MOVEMENT TOWARDS AN INTERNAL MARKET IN 1993: AN OVERVIEW OF CURRENT LEGAL DEVELOPMENTS IN THE EUROPEAN COMMUNITY

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This article highlights the legal developments in 1991 and 1992 that have helped to pave the way towards an internal market in the European Community (EC).¹ Although a number of factors continue to raise doubts concerning the timely completion of a single market, the past year has been marked by significant legislation and other key developments which have narrowed the gap. The Treaty for European Union (Maastricht Treaty), for example, demonstrates the most comprehensive Community effort at resolving many of the issues involved in the union of the member states.² The Maastricht Treaty will be examined in Part I.

Part II will highlight recent Community action in the area of insurance and Part III will consider developments in financial services. Part IV focuses on product safety in the EC and Parts V and VI treat EC agriculture initiatives and EC environmental initiatives respectively. Community action on energy will be considered in Part VII. Part VIII reviews EC initiatives on public procurement, Part IX examines the Community competition policy, and Part X considers antidumping. Telecommunications and copyright protections in the EC will be

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¹ The European Economic Community is referred to herein as the EC or the Community.

² The member states of the EC include Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, The Netherlands, Italy, Spain, Portugal, and the United Kingdom.
reviewed in Parts XI and XII respectively. Part XIII will survey agreements recently concluded between the EC and third countries and Part XIV will take a concluding look at the short-range prospects for the internal market.

I. MAASTRICHT TREATY

On February 7, 1992 the twelve member states of the European Community signed the Treaty for European Union in Maastricht, The Netherlands.\(^3\) The Maastricht Treaty comes thirty-five years after the birth in 1957 of the European Community, as embodied in the Treaty of Rome (EEC Treaty),\(^4\) and marks an important beginning of a new stage in the process of European integration.\(^5\) The goal for the beginning of 1993 is the completion of an internal market having 345 million citizens, with persons, goods, services, and capital allowed to moving freely within the EC.\(^6\)

A. Provisions of the Maastricht Treaty

The Maastricht Treaty sets forth many important provisions, the most significant of which are highlighted here. First, the introduction of a common European Currency Unit (ECU)\(^7\) is to be implemented by the year 1999.\(^8\) This plan for adoption of the ECU as the common currency of the EC is part of what is known as economic and monetary union (EMU). If in 1996 the conditions for the final stage of EMU have already been achieved, it is possible that the common currency could be introduced as early as 1997 or 1998.\(^9\)

A second important issue addressed at the Maastricht summit was a structure allowing for important citizenship rights within the EC. These include the right to reside in any member state\(^10\) and the right

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4. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]. The EEC Treaty is also referred to as the Treaty of Rome.
5. COMMISSION OF THE EUROPEAN COMMUNITIES, TOWARDS EUROPEAN UNION 1 (1992) [hereinafter TOWARDS EUROPEAN UNION].
6. Id.
7. Maastricht Treaty, supra note 3, art. G(B)(4), 31 I.L.M. at 257 (adding art. 3a(2) to the EEC Treaty).
8. TOWARDS EUROPEAN UNION, supra note 5, at 5.
9. Id.
10. Maastricht Treaty, supra note 3, art. G(C), 31 I.L.M. at 259 (amending Title II of EEC Treaty to add art. 8a(1)).
to vote and to stand as candidates in municipal and European elections in any member state.\textsuperscript{11} The Maastricht Treaty also entitles citizens of the EC, when in a nonmember country where the citizen's country of origin does not have an embassy or consulate, to use the diplomatic or consular protection of any other member state.\textsuperscript{12} Other important rights guaranteed by the Maastricht Treaty include the rights to petition the European Parliament (Parliament) and to apply to an ombudsman appointed by Parliament concerning "instances of maladministration in the activities of the Community institutions or bodies."\textsuperscript{13}

A third accomplishment of the Maastricht Treaty is the creation of new powers for the EC\textsuperscript{14} in the area of public health protection\textsuperscript{15} that enable the member states to deal jointly with diseases such as AIDS and cancer.\textsuperscript{16} Industry within the Community will be strengthened through this common policy, and research and development will increase, thus enabling the EC to become more competitive in the world market.\textsuperscript{17} Furthermore, the EC will be able to bring the member states closer together through the establishment of trans-European transport, telecommunications, and energy networks.\textsuperscript{18} Common policies will also be developed in the areas of education, culture, immigration, and relations with developing countries.\textsuperscript{19} Further, the member states will work together toward the implementation of a common policy in the areas of foreign policy and security, mainly with regard to disarmament and arms control in Europe.\textsuperscript{20}

A fourth improvement outlined in the Maastricht Treaty is an increase in the powers of the Parliament.\textsuperscript{21} This involves a codecision procedure that enables the Parliament to participate fully with the

\textsuperscript{11} Id. (adding art. 8b(1) to the EEC Treaty).
\textsuperscript{12} Id. (adding art. 8c to the EEC Treaty).
\textsuperscript{13} Id. art. G(E)(41) (adding arts. 138a–138e to Title II of EEC Treaty); see also TOWARDS EUROPEAN UNION, supra note 5, at 3 (explaining justification for adopted procedures).
\textsuperscript{14} TOWARDS EUROPEAN UNION, supra note 5, at 2.
\textsuperscript{15} Maastricht Treaty, supra note 3, art. G(D)(38), 31 I.L.M. at 280 (amending Title IV of EEC Treaty to add art. 129).
\textsuperscript{16} TOWARDS EUROPEAN UNION, supra note 5, at 2.
\textsuperscript{17} Id.
\textsuperscript{18} Maastricht Treaty, supra note 3, art. G(D)(38), 31 I.L.M. at 281 (amending Title IV of EEC Treaty to include art. 129b).
\textsuperscript{19} TOWARDS EUROPEAN UNION, supra note 5, at 2–3.
Council of the European Community (Council) in the enactment of
certain legislation. Should the Council and Parliament be unable to
agree on a Community regulation or directive, a special Conciliation
Committee must find a compromise. In addition, Parliament is
given the right to approve the membership of the Commission of the
European Community (Commission) before it is appointed. The
Parliament has also been empowered to set up a Committees of
Inquiry, hear individual petitions, and appoint an ombudsman.

