sup>

Fortunately, “fortressphobia” has subsided significantly in the past year.<sup>3</sup> For example, in a comment to British business executives, the United States International Trade Commission (“ITC”) Chairwoman, Anne Brunsdale, noted that much of the initial emotional reaction in the United States to a single European market has since been replaced by a more considered response.<sup>4</sup> Indeed, a study published by the International Trade Commission in July 1989 concludes that many aspects of the EC 1992 program will have a net positive or neutral effect on many U.S. industries.<sup>5</sup> As a result, American executives are seeking detailed information on how their businesses will be affected by the European Community’s 1992 program.<sup>6</sup>

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<sup>1</sup> 1992: *Europe-World Partner*, EC OFFICE OF PRESS & PUBLIC AFFAIRS, EUROPEAN COMMUNITY NEWS, No. 28/88 (Oct. 20, 1988).

<sup>2</sup> *Id.* The single EC market is estimated at \$4.5 trillion. N.Y. Times, June 1, 1989 at 30, col. 4. U.S. Exports to the EC total \$75 billion annually. SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND TRADE, MAY 1989, EUROPEAN COMMUNITY’S 1992 ECONOMIC INTEGRATION PLAN, H.R. REP. NO. 827, 101st Cong., 1st Sess. (1989) [hereinafter HOUSE REPORT].

<sup>3</sup> Europe’s Internal Market, *What Are They Building?*, ECONOMIST, July 8-14, 1989, at 5,6 (Europe’s Internal Market is a separately paginated section in this issue between pages 48 and 49) [hereinafter *What Are They Building?*]; *‘Fortress Europe’ Fears Exaggerated, Harvard Professor Tells House Panels*, 6 INT’L TRADE REP 265 (1989).

<sup>4</sup> Porter, *EC Dumping Rules Called Opaque*, J. COMM., June 27, 1988 at 3A, col. 3.

<sup>5</sup> UNITED STATES INTERNATIONAL TRADE COMMISSION, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES USTIC Pub. No. 2204, 1-6 (1989) [hereinafter ITC Report].

<sup>6</sup> *Industry, Labor Leaders Urge Government to Exert U.S. ‘Influence’ in Shaping EC 1992*, 6 INT’L TRADE REP. (BNA), at 1563-64 (Nov. 29, 1989).

American lawyers should be familiar with the background of the EC's 1992 initiative and understand the rationale behind the completion of an integrated market among the EC's twelve Member States.<sup>7</sup> Such an awareness should be helpful in recognizing those areas where American companies may be adversely affected, or where they may find new opportunities in the EC market. This Article will provide an overview of the history behind the EC 1992 Program and outline some of the major areas which have been of the greatest interest to U.S. businesses to date.

## II. HISTORICAL BACKGROUND

The modern process of European integration began over thirty years ago when, in 1957, Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands signed the Treaty of Rome.<sup>8</sup> Article 2 of that Treaty provided for the establishment of a "common market."<sup>9</sup>

Initially, the progress toward a single, integrated market between the EC Member States proceeded fairly rapidly. The customs union, which abolished internal tariffs between Member States, was completed eighteen months ahead of schedule in 1968.<sup>10</sup> However, the drive toward EC integration slowed significantly during the next decade.<sup>11</sup> The principal hurdles were the enlargement of the EC from the original six to twelve members<sup>12</sup> and adverse world economic conditions, leading to increased protectionist sentiments in each of the Member States.<sup>13</sup> "Eurosclerosis" set in.<sup>14</sup>

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<sup>7</sup> The EC's member states are; Belgium, France, Germany, Italy, Luxembourg, the Netherlands, the United Kingdom, the Republic of Ireland, Denmark, Greece, Spain and Portugal, STEPS TO EUROPEAN UNITY: COMMUNITY PROGRESS TO DATE: COMMUNITY PROGRESS TO DATE: A CHRONOLOGY, OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, (6th ed. 1989) [hereinafter STEPS TO EUROPEAN UNITY].

<sup>8</sup> Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 1 [hereinafter Treaty of Rome].

<sup>9</sup> *Id.* art. 2. Article 2 states in full: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability on accelerated raising of the standard of living and closer relations between the states belonging to it."

<sup>10</sup> STEPS TO EUROPEAN UNITY, *supra* note 7, at 36; ITC Report, *supra* note 5, at 1-5; *see also*, THE CUSTOMS UNION, EUROPEAN DOCUMENTATION, (Periodical 6) (1983).

