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## ARTICLES

### RECENT DEVELOPMENTS IN THE LAW OF THE EUROPEAN COMMUNITIES

Vivienne Robinson\*

This article deals with several of the more significant developments in the law and policy of the European Economic Community<sup>1</sup> that occurred during the first ten months of 1991. Due to the importance of the single market program, most of the developments relate to the proposals of the White Paper,<sup>2</sup> a far-reaching attempt by the Commission to outline the legislation required to complete the integration of the common market. Although progress toward the realization of a single market in the Community continues, it seems unlikely that all the measures specified as necessary to achieve this end will be adopted by the December 31, 1992 target date.

#### I. THE WHITE PAPER

In the early 1980s, concern grew about the progress being made in achieving the goal of creating a common market<sup>3</sup> for the member states<sup>4</sup> encompassing the rights of free movement of goods, services, capital, and

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\* M.A. (Hons) Law, Cambridge University, England, 1983; License Spéciale en Droit Européen, Université Libre de Bruxelles, Belgium, 1984. V. Robinson is an English solicitor and is a member of the bar in New York.

1. The European Economic Community is referred to in this article as the Community or the EC.

2. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final [hereinafter White Paper]. The single market program is often popularly referred to as "1992."

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 1-3, 9.

4. The Community now has twelve member states: Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, The Netherlands, Italy, Spain, Portugal, and the United Kingdom.

persons.<sup>5</sup> Although there was general satisfaction with the progress made since the establishment of the Community in 1958, many felt that a new impetus was vital.

The 1985 White Paper sought to quicken the process of facilitating and promoting intra-Community trade by harmonizing national laws through approximation rather than replacing them with comprehensive regulation at a Community level.<sup>6</sup> The single market program, as set out in the White Paper, identified specific measures needed to abolish the remaining barriers to unrestricted trade and free movement of persons between the member states. While the external common customs tariff had long since been established and duties and quotas between member states already abolished, the White Paper targeted the indirect barriers that exist due to differing regulations and associated practices across member states. The aim was to harmonize the laws on such matters as technical standards, financial and transport services, intellectual property rights, corporations, public procurement, and taxation.

In June 1991, the Commission published its Sixth Report on the progress being made in implementing the White Paper proposals.<sup>7</sup> While the Commission had, by this date, presented all the proposals listed in the White Paper,<sup>8</sup> eighty-nine remained to be adopted as legislation at the Community level<sup>9</sup> and still more awaited implementation at national levels.<sup>10</sup> It is unlikely that all the proposals will be adopted by the target date at the end of 1992.

Harmonization measures can be adopted by a qualified majority of the Council,<sup>11</sup> an improvement over the unanimous assent still required for certain types of legislation under the EEC Treaty.<sup>12</sup> Nevertheless, the political will to achieve even the former appears lacking in several areas. The Sixth Report highlighted the absence of agreement on measures on

5. EEC TREATY tits. I, III.

6. White Paper, *supra* note 2, at 17-19.

7. Sixth Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM(91)237 final, revised by Corrigendum, COM(91)237/2 [hereinafter Sixth Report].

8. *Id.* para. 12.

9. *Id.* para. 17. The outstanding dossiers were distributed as follows: internal market - 26; economic and financial affairs - 28; agriculture - 28; transport - 5; environment - 1; and social affairs - 1. *Id.*

10. Most of the legislation in the single market program is in the form of directives which must be translated into provisions of national law in each member state in order to become fully effective. The EEC Treaty provides: "A directive shall be binding, as to the result to be achieved, . . . but shall leave to the national authorities the choice of form and methods." EEC TREATY art. 189.

11. *Id.* art. 100a (as amended 1987). For the weighting applied in qualified majority voting, see *id.* art. 148(2).

12. For an example of one area where a unanimous decision is still needed for the adoption of harmonization measures, see *id.* art. 99.

transportation, the single European corporation, financial services, taxation, and establishment of a common Community trademark.<sup>13</sup>

On July 1, 1991, The Netherlands took over the presidency of the European Community. The presidency rotates on a semiannual basis, each member state taking its turn for a six month period.<sup>14</sup> For the six months extending to the end of 1991, The Netherlands will preside over Council sessions and the intergovernmental conferences meeting to discuss the future course of European economic and monetary union and movement toward political union. Hence, at this crucial point, The Netherlands will be responsible for shepherding the Community's agenda, including promotion of the initiatives to complete the single market. The Dutch government, for its part, has evinced a particular interest in pushing forward the transportation harmonization measures.<sup>15</sup>

## II. COPYRIGHT

The emergence of new technologies and the upcoming creation of the single market have combined to make the protection of copyright both a difficult proposition for the artist and a potential barrier to trade. Without adequate copyright protection, creativity is hindered because artists are not guaranteed proper remuneration. As a result of the creation of the common market, an artist's work may be marketed in all twelve member states without restriction but, by this very fact, his or her work may, ironically, be subject to plundering in those member states with low levels of protection. At the same time, technological developments have increased cross-border trade possibilities, but these can be hindered, as in the case of broadcasting, where copyright rules are too onerous. Somehow, a balance must be struck.

### A. The Commission's Action Plan

Harmonization of the member states' rules on copyright is part of the single market program.<sup>16</sup> However, the Commission felt it advisable, before embarking on a legislative program, to seek outside opinions on the subject to help identify priority areas and assess the interests affected. In 1988, the Commission published a discussion document, its Green Pa-

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13. Sixth Report, *supra* note 7, para. 19.

14. EEC TREATY art. 146 (as amended 1987). Portugal will hold the presidency from January 1 to June 30, 1992.

15. See generally Andrew Hill, *Brussels Seeks to Clear the Way for Community Road Haulage Companies*, FIN. TIMES, Oct. 17, 1991, at 2 (On October 16, 1991, the Commission proposed legislation that would, if adopted, permit road cabotage for haulage companies.); Richard Tomkins, *Brussels Seeks Charge Increase for Road Freight*, FIN. TIMES, Oct. 31, 1991, at 16 (EC transport Commissioner, Karl van Miert, announced that the Commission is to publish a white paper on EC transport policies.).

16. White Paper, *supra* note 2, at 37.

per on copyright (Green Paper).<sup>17</sup> Having received oral and written comments on that paper, the Commission, in January 1991, published its "working programme" in the field.<sup>18</sup>

In the Follow-Up Report to the Green Paper, the Commission identified the two guiding principles for implementation of its policy: first, the need to strengthen the protection of copyright and neighboring rights,<sup>19</sup> and second, the need for a comprehensive copyright policy.<sup>20</sup> The Commission undertook to prepare, by December 31, 1991, proposals for legislation, in the form of directives, on the home-copying of sound and audio-visual recordings, the legal protection of databases, the term of protection for copyright and certain neighboring rights, and the coordination of rules applicable to satellite and cable broadcasting.<sup>21</sup> A proposal for a directive on rental and lending rights has already been published<sup>22</sup> which would require member states to grant authors, performing artists and producers an exclusive right to authorize or prohibit the commercial rental of protected copyrighted works, phonograms, and videograms.<sup>23</sup>

The Commission also proposes<sup>24</sup> that a Council decision be addressed to the member states requiring them to accede by December 31, 1992, to the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 1971,<sup>25</sup> and to the 1961 Rome Convention on the rights of performers, producers of phonograms, and

17. Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action, COM(88)172 final.

18. Follow-Up to the Green Paper: Working Programme of the Commission in the Field of Copyright and Neighbouring Rights, COM(90)584 final [hereinafter Follow-Up Report]. On June 7, 1991, the Council welcomed the overall approach of the Commission to the harmonization of copyright as set out in the "working programme." See Conclusions of the Ministers for Culture Meeting Within the Council of 7 June 1991 on Copyright and Neighbouring Rights, 1991 O.J. (C 188) 4.

