1992 : A CHALLENGE TO AUSTRALIAN LAWYERS

The right of establishment and the freedom of movement of goods in the European Community

by Gabriel Moens*

Some months ago, I attended a Luncheon at which the guest speaker discussed recent developments in the European Community (E.C.). The speaker outlined the present efforts by the E.C. to accelerate the completion of the Single Market. He argued that the completion of the Single Market was inevitable in view of the fact that the E.C. Heads of State and of Government were committed to the success of this monumental project. But, in his enthusiasm to convince his audience of the inevitability of the present integration process, he did more than what was strictly necessary for the development of his argument. He impetuously claimed that the achievement of the Single Market would be the domino which would eventually lead to the unification of all of Europe. In this context he predicted that the Union of Soviet Socialist Republics (U.S.S.R.) would one day become a

Member of the European Community. The making of this wide and sweeping claim certainly undermined the strength of his argument, even though it was presumably made in order to bolster its credibility. But the speaker's claim, being in the nature of a prediction, cannot be proved or disproved.

The speaker's allegations remind me of the existence of an endemic problem which is, if my experience is an indication, often associated with Australian conferences and seminars on the European Community. The problem consists in the inability of some speakers, including those who may have been trained in the rigourous discussion of European issues, to relate their claims to the EEC Treaty, the legal acts adopted by the Community Institutions and the Jurisprudence of the European Court of Justice (ECJ). For example, even a perfunctory reading of the EEC Treaty, also popularly known as the Treaty of Rome, which came into operation on 1 January 1958, reveals that Article 237 stipulates that any European State may apply to become a full member of the Community. As the major part of the territories of the U.S.S.R. is located East of the Urals, it is doubtful that the U.S.S.R.'s eligibility to apply for membership would ever be seriously entertained. Of course, the concept 'European' cannot be authoritatively defined and, therefore, those sympathetic to the speaker's point of view, would argue that his claim is not totally preposterous. The speaker may also seek to justify his claim by pointing out that Article 237 of the E.E.C. Treaty, in failing to define the concept of 'European', does not indicate whether the

totality of a State's territory must be located West of the Urals in order to become eligible for E.C. membership. Moreover, it is not inconceivable that Community Members may, sometime in the future, agree to suitably amend the EEC Treaty to facilitate the admission of the Union of Soviet Socialist Republics. In any event, a sophisticated critic may question the eligibility of the U.S.S.R. on the ground that it has a centrally planned economy, the maintenance of which is inconsistent with the very principles upon which the free market economy of the E.C. is based.

This example of the over-enthusiastic proponent of European unification illustrates that the making of sweeping claims regarding the present attempts by the E.C. to facilitate the completion of a Single Market could easily distort an otherwise balanced review of the 1992 project. Thus, the validity of one's statements should constantly be tested in the light of the specific provisions of the EEC Treaty and related jurisprudential developments. If necessary, one's statements should be qualified in order to obtain a better, and, therefore, more satisfactory understanding of the historic events taking place in Europe.

As 1992 approaches, it is reasonable to anticipate that an increasing number of practising lawyers will be asked by their corporate and other clients to comment upon the impact of the new range of laws on their business opportunities and prospects. Such requests necessitate an ability to unravel

the intricacies of these new provisions and their interrelationships. This then is the '1992 challenge to Australian lawyers.'

In this paper, I propose to discuss a number of topics which practising lawyers may have to consider in the course of their work when responding to specific requests from their corporate and other clients. In particular, these topics include the prospects of Australian companies wishing to establish themselves in the E.C., the right of lawyers to freedom of establishment in a Member State of which they are not nationals, and freedom of movement of goods. As foreshadowed, the discussion concentrates on the interrelationship between the relevant legislative provisions. In addition to those provisions already mentioned I will, where appropriate, indicate the extent to which the Single European Act, 1986 (SEA), which came into force on 1 July 1987, supersedes the law of the E.C. as it existed prior to 1987. As this Act has been described as "a political and legal instrument which implements the Member States' resolve to advance the progress of the Community",[1] it is appropriate, in the next section, to outline its salient features.

1. The Single European Act, 1986

In June 1985, the Commission of the European Communities, the executive arm of the E.C., presented a White Paper to the European Council which consists of the

European Heads of State and of Government. This Paper was designed and destined to become the blue-print for the creation of the Single Market, or using the language of the Single European Act, 1986, the 'internal market', by the end of 1992. It is fair to say that the White Paper, entitled Completing the Internal Market[2] and the SEA have captured the attention and imagination of businessmen and lawyers throughout the world. The '1992' project embodies all the proposals which need to be adopted and implemented by the E.C. to create a single market by the self-imposed deadline of 31 December 1992. However, as is often the case when important and intellectually difficult issues are trivialised by reference to a popular concept, the complexities, inconsistencies and paradoxes inherent in it, are conveniently overlooked by many commentators. This process of trivialising poses a challenge to practising lawyers in that a study of the interrelationships of relevant '1992' laws is made more difficult by the constant flow of 'popularised' stories on 1992. It is therefore necessary to dispel a few misconceptions which may be perpetuated by the constant stream of literature that the 1992 project has spawned.

The 1992' project involving the completion of the internal market, is not a new project but, as will be seen later, the 'internal market' is a new legal concept. Also, the EEC Treaty has always envisaged from the outset the creation of a single integrated market with free movement of goods, persons, services and capital. Also, the EEC Treaty

has instituted a system aimed at ensuring that competition in the Common Market is not distorted. It provides for the approximation and harmonisation of national laws, including the wildly diverse national rules on indirect taxation. During the transtitional period which ended on 31 December 1969, the Council of the European Communities (the decision making body which, in the usual and simplest case, acts on proposals from the Commission) eliminated customs duties and tariffs as between Member States, and succeeded in establishing the common external customs tariff which applies to products exported to the Community by third countries. The elimination of customs duties, which is required by Article 13 of the EEC Treaty, was achieved in 1968, eighteen months ahead of schedule. This remarkable achievement, however, was followed by a long period of dissension and stagnation which, at least in part, has been responsible for the demonstrable inability of the Community to remove non-tariff barriers which continue to impede the free flow of goods within the community. These barriers include quantitative restrictions and measures having equivalent effect, including physical, technical and fiscal barriers. The Community, during this long period of sustained relative inactivity, also failed to remedy the widespread practice of giving preferences to nationals in awarding public sector contracts.

