Current Developments

RECENT LEGAL DEVELOPMENTS OF THE EUROPEAN COMMUNITY*

This article highlights the major developments in the law of the European Community (EC) during 1993. Of primary importance were the coming into force of the Treaty on European Union (Maastricht Treaty)[1] and the expansion of the common market through the passage of the European Economic Area (EEA) Agreement.[2] The effects of these developments are examined in Parts I and II respectively. The remainder of the article considers developments in the areas of competition, banking and financial services, public procurement, energy, environment, labor, transport, and intellectual property.

I. THE MAASTRICHT TREATY

A. The Coming into Force of the Maastricht Treaty

The Maastricht Treaty came into force on November 1, 1993.[3] The final two obstacles to ratification of the Maastricht Treaty were overcome when Danish voters voted in favor of the Treaty, thereby

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1. TREATY ON EUROPEAN UNION [EU TREATY].

2. Agreement on the European Economic Area, May 2, 1992, Part IV, Office of Official Publications for the European Community (1992) [hereinafter EEA AGREEMENT].

3. *EC: Declaration on the Entry Into Force of the Treaty On European Union*, Agence Europe, Oct. 31, 1993, *available in* LEXIS, World Library, TXTWE File.

overturning the narrow rejection of the Treaty in a 1992 referendum,[4] and when the German Federal Constitutional Court dismissed a challenge to the validity of the Treaty under German law.[5] The Treaty does not replace the three founding European Treaties,[6] but rather amends part of these treaties and adds a new dimension: the European Union.[7]

B. Name Changes Introduced After Passage of the Maastricht Treaty

The Maastricht Treaty changes the European Economic Community Treaty (EC Treaty) to refer to the community as the "European Community" rather than the "European Economic Community."[8] In practice the shorter appellation has been used since 1986, when the Single European Act[9] introduced new competences which were not purely economic in nature. However, the term "European Union" (EU) was also introduced by the Maastricht Treaty,[10] and it applies in the context of the new common policies introduced by the Treaty. This means that the term "EC" remains valid in most areas previously covered by the Treaties, because the term "EU" is only used in the context of the new common policies.[11]

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4. *See Maastricht Referendum; Danish 'Yes' Vote Reinvigorates Community, Though Economic and Social Problems Linger*, Eurowatch, May 31, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

5. *See EMU: Member States Re-Emphasize Their Allegiance*, European Report, Oct. 13, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

6. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EC TREATY]; TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY.

7. *The Maastricht Treaty at a Glance*, Reuter European Business Report, Oct. 28, 1993, *available in* LEXIS, World Library, ALLWLD File.

8. EU TREATY, tit. II, art. G(A)(1).

9. Single European Act, 1987 O.J. (L 169) 1 (as corrected in 1987 O.J. (L 304) 46).

10. EU TREATY, tit. I, art. A.

11. It is therefore proper to refer to the "EC" in the areas of: competition; company law; environment; banking; insurance; and, generally, to the freedom of establishment and to provide services. However, every person holding the nationality of an EC member state is now referred to as "a citizen of the Union." *See* EU TREATY art. 8. The term "EU" should be used in the context of the EU Treaty provisions on common foreign and security policy, and cooperation in the fields of justice and home affairs. EU TREATY, tits. V, VI. This latter category includes: asylum policy; rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combating drug addiction, in so far as this is not covered by other provisions; combating fraud on an international scale, in so far as this is not covered by other provisions; judicial cooperation in both civil and criminal matters; customs cooperation; police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other

Both the "Council of the European Economic Community" and the "Commission of the European Communities" have changed their official names. They are now called, respectively, the "Council of the European Union" (Council),[12] and the "European Commission" (Commission).[13] The European Parliament will not change its name.[14]

C. Court of First Instance

In June 1993, the Council of Ministers agreed to extend the jurisdiction of the Court of First Instance (CFI) to all direct actions brought by private parties against Community institutions.[15] This extension of jurisdiction became effective in September 1993, and since then the European Court of Justice (ECJ) has transferred about 450 individual cases to the CFI. The CFI's new case load includes judicial review and damages claims in environmental and consumer policy, state aid, external trade relations, and employment cases involving EU institutions. The ECJ will now operate as the appeals court on legal issues for all cases transferred to the CFI.[16]

D. New EU Member States

Although the EU currently consists of only 12 member states, several countries are vying for membership. The most likely candidates for joining the EU are Austria, Finland, Norway, and Sweden. On March 30, 1994, the negotiations on the accession of these four countries were officially concluded.[17] The European Parliament ratification is the next step; if this is completed in May 1994, the four new member states could join the EU on January 1, 1995.[18]

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serious forms of international crime.

12. *See New Name for European Community Institutions,* European Insight, Nov. 19, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

13. *Id.*

14. *Id.*

15. *See 1669th Council Meeting—General Affairs—Political Co-Operation — Luxembourg, 7, 8 and 9 June 1993,* RAPID, June 9, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File; Council Decision of 8 June 1993 Amending Council Decision 88/591/ECSC, EEC, Euratom, Establishing a Court of First Instance of the European Communities, 1993 O.J. (L 144) 21.

16. *See New Responsibilities Possible For The Community's Lower Court,* Eurowatch, May 29, 1992, *available in* LEXIS, Eurcom Library, ECNEWS File.

17. *EU: Negotiations on Accession of New Members are Officially Concluded,* Agence Europe, March 31, 1994, *available in* LEXIS, World Library, ALLWLD File.

18. *Id.*

II. EUROPEAN ECONOMIC AREA

A. Main Objective

The main objective of the EEA, which came into effect on January 1, 1993,[19] is to extend to the European Free Trade Area (EFTA) countries—with the exception of Switzerland and Liechtenstein—the essential rules on which the European Union is based. The EEA Agreement extends the following to EFTA countries: (1) the four freedoms of the EU (free movement of workers, capital, goods, and services); (2) the EC competition rules; (3) "horizontal policies" on the environment, social policy, consumer protection, statistics, and company law; (4) EU programs such as ERASMUS and Esprit.[20] This extension of EU law creates the largest integrated market in the world.[21]

Not all EC policies are covered by the EEA Agreement; there are several notable exceptions. The EEA is not a customs union like the EC, but a free trade area. Thus contracting parties retain their individual policies regarding third countries. The EEA will not be a frontier-free market, and border controls will remain between the EEA and EU countries. The EEA Agreement does not include participation in either the European Monetary System or the European Monetary Union. In addition, the EEA Agreement does not cover EC common policies on agriculture, fisheries, or transport, but special arrangements for these areas are established in bilateral agreements which entered into force simultaneously with the EEA Agreement.[22]

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19. *EC: Entry into Force of European Economic Area Gives Birth to the World's Largest Integrated Economic Zone*, Agence Europe, Dec. 31, 1993, *available in* LEXIS, World Library, TXTWE File.

20. The ERASMUS (European Community Action Scheme for the Mobility of University Students) and Esprit (European strategic program for research and development in information technologies) programs facilitate the sharing of research and development in information technologies among the member states. *See* Council Decision 88/279 of 11 April 1988 on the European Strategic Programme for Research and Development in Information Technologies [Esprit], 1988 O.J. (L 118) 32; Council Decision 87/327 of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students [ERASMUS], 1987 O.J. (L 166) 20.

21. *EC: Entry into Force of European Economic Area Gives Birth to the World's Largest Integrated Economic Zone, supra* note 19.

22. *The Agreement on the European Economic Area Comes into Force on 1 January*, RAPID, January 3, 1994, *available in* LEXIS, Eurcom Library, ECNEWS File.

B. New EEA Institutions

The implementation and development of the EEA Agreement will be monitored by four new institutions.

1. *The EEA Council.* The EEA Council consists of the members of the Council of the European Union, members of the European Commission, and one member from the government of each of the EFTA states.[23] The EEA Council, which is required to meet at least twice a year, is responsible for providing the political impetus for the implementation and amendment of the EEA.[24]

2. *The EEA Joint Committee.* The Committee, which must meet at least once a month, consists of representatives of the EU and EFTA member states.[25] Its main task is to make all formal decisions regarding the implementation and the operation of the EEA Agreement.[26]

3. *The EFTA Surveillance Authority (ESA).* The ESA, headquartered in Brussels, has powers and functions similar to those of the European Commission.[27] In the field of competition, the ESA investigates complaints and breaches of EEA competition rules and may impose sanctions.[28] The EEA Agreement provides for the distribution of competences between the ESA and the European Commission.[29] The ESA may bring an action against an EFTA State before the EFTA Court in the same way that the European Commission may bring an action against an EU member state before the ECJ.[30] However, unlike the European Commission, the ESA will play no role in the legislative process.