<sup>11</sup> ITC Report, *supra* note 5, at 1-6; Sontag, *Planning for 1992: Tapestry of Laws Likely to Confuse Attorneys at First*, Nat'l L.J., May 15, 1989 at 1, col. 1.

<sup>12</sup> Denmark, Ireland and the United Kingdom joined the EC in 1972, Greece became a member of the EC in 1979 and Spain and Portugal became the eleventh and twelfth members of the EC in 1985. Common Mkt. Rep. ¶ 121.01 (CCH 1987).

<sup>13</sup> ITC Report, *supra* note 5, at 1-6; Sontag, *supra* note 11, at 1, col. 1.

<sup>14</sup> ITC Report, *supra* note 5, at 1-6. *See also*, Messen, *Europe on Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAW. 359 (1989).

The original vision of an integrated market was gradually revived in response to Europe's stagnating economic growth.<sup>15</sup> In June 1985, a meeting of the European Council of Heads of Government in Milan officially relaunched the process to create a single market.<sup>16</sup> The Single European Act ("SEA"), ratified by the twelve Member States, became the official imprimatur of the 1992 program.<sup>17</sup> It modified the Treaty of Rome to provide that, "the Community shall adopt measures with the aim of progressively establishing an area without internal frontiers over a period expiring on 31 December 1992 . . . . The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."<sup>18</sup>

In order to ensure success of the program, SEA abolishes the requirement for unanimous voting in the Council of Ministers for most matters dealing with EC 1992.<sup>19</sup> The Single European Act also states a preference for harmonizing legislation which takes the form of "directives" rather than regulations.<sup>20</sup> This distinction is important. Both regulations and directives are passed into law by the Council of Ministers.<sup>21</sup> However, a regulation is binding in its entirety in each member state, without implementing legislation at the national level.<sup>22</sup> A directive, although binding with respect to the results to be achieved, leaves national authorities in each Member State with a choice of how the legislation is to be implemented.<sup>23</sup> Member States must ratify all of the

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<sup>15</sup> ITC Report, *supra* note 5, at 1-6, Brotman & Quintin, *Europe 1992: A Basic Guide*, 16 BARRISTER 41 (1989).

<sup>16</sup> A WINTER, R. SLOAN, G. LEHNER & V. RUIZ, *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 9-10 (BNA Corporate Practice Series, 1989) [hereinafter *EUROPE WITHOUT FRONTIERS*].

<sup>17</sup> The Single European Act, June 29, 1987, 30 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter *Single European Act*].

<sup>18</sup> *Id.* art. 13.

<sup>19</sup> *Id.* art. 6.

<sup>20</sup> *Id.*

<sup>21</sup> The principle EC institutions and their roles in 1992 integration are the European Commission, the Council of Ministers, the European Parliament and the European Court of Justice. The Commission is the equivalent of an executive branch. It consists of seventeen members who are appointed by the Member States' governments. The commissioners are mostly based in Brussels. It is the Commission which drew up the original list of measures required to fulfill the 1992 program, and which drafts and proposes the directives (legislation) to enact those proposals. The Council of Ministers are cabinet level Member State representatives who approve and issue the directives. The Council is the EC's decision-making body. The Parliament, which meets in Strasbourg, consists of 518 members who are elected from the Member States by universal suffrage. It cannot make laws, but reviews and comments on the proposed directives drafted by the Commission. The Court consists of 13 judges who are appointed by agreement among the Member States. It sits in Luxembourg and adjudicates cases where Member States have failed to implement directives. *The Institutions of the European Community*, EUROPE 23-26 (May 1987).

<sup>22</sup> Common Mkt. Rep. ¶ 121.73 (CCH 1989).

<sup>23</sup> *Id.*

directives dealing with the 1992 program before they become effective.<sup>24</sup>

### III. THE WHITE PAPER

The blueprint for the completion of the internal market is the "White Paper" prepared by the European Commission<sup>25</sup> for the Heads of Government meeting in June 1985.<sup>26</sup> This document identifies the approximately 300 legislative measures needed to complete the internal market in the EC.<sup>27</sup> The White Paper recognizes that although customs duties have been removed within the EC, a multitude of non-tariff barriers remain which are obstructing total market integration.<sup>28</sup> A non-tariff barrier exists when disparities in national laws and regulations, such as disparities in product or licensing standards, hinder the free movement of goods and services.<sup>29</sup> For example, artificial sweeteners and sugar substitutes were not previously allowed into France, although they could circulate freely in the rest of the EC.<sup>30</sup>