The physical barriers relate to the physical controls at customs posts, immigration controls and the occasional search of personal luggage "which to the ordinary citizen

are the obvious manifestation of the continued division of the Community."[3] These physical barriers impose a burden on the free movement of goods due to the "delays, formalities, transport and handling charges, thus adding to costs and damaging competitiveness."[4] Technical barriers include a bewildering array of different national product regulations and standards. These barriers, quoting the White Paper "have a double-edged effect: they not only add extra costs, but they also distort production patterns; increase unit costs ... discourage business cooperation, and fundamentally frustrate the creation of a common market for industrial products."[5] The fiscal barriers relate to the differences in the various taxation systems of Member States, especially indirect taxation such as value added tax.

The Commission's White Paper is designed to facilitate the completion of what is known as the 'internal market'. A description of the internal market is offered by the SEA, the main provisions of which have been incorporated into the EEC Treaty. The new article 8a of this Treaty stipulates that the internal market comprises "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." As the 'internal market' is limited to the implementation of the four fundamental freedoms of the E.C., it is necessary to distinguish the 'internal market' and the 'common market'. These two concepts are not interchangeable because the development of the common market requires, in addition to the implementation of these freedoms, the co-ordination of all

economic and monetary policies through approximation of the relevant legislation. The completion of the internal market does not extend to the establishment of a Monetary Union and a Central European Bank, or to the formation of the United States of Europe although their establishment is foreshadowed by Articles 20 and 30 of the SEA respectively. The concept of the 'internal market' is thus much narrower than that of the 'common market'.

The SEA provides for the involvement of the European Parliament (E.P.) in the legislative process of the Community. In particular, the Act initiates a co-operation procedure in areas involving the development of the internal market.[6] This procedure is described in Article 7 of the SEA, which has now been absorbed by the EEC Treaty as Article 149. If the E.P. rejects a proposed legislative measure as embodied in the Council's 'common position', the Council may adopt the impugned legislation by unanimity within a 3 month period. If the E.P. proposes amendments, the proposed legislation is transmitted to the Commission for further consideration. The Commission submits a revised proposal to the Council and, separately, it also makes available to the Council those E.P. amendments which it does not incorporate in its new text. If the Council amends within 3 months the Commission's revised proposal, for example, by acceding to the European Parliament' amendments rejected by the Commission, the proposal can only be adopted by unanimity. However, it is anticipated that most decisions affecting the internal market will be taken by the Council

by qualified majority. Indeed, the new article 100a stipulates that for the achievement of the objectives of the internal market, as outlined in article 8a, the "Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament" adopt the necessary measures. The new voting system undoubtedly increases the chances that a proposed legislative provision will be adopted by the Council. However, the legislative process is certainly lenghtened due to the laborious and time-consuming co-operation procedure, involving the deliberations of the European Parliament. In a sense, then, it is correct to say that the SEA makes the Parliament the prime mover in the 1992 project.

It is significant that the SEA is instrumental in improving the decision making process in that most (but not all) decisions affecting the establishment of the internal market can now be taken by a qualified majority, rather than by unanimity as previously required by Article 100. (This Article, however, continues to apply to those proposals which do not involve the progressive implementation of the internal market.) The importance of this development is clear when it is realised that legislative measures which may not have been accepted by a Member State, can nevertheless become legally binding in that State. In this context, it is apposite to mention that the main objections against the enactment of the SEA raised by Member States of the E.C. relate to the assumed loss of national sovereignty. For example, in the United Kingdom, Lord Denning was one of

the most vociferous opponents of the SEA because the Act arguably involved the delegation of sovereignty to a supranational Community. Later, however, when realising that the ratification of the SEA by the Member States as required by Article 236 of the Treaty, was a fait accompli, he withdrew his objections and whole-heartedly supported the European developments.

The SEA and its associated legislative programme are, at times, also criticised by non-member States which fear that their trade relations with the E.C. will be adversely affected as a consequence of the implementation of the 1992 project. This criticism which, in the relevant literature is encapsulated by the phrase "Fortress Europe", is the subject of the next section.

2. The European Community: A Fortress Europe?

It is stated in a number of European Community documents that non-member countries, including Australia, will benefit considerably from the completion of the Internal Market.[7] What are these benefits? Clearly, companies wishing to export to the E.C. will be able to profit from the harmonization of existing product standards and rules. Manufacturers will be relieved of the need to produce the same product to several specifications. The replacement of the diverse legal rules in force in the Member States by EC-wide standards has the further advantage that once a product is legally exported to a Member State, it can be

sold throughout the Community without having to comply with additional national rules. However, these advantages can only be described as real (as opposed to apparent) if Australian manufacturers are allowed to export their products to the European Community at all. Some commentators stress that the completion of the internal market, which requires the elimination of internal barriers, will lead to thicker external walls and that the E.C., after 1992, will introduce protectionist policies and measures, thereby creating a 'Fortress Europe'.