19. Neighboring rights refers to the rights of performers, producers of phonograms and broadcasting organizations guaranteed by the Rome Convention on the protection of the same of October 25, 1961. Follow-Up Report, *supra* note 18, intro.

20. *Id.* ch. 1.4.

21. *Id.* annex, § I. The broadcasting proposal is discussed in the next section. See *infra* part II.B.

22. Proposal for a Council Directive on Rental Right, Lending Right, and on Certain Rights Related to Copyright, 1991 O.J. (C 53) 35 [hereinafter Rental Right Directive]. See also Follow-Up Report, *supra* note 18, chs. 1.1-1.3.

23. Rental Right Directive, *supra* note 22, arts. 1-2.

24. Proposal for a Council Decision Concerning the Accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works, as Revised by the Paris Act of 24 July 1971, and the International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 26 October 1961, 1991 O.J. (C 24) 5 [hereinafter Copyright Convention Directive]. See also Follow-Up Report, *supra* note 18, paras. 1.11.4-1.11.6.

25. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, as revised at Paris, July 4, 1971, 168 CONSOL. T.S. 185 [hereinafter Berne Convention].

broadcasting organizations.<sup>26</sup> These Conventions will then provide a minimum level of protection and the Commission may, on specific matters, propose more complete harmonization as it sees fit.<sup>27</sup>

Finally, the Commission said it will prepare studies in four areas by December 31, 1992: reprography, resale rights, moral rights, and the collective management of copyright and neighboring rights and collecting societies.<sup>28</sup>

## B. Broadcasting

Copyright issues in broadcasting are a particularly thorny area and one in which the member states have been unable to reach agreement. Indeed, copyright provisions were originally to be included in the Broadcasting Directive,<sup>29</sup> but were dropped in order to attain agreement on the final adoption of the Directive. The Commission, at that time, indicated that it would continue to press for adoption of the copyright provisions and, in the Follow-Up Report, summarized its position on cable retransmissions, which centers around three principles.<sup>30</sup> First, since cable retransmission is a form of exploitation subject to copyright, cable operators must obtain, by contractual means, authorization from the owners of all rights in any part of the program.<sup>31</sup> Second, it should, however, be possible for these rights to be managed exclusively on a collective basis without hindrance from the owners of individual rights in sections of the program to be retransmitted.<sup>32</sup> Finally, voluntary conciliation procedures should be introduced to help in the negotiations between cable operators and collecting societies.<sup>33</sup>

On July 17, 1991, the Commission announced that it had drafted legislation to harmonize copyright protection for radio and television broadcasts by satellite and cable in the EC.<sup>34</sup> If adopted, the legislation would establish a minimum level of protection for all right-holders and allow broadcasters to obtain permission to transmit only from the right-

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26. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

27. Copyright Convention Directive, *supra* note 24.

28. *Id.* annex, § II.

29. Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter Broadcasting Directive].

30. Follow-Up Report, *supra* note 18, paras. 9.1-9.10.

31. *Id.* paras. 9.6-9.7.

32. *Id.* para. 9.8.

33. *Id.* para. 9.9.

34. EC Commission Proposes to Harmonize Protection for Satellite Broadcasts, Daily Rep. for Execs. (BNA), No. 138, at A-2 (July 18, 1991).

holder in the country from which the broadcast is made.<sup>35</sup> This would relieve broadcasters of any need to get permission from the right-holders in each EC country to which the work will be broadcast. The interests of these other holders would be satisfied, according to the Commission, by requiring that royalties be paid to them. The Commission hopes that this legislation will be adopted at the Community and national levels by January 1, 1995.<sup>36</sup>

### C. Computer Software

The perceived barrier to creativity and, therefore, development of industrial technology and trade, caused by inadequate protection afforded to computer software in the EC, encouraged the Community to act. On May 14, 1991, the Council adopted a directive on the harmonization of the legal protection of computer programs.<sup>37</sup> It obliges the member states to provide, in their own laws, that computer programs should be entitled to protection by copyright in the same way as literary works under the Berne Convention.<sup>38</sup> The term of the universal copyright will be fifty years.<sup>39</sup> There will be one uniform test throughout the EC to establish the originality of a work.<sup>40</sup> Each member state must enact enforcement provisions and has until January 1, 1993, to pass the national legislation necessary to implement the new rules.<sup>41</sup>

Much controversy centered around the right to reverse engineer or decompile a competitor's software. Following extensive debate, the Commission decided to limit the scope of the right to decompilation to ensure interoperability between programs, as opposed to permitting decompilation for the purpose of creating a competing software program.<sup>42</sup>

## III. ADVERTISING

The ability to advertise in a range of media and use a variety of advertising techniques is an important factor in the successful marketing of a supplier's goods and services. Where access to a particular medium,

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35. *Id.*

36. *Id.*

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

38. *Id.* art. 1.

39. *Id.* art. 8.

40. "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection." *Id.* art. 1(3).

41. *Id.* arts. 7, 10.

42. *Id.* art. 6. For a detailed discussion of the legislative process and the debates surrounding it, see Alan K. Palmer & Thomas C. Vinje, *The EC Directive on the Legal Protection of Computer Software: New Law Governing Software Development*, 2 DUKE J. COMP. & INT'L L. 65 (1992).

such as television, for example, is denied in some countries and not in others, or advertising in a particular manner is prohibited, barriers to trade are created. Market access and penetration are made more difficult and sales potentially are hindered in those countries with the more restrictive rules. It is precisely this type of internal market barrier that the single market program was designed to overcome. However, a balance must be struck between the need to harmonize and liberalize the applicable rules and standards throughout the Community and the concerns, where genuine, of the member states which gave rise to these rules in the first place. Such concerns involve, for example, considerations of public health, safety, and morality.

The Broadcasting Directive already provides rules applicable to advertising on television. It requires that advertising should not prejudice respect for human dignity; be discriminatory; be offensive to religious or political beliefs; or encourage behavior prejudicial to health, safety, or the protection of the environment.<sup>43</sup> Recently, the Commission published two proposals for further legislation on advertising.<sup>44</sup> The first, the proposed Advertising Directive, deals with the harmonization and, for some countries, the liberalization of national rules on comparative advertising, a form of advertising which is not currently permitted in all member states. The second, the proposed Tobacco Directive, which would ban all tobacco advertising, is restrictive in nature and is based on the need to protect public health. These two proposals pose an interesting contrast. One seeks to extend the right to advertise while the other seriously curtails that right, if, indeed, such a right can be said to exist at all.

#### A. Comparative Advertising

The proposed Advertising Directive would amend a 1984 directive,<sup>45</sup> which laid down common rules on misleading advertising, and excluded comparative advertising from its terms,<sup>46</sup> leaving it for future regulation.<sup>47</sup> If the draft were adopted, the 1984 Directive would be amended by the insertion of provisions expressly requiring the member states to allow

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43. Broadcasting Directive, *supra* note 29, art. 12.

44. Proposal for a Council Directive Concerning Comparative Advertising and Amending Directive 84/450 Concerning Misleading Advertising, 1991 O.J. (C 180) 14 [hereinafter Advertising Directive]; Amended Proposal for a Council Directive on Advertising for Tobacco Products, 1991 O.J. (C 167) 3 [hereinafter Tobacco Directive].

45. Council Directive 84/450 of 10 September 1984 Relating to the Approximation of Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984 O.J. (L 250) 17.