In order to abolish all internal frontiers, the White Paper states that physical, technical, and fiscal non-tariff barriers must be removed.<sup>31</sup> Physical barriers include; frontier controls, health and safety checks, vehicle checks, and immigration controls, all of which delay the movement of goods and people.<sup>32</sup> An EC study published in March 1988 showed that a 750-mile trip to deliver goods by truck within the United Kingdom took approximately thirty-six hours, while the same 750-mile trip to Milan from London took fifty-eight hours as a result of delays incurred in crossing borders.<sup>33</sup>

Technical barriers include not only differing national standards for

<sup>24</sup> *Policing Europe's Single Market*, ECONOMIST, Jan. 20-26, 1990, at 69-70. For a discussion on "footdragging" by the member states in implementing directives see the Economist. For example, according to the ECONOMIST, of the 88 directives which should have been implemented by the end of 1989, only 14 have become law in all 12 member states. *Id.*

<sup>25</sup> Common Mkt. Rep. ¶ 121.73 (CCH 1989).

<sup>26</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL (1985) [hereinafter WHITE PAPER].

<sup>27</sup> ITC Report, *supra* note 5, at 1-6; *see also*, U.S. COMMERCE DEPARTMENT, INTERNATIONAL TRADE ADMINISTRATION, 1 EC 1992: A COMMERCE DEPARTMENT ANALYSIS OF EUROPEAN COMMUNITY DIRECTIVES 1 (1989) [hereinafter COMMERCE DEPARTMENT ANALYSIS].

<sup>28</sup> WHITE PAPER, *supra* note 26, ¶ 6.

<sup>29</sup> EUROPE WITHOUT FRONTIERS, *supra* note 16, Appendix V at A-384.

<sup>30</sup> Bonne, *Government Incentives and Qualified Work Force Make France a Strategic Location*, EUROPE, 36-38 (Sept. 1988).

<sup>31</sup> WHITE PAPER, *supra* note 26, ¶ 10.

<sup>32</sup> *Id.* ¶¶ 24-56.

<sup>33</sup> COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMICS OF COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY (March 1988), reprinted in 1992: *The Changing Legal Landscape for Doing Business in Europe* (W. Oberriet, Chairman, Practising Law Institute, 1989).

product certification in such areas as telecommunications, but also restrictions in public procurement, which tend to promote national favoritism in government contract awards.<sup>34</sup> The inability to provide services, such as banking and investment services on an EC-wide basis because of local licensing restrictions, as well as disparities in intellectual property laws, are further examples of technical barriers.<sup>35</sup> Fiscal barriers result from inconsistent rates between Member States in value-added taxes and excise taxes, which must consequently be rebated on goods when exported from one Member State and then re-imposed on importation into the next Member State.<sup>36</sup>

The original 300 measures were subsequently revised to 279 proposals.<sup>37</sup> As of December, 1988 the Commission had proposed 229 directives to the Council of Ministers for implementation, and 107 directives had been adopted by the Council.<sup>38</sup> Significant progress has been made in the areas of technical standards and financial services.<sup>39</sup> Major difficulties have arisen in the areas of plant and animal health, VAT and border controls.<sup>40</sup> The sheer size of the EC's task in completing the internal market is perhaps best described in the words of the *National Law Journal*: "[i]t's as if the United States, all at once, trying to rewrite its entire spectrum of federal economic laws, preempt hundreds of state statutes, and alter the bulk of its regulatory rules."<sup>41</sup>

#### IV. MUTUAL RECOGNITION

Because total harmonization of the laws of all twelve countries is obviously an unrealistic objective, the Commission has adopted a minimalist approach.<sup>42</sup> Under this approach, the proposed directives target only those areas where harmonization is essential, such as the area of safety requirements.<sup>43</sup> The principle of "mutual recognition" is an important cornerstone of the plan to complete the internal market by the end of 1992.<sup>44</sup>

<sup>34</sup> WHITE PAPER, *supra* note 26, ¶¶ 60-87.

<sup>35</sup> *Id.* ¶¶ 95-123, 145-149.

<sup>36</sup> *Id.* ¶¶ 160-218.

<sup>37</sup> ITC Report, *supra* note 5, at 1-10.

<sup>38</sup> *Id.* In the Commission's Fourth Progress Report, as of May 31, 1989, 127 proposals have been adopted. See Williams, Perry and Madian, *Progress Report, EUROPE-1992 7* (Oct. 1989).

