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# EDITORIAL

It is my submission that the factor which concerning 1992 is in the first place worth considering at the present time is that already more than half of the time calculated for the progressive implementation of the common market has elapsed.

In the course of its Milan session in 1985 the Conference of the heads of states and prime ministers of the Member States (*vulgo dicitur*: the summit) confirmed the proposals set down in the Commission's White Paper and in February 1986 the final text of the Single Act was signed to come into effect from the 1st of July 1987.

One must certainly not understate the positive aspects of the quasi-magical effect that the 1992 deadline has created and continues to create not only on the media and public opinion but also on the business world, immune as a rule to this sort of fascination. As a mobilising theme, as an impulse for innovation and restructuring, as a justification and sometimes as an alibi for unpopular decisions, the myth of 1992 has had a deep influence which we have every reason to be satisfied with and must congratulate those who conceived it.

The positive attitude adopted by the governments as well as the public opinion and the economic circles to this timetable is justified as it is founded on obviously more serious grounds than the incantations of the media. It corresponds with a marked advance in the process of integration resulting from the combination of the adoption by the European Council of the objectives of the White Paper and of the passing of the Single Act. Accordingly, the single market of 1992 is something different from, and more than, merely the belated implementation of the objectives that, according to Article 8 of the EEC Treaty, should have been attained by the end of the transitory period set down by the article (31 December 1969); even if some of these objectives have not yet been realised. As a matter of fact the number of Member States has gradually increased from six to twelve. This has of course complicated the issues and increased the pressure on coordination mechanisms, but

at the same time has enhanced the economic impact of each step forward actually made.

In the meantime, owing to the dynamics inherent in the integration process, sustained moreover by the general phenomenon of the internationalisation of economic relations and with the impulsion from the Community institutions, notably from the Court of Justice, the notion of Common Market has gradually acquired new features, enriched by the possibilities – both at the institutional level and at the economic and social level – that were incipient in the treaties even if they were not expressed *ipsis verbis*.

The conception of a single market, not only extends that of a common market, but also goes beyond it, aiming at the setting up of a market offering the characteristics of an inner market, i.e. an area of common and fairly shared prosperity.

If both notions put the same emphasis on the suppression of barriers to intra-community exchanges, the second insists much more vigorously on the establishing of a common system of economic and social organisation and, if necessary of regulation. The Single Act, in order to do that, puts improved tools of action at the disposal of the Institutions and the States and at the same time indicates that this action is not the ultimate end, but constitutes a step towards a European Union, intended according to the preamble of the Act, 'to transform the entire relations between the Member States'. It means that the White Paper did not want and was not able to foresee everything and that if unexpected harmonisations and coordinations are imposed by the turn of events, we should refer to the opportunities of the Single Act rather than the enumerations of the White Paper.

We have to admit, however, that these tools of action are weak, and in that respect, we think with some misgivings of the debilitating possibilities offered by a unadvisedly handled resort to the 'escape clause' of the 4th paragraph of Article 100A.

It is to be hoped that the Member States will be wise enough to resort to it only in cases of emergency and that the Commission and the Court of Justice will see to it that its use is confined within narrow and impassable limits. Moreover we cannot fail to notice that as, in no trifling number of economic and social sectors, the price to be paid for the realisation of the single market appears, oppositions are proportionally likely to harden and get organised whereas the force of the myth will pale. One must right now therefore, think of the means to counter this opposition, where possible, and to surmount it if one cannot get around it.

In mid-course, the time seems to be propitious and suitable to try and strike the balance of what has been and what is still to be achieved; to consider possible shifts in direction, methods or priorities, as well as to try and discern the conditions in which the single market will have to function according to the current evolution, both political and strategic, economic, social and technological, of the world at large. To consider as well the peculiar effects of the implementation of the single market beyond the external boundaries of the Community.

The different studies collected in the present number of *Legal Issues* have been written in that spirit and will contribute, in a noteworthy and useful way, to the establishing of that balance and to the clarification of those prospects. Let me add the pepper of a few personal reflections, furthermore widely inspired by the information and commentaries that these different contributions offer to the reader.

A first element worth recalling, it appears to me, is that if the objective 1992 is a priority, it is not the only one and does not sum up all the others contained in the treaties. The management and the implementation of the common policies, the older ones as well as those propounded and reinforced by the Single Act, whether sectorial or global, those dependent on already well integrated decisional processes and those within the mechanics of co-operation, constitute indispensable fields of action as well, which might prove disastrous to disregard.