46. *Id.*

47. Advertising Directive, *supra* note 44, pmb1.

comparative advertising.<sup>48</sup> The member states would be required to provide adequate and effective means for the control of both misleading advertising and comparative advertising to serve the interests of consumers, competitors, and the general public.<sup>49</sup> The member states would have until December 31, 1992, to modify their laws to comply with the proposed Advertising Directive.<sup>50</sup>

Comparative advertising would be allowed provided that "it objectively compares the material, relevant, verifiable and fairly chosen features of competing goods and services . . . does not mislead . . . does not cause confusion in the market place" and does not disparage a competitor.<sup>51</sup> Individuals and organizations would be afforded the opportunity to challenge misleading or comparative advertising in court and/or before an administrative authority. When justified, a complainant would be able to obtain an order prohibiting, or requiring the cessation of, publication of the advertisement, irrespective of whether actual loss or damage to the complaining party, or intention or negligence on the part of the advertiser could be shown.<sup>52</sup>

## B. Ban on Tobacco Advertising

The second proposal offered by the Commission in the advertising field would require the member states to ban all forms of advertising of tobacco products and the free distribution of such products.<sup>53</sup> The ban would be comprehensive. It would prohibit advertising by any form of communication, whether printed, written, oral, by radio or television broadcast or in the cinema which has the aim or effect, direct or indirect, of promoting tobacco products. The Tobacco Directive would prohibit the advertising even if the product is not specifically mentioned, such as where brand names, trade marks, or other distinctive features are used.<sup>54</sup> Indirect advertising, such as that displayed at sporting events, would also

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48. *Id.* art. 1 (proposed art. 3a). Comparative advertising is defined as "any advertising which explicitly or by implication identifies a competitor of goods or services of the same kind offered by a competitor." *Id.*

49. *Id.* (proposed art. 4(1)).

50. *Id.* art. 2.

51. *Id.* art. 1 (proposed art. 3(a)(1)).

52. *Id.* (proposed arts. 4(1)-4(2)).

53. Tobacco Directive, *supra* note 44, art. 2. Tobacco products are defined to include all products intended to be smoked, sniffed, sucked, or chewed, including those products made partially of tobacco. *Id.* art. 1.

54. *Id.* In fact, advertising of tobacco products on television has already been banned by the Broadcasting Directive. Broadcasting Directive, *supra* note 29, art. 13.



be banned.<sup>55</sup> Indeed, advertising would be allowed only in tobacco sales outlets and then only if not visible from outside the premises.<sup>56</sup>

The Commission's justifications for the proposed ban are based on the protection of public health.<sup>57</sup> Although the Commission was expressly empowered and required to take into account public health considerations in devising harmonization measures for the single market program,<sup>58</sup> one of the significant aspects of this proposal is the use of legislation at the Community level to define what is effectively a restriction on the marketing of goods, rather than leaving it to each member state to decide for itself what is in the public interest. A ban in national, rather than Community, legislation based on these grounds could be challenged by an interested party in the national courts as contravening Article 30 of the EEC Treaty.<sup>59</sup> If successfully argued, the member state concerned would then have to justify the measure under Article 36 and show that it did not go beyond what was necessary to achieve the result sought.<sup>60</sup> However, by incorporating the ban into Community legislation, the interested party not only loses its chance to challenge the ban in this way, Community legislation overriding national law, but also, member states lose their discretion in this area. In addition, because the ban is proposed as a harmonization provision for adoption under Article 100a of the EEC Treaty,<sup>61</sup> which requires approval by qualified majority rather than unanimity, all member states will have to impose the ban, if the legislation is adopted, even if one or some of them did not feel that protection of human health requires such a drastic measure. A dissenting country will have to comply with a majority decision on adoption.

### C. Freedom to Provide Services

Issues involving the right to provide services throughout the Community arise in the context of advertising. For example, on July 25, 1991, the European Court of Justice (ECJ) delivered its judgments in *Stichting*

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55. Tobacco Directive, *supra* note 44, pmbl., para. 20, arts. 1-2.

56. *Id.* art. 3. See also *id.* pmbl., para. 18.

57. *Id.* pmbl.

58. See EEC TREATY art. 100a(3) (as amended 1987). This provision requires the Commission to take, as its base, a high level of protection.

59. EEC Treaty Article 30 prohibits all quantitative restrictions (quotas) on import and measures having equivalent effect between the member states. *Id.* art. 30.

60. Member states' restrictions on imports, exports or goods in transit, or measures having equivalent effect, must be justified on grounds of public morality, public policy, public security or the protection of health, national treasures or commercial property; and the measure must not be a means of arbitrary discrimination or a disguised restriction on trade. *Id.* art. 36.

61. *Id.* art. 100a (as amended 1987).

*Collectieve Antennevoorziening v. Commissariaat voor de Media*<sup>62</sup> and *Commission v. The Netherlands*<sup>63</sup> and declared that a Dutch law restricting advertising in The Netherlands by foreign broadcasters violated Article 59 of the EEC Treaty. The Dutch law prohibited Dutch cable television operators from retransmitting broadcasts from cable and satellite broadcasters in foreign countries if advertising did not meet government standards. These included requirements that the advertisements be produced by a person independent of the program producer, that advertising revenues be used to finance new programming, and that no commercials be broadcast on Sundays.<sup>64</sup>

In 1988, the Dutch Media Commission imposed a symbolic fine on ten cable operators for violations of the law. The operators challenged the imposition of the fine and the local court referred the matter to the ECJ. At the same time, the Commission challenged the law by bringing the Dutch government before the ECJ<sup>65</sup> for failure to fulfil its obligations under the EEC Treaty.<sup>66</sup>

The ECJ ruled that all discrimination affecting trade in services between member states must be eliminated unless based on the public health, security, and policy exceptions of Article 56 of the EEC Treaty. The ECJ also struck down a provision requiring state radio and television companies to reserve a percentage of their programming production needs for a Dutch production company. This limited their ability to use production companies established in other member states and created an unjustified preference in favor of a national producer, thus violating Article 59.<sup>67</sup>

#### IV. GAS TRANSIT

The Council adopted a directive, on May 31, 1991, guaranteeing the right of transit for natural gas through the major high-pressure natural gas transmission supply networks (grids) within the EC.<sup>68</sup> Member states are required to take all necessary steps, by January 1, 1992, to facilitate

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62. Case 288/89, *Stichting Collectieve Antennevoorziening v. Commissariaat voor de Media* (full text not yet officially reported). A brief report of the case may be found in COURT OF JUSTICE OF THE EUROPEAN COMMUNITY, No. 15/91, THE PROCEEDINGS OF THE COURT OF JUSTICE AND COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES 9 (1991) [hereinafter PROCEEDINGS OF THE COURT].

63. Case 353/89, *Commission v. The Netherlands* (full text not yet officially reported). For a report of the case, see PROCEEDINGS OF THE COURT, *supra* note 62, at 10.

64. *Id.*

65. The action was brought under Article 169 of the EEC Treaty.

66. PROCEEDINGS OF THE COURT, *supra* note 62, at 10. The reference to the ECJ was made under Article 177 of the EEC Treaty.

67. *Id.*

68. Council Directive 91/296 of 31 May 1991 on the Transit of Natural Gas Through Grids, 1991 O.J. (L 147) 37 [hereinafter Gas Transit Directive].

transit, in accordance with the terms of the Directive, between the major networks.<sup>69</sup> By imposing a nondiscrimination requirement,<sup>70</sup> the Commission seeks to make transit compulsory irrespective of the origin or final destination of the gas, provided the transmission either originates or ends in one of the member states and crosses at least one intra-Community frontier.<sup>71</sup> It is hoped that this will allow excess gas capacity in one country to be sold in other countries, thereby eliminating one of the major obstacles to the trade in gas between the national networks. The Gas Transit Directive also complements the directive on electricity transit<sup>72</sup> and moves the EC closer to the creation of a single internal energy market. The view of the Commission is that such a market will help ensure the security and quality of supplies while reducing the costs of investment in the network. Further, by introducing competition into markets dominated by national monopolies, the Commission believes that the price of gas will be reduced for the consumer.<sup>73</sup>

## V. INSURANCE BLOCK EXEMPTION TO BE DRAFTED

On May 31, 1991, the Council adopted a regulation authorizing the Commission to draft and adopt a block exemption regulation for insurance agreements.<sup>74</sup> Such an exemption would allow certain forms of insurance agreements to be used within the industry that would otherwise fall within the prohibition on restrictive agreements contained in Article 85(1) of the EEC Treaty. Thus, insurance companies would be relieved of the need to apply for separate exemptions for each of these agreements under Article 85(3).