The European Community has recently launched a media campaign to convince people that the 1992 project does not involve the creation of a Fortress Europe. The E.C. argues, through its overseas representatives, that the 'Fortress' view is untenable. They refer to a monumental study, known as the Cecchini Report, which documents the major benefits of the completion of the internal market.[8] Cecchini and his team of researchers calculated that the benefits of a Single Market include, but are not limited to, the prospect of a 5% growth in Community GNP, price reductions of 6% and 2 million new jobs. In a progress report submitted by the Commission to the Council on 17 November 1988, as required by article 8b of the Treaty, the Commission predicts, subject to the introduction of appropriate accompanying policies, "a rise of 7% in GNP and 5 million new jobs, three years additional growth and a reduction of one third in the dole queues of Europe."[9] These predictions are based on the assumption that the E.C., through the

lowering of costs, an improvement in the distribution of goods throughout the Community and constant growth without inflation will be in a stronger competitive position vis-à-vis third country producers. The Community's confident expectations that the completion of the Internal Market will not lead to, or result in, a 'Fortress Europe' is based on the simple consideration that the creation of a stronger competitive position is incompatible with protectionism. In particular, representatives of the Commission argue that the "full benefits of this increased competitiveness can only be reaped if it can be translated into increased world trade on the basis of comparative advantage."[10] This common sense argument certainly reinforces the expectation that the E.C., after 1992, will seek to open or develop mutually advantageous world markets. This argument is restated by the Head of the E.C. Delegation to Australia and New Zealand, H.E. Ove J. Jorgensen at the "Europe 1992 - In or Out?" Conference organised by the Australian Financial Review and the Australian Legal Group, in April, 1989. He points out that 10% of the E.C's gross income derives from export earnings and that, therefore, "it would not be economically, socially or politically rational"[11] for the EC to erect barriers to international trade. He implies that, if barriers were erected by the E.C., retaliatory measures could be taken by the Community's trading partners. It could be reasonably argued, however, that a protectionist policy does not necessarily and inevitably lead to loss of export earnings. Indeed, as the EC's present efforts are expected to result in the formation of a powerful trading

bloc, it is not altogether preposterous to suggest that retaliation by third countries is only a fanciful and imaginary prospect. The more likely outcome of E.C. protectionism will be the formation, in response, of other powerful trading blocs, perhaps in North America and the Pacific Basin.

Despite reassurances that the E.C. will not adopt a 'Fortress' mentality, the Commission itself indicated in its progress report previously mentioned, that "(p)ending implementation of the multilateral agreements under negotiation, it would be premature ... for the Community automatically and unilaterally to extend to third countries the advantages of the internal moves toward liberalization." The Commission goes on to say that "third countries, from whom it is reasonable to expect comparable liberalization, will benefit to the extent that a reciprocal and mutual balance of advantages is attained."[12]

An instructive insight into the E.C.'s commitment to world trade liberalization is provided by the Commission's amended proposal for a Second Banking Coordination Directive.[13] This Directive has as its key feature the concept of a single banking licence. It provides that by the end of 1992, the Member States must abolish their authorization requirements on branches of EC credit institutions. Foreign banks which are already operating a subsidiary in an EC Member State will benefit from this liberalization process because, in Community law, "third

country banks which establish subsidiaries in any EC country are considered EC undertakings from the moment of their incorporation."[14] It is not surprising, then, that the Directive provides for a coherent EC-wide policy on the first establishment of a third country bank in the Community. In particular, the Directive endorses in Article 7 a procedure of reciprocity which allows the Community to make the success of a foreign bank's application for access to the E.C., dependent on comparable or reciprocal access of E.C. banks to the applicant bank's home country. The relevant subsections of Article 7 read as follows:

> 2. The Member States shall inform the Commission of any general difficulties encountered by their credit institutions in establishing or carrying out banking activities in any third country.
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> 3. The Commission shall, initially not later than six months before the Directive enters into force and then periodically, draw up a report examining the treatment of Community credit institutions, in the terms referred to in paragraphs 4 and 5 below, regarding the establishment and carrying out of banking activities, and the acquisition of participations in credit institutions of third countries. The Commission shall submit those reports to the Council of Ministers.
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> 4. Where it appears to the Commission, either on the basis of the report referred to in paragraph 3 or at any other time, that a third country is not granting to credit institutions of the Community effective market access and competitive opportunities comparable to those accorded by the Community to credit institutions of that third country, the Commission may submit suitable proposals to the Council with a view to achieving such comparable access and competitive opportunities through negotigations between the Community and the third country in question.
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> 5. Where it appears to the Commission, either on the basis of the reports referred to in paragraph 3 or at any other time, that credit institutions of the Community do not enjoy national treatment and the same competitive opportunities as domestic

> credit institutions in a third country and that the condition of effective market access has not been secured, the Commission may in addition to the proposals for negotiations referred to in paragraph 4 decide that the competent authorities of the Member States shall limit or suspend their decisions regarding requests for new authorizations and acquisitions by a parent undertaking governed by the third country in question.

Although the application of the concept of 'reciprocity' is not necessarily unreasonable in the conduct of international trade, it can certainly be construed as a disguised protectionist policy, especially if the concept of 'reciprocity' is used to impose the Community's will on a weaker partner or if proper adjudicative procedures are not employed to determine questions relating to reciprocity. The critics of the E.C., in an attempt to discredit the reciprocity clause, will undoubtedly seek to bolster their arguments by reference to, what they may regard as, the 'appalling' record of agricultural protection in the Community. The claim that the '1992' project might trigger a protectionist spiral is thus not to be dismissed as preposterous. Nevertheless, it is reasonable to believe that the E.C.'s liberalization and deregulation programme will not result in a 'Fortress Europe'. This belief is based on the fact that the creation of a 'Fortress Europe' would inevitably involve an implicit repudiation of the very principles upon which the E.C. itself is based. Whether this belief is merely an article of faith that is unsupported by actual developments, is for the future to decide.

3. The Right of Establishment

The present positioning of foreign banks in anticipation of the completion of the internal market is part of a wider issue involving the extent to which non E.C.-companies, including Australian undertakings, have access to the Community. A consideration of this issue requires an interpretation of Articles 52 and 58 of the EEC Treaty which deal with the right of establishment.

Article 52 stipulates that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period". This period expired on 31 December 1969. The Article further provides that the "progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State." Thus, during the transitional twelve year period, following the establishment of the E.C. in 1958, the Member States were able to continue discriminatory practices against nationals of other Member States, even if those practises involved discrimination on the ground of nationality. Article 7 of the EEC Treaty stipulates that "any discrimination on grounds of nationality shall be prohibited" but, as this prohibition is subject to the other provisions of the Treaty, Article 52 could not be relied upon by individuals before the expiry of the transitional

period.