A second element which requires consideration is apparently provided by the necessity to be forewarned against the temptation – the first inklings of which are perceptible – to dilute the pursuit of European construction into wider obviously more ambitious, and, certainly more hazardous aims, but above all if they are closely examined, far from being incompatible with the european integration, adduce arguments favouring the latter.

The world-wide unfolding of the economy, that some make use of to suggest that the Community comes too late and the recurring idea of a Europe from the Atlantic to the Ural mountains for some or of a West European Economic Space for others, belong to that kind of reflection. The article by *H. Stenberg* 'Sweden and the Internal EEC Market' echoes those concerns, and the contribution of *I. van Bael* 'Public Procurement and the Completion of the Internal Market', deals with the problem in a concrete way as regards the public market of publics works or procurement within the compass of GATT. Those ideas have the merit of drawing one's attention of the major movements of the end of this century, which square with facts and modify, through operating on the data, some of the problems of planning on a world-wide scale.

But what is essential in this movement consists of replacing the bipolar world born of the Second World War by a practicable multipolarity and we have every reason to believe that the European Community will mightily contribute to the solving of that problem and, in so far as it succeeds, that it will constitute an element of balance and peace in the world at large. This success depends on its degree of coherence, not on its dilution.

So much having been said, where do we stand? The Commission pointed out at the end of 1988 that the number of proposed general directives or other measures implied on implementing the White Paper amounted then to 279, 90% of which had been drawn up by the Commission and submitted to the Council, which passed 40% of them, *i.e.* a hundred or so. If one bears in mind the delay – between one and two years – that as a rule is granted to the Member States for them to transform the directives into their domestic law,

one realises that all the measures will have to have been decided upon by the beginning of 1992 at the latest; the agenda has to be tighter still. The Commission deems that the results achieved at the end of 1988 are satisfying on the whole but remarks that 'the progresses accomplished so far are confined to the field of technical barriers, whereas the balance concerning physical and fiscal barriers is much less satisfying'.

By the end of 1988 three fields were clearly lagging behind: the harmonisation of legislation relating to the health of animals and plants, indirect taxation and the free movement of persons, which respecting activities that are not directly economic may be resolved, as the case may be, either by intergovernmental cooperation or by the decisional mechanisms of the Treaties. An analysis of the results achieved by the Commission leads one to observe that if in the matter of free movement of goods progress is real and the main obstacles are overcome, the case is different as regards the free movement of services and capital, and particularly of financial services.

Although the Council on 22 June 1988 passed a second directive on the matter of non-life insurance, and on 24 June 1989 a second directive in the matter of banking, what is left is still formidable enough: life-insurance, financial markets, free circulation of bearer-bonds and of debentures.

Furthermore it has been noticed that the last mentioned issues for the first time compel the States to consider a harmonisation of direct national taxes in particular taxes on the returns on stocks and shares.

Let us pause and review the juridical outfit at the disposal of the Community institutions to face the difficulties of their mission.

It is more diversified than it appears at first sight. On this subject excellent information is to be found in the contribution by *R. Dehousse*. Regulations and harmonisation directives passed unanimously (Article 100A EEC) as well as harmonisation directives passed by a qualified majority (Article 100A EEC), and 'other measures' made possible by Article 100A, and the application of the principle of mutual recognition, are in turns utilised and combined either by reason of the goal to be reached or of the obstacles to be surmounted. It is worth noticing that that practice reveals thus the existence of three variations of the principle of mutual recognition which is, let it be said in passing, an invention of the Court of Justice, inaugurated in the *Cassis de Dijon* judgment, systematically pursued in the matter of free movement of goods and gradually extended to the free circulation of services, which has been taken up by the Commission on its own account in the White Paper of 1985 and incorporated in the Treaty by the Single Act.

A first variation consists, for the Council in incorporating explicitly the principle into the harmonisation directives through imposing on Member State A recognition of the national measures of control enacted by Member State B. A case in point is the control of financial institutions operating in the Community as a whole through incorporating into the directives the principle of 'home country control'. Mutual recognition constitutes in such a case a form of harmonisation. In the article by *R. Smits* 'Banking Regulation in a European Perspective', there is an excellent commentary on that prin-

ciple which is likewise incorporated in the Directive of 22 June 1988 dealing with non-life insurance.