The categories of agreement the Commission is empowered to declare compatible with the EC competition rules are those relating to the following: (1) the establishment of common risk premium tariffs based on statistics collected or the number of claims; (2) the establishment of common standard policy conditions; (3) common coverage of certain types of risk; (4) settlement of claims; (5) testing and acceptance of security devices; and (6) registers of, and information on, aggravated risks, subject to the proper protection of confidentiality.<sup>75</sup> The Commission will consult

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69. *Id.* art. 5.

70. *Id.* art. 3(2).

71. *Id.* arts. 1-2.

72. Council Directive 90/547 of 29 October 1990 on the Transit of Electricity Through Transmission Grids, 1990 O.J. (L 313) 30.

73. Gas Transit Directive, *supra* note 68, pmb.

74. Council Regulation 1534/91 of 31 May 1991 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 1991 O.J. (L 143) 1.

75. *Id.* art. 1.

with the insurance industry and the Advisory Committee on Restrictive Practices and Monopolies over the next several months, prepare its draft, and publish the draft for comments before final adoption.<sup>76</sup>

## VI. FINANCIAL SERVICES

### A. Money Laundering

On June 10, 1991, following a number of initiatives at the international level on the subject,<sup>77</sup> the Council adopted a directive to control the laundering of money from illicit activities.<sup>78</sup> Once the Money Laundering Directive is introduced into the national laws of the member states, financial institutions will be required to demand identification when an account is opened, when transactions involving ECU<sup>79</sup> 15,000 or more take place, and whenever there is suspicion of money laundering, irrespective of the amount involved.<sup>80</sup> Money laundering is defined to include the intentional transfer, conversion, concealment or possession of property, knowing that the property is derived from criminal activity.<sup>81</sup> "Property" means assets of every kind, and knowledge or intent may be inferred from the objective factual circumstances.<sup>82</sup>

Financial institutions will be required to examine any transaction they regard as likely to be linked to money laundering and employees and directors who report suspected money laundering transactions will be excused from liability under national bank secrecy laws that prohibit information disclosure.<sup>83</sup> Member states have until January 1, 1993, to adopt the necessary implementing legislation.<sup>84</sup> One year after that date, the

76. *Id.* arts. 5-6.

77. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 28 I.L.M. 493; Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148. For an analysis of these initiatives and the Directive on money laundering (at its draft stage), see Jeffrey Lowell Quillen, Note, *The International Attack on Money Laundering: European Initiatives*, 1 DUKE J. COMP. & INT'L L. 213 (1991).

78. See Re-examined Proposal for a Council Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, COM(91)182 final [hereinafter Money Laundering Directive].

79. The European Currency Unit (ECU) exchanged at the rate of 1 ECU to \$ 1.27. WALL ST. J., Jan. 31, 1992, at C17.

80. Money Laundering Directive, *supra* note 78, art. 3. The bank is required to keep a copy of the identification and transaction documents for at least five years after the relationship with the customer has ended. *Id.* art. 4.

81. *Id.* art. 1.

82. *Id.*

83. *Id.* art. 9.

84. *Id.* arts. 2, 16.

Commission will draw up a report on that implementation and submit it to the Council and the European Parliament.<sup>85</sup>

There was some controversy prior to the adoption of the Directive as to whether the EC is competent to require member states to enact criminal legislation. To resolve this dispute, the Council decided to adopt a statement for publication in the Official Journal at the same time as the Directive.<sup>86</sup> The statement referred to the UN Convention on the subject, which has already been signed by the member states and from which the definition of money laundering offenses set forth in Article 1 of the Directive was taken.<sup>87</sup> This was an unusual step, apparently circumventing the need for a separate international treaty between the member states as is necessary when the Treaty does not authorize EC legislation in a given area.

## B. Credit Institutions

The EC already has accepted the principle of home rather than host country regulation of the cross-border provision of financial services,<sup>88</sup> but the Commission recognizes that disparities in the type and level of such regulation may distort competition within the Community. Therefore, certain supervision requirements should be made equivalent.<sup>89</sup> Guidelines for the supervision of large exposures of credit institutions were published in 1987<sup>90</sup> but the Commission now wants binding rules on the subject. So, on March 27, 1991, the Commission issued a proposal for a directive on the monitoring of large exposures of credit institutions.<sup>91</sup> If adopted by the Council, the member states will have until January 1, 1993, to introduce any laws and regulations necessary to implement the new rules.<sup>92</sup>

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85. *Id.* art. 17.

86. See *Council Adopts Money Laundering Directive*, 4 Common Mkt. Rep. (CCH) ¶ 95, 943 (1991).

87. See *Miscellaneous Decisions*, Council Press Release, 6776/91 (Presse 87 - G) (June 10, 1991), which was issued when the Directive was adopted.

88. See *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/EEC*, 1989 O.J. (L 386) 1.

89. *Commission Recommendation of 22 December 1986 on Monitoring and Controlling Large Exposures of Credit Institutions*, 1987 O.J. (L 33) 10.

90. *Id.*

91. *Proposal for a Council Directive on Monitoring and Controlling Large Exposures of Credit Institutions*, 1991 O.J. (C 123) 18 [hereinafter *Monitoring Directive*].

92. *Id.* art. 8(1). The draft Directive proposes to grant member states discretion to allow a transitional period of up to five years, from January 1, 1993, for bringing into line exposures which exceed the specified limits on the date the Directive, once adopted, is published in the Official Journal. *Id.* art. 6.

The purpose of the Monitoring Directive is "to limit the maximum potential loss that a credit institution may incur through a single client or a group of related clients. . . ."<sup>93</sup> The scheme would impose a limit on the value of such exposure equivalent to twenty-five percent of the institution's own funds<sup>94</sup> and ban large exposures<sup>95</sup> which, in aggregate, exceed 800 percent of own funds.<sup>96</sup> At the same time, a notification procedure would be introduced. Member states would be given a choice between requiring the notification of all large exposures at least once a year (together with interim communication of any modifications to the annual report) and notification of all large exposures at least four times a year.<sup>97</sup>

## VII. AVIATION

On July 17, 1991, the Commission proposed new legislation designed to complete its liberalization of the aviation market. The package consists of three draft regulations covering airline fare deregulation, common criteria for airline licensing, and the introduction of cabotage (allowing an airline from one country to offer local services within another). In addition, the Commission, in an attempt to loosen the control each of the national flag carriers has on its domestic market, seeks the adoption of measures on the redistribution of "slots" at airports so as to encourage new entrants to the market, especially those wishing to establish services on routes with limited competition.<sup>98</sup> These draft regulations are important to the continuing development of common transportation policies<sup>99</sup> which aim to facilitate the movement of goods and people within the Community and help integrate the remote regions into the more prosperous heartland of the EC. The provisions also seek to reduce national barriers between the member states and increase competition between carriers in the interests of the consumer. If adopted as currently drafted,

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93. *Id.* pmb., para. 8.

94. *Id.* art. 4(1).

95. An exposure is "large" when its value is equal to or exceeds 10% of own funds and is made to one client or a group of connected clients. *Id.* art. 3(2).

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

97. *Id.* art. 3(1).