The European Court of Justice (ECJ) decided in its landmark case of Reyners v. Belgian State[15] that "(a)fter the expiry of the transitional period the directives provided for by the Chapter on the right of establishment have become superfluous with regard to implementing the rule on nationality since this is henceforth sanctioned by the Treaty itself with direct effect."[16] The Reyners case involved a person of Dutch nationality who was born and educated in Brussels in Belgium. He had obtained, from the University of Brussels, an undergraduate degree in law which was a necessary and sufficient qualification for admission as an avocat (solicitor). However, his application to be admitted to the practice of the profession of avocat in Belgium was rejected because Belgian law provided that no one shall "be admitted to take the oath nor inscribed on the roll unless he is a Belgian."[17] Following rejection of his application for dispensation of this rule, Reyners brought proceedings in the Conseil d'Etat, the highest administrative Court in Belgium which, in turn, asked the ECJ for a preliminary ruling in accordance with Article 177 of the Treaty. In particular, the Conseil d'Etat wanted to know whether Article 52 could be directly relied upon in a national court by an individual and whether it creates rights which are enforceable in a national court. The Belgian Government argued that Article 52 could not have that effect because the article constituted "only the expression of a simple principle, the implementation of

which is necessarily subject to a set of complementary provisions, both Community and national, provided for by Articles 54 and 57."[18] However, as mentioned before, the Court held that Article 52 became directly effective at the expiry of the transitional period, even though it had not been implemented by the Community and the Member States. The Court stated:

> In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposed an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures. The fact that the progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment. This interpretation is in accordance with Article 8(7) of the Treaty, according to which the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the Common Market must be implemented. Is is not possible to invoke against such an effect the fact that the Council has failed to issue the directives provided for by Articles 54 and 57 or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by Article 52.[19]

Reyners was an ideal vehicle for the development by the ECJ of the doctrine of 'direct effect' relating to the right of establishment. Indeed, Reyners met all the conditions which the national legislation laid down for its own nationals. Even elementary fairness suggested that Reyners should not be prevented from practising his profession. Reyners, then, satisfied the requirement of paragraph 2 of Article 52 according to which "(f)reedom of establishment shall include

the right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected."

Article 58 stipulates that "(c)ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall ... be treated in the same way as natural persons who are nationals of Member States." Thus, a combined reading of Articles 52 and 58 reveals that the right of establishment benefits businesses that are incorporated in a Member State even if they are a subsidiary of, and owned by, a foreign company. These subsidiaries, provided they are formed in accordance with the law of a Member State, are treated as E.C. firms. The legislation of some Member States involving the privilege of setting up a subsidiary encourages foreign investment by medium-sized companies. At times, a State may even dispense aid in one form or the other. These aid schemes, while ostensibly falling under Article 92(1) of the Treaty which prohibits aid, are usually condoned by the Commission on the ground that they contribute to economic growth and employment creation "as well as performing an essential role in the maintenance of effective competition and in the balanced social and economic development of the regions."[20] These subsidiaries, since they are to be treated as E.C. firms, cannot, since the expiry of the transitional period, be discriminated against on grounds of nationality.

But, if they want to relocate or establish themselves in another Member State, they would still have to satisfy local requirements laid down by the host country. The 1992 project aims at harmonizing all these conditions throughout the Community or replacing them with E.C.-wide rules. Thus, a foreign company that is able to establish itself in a Member State before 31 December 1992 will after that date automatically have access to the enlarged market of 321 million consumers in twelve Member States. If these foreign companies wait until after 1992 to seek access to the E.C., they would presumably have to meet the new EC-wide conditions, the adoption of which is, at present, being considered by the Council. Some of these new rules, as mentioned before, endorse the principle of reciprocity. If the post-1992 conditions for establishment in the Community are cumbersome, Australian companies wishing to establish a subsidiary in the E.C. may have fewer opportunities than at present to break into the lucrative E.C. market. In contrast, Australian companies that are now able to establish a European presence by the expedient of incorporating a subsidiary in a Member State in accordance with the law of that Member State, will enjoy the considerable benefits of a single market after 1992.

4. The Right of Establishment of Lawyers

Article 52, as seen before, primarily aims at facilitating the establishment of professionals in a Member State other than the one of which they are a citizen. The

implementation of the right to establishment has been accelerated in the 1970's due to a number of ECJ decisions in which the Court declared the right of establishment to be directly effective even though the implementing measures had not been taken by the Member States and the Community. It is not the purpose of this paper to comprehensively discuss the expansive case law on this issue. But I propose to convey some of its flavour by discussing an issue that concerns us all, namely the establishment of law firms within the Community.

At the outset, for reasons of intellectual clarity, a distinction must be made between establishment, on the one hand, and the provision of services, on the other. The freedom to provide services in the E.C. is provided for in the first paragraph of Article 59 according to which "restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." The ECJ held in Van Binshergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid[21] that Article 59 is directly effective from the expiry of the transitional period although implementing measures had not been taken. The Council adopted on 22 March 1977 a Directive to facilitate the effective exercise by lawyers of freedom to provide services.[22] The Directive regulates the provision of services in one Member State by a lawyer who is

permanently established in another State. It distinguishes between 'reserved activities', namely those which involve representation in legal proceedings or before public authorities, on the one hand, and the provision of consultancy services, on the other. According to Article 4 "(a)ctivities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State." For the pursuit of reserved activities relating to the representation of a client in legal proceedings, a Member State may require lawyers to be introduced "to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State"[23] and to work in conjunction with a lawyer who practices before the judicial authority in question. The ECJ recently declared invalid a provision of a German law which required a lawyer from another Member State appearing in a German Court always to act in cooperation with a German attorney.[24]

The second paragraph of article 59 provides that the "Council may, acting by a qualified majority on a proposal from the Commission," extend the right to provide services to nationals of a third, non-EC country, who provide services and who are already established in the Community. Thus, an Australian lawyer who, in accordance with the national legislation of a Member State is successful in

establishing himself in the E.C., could be allowed to provide services to a client in another E.C. Member State.