4. *The EFTA Court.* The EFTA Court, located in Geneva, has been granted jurisdiction in the following areas: (1) infringement proceedings initiated by the ESA against an EFTA state; (2) advisory opinions (equivalent to the ECJ's "preliminary rulings") requested by

23. EEA AGREEMENT, *supra* note 2, part VII, ch. 1, sec. 1, art. 90(1).
24. *Id.* art. 89(1).
25. *Id.* sec. 2, art. 92(2).
26. *Id.* art. (92)(1).
27. *Id.* ch. 3, sec. 2, art. 108(1).
28. *Id.* arts. 109, 110.
29. *Id.*
30. *Id.* art. 110.

an EFTA national court on a point of EEA law; (3) actions to annul ESA's decisions; and (4) settlement of disputes between two EFTA states.[31]

C. The Four Freedoms: From EC to EEA

1. *Free Movement of Workers.* Any EEA national is free to move, to seek, and to retain employment anywhere in the EEA.[32] No discrimination based on nationality in the areas of employment, renumeration, and other working conditions is permitted.[33]

2. *Free Movement of Goods.* The 1972 and 1973 free trade agreements provided for the elimination of customs duties on industrial products between the EU and the EFTA countries,[34] and the EEA Agreement removes virtually all remaining obstacles to trade in goods, including quantitative restrictions and measures having equivalent effect.[35] However, common technical standards on certain products apply throughout the EEA.[36] Even in the absence of such standards, once a product is lawfully manufactured and marketed in an EEA country, it can be freely marketed in another EEA state, with a few exceptions.[37]

3. *Free Movement of Capital.* The EEA Agreement prohibits restrictions on the movement of capital belonging to legal or natural persons residing in EEA states.[38] In addition, the agreement prohibits discrimination based on the place where capital is invested or based on the nationality or place of residence of EEA nationals.[39]

4. *Free Movement of Services.* Under the EEA Agreement, EEA nationals and activities of an industrial or commercial character are granted the freedom of establishment and the freedom to provide

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31. *European Court of Justice Ruling Clears the Way for European Economic Area,* INT'L TRADE REP. (BNA), April 15, 1992, *available in* LEXIS, Eurcom Library, ECNEWS File.

32. EEA AGREEMENT, *supra* note 2, part III, ch. 1, art. 28.

33. *Id.* art. 28(2).

34. *The Agreement on the European Economic Area Comes into Force on 1 January, supra* note 22.

35. EEA AGREEMENT, *supra* note 2, part II, ch. 1, arts. 11-12.

36. *Id.*, Annex II.

37. For example, an EEA state may refuse a product on the grounds that it does not meet its stricter standards on consumer or environmental protection. *Id.* part II, ch. 1, art. 13.

38. *Id.* part III, ch. 4, art. 40.

39. *Id.*

services throughout the territory covered by the EEA.[40] In particular, the Agreement refers to financial, telecommunications, audiovisual and information services.[41] The principles of "single license"[42] and "home country control"[43] in financial services, introduced over the past few years within the EU, now apply throughout the EEA.[44]

III. COMPETITION

A. Competition Rules Cooperation

In December 1992, Sir Leon Brittan, the outgoing Commissioner for Competition,[45] announced a series of policy statements on reforms to be made to EC competition law. Above all he wished to clarify the role of national authorities in the application of the competition rules and to address the sensitive issue of subsidiarity.[46]

In furthering the aims of greater subsidiarity, the Commission published a Notice on Cooperation Between National Courts and the

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40. *Id.* ch. 3, arts. 36-37.

41. *Id.*, Annexes IX-XI.

42. Single license means that a credit institution authorized in an EEA state will be free to establish branches and provide services in another EEA state. The institution will not need to apply for a new authorization in each EEA country. *See generally, EC: Press Release—Single Market Completion in Banking, Finance,* European Commission Press, Dec. 18, 1992, *available in* LEXIS, Eurcom Library, ECLAW File.

43. Home country control means that supervision of a credit institution is carried out by the competent authorities in the EEA country where the institution is established (its home country). *Id.* This supervision covers the institution's branches located in other EEA states, as well as the services provided in other EEA states. *Id.*

44. *Id.*

45. *See European Commission: Distribution of Portfolios for New Term,* European Report, Dec. 12, 1992, *available in* LEXIS, Eurcom Library, ECNEWS File. Karel Van Miert took over the competition portfolio on the eve of 1993. He has indicated that he will take a less strict view of competition policy than his predecessor, taking into account other influences, including industrial, environmental, regional, and social pressures. *See, e.g., EC Competition Policy: New Commissioner Unveils His Vision,* Multinational Service, Feb. 12, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File; *U.K. Coal Unions Turn to EC Law,* EC Energy Monthly, Jan. 15, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

46. *See Commission Adopts Notice Aimed at Decentralising Applications of EC Anti-Trust Rules,* RAPID, Dec. 23, 1992, *available in* LEXIS, Eurcom Library, ECNEWS File [hereinafter *EC Anti-Trust Rules*]. For a general discussion on subsidiarity, *see* George B. Hefferan & Joanne Katsantonis, *Movement Towards an Internal Market in 1993: An Overview of Current Legal Developments in the European Community,* 3 DUKE J. COMP. & INT'L L. 1, 4 (1992).

Commission in applying Articles 85[47] and 86[48] of the EC Treaty.[49] The Commission wishes to encourage a more productive division of labor between the Directorate General IV (DG IV)[50] and the national courts, especially in view of the fact that many cases presently sent to the Commission exclusively involve a single member state and are thus suitable for treatment by that state's own authorities.[51] To further this goal of division of labor, the Commission has established guidelines to enable national courts to consistently apply Community law.[52]

Ordinarily, complaints about breaches of Articles 85 and 86 will be handled by the national courts, which, unlike the Commission, are able to award damages and can act more quickly than the Commission in adopting interim measures and terminating infringements of Articles 85 and 86. This is intended to enable the Commission to concentrate on notifications and complaints which have particular political, economic, or legal significance for the Community.[53] National courts are not, however, empowered to make decisions under Article 85(3), so applications or notifications for negative clearance, or individual exemptions, must still be made to the Commission, where they will usually be dealt with by way of a comfort letter.[54]

B. National Regulations

In three key cases, the ECJ explained the compatibility of EC competition rules with respect to national regulations. The Court held that member states infringe EC competition rules if they stipulate or support the conclusion of agreements which restrict

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47. Article 85 forbids anticompetitive agreements and concerted practices that may affect trade between member states. EC TREATY art. 85.

48. Article 86 prohibits an abuse of a dominant position that may affect trade between member states. *Id.* art. 86.

49. Commission Notice 93/C 39/05 on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, 1993 O.J. (C 39) 6. While notices are persuasive and may be taken into account by national courts, they do not in and of themselves constitute binding legislation.

50. DG IV is in charge of the Commission's competition policy. *See, e.g.*, D.G. GOYDER, EEC COMPETITION LAW 5 (1993).

51. *EC Anti-Trust Rules, supra* note 46.

52. Commission Notice 93/C 39/05, *supra* note 49, at 6.

53. *Id.* at 7.

54. A Comfort letter is an informal letter of assurance informing the parties that the Commission considers the agreement to fall within Article 85(1), but that it does not intend to take any further action in opposition to the deal, *see, e.g.*, GOYDER, *supra* note 50, at 412.

competition, reinforce effects of such agreements or leave enforcement to private parties. The competition rules are not, however, infringed when there is no connection between the national regulation and the business practice otherwise covered by the prohibition on cartels.