A second variation is the one provided for in Article 100B of the EEC Treaty as modified by the Single Act. In that case mutual recognition palliates the lack of harmonisation. In the course of the year 1992 a survey of the national regulations not yet harmonised, is to be initiated, and the Council will be entitled by a qualified majority to decide that the regulations enforced in a Member State must be recognised as being equivalent to these operative in another Member State. Let us add that, in our opinion, a reasonable and justifiable interpretation of Article 100B which would allow a separate reading of the two sentences of the provision, would render possible from now on a recourse to that method.

The third variation is of a jurisdictional nature. The Single Act did not delay, moreover it could not restrict the competence of the Court to interpret the provisions of the Treaties relating to the prohibition of national measures constituting restrictions incompatible with the fundamental provisions connected with the free circulation of goods, workers, services, and the freedom of establishment.

The Court therefore is fully entitled to pursue, especially in the field of freedom of provision of services, the line of thought inaugurated by *Cassis de Dijon*, but obviously it can only do it if an application has been made by the national courts for a preliminary ruling on interpretation.

'Mutual recognition' has its shortcomings too. One has to bear in mind that harmonisation or approximation of laws does not aim solely at ensuring free movement, but can also be used as an instrument of positive economic co-ordination capable of procuring economies of scale and of constituting the means of attaining macro-economic objectives such as a European policy of credit control.

But it is not enough to establish an internal market; it has to be set in motion in keeping with an expanding market, *i.e.* that increases prosperity and creates employment. It won't be done 'automatically', not even under the exclusive agency of the market's 'invisible hand'.

A critical analysis of the conditions necessary for the market to run well provides one with a theme for varied reflections.

One of the first observations to be made on this subject, is that the legal instruments put at the disposal of the institutions will have to be used still further after 1992. The Single Act is a continuous creation and not a static state and the instruments of its management as well as of its social and economical machinery will have to be constantly kept up to date, eventually directed towards new objectives or modified ones, or objectives extended to new fields when the necessity for new co-ordination adjustments to the mechanisms of the market appears.

But that won't be enough. Public attention is rightly and insistently attracted to the problems of adaptation arising from the implementation of the single market, which undertakings and Member States will be compelled to face.

The setting up of a great market will be attended by the transfer of economic activities, not only in the field of the production of goods but also in that of the production of services which moreover corresponds to the objective of optimum allocation. But optimum location for some, means de-location for others, especially to the detriment either of less favoured territorial areas or weaker economic structures – which does not necessarily mean superfluous – with the attendant train of problems, loss of employment, deindustrialisation, impoverishment and even depopulation entailed by it.

The considerable widening of the market may well create new opportunities by its own dynamism even for the most disadvantaged ones, but these opportunities will only be caught and exploited if meanwhile the market gradually opens, a series of accompanying measures are firstly adopted and then maintained, in order to facilitate on one hand desirable or inevitable reallocations of economic activities, notably by making them bearable, and on the other hand the reconversion of the areas affected by those phenomenons.

Besides these accompanying measures of a social kind of aiming at the renovation of the economic fabric, the necessity of other accompanying measures or more precisely of perfecting the economic dimension appeared with an urgency the White Paper had not expected, but which the Single Act mentions especially in the fiscal and monetary field and which the European Council has rightly stressed in its meeting in Rhodes the 2nd and 3rd of December 1988.

The first two categories of measures (social accompaniment and industrial reconversion) belong to the objective of economic and social cohesion expressly mentioned by the Article 23 of the Single Act (now Article 130A to 130E EEC), but also already formulated in 1957 in the Rome Treaty's Preambule which refers to the need of reducing the imbalances between the various regions and the backwardness of the least favoured ones. This will be the primordial objective of the regional policy, to be led with increased means but which still remain too modest in view of the extent of the task.

But the help given by a policy of economic and social coherence to the functioning of the single market is not limited to regional policy.

Article 21 of the Single Act (Article 118A EEC) aims expressly at the harmonisation of conditions protecting the security and health of workers, whereas Article 22 (Article 118B EEC) suggests the setting-up of collective conventions at a European level.