But the right of a practicing lawyer to provide services to a client residing in another Member State is not the main issue. A perfunctory review of the jurisprudence of the ECJ indicates that the main issue involves the right of establishment. The interest in this issue is fuelled by the stated ambition of an increasing number of continental law firms to establish themselves in the United Kingdom. International law firms too are seeking opportunities to merge with an E.C. company. The Reyners case, as mentioned before, reveals that, in the absence of an E.C. establishment directive, a non-national who wishes to establish himself in another EC Member State must take up employment under the conditions laid down for its own nationals by the law of the host country. Hence, all Community practising lawyers have a directly enforceable right under the E.C. Treaty to establish themselves as practitioners in any Member State provided they are able to satisfy the, at times, stringent national legislative measures or professional rules which equally apply to nationals and non-nationals alike. The ECJ has been called upon to interpret article 52 in relation to the legal profession. In 1983, in the case of Ordre des Avocats au Barreau de Paris v. Klopp,[25] the ECJ decided that article 52 prevents "the competent authorities of any member-State from refusing, in accordance with their national legislation and the professional codes of behaviour ruling there, a national

of another member-State the right to join and to practise the profession of advocate merely because he at the same time maintains chambers in another member-State."[26] Klopp, who was established in the Federal Republic of Germany "applied to be allowed to take the advocate's oath and to be registered on the in-service training list of the Paris Bar, while remaining a member of the Düsseldorf Bar and keeping his home and office in that city."[27] His application was rejected on the ground that the applicant "while satisfying all the other conditions for becoming an advocate, particularly with regard to the personal and formal qualifications required, did not meet the requirements of ... Rule 1 of the Rules of the Paris Bar, which provide that an advocate can maintain chambers in one place only, which is in the territorial jurisdiction of the Tribunal de Grande Instance with which he is registered."[28] The Paris Bar argued that its rule is justified "by the need for the advocate actually to practise within the jurisdiction of a certain court so that both the court and his clients can have ready access to him."[29] But the Court replied to this predictable, but ultimately specious objection, that "modern means of transport and telecommunications make it possible to maintain the appropriate contact with the judicial authorities and clients."[30]

The Paris Bar Council has been a prolific litigator in the Court. The ECJ had previously decided in 1977 in the case of Thieffry v. Paris Bar Council[31] that a person who had obtained recognition of his Belgian law qualification for

the purpose of admission to the Ordre des Avocats, could not be denied the right to practice because he did not have the relevant French qualification:

> In these circumstances ... when a national of one member-State desirous of exercising a professional activity such as the profession of advocate in another member-State has obtained a diploma in his country of origin which has been recognised as an equivalent qualification by the competent authority under the legislation of the country of establishment and which has thus enabled him to sit and pass the special qualifying examination for the profession in question, the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives provided for in Article 57, a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty.[32]

The Klopp and Thieffry cases are authority for the proposition that the national legislative measures imposed on applicants cannot be used as a disguised method which aims at, or has the effect of, excluding non-nationals from the profession, even if rational arguments can be advanced in favour of the implementation of these rules. The Thieffry case, especially, is interesting because, although a Member State, in the absence of E.C.-wide directives, is allowed to decide on its own educational standards, it cannot reject a person whose legal degree obtained in his country of origin is recognised as satisfying the conditions which have to be met to sit and pass the special qualifying examination for the legal profession.

The most recent judgment of the ECJ relating to the establishment of lawyers is Gullung v. Conseil de l'Ordre des Avocats.[33] In France, the establishment of an avocat is made dependent upon the applicant's admission to a Bar. The Court emphasised that such a national law or rule pursues "an objective which merits protection."[34] In particular, the obligation is "to guarantee good character and observance of the rules of professional conduct."[35] Thus, the Court decided that "member-States whose legislation imposes an obligation to become a member of a Bar on those who wish to establish themselves in their territory as avocats, within the meaning of their national legislation, may impose the same requirement on avocats from other member States who invoke the right of establishment laid down by the Treaty in order to avail themselves of the same capacity."[36] The Court did not deal with, and it specifically declined to rule on, the question whether a lawyer who is established under his home title "in another Member State where enrolment or registration with a professional body is compulsory for lawyers practising the national law of the host Member State"[37] can be required to join the Bar of another State in order to practice in that State. The Court's unwillingness to rule on this issue came as something of a relief to English solicitors practising under their home title in another Member State. It also raises the question as to whether these solicitors are already 'established' within the meaning of Article 52, thereby obviating the need to discuss the conditions under which their establishment may be effected. Fiona Gaskin, in an interesting article on the

Gullung case, argues that "the Court's judgment in relation to lawyers practising under a host title is out of line with recent developments in other fields and with the stated objectives of 1992."[38] She points to the Second Banking Directive which stipulates that branch offices will not be subject to the regulating code of a host Member but will remain subject to that in force in the Member State of the head office. She asks rhetorically why this provision cannot be applied to lawyers too.

Obstacles to the right of establishment for the self-employed arise through national legislation which applies to nationals and non-nationals alike. The Commission admitted in its White Pages that in "the field of rights of establishment ... little progress has been made" and identified the "complexities involved in the endeavour to harmonize professional qualifications"[39] as the main reason for this lack of progress. It is evident that these problems can only be alleviated if different educational systems and training laws are harmonized or, at least, mutually recognised by all E.C. Member States. As the harmonization of educational systems is an awesome, perhaps insurmountable task, the Commission announced in its White Paper a Directive on a general system of recognition of diplomas.[40] The Directive deals with most regulated professions; it has also specific provisions pertaining to the legal profession.[41] Under the establishment Directive, the host Member State may provide for an aptitude test or a compulsory adaptation period where knowledge of local law is

required. This provision can be construed as meaning that an English solicitor who establishes himself in Brussels for the purposes of practising E.E.C. law would not have to sit for an aptitude test because he would not deal with local Belgian law. But the distinction between 'local law' and 'other law' breaks down in practice because the Treaty and the regulations which are directly applicable by virtue of Article 189, are automatically part of the domestic legal system and, as such, can also be treated as being part of 'Belgian' law. It is likely that an increasing number of non-nationals will wish to establish themselves in other Member States when this Directive comes into force. Such liberalization, however, could have the effect that some Member States, trying to cope with an influx of non-national E.C. lawyers, may be tempted to introduce restrictive measures aimed at excluding lawyers from outside the Community.