In the first case, the Court examined a Dutch law that prevented insurance companies from granting commissions or other benefits to anyone except an insurance intermediary. In this case, the Ohra insurance company allowed its insureds certain financial gains, such as the waiving of contract fees. The ECJ held that this did not amount to a prohibited agreement between insurance intermediaries. The EC Treaty did not preclude state rules which prohibit insurance companies, whether or not they operate through agents, and such agents, from granting financial advantages to clients or the beneficiaries of insurance policies.[55]

In the second case, a financial advisor, contrary to German Federal law, passed on to clients the commission that had been paid to him by an insurance company. The Court found that the state rules were not in breach of the EC Treaty, since they did not require traders to enter into arrangements contrary to Article 85. Further, the national regulations were not deprived of their official character by the delegation to private traders of the responsibility for taking decisions that affect the economic sphere.[56]

In the third case, the Court held that the competition rules do not preclude the imposition of road transport rates, as long as the rates are regulated by public authorities.[57] A critical inquiry in this case, then, was whether the public authorities had given private economic operators the power to fix tariffs. Although the tariff rate at issue had been recommended by industry representatives, the court held that this was not a delegation of authority, because the industry representatives were only acting as independent experts, not as parties to an agreement.[58]

55. Case C-245/91, Ohra Schadeverzekeringen NV 32 E.C. PROC. 9 (1993).

56. Case C-2/91 Wolf Meng 32 E.C. PROC. 4 (1993).

57. Case C-185/91 Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG 32 E.C. PROC. 6 (1993).

58. *Id.*

C. Anticompetitive Agreements, Concerted Practices, and Abuse of Dominant Position.

1. *Peugeot.* The CFI has ruled that the refusal by the French car maker Peugeot to supply cars to Ecosystem, a specialist parallel importer, violated EC competition rules.[59] The Court therefore upheld a decision by the Commission that Peugeot's refusal hindered the importation of new Peugeot cars into France from Belgium and Luxembourg.[60]

The Commission had previously ruled that Peugeot's refusal did not satisfy certain requirements which would place it within the block exemption for car distribution and servicing agreements.[61] Peugeot claimed that Ecosystem was not an independent intermediary being used by consumers for the purpose of purchasing cars, as is permitted by the block exemption, but was in fact a re-seller.[62] Furthermore, Peugeot argued that it was permissible for distributors to refuse to supply independent re-sellers within an exempted network.[63] The CFI, however, disagreed and found that Ecosystem was not acting as a re-seller and that Peugeot's arguments were not acceptable under the block exemption.[64]

2. *Paper Pulp Fines Annulled.* The ECJ has annulled the Commission's 1984 decision to fine pulp producers from the United States, Canada, and Scandinavia up to ECU 500,000.[65] The companies had been accused of allegedly operating a price fixing cartel on wood pulp sales.[66] The Commission had based its decision on the similarity between "announced" and "transaction" prices. However, the ECJ ruled that there was insufficient evidence of concerted behavior, despite some evidence of contact between the pulp producers.[67] Thus, the ECJ reasoned that the system of price

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59. Case T-23/90 Automobiles Peugeot SA and Peugeot SA v. Commission, 5 C.M.L.R. 540 (Ct. First Instance 1993).

60. *Id.*

61. *Id.*

62. *Id.* at 546.

63. *Id.*

64. *Id.* at 550.

65. Joined Cases C-89/885, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlstrom v. Commission 11 E.C. PROC. 15, 18 (1993).

66. *Id.* at 15.

67. *Id.* at 16.

announcements itself was not contrary to EC competition rules and that the identical prices merely reflected an oligopolistic market.[68] The companies concerned were released from most of the provisions of the undertakings given to the Commission regarding pricing and information exchange practices.[69]

D. No Merger Threshold Change

The existing thresholds for investigation of cross-border mergers will not be reduced for at least another two years.[70] In the face of strong opposition from Germany, France, and the United Kingdom, Karel Van Miert has conceded that the thresholds will remain at ECU 5 billion and ECU 250 million for worldwide and Community turnover respectively.[71] The commissioner bowed to pressure not to request an increase of Community powers at a time when member states are calling for more subsidiarity.[72]

E. Joint Ventures

The Commission has issued a new regulation extending the application of certain block exemption agreements to include some forms of joint ventures.[73] The Regulation came into force on April 1, 1993, and has three principal effects. First, it extends the Commission Regulation on specialization agreements[74] to cover joint distribution of specialized products or products resulting from joint research and development, provided the market share of participating undertakings does not exceed 10 percent.[75] Where such agreements do not include joint distribution arrangements, the block exemptions will apply, as long as the combined market share of the participating undertakings does not exceed 20 percent and their aggregate turnover

68. *Id.* at 17.

69. *Id.* at 20.

70. *EC: Commission Decides to Leave Mergers Regulation Unchanged*, Agence Europe, July 29, 1993, *available in* LEXIS, World Library, TXTWE File.

71. *Id.*

72. *Id.*

73. Commission Regulation 151/93 of 23 December 1992 Amending Regulations 417/85, 418/85, 2349/84 and 556/89 on the Application of Article 85(3) of the Treaty to Certain Categories of Specialization Agreements, Research and Development Agreements, Patent Licensing Agreements and Know-How Licensing Agreements, 1993 O.J. (L 21) 8.

74. Commission Regulation 417/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Specialization Agreements, 1985 O.J. (L 53) 1.

75. *Id.*

does not exceed ECU one billion.[76] Second, it extends the Commission Regulation on certain categories of research and development agreements[77] in the same manner. Third, it amends the Commission Regulation on patent licensing agreements[78] and the Commission Regulation on know-how licensing agreements[79] to include arrangements whereby a parent undertaking grants the joint venture a patent or know-how license, provided certain market share thresholds are not exceeded. These thresholds require that: (1) in the case of a license limited to production or exploitation, the participating undertakings do not have a combined share of the relevant market in excess of twenty percent;[80] and (2) in the case of a license covering production, exploitation, and distribution, that combined market share is not more than ten percent.[81] The amendment also extends to the granting of reciprocal licenses on restricted terms.[82]

IV. BANKING AND FINANCIAL SERVICES

A. The Second Banking Co-ordination Directive (2BCD)

As of January 1, 1993, the implementation date of the 2BCD, regulatory control of banking is concentrated in each bank's principal place of operation.[83] Banks established in one member state rely on their home state authorization and no longer require additional authorization from the host state.[84] The directive gives EC credit institutions a license to carry on business in other member states either by establishing a local branch or by providing services across EU national borders.[85]

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76. Commission Regulation 151/93, *supra* note 73, art. 3(1)(b).

77. Commission Regulation 418/85 of 19 December 1985 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements, 1985 O.J. (L 53) 5.

78. Commission Regulation 2349/84 of 23 July 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L 219) 5.

79. Commission Regulation 556/89 of 30 November 1988 on the Application of Article 85(3) to Certain Categories of Know-How Licensing Agreements, 1989 O.J. (L 61) 1.

80. Commission Regulation 151/93, *supra* note 73, art. (3)(1)(a).

81. *Id.*

82. *Id.* art. 3(1)(b).

83. Second Council Directive 89/646 of 15 December 1989 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, art. 24, 1989 O.J. (L 386) 12 [hereinafter Second Banking Directive].

84. *Id.* art. 6.

85. *Id.* art. 18.

The application of host state rules is subject to the principle of the "general good," as defined by the ECJ.[86] The rules must not discriminate between local and incoming firms, nor can they duplicate protection under home state or other rules. Lastly, the rules must be proportionate to their effects.[87]

Non-EU banks with subsidiaries in EU member states can also use the single-license system as a stepping stone to operations throughout the EU. Under the 2BCD, third country ownership of an EU bank does not change the regulatory framework. Thus foreign owned banks operating in one EU member state may branch, or provide services, across state borders and still be regulated according to home member state rules.[88]

B. Investment Services and Capital Adequacy Directives

The Investment Services Directive (ISD)[89] and the Capital Adequacy Directive (CAD)[90] were adopted in March of 1993, thus completing the final piece of framework legislation needed for a single market in financial services. Member states have until December 31, 1995, to implement both directives, although they are required to adopt the necessary laws, regulations and procedures by June of that year.[91]

Under the ISD, an EC investment firm that is authorized in its home member state for investment services covered by ISD will be authorized to provide those services in other member states, either on a cross-border basis or by establishing a branch.[92] As described

86. The initial statement of the principles concerned was made in Case 205/84 Commission v. Federal Republic of Germany 1 C.M.L.R. 69 (1987). The Court found that freedom of services could be restricted where: (1) there are particular reasons relating to the "general good" or public interest; (2) restrictions apply to all insurers carrying on business within the member states concerned regardless of nationality; (3) the public interest was not already protected by the rules of the member state where the insurer was established; and (4) the same result could not be obtained by less restrictive rules. *Id.* The term "general good" has become English parlance, but the concept is also sometimes described as the general or public interest.