98. Other legislation in the aviation sector passed in 1991 includes: Council Regulation 1284/91 of 14 May 1991 Amending Regulation (EEC) No. 3975/87 Laying Down the Procedure for the Application of the Rules on Competition to Undertakings in the Air Transport Sector, 1991 O.J. (L 122) 2; Council Regulation 294/91 of 4 February 1991 on the Operation of Air Cargo Services Between Member States, 1991 O.J. (L 36) 1; Council Regulation 295/91 of 4 February 1991 Establishing Common Rules for a Denied Boarding Compensation System in Scheduled Air Transport, 1991 O.J. (L 30) 5.

99. For provisions on the EC's transport policy, see EEC TREATY tit. IV, and for air transport in particular, see *id.* art. 84.

the legislation would not require implementing legislation at the national level and would enter into force throughout the EC by January 1, 1993.<sup>100</sup>

The first draft regulation deals with air fares for both passenger and cargo services. It would formally continue the current system of "double disapproval" under which increased fares for air travel between two member states can only be rejected if both EC countries concerned object to the proposed fare.<sup>101</sup> The member states would be prohibited from disapproving air fares if those fares are reasonably related to costs.<sup>102</sup> There would be only limited rights to ask the Commission to approve the fare,<sup>103</sup> thus avoiding the need to create complex or comprehensive fare-setting procedures at a Community level. The aim is to complete liberalization by 1996 at which time the airlines themselves would be free to set their own fares, except on routes where there remained only limited competition.<sup>104</sup>

The second draft regulation addresses freedom of establishment.<sup>105</sup> All airlines meeting two criteria would be allowed to operate in the EC. First, the airline would need an Air Operator's Certificate attesting that the operator is competent to ensure the safe operation of its aircraft.<sup>106</sup> Second, the airline company would need an operating license obtained by meeting specific geographic, nationality, and capital adequacy requirements.<sup>107</sup> To qualify, the air carrier would have to be registered and have its principal place of business in one of the member states,<sup>108</sup> be owned and effectively controlled by Community nationals,<sup>109</sup> and have a start-up capital of at least ECU 100,000.<sup>110</sup>

The third of the draft regulations would end the use of quotas on market shares, authorize cabotage, and generalize the so-called "fifth free-

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100. The EEC Treaty provides: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." *Id.* art. 189.

101. Proposal for a Council Regulation on Fares and Rates for Air Services, 1991 O.J. (C 258) 15 [hereinafter Air Services Regulation]. The fare is deemed approved unless rejected, within 30 days of filing, by all the member states concerned. *Id.* art. 6.

102. *Id.* art. 3.

103. *Id.* art. 7 (providing for Commission intervention only in respect of routes on which competition is limited).

104. *See id.*

105. Proposal for a Council Regulation on Licensing of Air Carriers, 1991 O.J. (C 258) 2.

106. *Id.* arts. 8-11.

107. *Id.* art. 3.

108. *Id.* art. 4(1). In accordance with Article 7, a member state would be empowered to require, in addition, that the aircraft used by the air operator be registered within the Community. *Id.* art. 7.

109. *Id.* art. 4(2). The majority of the board would have to be representatives of those shareholders. *Id.*

110. *Id.* art. 5(1)(a). Also, the operator must carry insurance to cover losses from accidents. *Id.* art. 6.

dom" rights under which a carrier from one country can pick up passengers in a second and transport them to a third country within the EC.<sup>111</sup>

Note that non-Community carriers,<sup>112</sup> although permitted access to the EC market, will not benefit from the measures proposed in the same way as EC-based carriers. Only Community carriers would be guaranteed traffic rights between airports in the EC.<sup>113</sup> In addition, while member states would be denied the right to veto a fare change solely on the basis that it is lower than that of another Community carrier,<sup>114</sup> only Community carriers would be entitled to introduce lower fares than existing ones.<sup>115</sup> Evidently, the intention is that access of carriers from third countries will continue to be negotiated at the international level and dealt with through bilateral or multilateral treaties. In contrast, the member states are creating one internal air services market thereby eliminating, among themselves, both national boundaries and the need for such international treaties.

## VIII. PUBLIC PROCUREMENT

In 1990, as part of the single market program, the Council adopted a directive to open up to bidding from nationals from all member states public procurement contracts in the water, energy, transport, and telecommunications sectors.<sup>116</sup> These sectors were previously excluded from more general EC legislation on procurement,<sup>117</sup> but, in its White Paper, the Commission called for the removal of national barriers and preferences in these areas too.<sup>118</sup> The reason was obvious: contracts for public procurement in these sectors involve billions of dollars a year and, by restricting access to them to its own citizens and corporations, each member state is using national preferences that go against the fundamental

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111. Proposal for a Council Regulation on Access for Air Carriers to Intra-Community Air Routes, 1991 O.J. (C 258) 10 [hereinafter *Intra-Community Air Routes Regulation*].

112. A Community carrier is "an air carrier with a valid operating license issued by a Member State . . ." *Id.* art. 2(b). See also *Air Services Regulation*, *supra* note 101, art. 2(i).

113. *Intra-Community Air Routes Regulation*, *supra* note 111, art. 3.

114. *Air Services Regulation*, *supra* note 101, art. 3(1)(c). Some discretion still exists. See *id.* art. 3(2) (forbidding air carriers from charging fares that are excessively high or "unjustifiably low in view of the competitive market situation").

115. *Id.* art. 3(3).

116. 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 [hereinafter *Utilities Directive*].

117. Council Directive 71/305 of 26 July 1971 on the Coordination of Procedures for the Award of Public Works Contracts, 1971 O.J. (L 185) 5, as amended by Council Directive 89/440, 1989 O.J. (L 210) 1; Council Directive 77/62 of 21 December 1976 on the Coordination of Procedures for the Award of Public Supply Contracts, 1977 O.J. (L 13) 1, as amended by Directive 88/295, 1988 O.J. (L 127) 1.

118. White Paper, *supra* note 2, at 24.



principle of nondiscriminatory trading on which the Community is founded and which lies at the heart of the single market program.

The Utilities Directive set out publicity and selection procedures to be carried out in a nondiscriminatory manner based exclusively on commercial criteria.<sup>119</sup> However, its implementation is apparently hindered by the absence of effective remedies in some member states which discourages non-nationals from submitting tenders. In an attempt to resolve this problem and remove this barrier to trade, the Commission has proposed a directive which, if adopted, would require the member states to adopt contract award review procedures and mechanisms by July 1992.<sup>120</sup> These new procedures would permit a party alleging injury to commence interlocutory proceedings, at the earliest opportunity, to obtain suspension of the award procedure or the contracting entity's award decision, or other comparable relief, in the member state's discretion.<sup>121</sup> In all cases, there must exist the possibility of obtaining damages for injury. Additionally, the Directive provides for a conciliation process to be initiated by writing to the Commission or the appropriate national authority. Upon receipt by the Commission of such notification, a working group would examine the problem, give the parties the opportunity to make submissions, and try to reach an amicable agreement to resolve the problem.<sup>122</sup> The draft Directive would also require member states to carry out annual compliance reviews of the contract award procedures of the entities that fall within the scope of the Utilities Directive.<sup>123</sup>

## IX. ENVIRONMENTAL LAW DEVELOPMENTS

The harmonization of environmental laws and standards is not formally part of the single market program. It was not dealt with in the White Paper and, indeed, was not included in the EEC Treaty itself until the latter was amended by the Single European Act.<sup>124</sup> The EC's environmental policy has three principal objectives: the preservation, protection, and improvement of the quality of the environment; the protection

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119. The provisions are only non-discriminatory with respect to EC-based bidders. The Directive contains a buy-European preference permitting the rejection of tenders from non-EC bidders if less than 50% of the products (including software) comprised in the offer are not manufactured inside the Community or if the bid price is greater than, or less than 3% below, the best EC tender. Utilities Directive, *supra* note 116, art. 29.