In the economic and social arena, the member states agreed to
establish a cohesion fund that will cover activities in the area of
environmental protection and transportation infrastructure. This
policy is also aimed at reducing the economic disparity between the
member states. In the social policy sphere, the Social Charter has
been approved by eleven member states but rejected by the United
Kingdom, so there remains some skepticism concerning success in this
area.

B. Subsidiarity

One of the oft-mentioned themes raised at Maastricht was the
principle of subsidiarity. Under the principle of subsidiarity, decisions
should be made at the community level only when there is a good
reason for so doing. Otherwise, decisions affecting individual
member states should be left for resolution at the lowest possible local
level. This principle allows member states to retain control over a
variety of local issues and to preserve their national identities.

of the EEC Treaty); see also TOWARDS EUROPEAN UNION, supra note 5, at 4 (application of
codecision procedure would apply to the completion of the internal market, freedom of
movement for workers, certain aspects of the right of establishment, and some aspects of
environmental and consumer protection).

23. Maastricht Treaty, supra note 3, art. G(E)(41), 31 I.L.M. at 288 (adding art. 138b to
the EEC Treaty).

24. Maastricht Treaty, supra note 3, art. G(E)(46), 31 I.L.M. at 290 (adding art. 158(2) to
the EEC Treaty).

25. Id. art. G(E)(41), 31 I.L.M. at 288 (amending Part Five of EEC Treaty to include arts.
138c-138e).

26. TOWARDS EUROPEAN UNION, supra note 5, at 7.

27. Id. at 6.

28. Emiliou, supra note 20, at 246.

29. COMMISSION OF THE EUROPEAN COMMUNITIES, FROM A SINGLE MARKET TO
EUROPEAN UNION 21 (1992) [hereinafter FROM A SINGLE MARKET TO EUROPEAN UNION].

30. Id.

31. Id.
Article 3(b) of the Maastricht Treaty explains that where the Community does not possess exclusive power, it will take action only if the proposed action cannot be adequately achieved by the member states, and the action, by reason of its scale or effects, would be better achieved by the Community.\textsuperscript{32}

C. Future for the European Union

The enthusiasm over the success achieved by the Maastricht Treaty has been tempered by criticism of certain of its provisions. One complaint is that the Parliament will lack legislative initiative because its powers will continue to be inferior to those of the Council and the Commission.\textsuperscript{33} Another criticism, which refers to the economic features of the Maastricht Treaty, is that the movement towards economic convergence has thus far not extended beyond declarations of good intentions. Furthermore, the problem of the disparity between the richer and poorer nations of the Community remains unresolved. Questions have also been raised concerning the comparatively limited rewards to be gained from the accomplishment of EMU by those member states "that constitute the hard economic core of the Community."\textsuperscript{34}

One issue to be resolved in the near future is whether Europe will evolve into a loose association of states or a confederation in which central institutions hold broad powers.\textsuperscript{35} While the member states recognize the importance of common policies in order to promote economic integration and development, they do not appear ready to establish a political authority possessing wide powers in all areas of common concern.\textsuperscript{36} One theory is that political union naturally follows economic and monetary union and that a common economic policy requires political support as well as social acceptance and mobilization.\textsuperscript{37} According to this theory, success would depend upon the existence of a central political authority.\textsuperscript{38} Additionally, there has been criticism that structural weaknesses in the economic aspects of
the Maastricht Treaty will make participation in the EMU difficult.\textsuperscript{39} In this sense, the Maastricht Treaty is but one step along the way to European integration.\textsuperscript{40}

The process of ratification of the Maastricht Treaty by the member states runs the gauntlet of anti-Treaty backlash and its connection with the political fate of its proponents.\textsuperscript{41} The process thus far has been anything but smooth. Perhaps the most significant development occurred on June 2, 1992 when Danish voters rejected the Maastricht Treaty in a national referendum by a 50.7 percent vote.\textsuperscript{42} This was contrary to all expectations and has caused great concern among the governments of the remaining member states,\textsuperscript{43} particularly the United Kingdom and Germany.\textsuperscript{44} The attention garnered by the Danish rejection served only as a prelude to the intense publicity created by the French referendum on September 20, 1992. After the French Senate had approved the necessary constitutional revisions to allow for the ratification of the Maastricht Treaty on June 17, 1992,\textsuperscript{45} the Maastricht Treaty was approved by a mere 1 percent margin of French voters. This came after a long and focused debate which included French President Francois Mitterand publicly arguing in favor of the Maastricht Treaty on national television. His position was reinforced by German Chancellor Helmut Kohl.\textsuperscript{46} The close vote in France sent different messages throughout the EC. While some claimed that the approval signalled a great victory, it was seen by many as a negative forecast for success of the EMU, thus throwing the European monetary system into temporary turmoil.\textsuperscript{47}