87. Second Banking Directive, *supra* note 83, art. 6.

88. *Id.* art. 8.

89. Council Directive 93/22 of 10 May 1993 on Investment Services in the Securities Field, 1993 O.J. (L 141) 27 [hereinafter Directive on Investment Services].

90. Council Directive 93/6 of 15 March 1993 on the Capital Adequacy of Investment Firms and Credit Institutions, 1993 O.J. (L 141) 1 [hereinafter Directive on Capital Adequacy].

91. Directive on Investment Services, *supra* note 89, art. 31.

92. *Id.* art. 15(1), (3).

above, this is the concept of the "single license" or "European passport" for credit institutions first introduced by the 2BCD.[93]

Furthermore, the ISD lays down minimum standards concerning the authorization and supervision of EC investment firms. These standards include prudential rules governing sound administrative and accounting procedures, record keeping, and the protection of investor's funds.[94] In addition, the ISD aims to open up securities markets. Each member state must allow investment firms from other member states to become members of regulated markets in that state.[95]

The CAD complements both the ISD and the 2BCD by setting out capital adequacy requirements for investment firms and credit institutions which conduct investment business.[96] The CAD covers: (1) initial capital requirements for investment funds; (2) position risk, counter party risk and large exposure requirements in relation to the trading book; (3) requirements on foreign exchange and other risks; and (4) the extension of the solvency ratio requirements to investment firms.[97]

C. UCITS Amendments

The UCITS Directive provides a harmonized system for undertakings for collective investment in transferable securities (UCITS), including authorization procedures, structure, investment policy, and the publication of information.[98] Based on these minimum requirements, UCITS are afforded mutual recognition in a single license system which enables them to be sold without further authorization in any other member state.[99]

A proposal has been made to extend the scope of the directive to include money market funds and funds invested in units of other

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93. Second Banking Directive, *supra* note 83, art. 18(1), 1, 9.

94. Directive on Investment Services, *supra* note 89, art. 10.

95. *Id.* art. 14.

96. Directive on Capital Adequacy, *supra* note 90.

97. *Id.*

98. Council Directive 85/611 of 20 December 1985 on Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), 1985 O.J. (L 375) 3, *as amended by* Council Directive 88/220 of 22 March 1988, 1988 O.J. (L 100) 31 [hereinafter Directive for Collective Investment in Transferable Securities]. UCITS are open ended investment funds whose "shares" are redeemable at the investor's demand. *Id.* art. 1(2). The funds must be principally used for investment in listed companies. *Id.* art. 19(1)(a), (c).

99. *Id.* arts. 3, 4(1).

UCITS.[100] Several member states were opposed to the Commission's proposal that UCITS should be given freedom to invest up to 100 percent of their assets in cash deposits with credit institutions.[101] The opposing states argued that this freedom of investment might have a deleterious effect on foreign exchange markets and encourage the proliferation of short-term rather than long-term investment.[102] However, investors are protected by the fact that UCITS may place no more than 20 percent of their assets on deposit with the same credit institution or credit institutions within the same group.[103] Currently UCITS are only allowed to invest up to 5 percent of their assets in other UCITS. Because this limitation has proved too stringent in some markets, the proposal raises the limit to 10 percent.[104]

In this system, money market instruments are defined as classes of transferable securities which are normally dealt with on the money market, and which member states consider both liquid and valuable at a rate that can be determined with acceptable frequency and accuracy.[105] The definition of transferable securities is consistent with the definition finalized by the ISD.[106]

In the context of derivative instruments used for the purpose of efficient portfolio management, the proposal provides that UCITS may carry out transactions in financial derivative instruments. However, exposures relating to these instruments must be covered: UCITS should be required to hold assets that may reasonably be expected to fulfil actual or potential obligations which exist or may arise as a result of the derivatives themselves.[107]

In addition, while host member state local rules will continue to govern the form and content of advertising, UCITS with head offices

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100. Commission Proposal for a Council Directive Amending Directive 85/611 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS), art. 1(1), 1993 O.J. (C 59) 14, 15 [hereinafter Commission Proposal Relating to UCITS].

101. *Id.* at 14.

102. *See Financial Services; Euro Parliament Approves Amended UCITS Directive,* EuroWatch, Nov. 15, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

103. Commission Proposal Relating to UCITS, *supra* note 100, art. 1(9).

104. *Id.* art. 1(11).

105. *Id.* art. 1(1).

106. *Id.*; *see also* Directive for Collective Investment in Transferable Securities, *supra* note 98, art. 1.

107. Commission Proposal Relating to UCITS, *supra* note 100, art. 1(8).

in other member states should be free to advertise their units in host countries through all available means of communication.[108]

D. Deposit Guarantee Scheme

The Council has formally taken a common position on the proposed Directive on Deposit Guarantee Schemes, which is expected to be adopted in 1994.[109] The purpose of the directive is to introduce a minimum of harmonized rules throughout the EU to protect depositors in the event of the bankruptcy of a credit institution, and to prevent sudden withdrawals of funds that would destabilize the banking system.[110] Under the future harmonized system, which member states must implement by January 1, 1995, all credit institutions must in principle belong to a credit-guarantee system. Deposits must be repaid, as a general rule, in full, up to a flat-rate minimum amount. Special rules are laid down for branches of a credit institution located outside of the member state of the principal institution. The basic principle is that deposits collected by such branches should be guaranteed by the system of the member state of origin.[111]

E. Securities Guarantee Schemes.

The Commission has agreed on the ground rules for a Directive on the protection of investors, in the event that their securities firm becomes insolvent.[112] The new scheme should require minimum coverage of ECU 20,000, as in the proposed Directive on Deposit Guarantee Schemes,[113] and a minimum percentage coverage of 90 percent of the claim.[114] Because the proposal is still under consideration by a Council working party, it is unlikely it will be complete by January, 1995, the proposed implementation date.

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108. *Id.* art. 1(15).

109. Council Common Position on the Proposal for a Council Directive on Deposit Guarantee Schemes 8915/93, 1993 O.J. (C 314) 1.

110. Commission Proposal for a Council Directive on Deposit Guarantee Schemes, 1992 O.J. (C 163) 6.

111. Amended Commission Proposal for a Council Directive on Deposit Guarantee Schemes, art. 3, 1993 O.J. (C 178) 17 [hereinafter Amended Proposal for Directive on Deposit Guarantee Schemes].

112. Commission Proposal for a Council Directive on Investor Compensation Schemes, 1993 O.J. (C 321) 15 [hereinafter Proposal for Directive on Investor Compensation Schemes].

113. Amended Proposal for Directive on Deposit Guarantee Schemes, *supra* note 111.

114. Proposal for Directive on Investor Compensation Schemes, *supra* note 112.

F. Large Exposures of Credit Institutions

The Council Directive on the Monitoring and Control of Large Exposures of Credit Institutions was formally adopted in December 1992, and should be implemented in the member states by January 1, 1994.[115] The Directive applies to all credit institutions that have obtained authorization pursuant to Article 3 of the First Banking Coordination Directive.[116]

The directive's goals are twofold. First, the directive is intended to harmonize the criteria applied by supervisory authorities in the member states for determining the concentration of exposures.[117] Second, the Commission claims that such harmonization should prevent distortion of competition insofar as all credit institutions throughout the EU will be subject to the same rules; limits on large exposures will also enable more credit institutions to grant assistance to a given customer.[118] The directive is, however, essentially based on regulatory necessity.

The Directive prohibits a credit institution from incurring an exposure that exceeds 25 percent of its own funds to a client or group of connected clients, with certain limited exceptions.[119] It also imposes reporting requirements to a "competent authority" for a credit institution that incurs a large exposure—that is, an exposure that is equal to or exceeds 10 percent of its own funds.[120] The Directive calls for the monitoring of compliance with these obligations.[121]

G. Tighter Supervision of Financial Institutions

In response to the scandal surrounding the Bank of Credit and Commerce International, the Council recently published a Directive stressing the necessity of having competent authorities supervise

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115. Council Directive 92/121 of 21 December 1992 on Monitoring and Control of Large Exposures of Credit Institutions, arts. 8-9, 1993 O.J. (L 29) 1, 8.

116. *Id.* art. 2; *see also* First Council Directive 77/780 of 12 December 1977 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking up and Pursuit of the Business of Credit Institutions, art. 3, 1977 O.J. (L 322) 33.