120. Amended Proposal for a Council Directive Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, 1991 O.J. (C 179) 18.

121. *Id.* art. 2.

122. *Id.* arts. 10-12.

123. *Id.* arts. 3-8.

124. EEC TREATY tit. VII (as amended 1987).

of human health; and the prudent use of natural resources.<sup>125</sup> Member states are expressly permitted to introduce more stringent protective rules,<sup>126</sup> and they retain their ability to negotiate individually on the international plane.<sup>127</sup>

### A. Civil Liability for Waste

Article 130r(2) of the EEC Treaty enshrines the principle that when environmental damage occurs, the polluter should pay.<sup>128</sup> On June 28, 1991, the Commission issued its amended proposal on civil liability for damage to, or impairment of, the environment caused by disposal of waste.<sup>129</sup> If adopted, it would require the member states to impose strict civil liability on the producer of the waste.<sup>130</sup> However, it would leave the determination of who could bring an action to the discretion of the member states. The latter would also decide what the appropriate remedies should be, provided that they include the availability of an injunction and/or compensation for damage and an order for reinstatement of the environment or payment of the costs of so doing.<sup>131</sup> The burden of proof on the plaintiff could be no higher than the standard civil burden.<sup>132</sup> Member states would decide individually whether, and to what extent, damages for economic loss would be recoverable.<sup>133</sup> The possibility of contracting out of, or limiting, liability would be expressly denied and producers would be required to carry insurance or other financial security covering them against liability.<sup>134</sup> The limitation period proposed is three years from the date the plaintiff became aware, or should have become aware, of the damage to the environment.<sup>135</sup>

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125. *Id.* art. 130r (as amended 1987).

126. *Id.* art. 130r (as amended 1987).

127. *Id.* art. 130r(5) (as amended 1987).

128. The EEC Treaty provides "that environmental damage should as a priority be rectified at source, and that the polluter should pay." *Id.* art. 130r(2).

129. Amended Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1991 O.J. (C 192) 6.

130. *Id.* art. 3. Under the proposal, liability would be joint and several. *Id.* art. 5. Producer is defined as "any person who, in the course of a commercial or industrial activity, produces waste and/or anyone who carries out preprocessing, mixing or other operations resulting in a change in the nature or composition of this waste." *Id.* art. 2. In addition, a person who imports waste, who had control of the waste when the damage occurred or who is responsible for the licensed establishment to which the waste was transferred is deemed to be a producer for the purpose of the Directive. *Id.*

131. *Id.* art. 4(1).

132. *Id.* art. 4(1)(c).

133. *Id.* art. 4(d).

134. *Id.* arts. 8, 11.

135. *Id.* art. 9. The right to take legal action would be completely extinguished after 30 years from the date on which the incident giving rise to the damage or impairment occurred. *Id.* art. 10. Since legislation must not be retroactive, there would be no liability for damage caused by incidents

## B. Landfill

In April 1991, the Commission issued a proposal for a directive on waste disposal in landfill sites that would harmonize standards and increase environmental protection, especially for soil and groundwater.<sup>136</sup> If adopted, landfills would have to be classified<sup>137</sup> and the waste disposed at them would have to be registered. In the case of hazardous waste, its location at the site would also have to be recorded.<sup>138</sup> If waste were rejected as too hazardous, it would have to be returned to the producer unless another means of disposal could be found.<sup>139</sup> Landfill operators would have to comply with specified conditions in order to obtain their required operators permit,<sup>140</sup> issue annual reports on the type and amount of waste they process and give financial guarantees to cover the cost of closing the landfill and maintaining it afterwards.<sup>141</sup> A significant development in terms of liability is set forth in Article 14, which states that the landfill operator would be strictly liable under civil law for any damage to, or impairment of, the environment caused by the landfilled waste, irrespective of fault on his part.<sup>142</sup> The operator is effectively being characterized as the polluter although the waste was not generated by him in the first place.

In addition, environment ministers recently approved a plan to upgrade sewage treatment standards and increase the cleanliness of the EC's rivers and seas. Municipalities have until 1999 to 2005, depending on their size and the quality of the local environment, to ensure that all sewage (both household and industrial) is treated before being dumped.<sup>143</sup>

## C. Air Quality Standards

In July 1991, the Commission proposed legislation on the monitoring of air pollution by ozone.<sup>144</sup> The Directive would require each mem-

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which occurred before the date of the relevant member state's implementing legislation. *Id.* art. 13. Under the current draft, this would exclude actions even though the damage occurred after that date.

136. Proposal for a Council Directive on the Landfill of Waste, 1991 O.J. (C 190) 1 [hereinafter Landfill Directive].

137. *Id.* arts. 4-5.

138. *Id.* art. 11(2)(d).

139. *Id.* art. 11(5).

140. *Id.* arts. 6-7, annexes. See also Council Directive 75/442 of 15 July 1975 on Waste, 1975 O.J. (L 194) 39.

141. Landfill Directive, *supra* note 136, art. 17.

142. *Id.* art. 14.

143. *Pollution Control: Council Approves Curbs to Emissions from Trucks, Buses*, 1992 — THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, Apr. 5, 1991, available in LEXIS, Europe Library, 1992 Ex File.

144. Proposal for a Council Directive on Air Pollution by Ozone, 1991 O.J. (C 192) 17.

ber state to set up measuring stations<sup>145</sup> and to warn the public when ozone concentrations exceed a specified limit.<sup>146</sup> Member states would also be required to report regularly to the Commission.<sup>147</sup> The Commission intends, at a later date, to propose legislation on permitted levels of air pollution by ozone.<sup>148</sup>

To complement the existing rules on car emission standards, a directive has been adopted to place limits on the amount of carbon dioxide, nitrogen oxides, and hydrocarbons in the exhaust emissions of trucks and buses.<sup>149</sup> These controls would take effect in July, 1992, and would be made stricter after four years.<sup>150</sup>

The ECJ also had occasion recently to consider the environmental laws in the Community and, in particular, compliance with the rules on air quality standards. In May 1991, it delivered its judgment in *Commission v. Federal Republic of Germany*<sup>151</sup> and held that Germany had failed to implement fully two directives, one on sulphur dioxide<sup>152</sup> and one on air quality standards for lead emissions.<sup>153</sup> The German law, which purported to implement the Directives, was not legally binding, provided inadequate sanctions, and limited testing areas. Therefore, the ECJ held, Germany had failed to fulfil its obligations under the EEC Treaty with respect to the proper implementation of EC legislation.<sup>154</sup> The fact that low emission levels already existed in many Länder did not excuse the failure to comply with the Directives in those regions.<sup>155</sup>

## X. TELECOMMUNICATIONS

Like environmental policy, telecommunications policy was not formally included in the single market program. However, the Commission has embarked on an ambitious project aimed at breaking down the power

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145. *Id.* art. 3.

146. *Id.* art. 5, annex I, point 3.

147. *Id.* art. 6.

148. *Id.* art. 8.

149. See Council Directive 91/542 of 1 October 1991 Amending Directive 88/77/EEC on the Approximation of the Laws of the Member States Relating to the Measures to Be Taken Against the Emission of Gaseous Pollutants from Diesel Engines for Use in Vehicles, 1991 O.J. (L 295) 1.

150. See *id.*

151. Cases 361/88 59/89, *Commission v. Federal Republic of Germany* (not yet officially published). For an overview of this case, see COURT OF JUSTICE OF THE EUROPEAN COMMUNITY, No. 11/91, THE PROCEEDINGS OF THE COURT OF JUSTICE AND COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES 2 (1991).