More recently, the British House of Commons voted on November 4, 1992 to advance the bill to ratify the Maastricht Treaty. This

\begin{itemize}
  \item \textsuperscript{39} Peter Marsh, \textit{Maastricht Deal 'Suffers From Structural Flaws'}, \textit{FIN. TIMES}, June 15, 1992, at 3. Such flaws include lack of clarity regarding the political structure of the EC and needed alterations in wage and fiscal policies. \textit{Id.}
  \item \textsuperscript{40} See Emiliou, \textit{supra} note 20, at 248.
  \item \textsuperscript{41} David Buchan, \textit{Final Uphill Push for the Treaty}, \textit{FIN. TIMES}, Apr. 23, 1992, at 16.
  \item \textsuperscript{42} \textit{Maastricht Treaty Rejected by Danish Voters}, Common Mkt. Rep. (CCH), No. 708, at 6 (June 11, 1992).
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} Quentin Peel, \textit{Kohl and Major Look for Way to Stay on Road to Maastricht}, \textit{FIN. TIMES}, June 5, 1992, at 2.
  \item \textsuperscript{45} \textit{France: Senate Approves Constitutional Revision Needed for Ratification of Maastricht Treaty}, Agence Europe, June 18, 1992, \textit{available in LEXIS}, Europe Library, Alleur File.
  \item \textsuperscript{47} \textit{France Narrowly Votes Yes: Ministry Hails Maastricht Win}, \textit{FIN. TIMES}, Sept. 21, 1992, at 1, 22.
\end{itemize}
decision, achieved by a slim three vote margin, delivered conflicting signals regarding the future success of the Maastricht Treaty, in parallel fashion to the varying opinions engendered by the close French vote.\textsuperscript{48} Skepticism was increased by Prime Minister John Major's announcement that final consideration by the House of Commons would not occur before the second Danish referendum on the Maastricht Treaty, scheduled for May 1993.\textsuperscript{49}

Among other member states, Ireland ratified the Maastricht Treaty on June 18, 1992, and Luxembourg ratified it in early July, much to the delight of Commission President Jacques Delors.\textsuperscript{50} In moving up its ratification procedures from November to July in the form of a parliamentary vote, Greece also ratified the Maastricht Treaty. This news is tempered, however, by concern over the ability of Greece to participate in the European union.\textsuperscript{51} On July 21, 1992 the German government presented two draft bills set for fall debate; the first of which regards the ratification of the Maastricht Treaty, and the second of which calls for amendment to the German constitution to accommodate the Maastricht Treaty. On December 2, 1992 the German Bundestag approved the Maastricht Treaty with a 543–17 vote and eight abstentions. The Bundesrat, the upper parliamentary house, then unanimously approved the agreement on December 18, 1992.\textsuperscript{52} Finally, the Belgian Chamber of Deputies approved the Maastricht Treaty on July 17, 1992 after a poorly attended and unenthusiastic debate.\textsuperscript{53}

II. INSURANCE

A. Nonlife Insurance

On June 18, 1992 the Commission adopted the Third Nonlife Insurance Directive on the Coordination of Laws, Regulations, and


\textsuperscript{49} Id.; see also Delay in Maastricht Ratification Casts Doubt on Treaty Future, Agence France Presse, Nov. 6, 1992, available in LEXIS, Europe Library, Alleur file (discussing the increased skepticism surrounding ratification of the Maastricht Treaty after John Major's announcement).

\textsuperscript{50} Declaration du President Delors au Nom de la Commission Europeene après le Referendum Danois (Commission Press Release, IP456) (June 3, 1992).


\textsuperscript{53} Id.
Administrative Provisions Relating to Direct Insurance other than Life Assurance, which amends Directive 73/239/EEC (First Directive) and Directive 88/357/EEC (Second Directive). The Third Nonlife Directive enables insurance companies to operate throughout the Community based upon a single authorization received from its home country. Sir Leon Brittan, the EC Commissioner for Financial Services, has stated that the decision to adopt this Directive is "a major landmark in the creation of a single market itself."

Completing the series of nonlife insurance directives aimed at creating a single market, the Third Nonlife Insurance Directive extends the provisions of the First and Second Directives by opening the insurance market to "individual purchasers" of insurance. An individual may now purchase insurance from companies which are established anywhere in the Community. Insurance companies are thus able to compete in a single market for life insurance. By creating mutual recognition among the member states of a single system of control, the Third Nonlife Insurance Directive satisfies the dual aim of implementing a single authorization system and providing


57. Third Nonlife Insurance Directive, supra note 54, art. 5.


60. Single Market in Insurance Services Almost Complete, supra note 58, ¶ 96,462; see also Richard Lapper, Brussels Opens Door to Let Cinderella Industry Come in from the Cold, FIN. TIMES, Apr. 8, 1992, at 4 (stating that the Third Nonlife Insurance Directive will lead to harmonized regulatory procedures in the long run and create a more competitive industry).
consumers with greater access to a more diverse selection of products.61

Under the Third Nonlife Insurance Directive, insurance companies are supervised by authorities in their home country.62 An insurance company can also set up branches in other member states without additional authorization. Thus, based on the authorization obtained in its home country, an insurance company can sell its policies throughout the EC without being required to obtain approvals from other member states.63 This system results in national authorities losing their ability to review the contracts or refute the premiums charged before the policy is marketed.64

The Third Nonlife Insurance Directive also specifies the minimum requirements that insurance companies must meet in order to receive authorization in their home state. Criteria are set for the reserves an insurance company must maintain and how its assets may be invested.65 The Directive also outlines requirements for shareholdings, admissible assets covering liabilities, and solvency margins.66

Two areas covered by the Third Nonlife Insurance Directive have proved controversial: health insurance and monopolies. In certain countries, health insurance is of national importance because it functions as social security,67 while other countries provide access to