117. Council Directive 92/121, *supra* note 115, at 1.

118. *Id.*

119. *Id.* art. 4(1), (7).

120. *Id.* art. 3(1), (2).

121. *Id.* art. 3(4).

certain financial institutions.[122] In particular, the proposal requires that where a credit institution, insurance undertaking, or investment firm belongs to a group, the group structure must be sufficiently transparent in order to allow effective supervision.[123]

Other proposals include a requirement that credit institutions maintain their head offices in the member states in which they are authorized.[124] Confidential information exchanges between authorities will be allowed.[125] Guidelines are to be drafted which will allow auditors to extend the scope of the audit beyond the affairs of a specific credit institution. Furthermore, auditors will be required to inform the supervisory authorities of any serious wrongdoing.[126]

V. PUBLIC PROCUREMENT

A. Public Service Contracts

The EC public procurement regime has applied, in one form or another, to public works and public supplies for many years. Under a new directive, the regime has been extended to cover public service contracts since July 1, 1993.[127] The new directive applies whenever a contracting authority[128] enters into a public service contract[129]

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122. Commission Proposal for a Council Directive Amending Directives 77/780 and 89/646 in the Field of Credit Institutions, 77/239 in the Field of Non-Life Insurance, 79/267 and 92/96 in the Field of Life Insurance, and 93/22 in the Field of Investment Firms in Order to Reinforce Prudential Supervision, 1993 O.J. (C 229) 10.

123. *Id.*

124. *Id.* art. 3.

125. *Id.* art. 4.

126. *Id.* art. 5.

127. Council Directive 92/50 of 18 June 1992 Relating to the Coordination of Procedures for the Award of Public Service Contracts, 1992 O.J. (L 209) 1.

128. Contracting authorities include the state, regional or local authorities, bodies governed by public law, or associations formed by one or several of such authorities. *Id.* art. 1(b). Bodies governed by public law are further defined to include bodies financed or managed by state or local authorities, or by "other bodies governed by public law" and which, not having an industrial or commercial character, are established with the specific purpose of meeting needs in the general interest. *Id.*

129. Public service contracts are divided into two categories. List A services are subject to the full procedural rules of the directive. *Id.*, Annex IA. List B services, for the time being, are only subject to standards and reporting requirements. *Id.*, Annex IB. List A services encompass: maintenance and repair; banking and investment services; insurance; accounting and auditing services; computer and related services; architectural, engineering, urban planning and related services; land and air transport passengers. *Id.*, Annex IA. List B services include: educational services; legal services; health and social services; and all "other services." *Id.*, Annex IB.

worth over ECU 200,000,[130] which is not otherwise encompassed by the public works[131] or public supplies regimes.[132]

Public service contracts must be advertised in the Official Journal. The contract notice must outline the nature of the contract as well as the procedure that will be used to select the service provider.[133] The procedure for selecting service providers may be of three types. The first method of selection, the open procedure, allows any interested entity to submit a tender.[134] The second type of procedure is the restricted procedure, which allows only those entities selected by the contracting authority to submit a tender.[135] Lastly, the negotiated procedure permits the contracting authority to select one or more entities and negotiate directly with them.[136] The negotiated procedure is permissible only in limited circumstances, as provided for in the directive. In all other cases, the open or restricted procedures must be used.

The procedural rules of the directive are intended to produce genuine competition without discrimination. To further this end, a minimum number of potential contractors must be consulted in the restricted and negotiated procedures. In addition, each member state must ensure that contracting authorities issue invitations to tender on the same conditions as to its own nationals, and without discrimination to those nationals of member states who satisfy the necessary requirements.

Contracts must be awarded to the bidder who offers either the lowest price or the best economic benefits.[137] An offer that appears abnormally low may be rejected, but only after the contracting

130. Although the threshold for all contracts is ECU 200,000, calculating the value of a contract is not always a straight-forward matter. The directive thus provides guidelines for estimating the total value of the contract. *Id.* art. 7.

131. Council Directive 71/305 of 26 July 1971 Concerning the Coordination of Procedures for the Award of Public Works Contracts, 1971 O.J. (L 185) 5.

132. Council Directive 77/62 of 21 December 1976 Coordinating Procedures for the Award of Public Supply Contracts, 1977 O.J. (L 13) 1.

133. *Id.* art. 15.

134. *Id.* art. 1(d).

135. *Id.* art. 1(e). The negotiated procedure may be used only in limited circumstances, and contracting authorities must first justify its use with the commission. *Id.* art. 11.

136. *Id.* art. 1(f).

137. *Id.* art. 36. Economically advantageous criteria encompass: price, delivery date or period of completion, quality, aesthetic and functional characteristics, technical merit, after sales service, and technical assistance. *Id.* art. 36(1)(a). If a contracting authority wishes to award a contract based on the economically advantageous test, it must state its intentions at the original notice stage, or, at the very least, in other contract documentation. *Id.* art. 36(2).

authority requests an explanation for the abnormality, and assesses the validity of the offer in light of the explanation.[138] All tenders that are rejected because they are considered too low must be reported to the Commission.[139]

B. Utilities Services

Utilities operating in the water, energy, transport and telecommunications sectors are subject to their own specific public procurement regime. This procurement regime has been in operation for works and supplies since January 1, 1993 (except in Greece, Portugal and Spain).[140] Following the June 1993 adoption of an additional Utilities Directive, the procurement of services will be added to this regime with effect from July 1, 1994.[141]

C. Public Procurement Between the United States and the EU

Following lengthy negotiations, the EU and the United States agreed on a Memorandum of Understanding that permits EU companies to bid for government procurement contracts in the United States and vice versa.[142] The award procedures of the Public Supplies Directive[143] and the Public Works Directive[144] will now be openly available to United States suppliers. In return, the United States waives the application of the Buy America Act,[145] which governs the award of contracts by various public entities for goods and services, and which provides some preferential treatment for domestic companies.[146]

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138. *Id.* art. 37.

139. *Id.*

140. Council Directive 90/531 of 17 September 1990 on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1990 O.J. (L 297) 1.

141. Council Directive 93/38 of 14 June 1993 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1993 O.J. (L 199) 84.

142. Council Decision 93/323 of 10 May 1993 Concerning the Conclusion of an Agreement in the Form of a Memorandum of Understanding Between the United States of America and the European Economic Community on Government Procurement, 1993 O.J. (L 125) 1, 2.

143. Council Directive 77/62, *supra* note 132.

144. Council Directive 71/305, *supra* note 131.

145. Buy America Act of 1933, 41 U.S.C. § 10a *et seq.* (1993).

146. The EU and the United States also agreed to jointly sponsor a study of procurement opportunities. It is hoped that, following the study, a comprehensive agreement on procurement can be integrated through multilateral negotiations into the GATT Agreement on Government Procurement. Council Decision 93/323, *supra* note 142, at 3.

VI. ENERGY

A. Joint Working Groups on Energy and the Environment

EC officials met with representatives of the Gulf Cooperation Council (GCC) in Brussels in July 1993, and decided to set up a joint working group to examine the issues regarding the relationship between energy and the environment.[147] Negotiations on the EC's proposed carbon dioxide tax are continuing.[148] The GCC countries have remarked that such a tax would not assist oil producers or consumers, would not solve environmental problems, and could destabilize the international oil market.[149]

The working group met several times in 1993, and considered issues such as the outlook for world energy supply and demand, the development of trade in energy between EU and GCC countries, global environmental problems, and alternative strategies and options for achieving the goals of the United Nations Conference on Environment and Development which took place in Rio de Janeiro, Brazil, in June 1992 (Rio Summit).[150]

B. Trans-European Energy Networks

The Commission produced a working paper on the Community's plans for the development of European energy networks among member states.[151] In the working paper, the Commission stressed the importance of an EU-wide energy infrastructure.[152] The working paper also established guidelines for the development of networks which would help to complete the internal energy market, strengthen economic and social cohesion, and improve the security of supply.[153]

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147. *See EC/GCC: Joint Working Group on Energy and Environment*, Europe Energy, July 23, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See Energy Networks: Trans-European Networks Directive in the Pipeline*, Europe Energy, June 10, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

152. *Id.* The necessity of an EU-wide energy infrastructure is also addressed in the Maastricht Treaty, *see* EU TREATY arts. 3(n), 129(b).

153. *Energy Networks: Trans-European Networks Directive in the Pipeline*, *supra* note 151.