<sup>39</sup> EUROPEAN COMMISSION, COMPLETING THE INTERNATIONAL MARKET: AN AREA WITHOUT FRONTIERS: THE PROGRESS REPORT REQUIRED BY ARTICLE 8B OF THE TREATY, ¶ 12, COM(88) 650 (final) (Nov. 17, 1988).

<sup>40</sup> *Id.* ¶ 13; see also, ITC Report, *supra* note 5, art. 1-10.

<sup>41</sup> Sontag, *supra* note 11, at 1, col. 1.

<sup>42</sup> S.J. BERWIN & CO., THE 1988 BUSINESS MAN'S GUIDE TO EEC LEGAL DEVELOPMENTS, 2 (1988) [hereinafter BUSINESSMAN'S GUIDE].

<sup>43</sup> WHITE PAPER, *supra* note 26, ¶ 65.

<sup>44</sup> *Id.* ¶¶ 61, 63.

The roots of mutual recognition can be found in the *Cassis de Dijon Case*<sup>45</sup> decided by the European Court of Justice, which held that Member States must permit the importation and marketing of goods lawfully manufactured in another Member State, even if the goods do not meet the requirements of the importing country. Thus, in the absence of EC law, each Member State must recognize another Member State's national measures.<sup>46</sup> For example, the Federal Republic of Germany may not prohibit imports of beer from Member States which do not conform to German purity standards.<sup>47</sup> The Italian government may require its own pasta manufacturers to use 100% durum wheat, but it cannot ban imports of pasta from other Member States which meet only the requirements of the Member State where the pasta was originally produced.<sup>48</sup> Consequently, any analysis of the impact of the EC 1992 program on a particular industry must take both EC and national law into account.<sup>49</sup>

## V. THE EXTERNAL DIMENSION

As approximately fifty-nine percent of the EC's trade is among the Member States,<sup>50</sup> the Commission originally gave little thought as to how its 1992 plan would affect non-EC countries, including the United States.<sup>51</sup> Unfortunately, certain actions by the EC in 1988, including a draft financial services directive,<sup>52</sup> which contained unequivocal requirements of reciprocity, gave rise to fears in the United States that as the internal barriers in the EC began to fall, external barriers would rise.<sup>53</sup>

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<sup>45</sup> *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case No. 120/78, ECR 649, *reprinted in* [1978-1979 Transfer Binder] Common Mkt. Rep. ¶ 8543 (1972).

<sup>46</sup> The Single European Act supplements the Treaty of Rome by adding Article 100B to the Treaty providing that the Commission will draw up an inventory of all national laws which have not been harmonized, so that the Council can decide which national laws in each Member State must be mutually recognized by other Member States. Single European Act, *supra* note 17, art. 19.

<sup>47</sup> Under the sixteenth century Reinheitsgebot, German brewers were only allowed to use water, hops, malt and yeast to brew beer. The European Court of Justice held that this law could not be applied to French beer imported into West Germany. *Commission v. Federal Republic of Germany*, Case No. 178/84 ECR, *reprinted in* [1987-1988 Transfer Binder] Common Mkt. Rep. ¶ 14,417 (1987). *See also*, Dietrich, *Court Overrules Purity Law for Beer in Germany*, EUROPE 20 (April 1987).

<sup>48</sup> Sontag, *supra* note 11, at 28, col. 3; ITC Report, *supra* note 5, at 1-10.

<sup>49</sup> BUSINESSMAN'S GUIDE, *supra* note 42, at 3.

<sup>50</sup> German Information Center, *Featuring: The European Unified Market of 1992*, 3 (New York, October 1988).

<sup>51</sup> *See* Messen, *supra* note 14, at 361.

<sup>52</sup> COM(87) 715 final, Feb. 23, 1988, 31 O.J. EUR. COMM. (No. C 84) 1 (1988) (Proposal For a Second Council Directive on the Coordination of Laws, Regulation and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC) [hereinafter Second Banking Directive].

<sup>53</sup> *Europe Without Frontiers*, *supra* note 16, at 34 n.6; *What Are They Building?*, *supra* note 3, at 6. Messen, *supra* note 14, at 359; HOUSE REPORT *supra* note 2, at 61-63.