152. Council Directive 80/779 of 15 July 1980 on Air Quality Limit Values and Guide Values for Sulphur Dioxide and Suspended Particulates, 1980 O.J. (L 299) 30.

153. Council Directive 82/884 of 3 December 1982 on a Limit Value for Lead in the Air, 1982 O.J. (L 378) 15.

154. PROCEEDINGS OF THE COURT, *supra* note 151, at 2.

155. See *id.*

of the national telecommunications administrations, all of which are monopolies or hold monopoly power in their respective domestic markets. At the same time, the Commission is seeking to harmonize product and service standards throughout the EC to facilitate competition and stimulate the European-wide provision of services by reducing the barriers to trade caused by discrepancies between national regulations. Many proposals were made in this field during 1991.

#### A. Terminal Equipment Testing

On April 29, 1991, the Council adopted a directive on telecommunications terminal equipment.<sup>156</sup> This Directive provides that all terminal equipment, including telephones, to be connected to a telecommunications network should comply with set standards on matters such as user safety and compatibility with the network.<sup>157</sup> The Directive lays down official certification and self-certification procedures and authorizes the affixing of the Community "CE" product standard mark to equipment certified as complying with EC standards.<sup>158</sup> Member states have until November 6, 1992, to ensure that their laws require terminal equipment to comply with the requisite standards and do not in any way impede the marketing or use of equipment that does so comply.<sup>159</sup>

#### B. Progress Towards Provision of Trans-European Services

Also in the telecommunications field, on June 3, 1991, the Council adopted a directive designating frequency band 1880-1900 MHz for the coordinated introduction of digital European cordless telecommunications (DECT) into the Community.<sup>160</sup> The member states have until December 31, 1991, to comply.<sup>161</sup> Also on June 3, 1991, the Council issued a Recommendation to the member states encouraging them to follow a coordinated approach to the introduction of DECT so that standards and services will be compatible and uniform throughout the EC.<sup>162</sup> In a similar move with respect to digital short-range radio (DSRR), the Commis-

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156. Council Directive 91/263 of 9 April 1991 on the Approximation of the Laws of the Member States Concerning Telecommunications Terminal Equipment, Including the Mutual Recognition of Their Conformity, 1991 O.J. (L 128) 1 [hereinafter Terminal Equipment Directive].

157. *Id.* art. 4.

158. *Id.* arts. 9, 11. See also Proposal for a Council Regulation (EEC) Concerning the Affixing and Use of the CE Mark of Conformity on Industrial Products, 1991 O.J. (C 160) 14.

159. Terminal Equipment Directive, *supra* note 156, arts. 3, 17.

160. Council Directive 91/287 of 3 June 1991 on the Frequency Band to be Designated for the Coordinated Introduction of Digital European Cordless Telecommunications (DECT) into the Community, 1991 O.J. (L 144) 45.

161. *Id.* art. 3.

162. Council Recommendation of 3 June 1991 on the Coordinated Introduction of Digital European Cordless Telecommunications (DECT) into the Community, 1991 O.J. (L 144) 47.

sion has proposed that the frequency bands 880-890 and 933-935 MHz be designated for DSRR throughout the Community by December 31, 1991.<sup>163</sup>

Proposals were also put forward for introduction of the prefix 00 as the standard international telephone access code<sup>164</sup> and for the introduction of one emergency number 112<sup>165</sup> to be used throughout the Community.

### C. Guidelines for Competition in Telecommunications

On July 26, 1991, the Commission announced that it had adopted guidelines indicating how its enforcement division for antitrust violations, Directorate-General IV, will apply the competition rules of the EEC Treaty in the telecommunications sector.<sup>166</sup> Problems can arise, in the Commission's view, because of the monopolistic character of the PTTs - the national telecommunications administrations. As they are monopoly suppliers, a denial of access to their networks prevents downstream competition in services. The guidelines include examples of agreements that restrict competition and outline those that may qualify for an exemption under Article 85(3).<sup>167</sup> They also specify situations in which the Commission will consider that an abuse of a dominant position in the market has occurred, constituting a breach of Article 86. These include denial of access to the network, cross-subsidization, and price discrimination.<sup>168</sup>

## XI. COMPETITION

### A. Reporting Rules for State-owned Enterprises

The Commission is empowered by Article 93 of the EEC Treaty to review the compatibility with the common market of aids given by member states to industry. If it finds an incompatible aid, the Commission can prohibit the planned support or order the national government involved to recover the aid it has given.<sup>169</sup>

163. Proposal for a Council Directive on the Frequency Bands to be Designated for the Coordinated Introduction of Digital Short-Range Radio (DSRR) in the Community, arts. 2-3, 1991 O.J. (C 189) 14, 15.

164. Proposal for a Council Decision on the Harmonization of the International Telephone Access Code in the Community, 1991 O.J. (C 157) 6.

165. Council Decision 91/396 of 29 July 1991 on the Introduction of a Single European Emergency Call Number, 1991 O.J. (L 217) 31.

166. Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, C(91)1437 final. These guidelines were issued August 9, 1991.

167. *Id.* at 19.

168. *Id.* at 35.

169. *See* EEC TREATY art. 93.

On July 10, 1991, following growing concern about the amount of, and difficulty in detecting, illegal aid that member state governments give to their state-owned enterprises, the Commission approved new reporting requirements for state-owned companies.<sup>170</sup> Manufacturing companies which are 51% or more state-owned and have a turnover of more than ECU 250 million, whether profitable or not, will be required to provide annual reports to the Commission.<sup>171</sup> Within six months of the end of its financial year, the company must submit copies of its balance sheet and profit and loss statement and details of the provision of capital, non-refundable grants, loans, guarantees, dividends, retained profits, and concessions regarding debt repayment.<sup>172</sup>

## B. Commission Fines for Infringement of Competition Rules

On June 5, 1991, Toshiba Europa GmbH, a wholly-owned subsidiary of the Japanese Toshiba group, was fined ECU 2 million (US 2.4 million) by the Commission for infringement of Article 85(1) of the EEC Treaty.<sup>173</sup> During its investigation, triggered by a complaint from Viho Europe, a Dutch company that was refused supplies by Toshiba's Dutch distributor, the Commission found that Toshiba used clauses in its exclusive distribution agreements to ban the export of its photocopiers from one member state to another. Distributors were forbidden, under the terms of the agreement, from selling or exporting photocopiers to other countries and in this way Toshiba divided the EC into separate national markets.<sup>174</sup> Such a dividing of the common market is always considered a serious infringement of the competition rules and such a practice has often attracted fines.

The Commission said that it took mitigating factors into account and had, therefore, reduced the fine from the level it would otherwise have been. These factors included Toshiba's cooperation during the investigation and its drawing up of a wide-ranging competition law compliance plan.<sup>175</sup>

On July 24, 1991, the Commission imposed a fine of ECU 75 million on Tetra Pak, the world's largest supplier of packaging machinery and

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170. *New EC Plan Aims to Highlight Government Aid to State-owned Firms*, Int'l Bus. Daily (BNA), available in LEXIS, Nexis Library, BUS File.

171. *Id.*

172. *Id.*

173. Commission Decision 91/532 of 5 June 1991 Relating to a Proceeding Under Article 85 of the EEC Treaty, 1991 O.J. (L 287) 39.

174. *Id.* at 40.