VII. ENVIRONMENT

A. Future Environmental Policy

In March of 1993, the Commission presented the main features of a two year environmental policy plan.[154] The Commission aims to integrate environmental concerns into other common policies. In particular, it will be taking a closer look at the economic implications of sustainable development and the consequent effects on growth and employment.[155] The Commission also intends to focus more on regional and global environmental problems highlighted by the Rio Summit. Special emphasis is placed on preserving the tropical rain forest and ratifying the climate change and biological diversity conventions.[156]

In administering these policies, the Commission is taking pains to stress that it will apply the subsidiarity principle, which means that it will devolve powers to appropriate national and regional authorities.[157] The Commission has pledged to increase the transparency of its workings by encouraging consultation, regularizing lobbying, and disseminating information.[158]

B. Green Paper on Environmental Liability

The Commission has formally adopted a Green Paper with a view to establishing civil liability for environmental damage.[159] The Green Paper seeks to open the debate on ways of allocating responsibility for the costs of environmental restoration. The Green Paper is based on the Polluter Pays Principle, holding those who are responsi-

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154. *See CO_2 Press Briefing*, RAPID , March 23, 1994, *available in* LEXIS, Eurcom Library, ECNEWS File.

155. *Id.*

156. *Id.* For example, following the Rio Summit the Council unanimously approved the creation of a system of monitoring carbon dioxide and other greenhouse gases. Under this system, the Community endeavors to limit the emission of greenhouse gases—in particular, carbon dioxide emissions will be stabilized at 1990 levels by the year 2000. The Commission will work in close cooperation with the member states to ensure that the Community is provided with reliable information on the level of emissions and limitation measures. *Id.*

157. *European Commission: Environment Policy Priorities for 1993-94*, Europe Environment, March 2, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

158. *Id.*

159. Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM(93)47 final at 3 [hereinafter Remedying Environmental Damage].

ble for causing environmental degradation liable for remedial costs. In theory, this doctrine forces potential polluters to take greater care to prevent harm, by making them pay for any clean-up operations.

The Green Paper considers the usefulness of two methods of establishing liability. The fault-based approach involves proving negligence on the part of a liable party, while recognizing the difficulties of placing the blame on any one party. This method may inappropriately encourage the seeking of redress from the most affluent defendant in the most favorable national legal system, rather than ferreting-out those responsible for causing the damage.[160] Fault-based liability encourages the behavior of seeking deep-pockets, because the injured party has no incentive to pursue impecunious liable parties. Moreover, fault-based liability encourages forum shopping because differences in substantive law may result in different levels of compensation. Strict liability, which precludes the need for proving negligence, is also discussed in the Green Paper.[161]

In addition, the Green Paper investigates the concept of joint compensation schemes that would apply in cases where recourse to civil liability is not feasible. An obvious instance where the use of a joint compensation scheme would be appropriate, would be in a situation where no one polluter could be identified. The Green Paper further discusses the possibility that the Polluter Pays Principle will be maintained in circumstances where the economic sectors most involved in the damage concerned jointly fund a compensation scheme. This means that a dual mechanism of identifiable liability and collective compensation may emerge.[162]

C. Waste Framework

The proper legal basis for the adoption of waste directives has been an area of considerable disagreement. At the center of the disagreement are the Framework Directive,[163] the Waste Shipment Regulation[164], and the Packaging Waste Directive.[165] In a recent

160. *Id.* at 8.
161. *Id.* at 7.
162. *Id.* at 19-20.
163. Council Directive 91/156 of 18 March 1991 Amending Directive 75/442 on Waste, 1991 O.J. (L 78) 32.
164. Council Regulation 259/93 of 1 February 1993 on Supervision and Control of Shipments of Waste Within, Into and Out of the European Community, 1993 O.J. (L 30) 1.
165. Commission Proposal for a Council Directive on Packaging and Packaging Waste, COM(92)278 final, (*amended* at 1993 O.J. (C 285) 1).

case, the ECJ resolved the controversy to some extent by ruling that the Framework Directive was correctly adopted under Article 130(s) of the EC Treaty.[166]

Articles 130(r) to 130(t), added to the EC Treaty by the Single European Act,[167] specifically concern environmental matters.[168] Under Article 130(s) the Council decides on environmental legislation by a unanimous vote following a single reading in the European Parliament.[169] Under this article, member states can also maintain or adopt more stringent domestic environmental protection measures than those made at the Community level.

The European Parliament and the Commission would have preferred the Framework Waste Directive to have been adopted under Article 100(a) of the EC Treaty. Legislation made under Article 100(a) requires only a qualified majority vote in the Council and allows the European Parliament two opportunities for formal comment.[170] Since legislation made on this basis has as its prime function the smooth operation of the internal market, member states have less freedom to adopt stronger environmental legislation.

The ECJ held that the choice between 100(a) and 130(s) must be made on the basis of objective criteria capable of judicial control, the most important of which are the aims and content of the legislation.[171] In the case of the Framework Waste Directive, the main aim and contents relate to environmental protection, although some facets of the directive, such as a common definition of waste and related activities, have an impact on the free functioning of the single market. In the Court's reasoning, the fact that the legislation concerns the creation or operation of the internal market does not in and of itself justify the use of Article 100(a). If the creation or operation of the internal market is only a secondary effect, then the use of Article 100(a) is not justified.

166. Case C-155/91, Commission v. Council, E.C.J. Info. Service (Ct. First Instance 1993).
167. The Single European Act, *supra* note 9, at 1.
168. EC TREATY art. 130(r)-(t).
169. *Id.* art. 130(s).
170. *Id.* art. 100(a).
171. Case C-155/91, Commission v. Council, *supra* note 166, at 6.

D. Eco-Labels

The Commission has issued a decision establishing guidelines to fix costs and fees in connection with the Community eco-label.[172] Every applicant for a label is subject to an application fee of ECU 500.[173] Those who receive eco-labels must also pay an annual minimum fee of ECU 500 for the use of the labels.

The Commission suggests that the annual fee should be calculated based on a percentage of sales within the Community for products that have received the label.[174] National organizations would still be able to set fees 20 percent higher than ECU 500. It is envisioned that market forces will help to ensure that the prices of the eco-label do not differ greatly among member states, since labels awarded in one country are valid in all others. Member states have been urged to nominate the national organization that will have the competence to award the eco-label.

In addition, the Commission has published the terms of the contract to be used between the state authority competent to award eco-labels under Regulation 880/92 and each applicant.[175] According to the contract, the competent state authority grants the holder, who is either a manufacturer or an importer, the right to use an eco-label for its product.[176] The eco-label cannot form part of a trademark, and must be used for specified products only.[177] The holder is responsible for the manner in which the eco-label is used in advertising the product.[178] The competent body may monitor the ongoing compliance with the provisions of the contract. Provisions are made for confidentiality and the suspension and withdrawal of the eco-label. The eco-label holder may not include the label as part of

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172. Commission Decision 93/326 of 13 May 1993 Establishing Indicative Guidelines for the Fixing of Costs and Fees in Connection with the Community Eco-Label, 1993 O.J. (L 129) 23. For a general discussion of the Eco-Label scheme, which allows companies whose products meet minimum environmental standards to receive an eco-label, *see* Hefferan & Katsantonis, *supra* note 46, at 23.

173. Commission Decision 93/326, *supra* note 172, art. 1.

174. *Id.* art. 2.

175. Commission Decision 93/517 of 15 September 1993 on a Standard Contract Covering the Terms of Use of the Community Eco-Label, 1993 O.J. (L 243) 13. The use of this standard contract is mandatory. *Id.* Additional provisions can be included as long as they are compatible with Regulation 880/92. *Id.*

176. *Id.* at 14.

177. *Id.*

178. *Id.*

any guarantee or warranty in relation to the product, and the competent monitoring body is not liable for any loss or damage sustained by third parties arising out of the use of the eco-label.[179]

VIII. LABOR

A. Working Hours Directive

On November 23, 1993, the Council adopted the Working Hours Directive.[180] The Directive's provisions include a maximum forty-eight hour week, including overtime, with a minimum daily rest of eleven hours.[181] Night work must not exceed an average of eight hours per night. Provisions are also made for a right to a break when the working day is longer than six hours, a minimum one day off per week, and four weeks annual vacation.[182]

Derogations have been granted to several industries: the transport sector, work at sea, such as ocean fishing and work on oil rigs, and doctors in training.[183] Other activities which are excluded are those in which continuous service or production is essential, such as work in hospitals, prisons, airports, energy production and distribution, and fire fighting.[184]

B. Unfair Contract Terms Directive

The Council issued a directive concerning unfair contract terms with consumers.[185] A term is considered unfair if, contrary to the requirement of good faith, it causes a detrimental imbalance in the consumer's rights and obligations.[186] A consumer is not bound to the unfair terms contained in a contract with a seller or supplier.[187] If a workable contract still exists once the unfair terms have been removed, the contract will continue to bind the parties.[188] The

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179. *Id.* at 15.

