This is my final editorial after three years as Editor. I know in handing over to Jonathan Foster you will be in sound and safe hands. Jonathan, a barrister with Lloyd's Legal Department and both a Committee Member of BILA as well as serving on the Editorial Committee of the Journal, is well equipped for the task and I wish him well. My grateful thanks are due to fellow members of the Editorial Committee on which I hope to continue to serve. Lastly to all our regular contributors in specialist areas, Mark Dawbarn, Roger Doulton, Tony O'Dowd, Tim Scorer, John Goodwin, Nick Stanbury and Edward Wright and many others, a number from overseas, who have been persuaded to write articles, for no financial reward, my most sincere and grateful thanks. To Vice President Gordon Shaw whose command of the English language has helped to correct typing and grammatical errors and to the other Gordon, Gordon Cornish, whose liaison with the printers and in recent times his help and advice as Chairman of BILA, a very special thank you.

To the Journal and BILA every possible success in the future.

DEREK COLE.

CHAIRMAN'S LUNCH
Tuesday, 13th June 1989
"1992 and the Insurance Industry"
by Mr. T.J. Palmer, Group Chief Executive, Legal and General Group plc

Thank you, Mr. Chairman, for the generous introduction and for giving me the opportunity to address the association today. Representing, as I do, a company which was founded by six lawyers in 1836, I have a high opinion of the Legal profession.

Someone who did not was Ulysses S. Grant, the hero of the American Civil War. Undistinguished and often shabby in appearance, the future President Grant did not commend himself to strangers by his looks. He once entered an inn in Illinois on a stormy winter's night. A number of lawyers, in town for a court session, were clustered around the fire. One looked up as Grant appeared and said,"Here's a stranger, gentlemen, and by the looks of him he's travelled through hell himself to get here'. "That's right" said Grant cheerfully. "And how did you find things down there?"
"Just like here," replied Grant, "Lawyers all closest to the fire".

I am pleased to see so many of my colleagues here today from both Legal & General and Victory - they're all close to the fire too. This is, I believe, the first time in the history of the Association, that we've ever taken a full table at this lunch. I'm not sure why so may of my colleagues have decided to be here today - but I hope that they will learn something to their advantage!

I have chosen today to talk about 1992 and the insurance industry because the single market is something that will have a profound effect on us all, on lawyers just as much as chief executives. And, whether we like it or not, 1992 is just around the corner, so we all need to become familiar with its implications.

In a world in which competitive activity is becoming steadily more global in character, I find myself attracted by the prospect of a strong European-wide insurance industry, able to compete successfully on a world scale with American and Japanese insurers. It seems to me that this is a powerfully persuasive argument in favour of the European concept.

My vision of the single market is one where an insurance company can distribute its products throughout the twelve member states from the one manufacturing base. Access to a market of 350 million people, significantly in excess of that of the United States, will give European insurers the opportunity to become world class players.

However, a true single market will take time to evolve. In this sense "1992" is a concept not a date. It is unlikely that a common market in financial services will be in place until long after Europe is officially "open for business".

The creation of a single market is dependent upon a number of factors. These factors fall into four groups:

- Monetary
- Fiscal
- Supervisory, and
- Cultural.

The financial services industry cannot make the most of 1992 without monetary union. This is not a call for the United States of Europe, just a statement of fact. Until Europe has a common currency, it will be virtually impossible to market products cross-border, particularly long-term investment products, since either manufacturers

or customers will face unacceptable currency risks. Companies will also have the administrative hassle of dealing with constantly changing exchange rates for perhaps hundreds of thousands of individual policies.

Full monetary union would solve this. But, we have to be realistic and recognise that a common currency is a long way off. While full membership of the European Monetary System would be an important first step on the road to monetary union, there are many factors which impact on any country's degree of comfort once inside the EMS. In particular full membership means that national interest rates will be dictated by the need to keep currencies in line with each other, rather than by domestic considerations.

Even if the doubts which the UK government expresses about joining the exchange rate mechanism of the EMS are soon resolved (which I don't think is very likely), I think it will be a long time before cross-border transactions become commonplace in the personal sector. Can we really envisage a situation where someone buys a £70,000 house in this country with a Dutch mortgage for 250,000 guilders, backed by an Italian endowment policy for 160 million lira. I can't!