5. The Free Movement of Goods

The ECJ has also taken a leading role in another essential plank of the completion of the 'internal market', namely the free movement of goods. Article 30 of the EEC Treaty stipulates that "(q)uantitative restrictions on imports and all measures having equivalent effect shall ... be prohibited between Member States." Article 30 is thus the European counterpart of section 92 of the Australian Constitution, dealing with interstate trade and commerce. The Court interpreted Article 30 in Procureur du Roi v.

Dassonville.[42] That case involved a Belgian statute which prohibited the importation and sale of spirits that bear an authorised designation of origin, unless the importer or seller possessed a certificate of origin (C.O.). The product in question was Scotch whisky. The C.O. was issued by, and only obtainable from, the British customs authorities. It emerged from the proceedings that a Belgian parallel importer, who imports whisky which is already in free circulation in France, can only obtain the document with great difficulty "unlike the importer who imports directly from the producer country."[43] Presumably, this difficulty stems from the fact that a parallel importer may find it cumbersome to obtain the relevant documents from the British customs authorities after the product had already been exported to another E.C. Member State. The Court decided that "(a)ll trading rules enacted by member-States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"[44] constitute a measure having an effect equivalent to quantitative restrictions on trade.

In Dassonville, however, the court also developed a judicial exception which became known in the relevant literature as the 'rule of reason'. The effect of this rule is that national measures which equally apply to local as well as imported products are exempted from the prohibition in Article 30, if these measures are 'reasonable' in the sense of being necessary to ensure that certain standards are maintained, values preserved and unfair practices

prevented in the general interest. This rule was further elaborated in the leading case of Rewe-Zentral AG v. Bundesmonopolverwaltung Fuer Branntwein,[45] popularly referred to as the Cassis de Dyon case. The Court said:

> Obstacles to movement within the Community resulting from 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 recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[46]

This quotation needs to be examined in more detail because, as is not unusual with statements which appear to be clear, it raises a number of issues. National laws restricting the free movement of goods, if they are to qualify under the rule of reason must be "necessary in order to satisfy mandatory requirements," in particular relating to "the protection of public health, the fairness of commercial transactions and the defence of the consumer." Thus, not all measures aimed at protecting the consumer will be exempted. Indeed, those measures which are not necessary for the achievement of that aim will not be exempted. In other words, the 'necessity' principle involves an application of the familiar principle of proportionality according to which "a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure."[47] How are we to interpret the 'necessity' requirement? Assume

that Member State A enacts a number of legislative measures prohibiting the use of flavouring additives in beer. These measures, in their totality, are deemed by State A to be necessary to protect the health of its beer drinking citizens. Also assume that Member State B equally wants to protect the health of its beer drinking citizens but decides that, in addition to laws prohibiting the use of flavouring additives, a number of other purity requirements for beer are necessary to achieve the State's aim. Obviously, both States agree that measures prohibiting the use of flavouring additives are necessary to protect the health of their citizens but these measures are not considered sufficient by Member State B. It is equally evident that the totality of measures taken by State B are more likely than the measures taken by State A to inhibit interstate trade within the Community since interstate products which do not satisfy the stringent health requirements of the former cannot be imported. In the context of this hypothetical case, it is certainly tempting to argue that the State B measures are disproportionate in the sense that they are not "strictly necessary in the public interest" to attain the purposes of the measures. If the ECJ were to give preference to national legislative measures which least inhibit interstate trade, the 'necessity' principle could easily become meaningless. Indeed, taken to its logical extreme, the application of the 'necessity' principle could lead to the conclusion that, in cases where a State does not consider it necessary at all to legislate for the protection of the health of its citizens, any relevant legislative measure taken by another State

could be interpreted as violating Article 30 of the Treaty. On this interpretation of the 'necessity' principle, a product that is legally produced and sold in one Member State, can be legally sold in another.

Subject to the validity of these arguments, the 'rule of reason' doctrine has been reduced to the simple proposition that once products have lawfully been produced and marketed in one Member State, their importation and sale in another Member cannot be prevented without contravening Article 30 of the Treaty. The 'necessity' principle is also referred to in the relevant literature as the principle of equivalence. The Court, when considering an Article 30 case, may decide that, "where the objectives and methods of achieving them are reasonably similar",[48] the national measures of two Member States are equivalent, of equal value. The set of legislative measures which impinge most on the free movement of goods will be held to violate Article 30 because these measures, by comparison to those of the other State, would not be strictly necessary for the achievement of the State's aim.

There are, of course, a number of other problems with the application of the 'necessity' or 'equivalence' principles to Article 30. For example, the application of these principles does not usually involve a scientific examination of the extent to which a set of national measures are necessary and sufficient to attain the State's aim. The question whether, and if so, to what extent, an

Article 30 judgment should depend on, and largely be determined by, scientific data must still be considered. The effect of the rigid application of the 'necessity' and 'equivalence' principles is certainly that the least (or the least cumbersome) national rules would, in the usual and simplest case, be selected as a yardstick by which to determine the extent to which a measure is 'necessary'. Thus, the 'necessity' or 'equivalence' principle, while significantly facilitating the free movement of goods within the Community has some obvious disadvantages. In particular, the principle, to the extent that it enables the Court to select national measures, which least infringe Article 30 of the Treaty, may actually undermine the achievement of the legitimate aims of other Member States that introduce protective measures.