63. See id. arts. 5, 9.
64. Compulsory insurance, in the form of alternatives to a national social security system, is distinguished from optional insurance policies in the Third Nonlife Insurance Directive. In the case of compulsory insurance, member states may require insurance institutions to follow certain notification provisions and to include requisite provisions in their policies. Id. art. 54. This is not the case for optional policies. Id. art. 2; see Hill, supra note 59, at 2.
66. Third Nonlife Insurance Directive, supra note 54 arts. 15, 22, 24. For example, persons seeking to acquire a shareholding in an insurance company must notify the competent authorities of the home member state and must also notify the authorities if ownership reaches 20, 33, or 50 percent. Id. art. 14; see also Eric Short, Britain to Accept Main Terms of EC Insurance Code, FIN. TIMES, Dec. 20, 1991, at 10 (describing the British government's initial response to the Third Nonlife Insurance Directive).
private health insurance coverage at a nominal rate. A third group of countries imposes strict regulations on their private health insurance companies. Attempting to harmonize the varying national rules, the Third Nonlife Directive treats health insurance in a special manner that permits member states to set certain legal requirements pertaining to health insurance for the protection of the general public.

The second hotly debated issue is whether to abolish exclusive rights granted to insurance companies. These exclusive rights permit certain companies to maintain monopolies on insuring certain types of risks. The Council is adamant in its position that monopolies should be discouraged because they contradict the philosophy of the single market which would allow citizens of member states to exercise their freedom of choice. Implementation of the Third Nonlife Insurance Directive is planned for July 1, 1994, although it has been deferred in Spain until the end of 1996 and in Portugal and Greece until the end of 1998.

B. Life Insurance

The Third Life Insurance Directive was agreed upon on June 22, 1992. The Third Life Insurance Directive mirrors the Third Nonlife Insurance Directive in establishing a “single passport” for insurance companies. This passport allows a life insurance company established in one member state to offer its services in other member states based on authorization which it receives from the relevant authorities in its

68. Turkey is an example. Annie Wilson, Turkey 16: Stark Contrasts Evident, FIN. TIMES, May 20, 1987, at 16.

69. See Devine & Flinch, supra note 67 (insurance companies in Germany that want to write health insurance are limited to that area).

70. Third Nonlife Insurance Directive, supra note 54, art. 54; Council Moves Closer Towards a Single Insurance Market, supra note 59, ¶ 96,205 (stating that because “[p]rivate health insurance is a matter of great social importance . . . member states can ensure that contracts . . . meet specific legal requirements designed to protect the general good [under] the directive”).


72. Id., art. 15. The provisions adopted concerning notification of shareholdings in insurance companies are ways that the Commission seeks to supervise monopolies. See Recognition of Evidences of Qualification, 1 Common Mkt. Rep. (CCH) ¶ 1486.29 (1988) (explaining freedom of choice).


state of origin.  

This Directive will be implemented concurrently with the Third Nonlife Insurance Directive.

Legislation in investment services, banking, and insurance is necessary for the EC to break into the worldwide markets in financial services. Based on the principle of control by the home country and mutual recognition by the member states, the Third Life Insurance Directive marks the final stage in the financial services single market plan.

This Directive is important for a number of reasons. First, the Third Life Insurance Directive abolished the system that required an insurance carrier to notify authorities in each member state of its operations. This will allow insurance companies to market their services and policies without being stalled by onerous approval processes. Member states, however, may still require that certain guidelines be followed for the maintenance of technical reserves and the notification of premium systems.

Second, insurance companies are required to maintain sufficient "technical provisions." The Third Life Insurance Directive proposes uniform methods for calculating these provisions and provides a common basis for analyzing and comparing insurance companies located in the various member states.

Finally, the Third Life Insurance Directive provides consumers with access to a wider range of products at cheaper prices. Consumer protection is a paramount concern when opening the frontiers to

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76. Single Market in Insurance Services Almost Complete, supra note 74, at 9.
78. Proposal for Third Life Assurance Directive Agreed by Commission, supra note 77, ¶ 95,768.
79. Single Market in Insurance Services Almost Complete, supra note 58, ¶ 96,462. Member states may still require systematic notification of premiums and technical services. Id.
81. Id. art. 18.
82. Id. arts. 21–22.
crossborder markets, and the Third Life Insurance Directive has taken this into consideration. Policyholders are protected by the laws of their country of residence or nationality. The Third Life Insurance Directive also requires insurance companies to supply information to policyholders concerning the details of the terms and conditions of their contracts and certain information about the insurance provider. Member states are not prohibited from permitting policyholders to cancel an insurance policy within a certain period after the date it becomes effective. Despite these requirements, there has been some criticism that although the Third Life Insurance Directive strives to protect consumers, the lack of consistent consumer protection rules decreases the benefits that could otherwise be obtained. For example, if a consumer were to purchase a life insurance policy from a Greek company which later went bankrupt, the consumer would have no redress because Greek laws do not provide for a compensation scheme in such situations.

C. Insurance Accounts

The Council adopted a directive on December 19, 1991 that provides for the harmonization of annual statements of accounts and consolidated accounts of insurance companies and that must be implemented by the member states by January 1, 1994. Applying to accounts beginning in 1995, this Directive establishes greater transparency and account comparability among financial institutions located in the member states of the EC. Previously, the differences in the criteria used to evaluate assets, liabilities, and the varying structures and contents of accounts made comparison of the financial soundness of insurance companies difficult. This Directive sets forth uniform procedures for calculating items on the accounts of insurance companies. For example, technical provisions are calculated through a specific procedure as outlined in the Directive. This provision is

83. Id. pmbl., para. 19.
84. Id. art. 31.
85. Id. art. 49; see also Proposal for Third Life Assurance Directive Agreed by Commission, supra note 77, ¶ 95,768 (stating that a policy holder may cancel his policy within fourteen to thirty days prior to date it becomes effective).
88. Id.; see also Three Major Steps Forward for European Insurance (Commission Press Release, IP1184) (Dec. 19, 1991) (detailing three separate Commission decisions on insurance and their relative importance for the creation of a single insurance market).
89. See id.
extremely important because it lays the foundation for single license authorizations which constitutes the central theme behind the Third Nonlife Directive and Third Life Directive.