Fiscal harmonisation is a key issue at both the corporate and personal level. Now, although income tax has made more liars out of people than fishing or golf, it is comparatively simple. However, the different ways in which *insurance* companies' profits are taxed in the twelve member states are even more of a problem than the considerable differences that exist in the *rates* of corporation tax.

For example, the British formula for the taxation of life assurance of income plus gains less expenses is more or less unique in the Community.

On the non-life side, the tax regimes of many member states give their insurers a significant advantage over UK companies, in particular by allowing the use of claims equalisation reserves. I must stress that this is not simply a point of academic interest, or just a desire to maximise profit for the sake of profit. Companies which pay less tax on their earnings can afford to invest more in their businesses. Insurers in, for example, Germany, can use the relatively favourable tax treatment that they enjoy to build up their reserves at a faster rate than their UK competitors, thus allowing them to expand capacity more quickly.

In the area of life assurance and other investment products, the way each country taxes the proceeds of policies and savings contracts is highly relevant. If the twelve member states continue to maintain different tax regimes in the personal sector, the providers of investment products will be unable to market a common product range

throughout the Community. Instead companies will have to offer a different set of products in each national market, tailored to the particular idiosyncrasies of each fiscal system and that's not what 1992 is all about.

The problems that are posed by the existence of separate regulatory regimes in the twelve member states will be of particular interest to this audience. It seems to me that if Europe's insurance industries are run according to different rules, competition between them cannot be free and fair. The chances are that some supervisory authorities will be less stringent than others. It follows that firms which operate from member states whose regulations are relatively light will enjoy an advantage over the rest of us. I think it goes without saying that in the wake of the Financial Services Act, the rules that we have to play by in the UK could not be described as "light". In terms of freedom to conduct one's business, the F.S.A. has done for our insurance industry what Long John Silver did for figure skating!

The springboard for 1992 was the White Paper on the Internal Market which the Commission published in 1985. This provided for the completion of the single market in financial services on the basis of home country supervision. This means that once an insurer is established in one member state it need not seek authorisation in the other member states in which it wants to operate. So Legal & General, for example, would be able to sell policies throughout the Community on the basis of its home authorisation by the DTI, without the need to comply with the requirements of host regulators in the rest of Europe.

Unfortunately this very laudable aim was compromised by a decision of the European Court of Justice in 1986. The Court decided that in the personal sector of the insurance market at least, a much more far-reaching harmonisation might be necessary across the Community on the grounds of consumer protection. Their argument was that consumers needed the extra protection of host country regulation against products from countries whose rules were less stringent than their own.

The Commission believes that the way forward on this issue is for the principle of home authorisation to be combined with community-wide minimum standards. This may sound fine to the bureaucrats, but speaking as one who has to make sure that the insurance industry can still function, I have reservations. The problem with this approach is that these minimum standards would have to be set by another regulatory body, which would, of course, be the Commission. So we would face the possibility of an additional and unwelcome supervisory tier for the insurance industry, with the super-regulator - the regulator's regulator - 400 miles away in Brussels. Insurance lawyers who enjoy travelling might not be too sorry about this! But, speaking for

Legal & General, I'm not sure that we could afford Gordon Cornish's hotel bills and air fares!

Home country regulation applies essentially to solvency supervision. Host country control will continue to apply in respect of marketing regulations - so every company selling in a particular market will be governed by the same marketing controls. On balance this has to be a good thing, at least for the time being. If home country marketing regulations applied we would face the prospect of foreign insurers selling their policies in the UK according to the rules laid down by their own regulators, while we would have to play by the rules of SIB. Not an inviting prospect, you will agree.

In the long run the Commission would like to see the principle of home country supervision extended to the marketing of products as well, backed up by minimum Community-wide standards. I am sure that this approach is the right one, but I am equally sure that it will be a long time before such a measure can be put into place. It makes sense to think in terms of common marketing regulations eventually. Otherwise firms who wish to make the most of the single market by selling their products cross-border will have to contend with twelve different sets of regulations. This is not a situation that will be beneficial to insurance companies' customers or their compliance officers.

Early harmonisation of marketing regulations would not be welcome, however, since the likelihood is that the Commission would seek to apply the most stringent rules that currently exist in Europe, not the most sensible ones.

The implementation of the UCITS directive in October of this year is likely to highlight the compliance problems that insurers will face when transacting business cross-border. The UCITS directive will allow unit trusts and other open-ended funds that comply with its provisions to be freely sold throughout the Community, subject only to the marketing controls that apply in each market. A number of UK investment houses are reportedly planning to market UCITS throughout the Community. It will be interesting to see what compliance pitfalls they encounter there.