This discussion of the 'necessity' and 'equivalence' principles is based on the assumption that the products involved are produced by E.C.-Companies, producing EEC-products. A special problem involving freedom of movement of goods is presented in the case of foreign companies which are established in the E.C. in accordance with the national law of the host country. As explained in section three of this paper, these companies, following incorporation, are treated as E.C. firms; this will enable them to relocate or establish branches in all Member States after 1992. But are products manufactured or produced by these companies necessarily EEC products? It can be reasonably assumed that the legislation of an E.C.-Member

State where incorporation is proposed, will not provide for the operation of assembly plants, also known as screwdriver companies, by a non EEC-company. Usually, that State will have detailed rules on the proportion of locally produced components in relation to the product as a whole. Can these products be freely imported into other Member States or is the equivalence principle modified with regard to these products? For example, most Member-States are limiting the importation of Japanese cars. If, however, a Japanese car manufacturer managed to incorporate a subsidiary in a Member State, should his products be considered 'EEC products'? The importance of this question is clear because, if treated as Japanese products, a Member State could presumably prevent the importation of these goods without contravening article 7 of the Treaty which prohibits discrimination on the ground of nationality. Let me illustrate this interesting issue with reference to a present dispute. Nissan cars are legally built in the United Kingdom. France has a ceiling limiting sales of Japanese cars to 3 per cent of the French Market. Products manufactured in the E.C. which do not have an 80 per cent local content are not treated by France as EEC products. In the case of Nissan, then, Nissan cars would be classified as Japanese cars, the importation of which would count towards the 3 per cent ceiling. National legislation of Member States sometimes even requires that, in addition to dealing with rules on the "proportion of locally produced components in relation to the product as a whole," the law should also seek "to ensure that the most technologically advanced components are of European origin."[49] This problem,

outlined above, suggests that after 1992, the introduction of E.C.-wide rules on what constitutes a E.C. product could reasonably be anticipated. These rules would replace the existing national restraints which, after 1992, would become unenforceable at national level. Richard Eccles recently suggested that another "possibility would be to declare simply that Member State governments' restraints on imports of Japanese products from one Member State to another should not be enforceable as between Member States."[50] In this way, he argues, "Member States seeking to operate quotas against Japanese products could only enforce them as against direct imports from Japan but not against imports of Japanese products, wherever manufactured, via other EEC countries."[51] If Eccles' suggestion is not adopted, there is no guarantee that foreign companies will have an easy ride into the E.C. after 1992, thereby reinforcing the view that the Community may become a 'Fortress Europe' upon the completion of the internal market.

The Eccles suggestion is, of course, a restatement of the equivalence principle, discussed in the context of the 'rule of reason' doctrine. The rule of reason exception to the application of Article 30 is supplemented by a statutory exception which is incorporated into Article 36. This stipulates that Article 30 "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on 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 archaeological value; or the protection of industrial and commercial property." It can be assumed that both the judicial and statutory exceptions are temporary because uniform E.C.-regulations in relation to the different grounds for exceptions will obviate the need for State-inspired prohibitions or restrictions on imports.

The enormous number of directives needed to harmonize the existing national restrictions on freedom of movement of goods, however, has precipitated the development of the principle of mutual acceptance of goods. This principle involves the recognition by Member States of "the different national standards concerned, so that goods lawfully manufactured or marketed in one Member State can be presumed to comply with the standards of other States."[52] The principle of mutual acceptance of goods is undoubtedly inspired by the equivalence principle as elaborated by the Court. It is also found in the new article 100b of the Treaty according to which the Council may decide, during 1992, that the un-harmonized provisions in force in a Member State "must be recognized as being equivalent to those applied by another Member State." This provision, then, indicates that the internal market does not presuppose the establishment of a uniform market.

The above discussion of the equivalence principle and its associated principle of mutual acceptance of goods

illustrates the interaction of the jurisprudence of the ECJ with the legislative efforts of the Community. But this interaction, as the next section indicates, is not always without its problems.

6. The Ambiguous Nature of the SEA: Some Implications for the Right of Establishment and Free Movement of Goods

An analysis of the new Article 8a reveals the existence of a great paradox that practising lawyers, wishing to advise their clients, must certainly consider in detail. Article 8a introduces a new transitional period during which freedom of movement of goods (and of persons, services and capital) shall be achieved. The Treaty, prior to its amendment by the SEA, also provided for a transitional period which ended on 31 December 1969. As seen before, the Court held on a number of occasions that Articles 30 and 52 are directly effective as from the expiry of the transitional period even if harmonization measures have not been taken. The Treaty, in the new Article 8a, has now introduced a new transitional period which is scheduled to end on 31 December 1992. Does the Community's stated objective of completing the internal market by that date effectively deprive Articles 30 and 52 of their direct effect and, therefore, can no longer be relied upon in national courts by individuals? If so, the new Treaty provisions could hinder the completion of the internal market "by weakening the principles currently applicable to free movement of goods and services, as established by the

case-law"[53] of the Court. It could be argued that, even if the case-law of the Court is thus affected, the new transitional period cannot be construed as constituting a regression because the new E.C.-wide measures, now being developed, are necessary for, and will result in, the creation of the Single Market, thereby obviating the need for litigants to rely on the doctrine of 'direct effect'. The validity of this point must, however, be questioned in view of the fact that a Declaration on Article 8a of the EEC Treaty appended to the SEA stipulates that the setting of 31 December 1992 "does not create an automatic legal effect." This Declaration implicitly raises the prospect that the internal market will not be complete by that deadline since the process of 'harmonization' is a monumental task. In addition, article 100b, in providing that the principle of equivalence may be applied by the Council during 1992, also seems to suggest that 'harmonization' may not be the magic technique for the creation of the single market. However, the claim that the new transitional period adversely affects the direct effect of Articles 30 and 52 is probably unwarranted because the completion of the internal market, according to Article 8a, is "without prejudice to the other provisions of the Treaty." These other provisions, including Articles 30 and 52, have been interpreted by the Court as being directly effective. Hence, it is reasonable to suggest that the expansive interpretation of the Treaty by the Court and the enactment of new 'harmonized' E.C.-wide measures in accordance with Article 100a are alternative and consecutive routes to the creation of the internal market. But it is

fair to say that the lack of clarity of the new provisions and their interrelationships justifies the revealing comment made by a former ECJ judge, Pierre Pescatore, who indicated that "different interpretations of the SEA may be possible and that deliberate ambiguities may have been left ... to secure overall acceptance."[54] In this context, and by way of example, it is instructive to refer to sub-section 4 of article 100a:

> If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions.