III. FINANCIAL SERVICES

A. Proposed Investment Services Directive

The Proposed Investment Services Directive (ISD), recently approved by the Community finance ministers, creates a single license for an entity to conduct investment business in the EC.90 The ISD fosters a single market in investment services, similar to those proposed for the banking and insurance sectors, by promoting a single authorization procedure in one member state for any entity wishing to provide investment services throughout the Community.91 The ISD thus provides a level playing field which allows securities firms to compete with banks.

An investment firm receiving authorization for investment services in its home state is entitled to provide those services throughout the EC without the need for additional authorization. Furthermore, the ISD provides that investment firms authorized as brokers or dealers must be granted membership on exchanges in other member states.92 The Directive proposes minimal standards for authorization which must be obtained in the home member state,93 and is applicable to "investment firms"94 who propose to offer "investment services"95.


93. EC: Agreement Reached on Marketable Securities Directive, Agence Europe, Nov. 25, 1992, available in LEXIS, Europe Library, Alleur file. For example, all member states must establish a general compensation scheme to protect investors against default or bankruptcy of an investment firm. See id.

94. Investment firm is defined as a legal entity whose business is providing professional investment services to other parties. Charles Abrams, The Investment Services Directive, A European Passport for the Conduct of Investment Business?, PRAC. L. FOR COMPANIES, May 1992, at 33, 35.

95. Investment services include acting as a broker or agent, managing portfolios, giving advice on investments, dealing for own account, and placements or underwriting services. Id.
with respect to certain "investment instruments." The ISD also requires an investment company to maintain adequate financial resources in accordance with the Capital Adequacy Directive. Additionally, member states will be required to establish minimum prudential rules. These include segregating securities belonging to investors, maintaining client accounts, handling personal accounts, maintaining satisfactory records and procedures for internal control, and satisfying certain disclosure requirements. The Directive also requires that information be published concerning the price and volume of transactions.

Political agreement was reached on six points of the ISD on June 29, 1992. Belgium, France, and Italy will have until at least 1996 to implement the Directive, while Spain, Greece, and Portugal will have until at least 1999 for implementation.

B. Proposed Capital Adequacy Directive

The Capital Adequacy Directive (CAD), proposed pursuant to Article 149(3) of the EEC Treaty on January 27, 1992, sets forth minimum capital requirements for investment firms' and banks' financial services and securities. Types of services and transactions covered under the capital requirements are also detailed. Finally, the CAD creates a system of supervision for investment firms and seeks to reduce risks that may adversely affect the consumer.

96. Investments include transferable securities, money market instruments, financial futures, currency options, units in collective investment schemes, and exchange rate of interest rate instruments. *Id.* at 37.
99. Abrams, *supra* note 94, at 40. Disclosure requirements include disclosure of information relating to compensation schemes for example. *Id.*
100. *Political Agreement Reached on Investment Services and Capital Adequacy Directives*, *supra* note 90, ¶ 96,463.
101. *Id.*
102. *Id.*
104. *Id.* For example, the CAD covers firms which hold money or securities for clients and that offer financial services including making orders for financial investments and managing portfolios for individuals. Such firms must have an initial capital of at least ECU 100,000 provided they meet certain other criteria. *Id.* art. 3(1); see also Andrew Hill, *EC Closer to Accord on Capital Adequacy*, FIN. TIMES, Feb. 3, 1992, at 15 (noting the dispute among member states over whether securities firms should be regulated as strictly as banks).
In addition, the CAD protects against foreign exchange risks by setting forth requirements that banks and investment firms must meet.\textsuperscript{106} These requirements include: minimum initial capital requirements;\textsuperscript{107} regulatory capital requirements;\textsuperscript{108} minimum capital requirements coupled with certain financial risks;\textsuperscript{109} provisions to cover large exposures;\textsuperscript{110} and procedures or the application of these requirements to banks and investment firms.\textsuperscript{111} The Council reached a political agreement on the Capital Adequacy Directive in Luxembourg on June 29, 1992.\textsuperscript{112}

C. Supervision of Credit Institutions

On April 6, 1992 the Council adopted a Second Directive on the Supervision of Credit Institutions on a Consolidated Basis.\textsuperscript{113} Unlike its predecessor,\textsuperscript{114} the Second Directive covers the supervision of all types of credit institutions. Various provisions empower authorities to assess the activities and financial situation of credit institutions.\textsuperscript{115}

\textsuperscript{106} See Political Agreement Reached on Investment Services and Capital Adequacy Directives, supra note 90, ¶ 96,463. The minimal capital requirement under the CAD supports the Proposed Investment Services Directive and the adopted Second Banking Coordination Directive. \textit{Id.}

\textsuperscript{107} See Proposed Capital Adequacy Directive, supra note 98, art. 3.

\textsuperscript{108} See \textit{id.} art. 4. This would include subordinated debt of 250 percent of base equity capital. \textit{Id.}, Annex V; see also Simon London, \textit{Muted Cheers for the Single Market}, \textit{FIN. TIMES}, June 11, 1992, at 23 (stating that the Proposed Capital Adequacy Directive was generally welcomed by banks and securities firms in the United Kingdom as a desirable step towards a single European Securities Market).