It should not be forgotten that in the single market the pressure of competition will also have effects upon the costs of labour and will put the states with high direct (salaries) or indirect (social security) labour costs in a defensive position, especially when the modest rate of labour costs appears to be one of the assets of the less-privileged regions. In order to avoid a levelling towards the least protected level, the Belgian Prime Minister W. Martens has stressed at the Summit of the 2nd and 3rd of December 1988 in Rhodes, the economic and social necessity of common social security funds which could be partially financed by the Community.

Some of the complex problems arising from the implementation of a community social cohesion have been revealed in a study of the Commission

which is not yet published but of which some extracts have appeared in the press. If the Community can be estimated to give 25% of its IGP (internal gross profit) to social care, this average, however, covers important disparities, national (Netherlands 32% and Portugal 13,4%) as well as sectoral (Pensions 44,3%, Health 37,5%, Families 7,7%, Unemployment 7,4%), or both (Spain gives 16% of social benefits to unemployment, whereas Luxemburg can do with 1%). The financing, shared between public authorities, undertakings and benefactors, is just as disparate: a state's participation varies from 99% in Denmark to 27,8% in France. In spite of their complexity, the problems linked to social and economic coherence, that is to say solidarity, cannot be avoided.

It cannot be thought that a single market left to what has been called economic darwinism could be viable, nor that faith in the 'winners time' solves all the problems by itself. If the system of 'workable competition' would turn into total war, the Member States could not remain indefinitely indifferent, and one can confidently believe that the model of 'soziale-marktwirtschaft', adapted to single market dimensions and technological progress, will recover the prestige affected by a decade of justified reactions against the excesses of state's interventionism.

The second package of measures concerning the functioning of the single market concerns the fiscal area. The White Paper took issue with VAT and excise duties but since then it appeared impossible to avoid some degree of harmonisation of certain direct taxes, in particular taxes on the income of some transferable securities.

In a market where they circulate freely, differences in the taxation of the income of transferable securities and especially of bearer bonds, according to where this income is paid would lead to an enormous concentration of financial services in the financially most favourable places.

This must be avoided because erratic movements of capital, which now represents fifteen times what is necessary to supply world trade, constitute a permanent element of financial and economic instability, not to mention that competition between Member States in this field would deprive them of a fair and economically justified budgetary resource.

This being said, it cannot be concealed that harmonisation is going to bring certain Member States into serious troubles, particularly Luxemburg, which cannot be simply held up to public obloquy but for which an acceptable solution must be implemented.

Finally, last but not least, the single market needs a monetary escort, without which movements of currencies and capital would quickly turn out to be unbearable for certain Member States and not necessarily the same ones. The system of monetary compensatory amounts has sufficiently showed how variations of exchange rates disturb exchanges.

The phenomenons which have affected agricultural exchanges might occur with the whole of exchange if a sufficient monetary discipline is not implemented, and of which the three major elements are: sufficiently fixed intracommunity exchange rates, a solidarity mechanism and, finally, an instrument which will ensure sufficient coordination of national budgetary

policies. Indeed such coordination is the necessary counterpart of solidarity without which such coordination would prove intolerable.

On this point, the EMS offers a solid basis to be applied to all the Member States and to be strengthened by a progressive reducing of difference margins, accompanied by a valorisation of the ECU as an instrument for private and public investments, all being administered by a common financial body.

Despite being attractive and having a symbolic value, a single currency does not seem to be so urgent. The most difficult problem, which is also politically and psychologically the most sensitive one, will certainly be that of a sufficient coordination of national budgetary policies. The size of the Community budget as such is simply not sufficient to have that serve as the instrument of monetary policy. Indeed, whereas in Federal States the federal budget amounts to some 30 to 50% of the grand total, this percentage for the Community does not go beyond some 4% and will not grow substantially. Hence the need for at least a minimum of coordination of national budgetary policies. This is certainly not meant as a way of subjecting national sovereignties, but rather aims at creating warning mechanisms which will, where necessary, allow the isolation of 'fire centers'. Furthermore this coordinated monetary policy is an essential part of the necessary lay-out of the already mentioned external position of the Community.

It could be possible to extrapolate further about the working conditions of the single market: its position towards developing countries, implementation of multipolarity, cultural and sociological consequences, human relations, as a social model, etc.

But what has been mentioned seems to me sufficient to show that the immediate task is enormous. Enormous but possible if the will to profit in common from the advantages of the common market is indissolubly linked with the will to accept its costs and to make sure that these costs are equally shared, outside the common market as well.