180. Council Directive 93/104 of 23 November 1993 Concerning Certain Aspects of the Organization of Working Time, 1993 O.J.
(L 307) 18.

181. *Id.* art. 6.

182. *Id.* art. 7.

183. *Id.* art. 17.

184. *Id.*

185. Council Directive 93/13 of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

186. *Id.* art. 3.

187. *Id.* art. 6.

188. *Id.* art. 3.

Directive further stipulates that member states ensure consumer organizations and individuals the ability to pursue legal action against the continued use by suppliers of unfair terms.

The Directive includes an illustrative list of types of terms that are presumed to be unfair. This presumption may be contested by a seller or supplier who uses the terms in a specific situation.[189] The types of clauses that are presumptively unfair are: (1) those that force consumers to perform obligations even when the professional fails to perform; (2) those that impose a disproportionately high fine on a consumer for failing to perform; and (3) those that restrict the liability of the professional in the event of death or personal injury to the consumer resulting from the professional's act or omission.[190]

C. Pensions: Developments Regarding Article 119 of the EC Treaty

The 1990 *Barber* decision,[191] interpreting Article 119 of the EC Treaty,[192] left a number of issues unclear. In particular, the *Barber* decision left unresolved the extent to which Article 119 should be applied retrospectively to occupational pensions, and it failed to define what constitutes pay under Article 119. Both of these ambiguities were clarified in two key ECJ cases.

The *Ten Oever* case[193] resolved the uncertainty surrounding the temporal effects of the *Barber* decision. *Ten Oever* involved the status of a spouses' pension on the death of the occupational pension scheme member.[194] Mr. Ten Oever's wife died in 1988. She had been a member of an occupational pension scheme for Dutch window cleaners. Mr. Ten Oever was refused a widower's pension, since the scheme at that time only provided for widows' pensions. Mr. Ten Oever applied in the Dutch courts for a declaration that the scheme was obliged to grant him a pension. The Dutch court referred two questions to the ECJ.[195] First, the Dutch court asked whether pay

189. *Id.* art. 4.

190. The list included in Directive 93/13 is not intended to be exhaustive. *Id.* at 29.

191. Case C-262/88, Barber v. Guardian Royal Exch. Assurance Group, 1989 E.C.R. 1889, 2 C.M.L.R. 513 (1990). The ECJ held that pension benefits under employment related schemes were "pay" and that therefore employers may not discriminate based on sex in granting pension benefits. *Id.*

192. Article 119 requires member states to apply the principle that men and women should receive equal pay for equal work. EC TREATY art. 119.

193. Case C-109/91, Gerardus Cornelis Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoomaakbedrijf, E.C.J. Info. Service (Ct. First Instance 1993).

194. *Id.*

195. *Id.* at 7.

for the purposes of Article 119 included survivor's benefits; second, the court requested a clarification of the date Article 119 first applied in relation to the claim for a widower's pension.

On the first point, the ECJ ruled that survivor's benefits may be considered pay for the purposes of Article 119.[196] This determination depends on the nature of the benefits themselves. If the pension scheme arises from the employment relationship, and can be viewed as an agreement that was reached by the employer and the employees, then it should be considered pay under Article 119.[197] On the other hand, if the pension can be characterized as a form of social security, or any other type of benefit controlled by legislation which does not require specific agreement between the employer and employees, then the benefit is not pay under Article 119.[198] The ECJ analyzed this case in light of its *Defrenne*[199] decision. *Defrenne* held that Article 119 did not cover social security schemes or benefits governed by legislation without any element of agreement within the undertaking.

On the second point, the ECJ ruled that by virtue of the *Barber* decision, Article 119 has direct effect and can be relied on by those claiming equal treatment in the matter of occupational pensions.[200] This normally applies only in respect to employment after May 17, 1990. The only exception to this rule are those cases where the claimant has, before that date, started legal proceedings, or the equivalent, under applicable national law. This holding means that pension schemes will not face the large costs that would have arisen if the ECJ had found Article 119 to apply to periods of employment before May 17, 1990.

The ECJ clarified what constitutes pay under Article 119 in the *Neath* case.[201] In *Neath*, the court considered the use of different actuarial assumptions for men and women as they apply to the calculation of transfer values and lump sums in pension schemes. The Court held that unequal employers' contributions to pension schemes fall outside Article 119, because they are determined by reference to

196. *Id.* at 8.
197. *Id.*
198. *Id.*
199. Case 80/70, Defrenne v. Belgium, 1971 E.C.R. 445, 1 C.M.L.R. 494 (1974).
200. *Ten Oever, supra* note 193, at 9. The ECJ's decision on the second point applies to occupational pensions in general despite the fact that the question put to the court was more narrowly framed. *Id.*
201. Case 152/91, David Neath v. Hugh Steeper Ltd., E.C.J. Info. Service (Ct. First Instance 1993).

funding arrangements.[202] Because lump sums and transfer values are also determined by reference to funding arrangements, they too fall outside the scope of Article 119.[203] The Court thus concluded that Article 119 does not apply to the use of different actuarial assumptions for men and women in final salary occupational pension schemes.[204]

IX. TRANSPORT

A. Open Skies

The Commission's ambition to negotiate "open skies" deals on behalf of the entire EC was rejected by EC transport ministers.[205] The Transport Council meeting of March 15, 1993, resulted in a decision that member states should remain fully responsible for their relations with third countries in the aviation field unless and until action is taken by the Council.[206] Such action cannot be expected until the Council is convinced there is a clearly defined common interest between the member states and research has shown that negotiations on behalf of the Community as a whole will realistically lead to better results for all of the member states.[207]

B. New Airline Article 85 Block Exemptions

The Commission renewed block exemptions authorizing airline companies to operate certain types of commercial agreements which are considered not to be contrary to Article 85 of the EC Treaty.[208] One new exemption is added, allowing joint operations on new routes. The exemptions entered into force on July 1, 1993, and will run for

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202. *Id.* at 3.

203. *Id.*

204. *Id.*

205. *See Ministers Shoot Down Commission Authority on 'Open Skies'*, EuroWatch, March 22, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

206. *Id.*

207. *See EC/Third Countries: Show of European Solidarity in Aviation Talks?*, Transport Europe, March 25, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

208. Commission Regulation 1617/93 of 25 June 1993 on the Application of Article 85 (3) of the Treaty to Certain Categories of Agreements and Concerted Practices Concerning Joint Planning and Coordination of Schedules, Joint Operations, Consultations on Passenger and Cargo Tariffs on Scheduled Air Services and Slot Allocation at Airports, 1993 O.J. (L 155) 18. Article 85 states that agreements which serve to prevent, restrict or distort trade or competition within the common market are incompatible with the common market. EC TREATY art. 85.

five years.[209] Regulation 1617/93 contains special provisions for several specific activities: (1) joint planning and coordination of schedules in order to allow airlines to provide services in off-peak hours and to improve flight connections;[210] (2) joint operations allowing smaller airlines to obtain marketing and finance support from another airline;[211] (3) consultations on passenger and cargo tariffs to facilitate interlining; and (4) slot allocation and airport scheduling that facilitate inter-airline agreements regarding the distribution of airport slots, provided such allocation is open to all and is nondiscriminatory.[212]

C. Allocation of Airport Slots

A new code of conduct for the allocation of slots at Community airports came into operation in January 1993.[213] The aim of the regulation is to ensure that new entrants to either the aviation market or particular routes have sufficient access to slots at EU airports. The regulation defines two types of new entrants. One type includes air carriers requesting slots at an airport on any day, and holding, or having been allocated, fewer than four daily slots at that airport.[214] The other type of new entrant encompasses air carriers operating within the EU requiring slots on a route on which, at most, two other carriers operate a direct service. These carriers must also have fewer than four slots at the required airport on the required day.[215] No carrier with more than 3 percent of the total slots available in the specific airport will be considered a new entrant to the market.[216] Member states must, where necessary, carry out capacity analyses to ensure the application of the new rules.[217]