Hence the term "Fortress Europe."<sup>54</sup>

A study published by the International Trade Commission ("ITC") in July 1989 now concludes that several aspects of the 1992 program will have net positive effects on many U.S. industries.<sup>55</sup> However, it also highlights the main concerns of American companies as they make business plans in light of the anticipated changes.<sup>56</sup> The main areas of concern are technical standards, rules of origin and local content restrictions and reciprocity.<sup>57</sup>

## VI. TECHNICAL STANDARDS

According to the ITC study, the adoption of uniform standards in the area of telecommunications and pharmaceuticals will facilitate U.S. sales of these products in the EC.<sup>58</sup> The ITC found that elimination of technical barriers would facilitate the marketing of U.S. products throughout the EC, without the need to complete duplicative testing and inspection.<sup>59</sup> However, the ITC points out that U.S. exporters remain concerned that if the EC adopts standards that are biased against U.S. products, the resulting retooling of production lines, plus retesting and recertification, will lead to a loss in European sales.<sup>60</sup> U.S. exporters have also been frustrated by their lack of representation in the European standards-making bodies, CEN and CENLEC.<sup>61</sup>

## VII. RULES OF ORIGIN AND LOCAL CONTENT

The areas of local content and rules of origin have also become im-

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<sup>54</sup> See e.g., Browning, *Hill Hopes Talks Will Prevent A Protectionist 'Fortress Europe'*, Wall St. J., Sept. 12, 1989 at A21, col. 5.

<sup>55</sup> *EC 1992 Program to Have Major Impact on U.S., ITC Report Shows*, UNITED STATES INTERNATIONAL TRADE COMMISSION, Press Release, July 20, 1989 (USITC 89-030) [hereinafter USITC Press Release].

<sup>56</sup> ITC Report, *supra* note 5, at vii-xiv.

<sup>57</sup> *Id.*; see also HOUSE REPORT, *supra* note 4, at 1.

<sup>58</sup> ITC Report, *supra* note 5, at x; see also Grignolo, *How Drug Companies Are Preparing for 1992*, 44 FOOD DRUG COSMETIC L.J. 557, 562 (1989).

<sup>59</sup> ITC Report, *supra* note 5, at 6-7.

<sup>60</sup> *Id.* As an example, the United States Department of Commerce has determined that the testing requirements of the Single European Act Directive 86/663, relating to self-propelled industrial forklift trucks, placed requirements on manufacturers that cannot be easily met by non-EC suppliers. For instance, although the CEN standard on cables for forklifts was introduced in 1988 and the Directive became effective on January 1, 1989, it took U.S. companies until mid-1989 to modify their manufacturing process to be able to adopt the EC standard. COMMERCE DEPARTMENT ANALYSIS, *supra* note 27, at 63.

<sup>61</sup> HOUSE REPORT *supra* note 2, at 62; U.S., *EC Reach Agreement to Establish Dialogue on Product Standards for 1992*, 6 INT'L TRADE REP. (BNA) at 730 (June 7, 1989); *U.S. Firms Look to International Bodies to Influence EC Standard - Setting Process*, 6 INT'L TRADE REP. (BNA) at 1070 (Aug. 16, 1989). See P. COOKE, A SUMMARY OF THE NEW EUROPEAN COMMUNITY APPROACH TO STANDARD DEVELOPMENT 43-09-43-13 (National Bureau of Standards) (August, 1988).



portant to U.S. exporters.<sup>62</sup> Where a product contains materials from different countries, or is manufactured in more than one country, rules of origin are applied to ascertain which country the product is deemed to originate from.<sup>63</sup> The rule of origin applied in both the United States and Europe depends on the country where the product was substantially transformed from raw materials into a finished product.<sup>64</sup> Local content rules require that if a certain percentage of the parts of labor in a product originate from one country, then that will automatically be deemed the products country of origin.<sup>65</sup> Rules of origin and local content rules are important issues in the area of quotas, dumping, and government procurement.<sup>66</sup>

In dismantling frontier controls, the EC envisions replacing national quotas on such import-sensitive items as cars and textiles with EC or external quota.<sup>67</sup> These quotas will, for example, limit the total number of Japanese cars imported into the EC.<sup>68</sup> Under the rules of origin, the question then becomes whether U.S. assembled cars containing Japanese components are to be considered American or Japanese.<sup>69</sup>

The recent enactment of "screwdriver" regulations to discourage the circumvention of dumping duties means that assembly of a product inside the EC from non-EC components may no longer avoid dumping duties.<sup>70</sup> These duties are normally assessed if a non-EC product is sold for less in the EC than in its home market, causing injury to EC manufacturers.<sup>71</sup> The question of local content is a significant issue in certain government procurement areas, such as telecommunications, where proposed EC-wide directives to open up the bidding process apply only to products that contain at least a fifty percent EC content.<sup>72</sup> Proposed local content requirements have also become a controversial issue for U.S.