\textsuperscript{109} For example, the initial capital requirement is reduced to ECU 50,000 for firms which do not hold securities or money for clients. See Proposed Capital Adequacy Directive, \textit{supra} note 98, art. 3.

\textsuperscript{110} \textit{Id.}, Annex VI (providing methods to monitor and control large exposures for firms that do not calculate capital requirements according to Directive 89/647).

\textsuperscript{111} \textit{Id.} art. 1; see also R.P. Falkner, \textit{European Community Competition Policy and Financial Services: An Overview}, 3 EUR. COMPETITION L. REV. 113, 115–16 (1991) (discussing capital adequacy requirements in the context of the entire policy of the Community on financial services).

\textsuperscript{112} Political Agreement Reached on Investment Service and Capital Adequacy Directives, \textit{supra} note 90, ¶ 96,463.


\textsuperscript{115} Every credit institution which has a subsidiary or affiliating credit or financial institution is subject to supervision on the basis of its consolidated financial situation. Second Supervision
These provisions ensure that the supervision covers all institutions engaged in credit activities. In order to stratify interstate supervisory authority over entities with non-credit institution parent companies, which were not covered by the old directive 83/350, the Second Directive provides a rule of jurisdictional distribution. Finally, member states are empowered to assess penalties and may provide measures designed to prevent infringement of the Directive. The Directive is set to be implemented by January 1, 1993.

IV. PRODUCT SAFETY

A. Product Safety Directive

On June 29, 1992 the Council adopted a directive covering general product safety for merchandise intended for consumer use and for any products likely to be used by consumers (Product Safety Directive). The member states are responsible for taking appropriate action to transform the Product Safety Directive into national law, the terms of which should set out the following requirements for manufacturers and suppliers: (1) introduce only safe products on the market for normal or reasonably foreseeable use; (2) supply consumers with all necessary information concerning possible risks arising from the use of these products; and (3) adopt measures aimed at informing consumers of situations and or places in which use of the product might be dangerous.

of Credit Institutions Directive, supra note 113, art. 3. Any information can be required from a parent institution with regard to the activities of itself and its subsidiaries so that even companies operating in diversified fields can be accurately assessed on a consolidated basis. Id. art. 6. Competent authorities responsible for exercising supervision are stipulated in Article 4. Id. art. 4; see also Council Publishes Directive on Consolidated Supervision of Credit Institutions, 4 Common Mkt. Rep. (CCH) ¶ 96,397 (1992) (explaining the history, purpose, and provisions of the Directive).

117. Id. art. 4.
118. See Supervision of Credit Institutions Directive, supra note 114, arts. 3-4; see also Credit Institutions, 1 Common Mkt. Rep. (CCH) ¶ 1486.19 (1988) (explaining the supervision scheme of credit institutions under the Supervision of Credit Institutions Directive).
120. Id. art. 9.
At the Community level, where specific safety rules exist for certain products, the safety requirements of the Product Safety Directive will not apply.\textsuperscript{123} Instead, the Product Safety Directive ensures that there are no significant gaps left in the product safety legislation of a member state. In cases of overlap, domestic safety law preempts the Directive.\textsuperscript{124}

Other goals of the Product Safety Directive include a formalization of the responsibilities of member states in this area, the adoption of a uniform system of safety, and the reduction in the number of product related accidents which currently occur within the Community.\textsuperscript{125} The member states are required to adopt these measures into national law by June 29, 1994.\textsuperscript{126}

B. Food Quality Legislation

Two important Council regulations concerning food quality and consumer protection were recently adopted. The first deals with the protection of geographical information and designations of origin for agricultural products and foodstuffs.\textsuperscript{127} The second deals with certificates of specific character for these same products.\textsuperscript{128} The Regulations are designed to alleviate the confusion involved with the methods used by different member states in labelling their different products with correct origin information, thereby providing consumers with reliable information concerning the origins of a product.\textsuperscript{129}

Regulation 2081/92, as adopted by the Council on July 14, 1992, contains rules designed to protect the identifiable geographical origin of certain agricultural products or foodstuffs through a uniform framework of Community rules to ensure that fair competition among producers exists.\textsuperscript{130} Member states must establish inspection bodies

\textsuperscript{123} Product Safety Directive, \textit{supra} note 121, art. 1.
\textsuperscript{124} Product Safety Directive Adopted, \textit{supra} note 122, ¶ 96,488.
\textsuperscript{125} \textit{Id.}; see Commission Adoption of the Directive on General Product Safety, (Press Release, IP524) (June 30, 1992).
\textsuperscript{126} Product Safety Directive, \textit{supra} note 121, art. 17.
\textsuperscript{128} Council Regulation 2082/92 of 14 July 1992 on Certificates of Specific Character for Agricultural Products and Foodstuffs, 1992 O.J. (L 208) 9 [hereinafter Foodstuff Certification Regulation].
\textsuperscript{130} Foodstuff Origin Regulation, \textit{supra} note 127, pmbl.
that will ensure that designated products comply with Community criteria.\textsuperscript{131}

Regulation 2082/92 protects the consumer by allowing products that fulfill Community criteria and specifications and that are subject to Community inspection procedures to be marked as such with Community certificates guaranteeing a specific character.\textsuperscript{132} Both of these regulations are due to enter into force on July 14, 1993.\textsuperscript{133}

V. AGRICULTURE

On May 21, 1992, following long negotiations, the member states' agriculture ministers reached agreement on many significant reforms in the Community’s Common Agricultural Policy (CAP).\textsuperscript{134} Among the underlying goals are: (1) to reduce European food prices; (2) to moderate excessive fluctuations in farmers’ incomes; and (3) to aid in finalizing the stalled talks of the Uruguay Round of General Agreement on Tariffs and Trade (GATT).\textsuperscript{135}