D. Maritime Cabotage

Council Regulation 3577/92, which came into force on January 1, 1993, applies the principle of freedom to provide services to maritime

209. Commission Regulation 1617/93, *supra* note 208, art. 7.
210. *Id.* art. 2.
211. *Id.* art. 3.
212. *Id.* art. 4.
213. Council Regulation 95/93 of 18 January 1993 on Common Rules for the Allocation of Slots at Community Airports, 1993 O.J. (L 14) 1.
214. *Id.* art. 2.
215. *Id.*
216. *Id.*
217. *Id.* art. 3.

transport within member states.[218] It provides that EC ship owners with ships registered in, and flying the flag of, any member state can provide maritime transport services within any member state. From December 31, 1996, those ships must also comply with all the cabotage conditions of the particular member state for which they are providing the services.[219]

E. Computerized Reservation Systems

Regulation 2299/89[220] on the code of conduct for airline computerized reservation systems (CRS) has been amended.[221] The operator of a CRS must now allow any air carrier to participate in the system.[222] A parent carrier may not discriminate against a competing CRS by refusing to provide to it the same information on schedules, fares, and availability relating to its air services as it provides to its own CRS.[223] The operator of a CRS owned by a carrier of a third country will not have to comply with the regulation with regard to a CRS outside the Community.[224]

X. INTELLECTUAL PROPERTY

A. Copyright Protection

In October 1993, the Council adopted a copyright Directive that harmonizes the protection of copyright and neighboring rights in the EU.[225] The basic term of copyright protection for literary, dramatic, musical, and artistic works is the life of the author plus seventy years, irrespective of the date when the work is lawfully made available to the public.[226] The directive provides for joint authorship, anony-

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218. Council Regulation 3577/92 of 7 December 1992 Applying the Principle of Freedom to Provide Services to Maritime Transport Within Member States (Maritime Cabotage), art. 11, 1992 O.J. (L 364) 7.

219. *Id.* art. 1.

220. Council Regulation 2299/89 of 24 July 1989 on Code of Conduct for Computerized Reservation Systems, 1989 O.J. (L 220) 1.

221. Council Regulation 3089/93 of 29 October 1993 Amending Regulation 2299/89 on a Code of Conduct for Computerized Reservation Systems, 1993 O.J. (L 278) 1.

222. *Id.* art. 3.

223. *Id.* art. 3(a).

224. *Id.* art. 7.

225. Council Directive 93/98 of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9.

226. *Id.* art. 1.

mous and pseudonymous works, collective works, and works published in installments.[227]

For cinematographic and audiovisual works, the principal director is considered to be its author.[228] In addition, member states are free to designate co-authors.[229] The term of protection of such works is seventy years from the death of the last of the principal creators—the director, the author of the screenplay, the author of the dialogue, or the composer of music specifically created for the work—regardless of whether they are also designated as co-authors.[230]

The rights of performers and record and film producers is protected for fifty years after the performance or fixation of the work, or, if the work is published during that fifty year period, then fifty years after publication.[231] The rights of broadcasting organizations run for fifty years from the first transmission of a broadcast.[232] After the expiry of copyright protection, any person who lawfully publishes a previously unpublished work, benefits from a protection equivalent to the economic rights of the author. The term of such protection is twenty-five years from the date of publication.[233]

Member states may protect critical and scientific publications of works that have entered the public domain for up to thirty years from first publication.[234] There are specific provisions for protection in regard to non-EU countries and nationals.[235] Terms of protection run from January 1 of the year following the death, the creation, or the publication of the work, as applicable.[236] Directive 93/98 has no effect on domestic laws regulating moral rights.[237]

The terms of protection apply to all works and subject matter which are protected in at least one member state by the date Directive 93/98 comes into force or which derive protection from Directive 92/100 on rental and lending rights.[238] The recitals of the

227. *Id.*
228. *Id.* art. 2.
229. *Id.*
230. *Id.*
231. *Id.* art. 3.
232. *Id.*
233. *Id.* art. 4.
234. *Id.* art. 5.
235. *Id.* art. 7.
236. *Id.* art. 8.
237. *Id.* art. 9.
238. *Id.* art. 10; *see* Council Directive 92/100 of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61.

directive declare that member states may provide, in certain circumstances, that the rights that are revived pursuant to the directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time those works lay within the public domain.[239]

The harmonization of copyright terms also applies to Directive 91/250 on the Protection of Computer Programs,[240] and to Directive 92/100 on Rental and Lending Rights.[241] Copyright protection of computer programs is extended from fifty to seventy years.[242] The provisional terms of protection laid out in the Rental and Lending Rights Directive are now replaced by the terms set out in the Copyright Harmonization Directive.[243]

B. Intellectual Property Discrimination

The ECJ has ruled that the EC Treaty rules concerning non-discrimination on the basis of nationality apply to intellectual property.[244] This ruling was the result of joined references from the German courts concerning the application of German domestic intellectual property legislation to the complaints of British performers Phil Collins and Cliff Richard.[245]

Article 6 of the EC Treaty, prohibiting discrimination on the grounds of nationality, has direct effect and can be invoked before the domestic courts of the member states.[246] Intellectual property rights, such as copyright and neighboring rights, include the right to control the use of protected work and to receive royalties through the commercial exploitation of a copyright.[247] Thus, copyright can affect both competition and the free movement of goods within the EU and

239. Council Directive 92/100, *supra* note 238, art. 13.

240. Council Directive 91/250 of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42.

241. Council Directive 92/100, *supra* note 238.

242. Council Directive 93/98, *supra* note 225, art. 1.

243. *Id.* art. 10.

244. Joined Cases C92/92 & C326/92, Phil Collins v. Imtrat Handelsgesellschaft mbH, 1993 O.J. (C 312) 3.

245. In Phil Collins's case, a German company was selling bootleg copies of a recording of a United States concert. The German exclusive distributor of Cliff Richard's recordings of UK performances in the late 1950s had brought a complaint of breach of exclusive rights against another company that allegedly distributed unauthorized copies of parts of this work. German law would not offer these two British subjects protection equal to that accorded to German nationals in similar circumstances.

246. EC TREATY art. 6.

247. Council Directive 93/98, *supra* note 225.

is covered by the provisions of the EC Treaty.[248] The effect of this ruling will prevent member states from making the exploitation of intellectual property rights a purely domestic endeavor. Instead, intellectual property rights must be available to all EU citizens.[249]

C. Protection for Industrial Designs

The Commission has unveiled plans for Community-wide protection of industrial drawings and models.[250] The term of protection, as proposed, is twenty-five years.[251] There are presently many disparities between the periods of protection for industrial designs in various member states.[252] Member states with high levels of protection for drawings and models sometimes refuse to protect designs from other member states at the same high level when the laws of the foreign designer's state allow lower levels of protection.[253] There are also differences between the member states in the types of protection available.[254]

A new directive will harmonize national legislation on the protection of industrial designs. In order to obtain protection, a drawing or model should incorporate both novelty[255] and individuality.[256] Manufacturers will be able to continue to protect designs at the national level only.[257] The new legislation will cover most types of designs, including, textiles, shoes, cars, and household appliances.[258] However, protection will not extend to semi-conductors and on-board shipping equipment, since these are covered by other directives.[259]

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248. *Id.*

249. *Id.*

250. Proposal for a European Parliament and Council Directive on the Legal Protection of Designs, 1993 O.J. (C 345) 14.

251. *Id.*

252. For example, France offers fifty years protection, the United Kingdom offers twenty-five years, and Spain only offers ten, *see Industrial Property: EC Protection of Drawings and Models*, Tech Europe, Sept. 9, 1993, *available in* LEXIS, Eurcom Library, ECNEWS File.

253. *Id.*

254. *Id.*

255. "Novelty" means that it must not have been revealed to the public at the time of registration. *Id.*

256. "Individuality" means that the design must not give an informed person the impression of having already seen it. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

If passed, a regulation would establish two EC systems of protection. Manufacturers could either automatically obtain three years' protection for their new designs and models, or register them with a new Community office of drawings and models.[260] Registration with the Community Office would protect designs and models for up to twenty-five years in five year renewal periods.[261]

260. The proposed office would be established alongside the planned Community Trade Mark Office, and would also have a general duty to monitor the workings of the system. *Id.*

261. *Id.*