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<sup>62</sup> HOUSE REPORT, *supra* note 2, at 26.

<sup>63</sup> *See, e.g.*, 19 C.F.R. § 134.1(b) (1989).

<sup>64</sup> The rule in the United States is found at 19 C.F.R. § 134.1(b)(1989); the EC rule of origin is Council Regulation No. 802/68 (June 27, 1968), *reprinted in* Common Mkt. Rep. 3825 (CCH 1986).

<sup>65</sup> HOUSE REPORT, *supra* note 2, at 26-27.

<sup>66</sup> *Id.* at 27; ITC Report, *supra* note 5, at viii; *see also*, J. Comm., Sept. 12, 1989 at 1, col. 3.

<sup>67</sup> Rockwell, *Hill Warns the EC On Auto Import Curbs*, J. Comm., Feb. 23, 1990 at 4A, col. 2. HOUSE REPORT, *supra* note 2, at 35 (discussion on automobiles).

<sup>68</sup> *Id.*

<sup>69</sup> HOUSE REPORT, *supra* note 2, at 36; Rockwell, *supra* note 67.

<sup>70</sup> Council Regulation No. 2428/88, 31 O.J. EUR. COMM. (No. L 209) 1 (1988) (On Protection Against Dumping or Subsidized Imports From Countries Not Members of the European Economic Community); *See also*, De Smedt, *Survey of the Revised Basic EC Anti-Dumping Regulation*, 17 INT'L BUS. LAW. 13 (1989).

<sup>71</sup> Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective*, 17 INT'L BUS. LAW. 58, 63 (1989).

<sup>72</sup> ITC Report, *supra* note 5, at 4-19.

producers that sell television programs to the EC.<sup>73</sup>

Rules of origin will play an important role as U.S. executives decide whether to build or expand manufacturing facilities in the EC to remain competitive after 1992.<sup>74</sup> The Commission recently developed a rule that semi-conductors must be "diffused" in the EC in order to be considered of EC origin.<sup>75</sup> Semiconductors play an important part in many industries where government procurement contracts are a significant source of revenue.<sup>76</sup>

The cost of opening a European semiconductor diffusion plant is estimated at between \$200 million to \$400 million, therefore, companies in the U.S. semiconductor industry are faced with the difficult choice of either losing export opportunities or moving U.S. production to Europe at great expense.<sup>77</sup> In 1989, the Commission also adopted a regulation which will require Ricoh of Japan to increase the U.S. content of copiers assembled in California for them to be deemed of American.<sup>78</sup> Unless the number of Japanese components in the copiers is decreased, the EC dumping duties applicable to Japanese copiers will be levied on importation.<sup>79</sup>

## VII. RECIPROCITY

The United States originally viewed reciprocity in financial services as one of the most highly controversial area of the EC 1992 program.<sup>80</sup> The original proposal, known as the Second Banking Directive, stated that the entry of third-country banks into the integrated market would be predicated on whether EC banks received "reciprocal treatment" in the third country.<sup>81</sup> As the 1992 program involves both comprehensive and

<sup>73</sup> U.S. Considers Filing Complaint with GATT Over Proposed Minimum Content TV Directive, 6 Int'l Trade Rep. (BNA) at 736-37 (June 7, 1989).

<sup>74</sup> HOUSE REPORT, *supra* note 2, at 33.

<sup>75</sup> *Id.* at 32.

<sup>76</sup> *Id.* at 33.

<sup>77</sup> *Id.* See also, Barnard, *Intel's Irish Plant Decision Is Victory For EC*, J. Comm., Oct. 6, 1989 at 1A, col. 2. *Intel to Manufacture Chips in Ireland, Cites EC Origin Rules*, 1 EUROPE-1992 367 (Oct. 1989).

<sup>78</sup> 32 Commission Regulation No. 2071/89/EEC, July 11, 1989, O.J. EUR. COMM. (No. L 196) 24 (1989) (On Determining the Origin of Photocopying Apparatus, Incorporating an Optical System or of the Contact Type).