The main item in this package involves a 29 percent\textsuperscript{136} cut in the price of cereals over three years, which is designed to lead to cheaper feeding stuffs for livestock. This will, in turn, promote a 15 percent cut in subsidized prices for beef and also a 5 percent cut in butter prices.\textsuperscript{137} These reductions are intended to align European agriculture prices more closely with world levels.\textsuperscript{138}

Another goal of the package is to end export subsidies by 1997. Farmers will have a right to direct payments as compensation for this lost price support\textsuperscript{139} and all farmers will receive compensation for the income lost as a result of these price cuts. In order to qualify for such compensation, however, all but those farmers with very small holdings will have to reduce their land used for production by 15 percent.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{131} Id. art. 10.
\item \textsuperscript{132} Food Quality Legislation Adopted, supra note 129, at 1–2.
\item \textsuperscript{133} Foodstuff Certification Regulation, supra note 128, art. 22; Foodstuff Origin Regulation, supra note 127, art. 18.
\item \textsuperscript{134} See Community Agrees on Radical Reform of the CAP, Common Mkt. Rep. (CCH), No. 707, at 1 (May 28, 1992).
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\end{itemize}
Farmers will also receive compensation for this limitation on land use.\textsuperscript{141}

There was cautious welcome for this agreement in the United States where it is hoped that these changes will enable the EC to reach agreement on the reforms demanded by the United States in the Uruguay Round Talks.\textsuperscript{142} There is fear, however, that because the compromise embodied in the CAP Agreement is tenuous, it will inhibit any further change in this area.\textsuperscript{143} Reaction to these changes have included strong protests from farmers in different regions of the EC, particularly France and Germany.\textsuperscript{144}

On June 30, 1992 a number of Council Regulations were adopted, based upon the above-mentioned reforms, which set agricultural prices for the 1992–93 marketing year.\textsuperscript{145} Regulation 1738/92 reorganizes the market in cereals,\textsuperscript{146} and Regulation 1739/92 fixes cereal prices.\textsuperscript{147} Also, Regulation 1742/92 fixes the monthly price increases for cereals, wheat, and rye flour, as well as wheat groats and meal.\textsuperscript{148}

On July 8, 1992 the Commission adopted a proposal for a Council regulation for reform of the agrimonetary system under CAP. The new system would seek to stabilize currency exchange rates and to abolish the monetary compensatory amount system.\textsuperscript{149}

\section*{VI. ENVIRONMENT}

\subsection*{A. The Effect of the Maastricht Treaty on the Environment}

The Maastricht Treaty amends the EEC Treaty to include environmental provisions which strengthen environmental protection in the EC. Specifically, the Maastricht Treaty amends Article 2 of the

\begin{enumerate}
\item Id.
\item Id. at 2.
\item Id.
\item Id.
\item Id.
\item These proposals could be carried out more successfully upon completion of monetary union. See \textit{Commission Proposes Reform of the CAP Agrimonetary System}, 4 Common Mkt. Rep. (CCH) ¶ 96,492 (1992).
\end{enumerate}
EEC Treaty to provide that any economic development or activity should take account of its environmental impact. Article 130(r)(2) of the EEC Treaty is also amended so that the environmental policy of the EC is based on principals that allow the Commission to enact legislation aimed at protecting the environment through preventive measures.

One of the most significant results of the Maastricht Treaty is the revised procedure for the enactment of EC environmental legislation. Revising Article 130(s) of the EEC Treaty, the Maastricht Treaty proposes four such procedures: (1) codecision; (2) cooperation; (3) consultation/unanimity; and (4) qualified majority. The new procedures will allow the Council to adopt more environmental legislation through a majority vote rather than through the existing procedures that require unanimity. The new procedures may also grant to the Parliament more influence on environmental policy making.

B. Earth Summit

The Earth Summit, officially referred to as the United Nations Conference on the Environment and Development, was held in Rio de Janeiro in early June 1992. The Summit involved negotiations between the heads of state from over 160 countries including EC member states. The purpose of the Earth Summit was to develop treaties designed for the protection of all aspects of the environment, including land, air, water, waste, and hazardous substances.

Although the practical effects of the several treaties adopted at the Earth Summit have been minimal, the mere signing of the treaties illustrates the concern that the signatories have for the global environment. Some of the more significant agreements from the Earth Summit include: (1) confirmation of the "polluter pays" principle, 

151. Id. art. G(D)(38), 31 I.L.M. at 285.
152. Id., 31 I.L.M. at 286.
153. However, certain areas of fiscal and town and country planning which are politically sensitive, including management of water resources, land use, and energy supply, will keep the unanimity procedure applicable to them. Rhiannon Williams, Survey of Key Developments: Maastricht Treaty, LAW. EUR., Spring 1992, at 13.
which allocates cleanup costs to the responsible party;\(^{156}\) (2) a commitment from the signatories to prevent hazardous activities from crossing national borders; (3) a declaration of a "precautionary approach" allowing for preventative measures; (4) adoption of measures informing the public about hazardous activities; (5) adoption of provisions controlling hazardous waste disposal; and (6) promotion of research and technological advancement.\(^{157}\) In addition to these measures, one of the most significant results from the Summit is a treaty concerning climate change, which requires the participants to devise plans for the limitation of emissions relating to greenhouse gases that damage the environment.\(^{158}\) Finally, a treaty on biodiversity was also signed, containing measures intended to protect plant and animal life and restrict their commercial exploitation.\(^{159}\)