This sub-section specifically allows the Member States to derogate from the new measures not only on the grounds mentioned in Article 36 but on two new grounds which did not exist previously, namely the protection of the environment or the working environment. In addition, Article 8c provides for a general derogation on economic grounds. It is not clear whether these derogations may continue after 31 December 1992. Thus, in the light of the proceeding considerations, it is not totally preposterous to suggest that the new provisions have lost their 'bite' by providing for numerous derogations from their application. This leads to the paradoxical conclusion that the present 1992 project could be interpreted as hindering the free movement of goods and the right of establishment.

7. Conclusion

The 1992 project is often associated with progress and hope for a better world, based on a liberal world trading system. The project is a challenge to Australian lawyers who should inform themselves of the manifold issues and be prepared to give advice to their clients on the implications of a new range of laws and business opportunities. Although the 1992 project involves, and even requires, the implementation of many exciting programs, it should be realised that miracles do not happen overnight. The complexities involved in the completion of the internal market cautions against the making of over-optimistic predictions. After all: the French will always prefer wine, the Germans beer and the Italians pasta made of durum. Thus, although the rich variety of electric plugs will gradually disappear in the E.C., the desire to maintain diversity and old-fashioned nationalism will remain a potent force.

NOTES

*. Senior Lecturer in Law, University of Queensland. This is a revised version of a paper delivered at an Evening Seminar, Law Council of Australia, Public International Law Committee, on 7th July, 1989.

1. W. Forwood, "The European Community and Australia: A Natural Nexus", Monash University, 1988 Seminar Series of the Centre for European Studies, 1 June 1988, p.14.

2. Commission of the European Communities, Completing the Internal Market. White Paper from the Commission to the European Council, Luxembourg, Office for Official Publications of the European Communities, 1985.

3. Id., 9.

4. Ibid.

5. Id., 17.

6. The SEA also provides for the establishment of a European Court of First Instance. The Council, acting unanimously in accordance with article 168a established that Court by Council Decision 88/591/ECSC, EEC, Euratom, of 24 October 1986; [1989] 1 C.M.L.R. 323-336. The Court is, however, not competent "to hear and determine actions brought by Member States or by Community institutions" (Article 168a (1) EEC Treaty) or questions referred to the ECJ by national judges seeking a preliminary ruling concerning the interpretation of the EEC Treaty in accordance with article 177. The Court of First Instance will have jurisdiction in cases involving Staff of the Community and competition cases, which often involve the determination and consideration of issues of fact and law (Council Decision 88/591, Article 3(1)).

7. O.J. Jorgensen, "The Single Market: An Overview", April 1989, p.8; Supra n.1 at 19; Press and Information Service, Delegation of the Commission of the European Communities, E.C. Background Information Note 88/3, October 1988.

8. P. Cecchini, The European Challenge - 1992 : the Benefits of a Single Market, Aldershot, Gower, 1988.

9. Commission of the European Communities, Completing the Internal Market: An Area Without Internal Frontiers. The Progress Report Required by Article 8b of the Treaty (Com (88) 650), 17 November 1988, p. 1.

10. Press and Information Service, Delegation of the Commission of the European Communities, E.C. Background Information Note 88/3, October 1988, p. 3.

11. O.J. Jorgensen, "The Single Market: An Overview", April 1989, p. 13.

12. Supra n. 9 at 11.

13. Amended Proposal for a Second Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC, Brussels, 29 May 1989 (Com (89) 190).

14. G.S. Zavvos, "1992 : One Market" (March 1988), International Financial Law Review 7 at 11.

15. [1974] 2 C.M.L.R. 305.

16. Id., 327.

17. Id., 307.

18. Id., 324.

19. Id., 327.

20. E.E.C. Competition Policy in the Single Market (2nd ed.), Luxembourg, Office for Official Publications of the European Communities, 1989 at 63.

21. [1975] 1 C.M.L.R. 298.

22. Council Directive 77/249/EEC, of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

23. Council Directive 77/249/EEC, Article 5.

24. Commission v. Germany, (Case 427/85), judgment of 25 February, 1988.

25. [1985] 1 C.M.L.R. 99.

26. Id., 114.

27. Id., 110.

28. Ibid.

29. Id., 113.

30. Id., 114.

31. [1977] 2 C.M.L.R. 373.

32. Id., at 404-405.

33. [1988] 2 C.M.L.R. 57.

34. Id., 74.

35. Ibid.

36. Id., 75.

37. F. Gaskin. Freedom to Provide Legal Services : Gullung, (Clifford Chance mimeographed paper), 1988, p. 16.

38. Id., at 17.

39. Supra n. 2 at 25.

40. Supra, n. 2 at 25-26.

41. Council Directive 89/48/EEC, of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.

42. [1974] 2 C.M.L.R. 436.

43. Id., 453.

44. Id., 453-454.

45. [1979] 3 C.M.L.R. 494.

46. Id., 508-509.

47. T.C. Hartley, The Foundations of European Community Law (2nd ed.), Oxford, Clarendon Press, 1988 at 146.

48. "The Single European Act : Its Implications for the Internal Market and for the Development of the European Community", Brussels, Belmont, European Community Law Office, 1986, annex 3, p. 4.

49. R. Eccles, "When is a British Car not a British Car? - Issues Raised by Nissan" (1989) 10 European Competition Law Review 1 at 1.

50. Id., 2.

51. Ibid.

52. Supra, n. 48 at 4.

53. Supra, n. 48 at 1.

54. Supra, n. 48 at 2.