<sup>79</sup> *Id.* Both United States Trade Representative Carla Hills and U.S. Secretary of Commerce Robert Mosbacher have charged that these rules of origin force U.S. companies to build plants in Europe and are protectionist. See, Browning, *supra* note 54, at col. 6. Mosbacher, *US-EC Cooperation Increases As the Single Market Takes Shape*, BUS. AM., Jan. 15, 1990, at 2, 3 (U.S. Department of Commerce).

<sup>80</sup> EUROPE WITHOUT FRONTIERS, *supra* note 16, at 74 n.6; U.S. Business, *Government Urged to Be Vigilant About EC Single Market*, 6 Int'l Trade Rep. (BNA) at 459 (Apr. 12, 1989) [hereinafter *U.S. Urged to be Vigilant*].

<sup>81</sup> Second Banking Directive, *supra* note 52.

EC interstate banking, U.S. banks were apprehensive that they would be locked out of the EC.<sup>82</sup> The legal separation of commercial and investment banking in the U.S. made strict reciprocity unfeasible.<sup>83</sup>

Fortunately, in April, 1989, the Commission proposed a more flexible approach based on a theory of "national treatment."<sup>84</sup> Under the former strict reciprocity rule, a U.S. bank or credit institution would only be able to obtain a license in a Member State if the Commission satisfied itself that EC banks would enjoy the same treatment should they seek to establish branches or buy into banks in the United States.<sup>85</sup> National treatment requires only that U.S. and EC banks be treated equally in the United States.<sup>86</sup> The Commission's amended proposal achieves this result by providing that the EC will seek comparable, effective, market access and competitive opportunities for EC banks through negotiation with the non-EC country concerned.<sup>87</sup>

This directive was adopted by the Council of Ministers on December 15, 1989.<sup>88</sup> The Commission has also publically stated that it will propose similar treatment of third-country firms in the investment services and insurance sectors.<sup>89</sup> In that case, the ITC envisions that the 1992 program for financial services will create many opportunities for U.S. banks, securities firms, mutual funds, and insurance companies, because of the elimination of restrictions on the movement of capital within the EC and the overall deregulation of EC financial markets.<sup>90</sup>

## IX. OTHER ISSUES

The Single European Act also contains long-term plans for the convergence of monetary and foreign policies within the EC,<sup>91</sup> the harmoni-

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<sup>82</sup> See, *U.S. Urged to Be Vigilant*, *supra* note 80.

<sup>83</sup> Gruson & Nikowitz, *The Second Banking Directive of European Economic Community and Its Importance for Non-EEC Banks*, 12 *FORDHAM INT'L L.J.* 205, 229 (1989).

<sup>84</sup> *EC Commission Clarifies Reciprocity Provisions in Proposed Second Banking Directive*. No. 10/89 (Apr. 13, 1989) *EUROPEAN COMMUNITY NEWS: EC OFFICE OF PRESS & PUBLIC AFFAIRS* [hereinafter *EC Commission Clarifies Reciprocity Provision*]. See also Gruson & Nikowitz, *supra* note 83, at 452, 454.

<sup>85</sup> Second Banking Directive, *supra* note 52, art.7.

<sup>86</sup> *EC Commission Clarifies Reciprocity Provision*, *supra* note 84, at 3.

<sup>87</sup> *Id.*

<sup>88</sup> Council Directive No. 89/646/EEC, Dec. 30, 1989, 32 *O.J. EUR. COMM.* (No. L 386) 1 (1989) (Second Banking Directive on the Laws, Regulations and Administrative Provisions Relating to the Taking-Up and Pursuing of the Business of Credit Institutions and Amending Directive 77/780/EEC, Dec. 15, 1989).

<sup>89</sup> ITC Report, *supra* note 5, at xi.

<sup>90</sup> See also, Fine, *Opening of the EEC Insurance Market: A Review of the 1st & 2nd Council Directives*, 17 *INT'L BUS. LAW.* 223, 224 (1989).

<sup>91</sup> Single European Act, *supra* note 17, arts. 20, 30. See also Stein, *European Foreign Affairs Systems and the Single European Act of 1986*, 23 *INT'L LAW.* 977 (1989); But see, Barnard, *EC Hopes to Patch Rift Over Monetary Union*, *J. COMM.* June 27, 1989 at 7A, col.4.

zation of environmental laws,<sup>92</sup> and greater community-wide research and development.<sup>93</sup> Legislation has also been recently proposed to increase worker participation in company decision-making.<sup>94</sup> All of these trends will affect American businesses in their European operations. U.S. companies must also be sensitive to EC competition (antitrust) law which regulates certain mergers, joint ventures, and licensing agreements.<sup>95</sup> In addition to the traditional antitrust considerations regulated by Articles 85 and 86 of the Treaty of Rome, the Council recently adopted a merger directive to regulate the increasing number of acquisitions involving EC-based companies.<sup>96</sup>