I know that Lord Goodman said that one of the basic freedoms of the Englishman is the freedom from culture, but the last factor that I mentioned at the beginning of my talk was culture. However, no matter what the Commission achieves in providing the right regulatory framework for harmonisation, and in persuading national governments to support monetary union and fiscal harmonisation, the real pace of change will be dictated by the cultural barriers to a common market. It is all too easy to think

of language as the only problem in this respect. I would argue, however, that language is the least of the cultural obstacles to 1992. After all, languages can be learned. It's much more difficult to understand and appreciate a nation's heritage and background. Companies which want to make the most of the single market will have to understand this and accept the challenge of persuading customers to abandon established national brands and to "think European" in their buying behaviour.

One of the great truisms of the insurance business is that insurance is sold and not bought. No one will be able to make a success of the single market without adequate distribution channels. The UK is more or less alone in having, in the independent intermediary sector, a channel of distribution that can be immediately used by new entrants to the market. In the rest of Europe a market position has to be carefully built by securing tied agents, developing direct sales forces, or by entering into distribution agreements with the banks.

Because UK insurers have enjoyed free competition for so long, our marketing skill and flair should give us an advantage in Europe. Not only do we have competitive products, we also have some well-known brands. Over the past 15 years or so the UK insurance industry has come to recognise the value of brand management, and has invested heavily in advertising in order to build brand awareness. One suspects that this is an area in which the rest of Europe lags behind.

However, if we are to succeed in Europe we must take our marketing skills and apply them in markets that have a different cultural mix to our own. This won't be easy!

One of the things that 1992 *will* achieve is a common recognition of professional qualifications across the Community. So a British lawyer will be able to practise in, let us say, Belgium, while a Greek actuary will be recognised in the UK - I'm not sure what they think about this in Staple Inn! This all sounds very good, but one wonders to what extent professional qualification can in practice be exported. Even if a UK compliance officer can speak French fluently, will he be able to deal with the compliance problems of a UK company's French operation as well as a French lawyer could? Can an English lawyer used to our adversarial system adapt easily to the Continental inquisitorial system? I am sure that legal officers will relish the challenge of the single market, but the cultural barriers that divide Europe will make it very difficult for the professional expertise gained in one market to be successfully applied in another.

From what I have said it is clear that the barriers to a single market in financial services are formidable. It will be no easier to sell in Europe on the 1st January 1993 than it is

now. However, unless something happens to reverse the European process, a true single market will eventually emerge.

I believe that the sooner we have a single market for financial services, the better. Europe's insurance companies need the wider opportunities that the single market will bring in order to match the resources that our global competitors enjoy. If we fail to meet the challenge, we may wake up one morning to find that the leaders of the European insurance industry are indeed talking in a common language - [pause] Japanese. Thank you.

WRONGFUL TRADING - NO LONGER JUST A CONCEPT
by N.H. Stanbury, F.C.A., Director, Directors and Officers Ltd.

Prior to the passing of the Companies Act 1985 and the Insolvency Act 1985, a director's primary duty was only to his company, as was well-established in common law and confirmed in *Multinational Gas Petrochemical Co. - v -Multinational Gas & Petrochemical Services Ltd. and Others* [1983] Ch. 258. However, S.309, Companies Act 1985 extended the duty to consider the interests of employees and S.15 Insolvency Act 1985 required the director to minimise the potential loss to his company's creditors by refraining from "wrongful trading".

The wrongful trading provisions are now contained in S.214, Insolvency Act 1986 and permit the liquidator of an insolvent company to seek (on behalf of the creditors) a personal contribution from any director who".... knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation ...."and who failed to take".... every step with a view to minimising the potential loss to the company's creditors as .... he ought to have taken ...." having regard to ".... the general knowledge, skill and experience ...."that he had or should reasonably be expected to have had. It should be noted that: (a) any director, including a shadow director (who may be e.g. a parent company) who participated in the alleged wrongful trading is vulnerable, even if this occurred several years before the liquidation (provided that it was after 28th April 1986); (b) the contribution sought is towards the deficiency of assets in the liquidation and the amount (if any) declared by the court as the liability of each individual director is a matter for the court's discretion.

The wrongful trading provisions should be distinguished from those that can be applied (under S.213) if fraudulent trading has occurred, although the sanctions and procedures are very similar. Fraudulent trading has always been recognised by the