175. *Id.* at 45.

cartons, for anti-competitive behavior in breach of Article 85.<sup>176</sup> The Commission indicated that the fine was particularly high because of the length of time over which the infringements took place — up to fifteen years in some cases.<sup>177</sup>

Tetra Pak, a Swedish-based group, encouraged its customers to stay loyal to it through the use of restrictive clauses in contracts that required users of its machines to use only its brand of packaging cartons. This, together with predatory pricing practices, operated to exclude suppliers of competing brands from the market. Other provisions in the contracts challenged by the Commission included clauses requiring that only Tetra Pak be allowed to provide spare parts and that customers could not alter or move the machinery supplied to them.<sup>178</sup>

On July 22, only two days before this decision, the Commission announced, in an unconnected proceeding, that it would not object to Tetra Pak's acquisition of the Swedish company Alfa-Laval.<sup>179</sup> The merger had been notified to, and investigated by, the Commission under the Merger Regulation.<sup>180</sup> The Commission had previously lifted its suspension of the proposed acquisition and concluded that Tetra Pak's dominant position in the packaging machine market would not be strengthened by the merger and no dominant position would be created in the liquid food processing market.<sup>181</sup>

### C. Investigatory Powers of the Commission

When investigating alleged breaches of EC competition law, the Commission has extensive search and seizure powers under Regulation 17/62, including the power to demand entry to premises and the right to see documents.<sup>182</sup> These powerful tools of investigation were the subject of review by the ECJ in the recent case of *Hoechst AG v. Commission*.<sup>183</sup> The plaintiff alleged that the Commission had overstepped certain of its

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176. See *Commission Fines Tetra Pak, Citing Numerous Violations*, 1992 — THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, July 26, 1991, at 2.

177. *Id.*

178. *Id.*

179. Commission Decision 91/535 of 19 July 1991 Declaring the Compatibility with the Common Market of a Concentration, 1991 O.J. (L 290) 35 [hereinafter Commission Decision 91/535].

180. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1, revised by Corrigendum, 1990 O.J. (L 257) 13. The Commission initiated a number of investigations and issued a number of decisions under this Regulation during 1991.

181. Commission Decision 91/535, *supra* note 179, at 39-41. For other developments in the competition field discussed in this article see *supra* parts V, X.C.

182. Commission Regulation 17/62 of 6 February 1962, The First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-1962 O.J. SPEC. ED. 87.

183. Joined cases 46/87 and 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, 4 C.M.L.R. 410 (1991).



powers, as defined in Regulation 17/62 and that, therefore, the authorization of the investigation and the imposition of fines on Hoechst for its failure to cooperate were void. The ECJ rejected these allegations and held that Article 14 of the Regulation confers certain powers on the Commission to assist it in its task of preventing the distortion of competition.<sup>184</sup> To this end, the Commission can undertake investigations that may expose infringements of Articles 85 or 86. However, it must exercise its powers in such a way as to ensure that the fundamental rights of the company involved are observed. Therefore, the Commission must, in its formal decision to investigate, specify the subject matter and purpose of the investigation. If the company opposes the investigation, the national authorities should participate in the investigation and decide on the applicable procedural rules.<sup>185</sup> The ECJ held that the Commission had complied with its duties under the Regulation in this case.<sup>186</sup>

The Commission again used its powers under Regulation 17/62 in April 1991, when officials of its Directorate-General IV raided the offices of fifteen carton-board manufacturers to investigate allegations made by the British Printing Industries Federation that a cartel existed and prices were being fixed in contravention of Article 85(1).<sup>187</sup>

#### D. Ninth Annual Report on Antidumping Adopted

In June 1991, the Commission adopted its ninth annual report to the European Parliament on antidumping.<sup>188</sup> The Report gives statistics on antidumping cases in the EC from 1986 through 1990 and discusses six of the 1990 cases in detail: those dealing with CD players from Japan and South Korea; DRAMs from Japan; small-screen color televisions from South Korea; audio-cassettes from Hong Kong, Japan, and South Korea; and aspartame from Japan and the United States.

### XII. EC LAWS EXTENDED TO THE EFTA COUNTRIES

On October 21-22, 1991, the EC and the European Free Trade Association (EFTA) reached an historic agreement to create the largest trading block in the world, to consisting of 380 million consumers and stretch from the Arctic to the Mediterranean. The seven EFTA countries of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland agreed to join together with the twelve EC member states to form

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184. *Id.* at 2927-28, 4 C.M.L.R. at 465.

185. *Id.* at 2929, 4 C.M.L.R. at 466.

186. *Id.* at 2931, 4 C.M.L.R. at 468.

187. Boris Johnson, *Dawn Raids in EC Price-Fix Probe*, THE DAILY TELEGRAPH, Apr. 26, 1991, at 20.

188. *Commission Adopts Ninth Annual Report on Anti-Dumping*, Common Mkt. Rep. (CCH), No. 684, at 5 (June 27, 1991).

the European Economic Area (EEA).<sup>189</sup> The Treaty, the current draft of which is nearly one thousand pages long, was expected to be signed by the parties in early 1992, and then ratified by the parliaments of all nineteen nations within 12 months, before proceeding to the European Parliament.<sup>190</sup>

It is envisaged that the EEA Treaty will come into force in January 1993, from which time most of the EC laws and the case law of the European Court of Justice will be applied in the seven EFTA states, but without the latter becoming full members of the EC.<sup>191</sup> However, the EEA may be only a transitory stage for European integration since several of the EFTA countries have already applied for, or expressed an interest in, full EC membership status. Austria and Sweden have already applied to join and Finland is expected to do so in early 1992.<sup>192</sup>

If all goes according to plan, the EC's rules on the free movement of goods, services, capital, and people will apply in the EFTA countries. As a result, people who are nationals of any of the nineteen countries will be able to move freely around the EEA to work, without the need for work permits, visas or similar authorizations. Likewise, capital will move without restrictions and there will be a right to supply services across national borders. The EC antitrust rules will be applied in the EFTA states, along with the Merger Control Regulation which requires parties to all mergers which exceed certain high thresholds to obtain clearance prior to the merger.<sup>193</sup>

Although goods also will move freely, the EEA countries will not be creating a full customs union, such as that which exists for the EC. While a common customs tariff is applied to imports into the EC from non-EC countries, the EFTA countries have special tariff arrangements and each applies its own customs duties and rate scale. There will not, therefore, be a common external trade stance and border controls will remain in place between the EC and the EFTA countries.

As well as applying the principles enshrined in the EEC Treaty, the EFTA countries will introduce into their own laws EC legislation, both existing and future, in many spheres including that of the single market

189. EC, EFTA Foreign Ministers Reach Accord on New European Economic Area, 8 Int'l Trade Rep. (BNA) No. 42, at 1528 (Oct. 23, 1991).

190. *Id.* Since this article was drafted, the ECJ has issued an opinion objecting to the creation of a parallel EEA Court which was included among the EEA Treaty provisions. Consequently, portions of the Treaty shall have to be renegotiated, if possible. See *Court Rules Against EEA Treaty*, 1992 Common Mkt. Rep. (CCH), No. 697, at 1 (Jan. 9, 1992); David Buchanan, *European Pact in Doubt After Court Ruling*, FIN. TIMES, Dec. 16, 1991, at 1.

191. *Id.*

192. *Id.*

193. *Id.* See also *supra* note 180.

program. Consequently, the rules in such areas as public procurement, banking and financial services, product standards, intellectual property, environmental protection, and labor law will apply throughout the nineteen EEA member countries. However, certain areas, such as agriculture, are excluded from coverage; and others, such as company law, will have longer implementation periods.<sup>194</sup>

In fact, the EFTA countries already are changing their own national laws, where necessary, to bring them into line with EC rules. For example, the EC and EFTA have, for some time, worked together on the development of common harmonized product standards. The broader application of product standards and mutual recognition of product certification and testing procedures is typical of the benefits that all parties to the EEA Treaty expect to gain from the extended cooperation and adaptation of their laws. Goods will move more easily between the EEA countries and costs to manufacturers, both inside and outside the EEA, will be reduced through abolition of the need to adapt products to several different national standards and submit them to many different certification authorities for approval.

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194. *Id.*