Finally, the concept of a "European Company" is envisaged as an important mechanism for cross-frontier cooperation.<sup>97</sup> The European Company will be incorporated in Europe, registered at the European Court of Justice in Luxembourg, but domiciled in a Member State.<sup>98</sup> It will also be governed by EC legislation rather than national company laws.<sup>99</sup>

The Commission believes that the formation of a European Company will help overcome a number of problems which currently exist with respect to cooperation between companies incorporated in different Member States.<sup>100</sup> These include tax problems arising when companies from different Member States merge, the disparity between the various requirements of the company laws of each Member State, and the general business and administrative difficulties currently surrounding the formation of a company in a second Member State.<sup>101</sup> The European Company may also provide a useful vehicle for American companies establishing a presence in the EC after 1992.<sup>102</sup>

## X. CONCLUSION

The dimensions of the EC 1992 program are staggering. The ITC

<sup>92</sup> Single European Act, *supra* note 17, art. 23.

<sup>93</sup> *Id.* art. 24.

<sup>94</sup> Buchan, *UK Stands Alone on Social Charter*, *Fin. Times*, June 13, 1989 at 24.

<sup>95</sup> See e.g., Lutz & Broderick, *Know-How Licensing Agreements under EC Group Exemption Reg. No. 556/89*, 17 INT'L BUS. LAW. 373 (1989).

<sup>96</sup> Regulation 4064/89, (Dec. 21, 1989), *reprinted in* Common Mkt. Rep. 2839 (CCH 1990).

<sup>97</sup> WHITE PAPER, *supra* note 26, ¶¶ 133-144.

<sup>98</sup> BUSINESSMAN'S GUIDE, *supra* note 42, at 51.

<sup>99</sup> *Id.* See also Nieuwdorp, *Corporate Law: Recent Development-III*, 18 INT'L BUS. LAW. 31 (1990).

<sup>100</sup> WHITE PAPER, *supra* note 26, ¶¶ 133-144.

<sup>101</sup> *Id.*

<sup>102</sup> ITC Report, *supra* note 5, at xii. See also, the ITC's discussion of Regulation 2137/85 on the EC's creation of a new legal entity called the European Economic Interest Grouping, which allows cross-border cooperation or pooling of resources between companies in different Member States. *Id.* at 9-23 - 9-24. See also Nieuwdorp, *supra* note 99, at 31.

predicts that important U.S. export industries will be fundamentally affected.<sup>103</sup> American executives must now analyze how best to take advantage of a single EC market of 320 million consumers.<sup>104</sup> Great opportunities are seen in the areas of financial services, telecommunications, and pharmaceuticals, along with the potential for easier entry into EC markets for many U.S. products.<sup>105</sup> This increased access will result from the harmonization of intellectual property laws and technical standards as well as the elimination of border controls.<sup>106</sup> However, some concerns still exist as to whether EC standards and reciprocity issues may result in eventual discrimination against U.S. products and services.<sup>107</sup>

American executives would be best advised to carefully analyze the proposed legislation which most directly addresses their particular company's or industry's products or service. Decisions on whether to export to the EC or to follow the direct investment route will need to take into account both national EC legislation which will influence the form of doing business in Europe.<sup>108</sup>

There will be no "big bang" in the EC on January 1, 1993. However, it is clear that a new, more integrated Europe is emerging, and that the creation of a single market will have a major impact on world trade. In the words of Jacques Delors, President of the European Community Commission:

Europe is once again on the move. It is no exaggeration to say that a quiet revolution is taking place. Do not be misled by the 1992 date, the revolution has already begun. The time to make decisions on your business strategy is now. Anyone who waits until 1992 will have missed the opportunities.<sup>109</sup>

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<sup>103</sup> USITC Press Release, *supra* note 55.

<sup>104</sup> HOUSE REPORT, *supra* note 2, at 61.

<sup>105</sup> ITC Report, *supra* note 5, at ix-x.

<sup>106</sup> *Id.* at x and xiv.

<sup>107</sup> *Id.* at ix-x.

<sup>108</sup> Murphy, *Europe-1992: Direct Investment Strategy*, BENCH & B. MINN. 19-22 (July 1989).

<sup>109</sup> *Id.* at 20.