The concrete effects of the Earth Summit have not yet materialized. Although the EC member states that participated are obligated to enforce the principles established at the Earth Summit, no deadlines were set.\(^{160}\) The United Kingdom, however, as the current president of the EC until December 31, 1992, has already announced its intention of implementing the declarations outlined at the Earth Summit and has proposed an eight point plan of action which would ratify these agreements and encourage member states to implement similar legislation.\(^{161}\)

C. Eco-Audit Scheme

On March 6, 1992 the Commission proposed a regulation to the Council that would establish an eco-audit scheme whereby companies in the industrial sector could voluntarily participate.\(^{162}\) If adopted, the scheme would require companies to follow a set of guidelines,

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156. The Maastricht Treaty provides "that environmental damage should as a priority be rectified at source and that the polluter should pay." Maastricht Treaty, art. G(D)(38), \textit{supra} note 3, 31 I.L.M. at 285 (amending art. 130r(2) of the EEC Treaty).


158. \textit{Id.} This commitment from the EC gave further strength in promoting the energy tax directive discussed below. \textit{Id.; see also} David Gardner, \textit{EC Environment Plans Softened Before Rio Talks}, \textit{FIN. TIMES}, May 27, 1992, at 20 (noting that the EC's position at the Rio Conference fell short of the position proposed by the EC Environmental Commissioner).


161. \textit{Id.}

designed to improve industrial environmental policies using techniques such as environmental protection systems and environmental statements. The Regulation, which is based on the "polluter pays" principle, attempts to accomplish these goals by prompting companies to adopt environmental protection systems calling for periodic evaluation. The eco-audit scheme also seeks to standardize auditing and validation techniques. An environmental review performed by auditors would provide a comprehensive analysis of the performance of companies and would harmonize environmental assessments. The auditor, whether an independent external auditor or a company's own auditor, would have to be accredited by the member state and follow the guidelines set forth in the Regulation. This independent validation procedure would ensure reliability of environmental statements and standardize environmental certificates. These audits could then be used by companies to identify relevant problems and to establish safeguards for environmental protection.

The eco-audit scheme also provides a logo to companies that are environmentally conscious of their performance. The logo, which can be used as a marketing tool, would be provided to those companies that voluntarily enter the program and achieve satisfactory results.

163. Id. art. 3; see also id., Annex I (setting forth specific guidelines necessary to comply with article 3).
164. Id. pmbl.. This principle derives from the Maastricht Treaty. See Maastricht Treaty, art. G(D)(38), supra note 3, at 31 I.L.M. at 285; supra note 156 and accompanying text. The "polluter pays" rule seeks to promote sound management by creating this accountability. See Environmental Protection Measures, 2 Common Mkt. Rep. (CCH) ¶ 3315.02 (1981) (stating that responsibility of the polluter is one of the underlying principles of the Community's environmental program).
165. Eco-audit Scheme, supra note 162, art. 1(2).
166. See id. art. 5. The proposal requires environmental assessments to contain a description of the company's activities, an assessment of environmental issues, a compilation of data on pollutant emissions, raw material, and waste generation, energy and water consumption figures, and an assessment of the company's environmental performance and of its system of environmental protection. Id.
167. Id. art. 7.
170. See Eco-audit Scheme, supra note 162, art. 11 (companies "may" use the logo when becoming part of the eco-audit scheme, but must then comply with regulations laid out by the scheme in order to continue in the program). The logo may be used in advertisements, providing that no specific product or service is mentioned, or on brochures, reports, environmental
The eco-audit scheme represents a significant compromise by the Commission which had originally planned to make the audit scheme mandatory in 58 industries. The Commission changed its position so that companies might avoid the burden often associated with complicated laws. The Regulation, if adopted, will have to be enacted by January 1, 1993, and will be effective as of July 1, 1994. After four years, the Commission will have the right to review the Regulation and make any necessary amendments.

D. Eco-Label Scheme

On March 23, 1992 the Council adopted a regulation pursuant to Article 100(s) of the EEC Treaty providing for an eco-labeling scheme. This scheme allows a company whose products meet minimum environmental criteria to receive an eco-label. This Regulation has the dual purpose of informing consumers about the environmental impact of different products and encouraging manufacturers to develop and promote the use of products that are environmentally safe. Consumers will be able to identify products that are not excessively harmful to the environment and will be provided with information on energy consumption levels for products such as refrigerators, washing machines, dishwashers, and ovens. The Regulation sets forth criteria for the evaluation of the environmental quality of a product and its potential effects in the areas of waste, pollution, water and air contamination, noise, energy consumption, and consumption of natural resources.

statements, or the letterhead of the company. Id.; Commission Proposes Logo, supra note 169.

171. Mr. Ripa di Meana, former European Commissioner of Environmental Affairs, advocated the importance of the environmental audit and the need to make the regulation compulsory in each member state. See EC: Commission to Adopt its Environment Proposal to the Eco-Audit, supra note 168.

172. See EC Environmental Statements by Mr. Ripa di Meana, Agence Europe, Dec. 21, 1991, available in LEXIS, Europe Library, Alleur File (stating that the cost of an audit for a small to medium-sized firm would be only ECU 3000 every three years for a site of limited size).

173. See Eco-audit Scheme, supra note 162, art. 14.


176. Id. art. 4.

177. A dangerous product may now still receive the award provided it meets the objectives set forth under article 1. Id. arts. 1-2; see Regulation on Eco-label Published, 4 Common Mkt. Rep. (CCH) ¶ 96,370 (1992).

178. Council Regulation on Eco-label Award Scheme, supra note 175, art. 5.

179. See id.
The Regulation also requires the formation of a committee of representatives from the member states and chaired by a representative of the Commission. This committee will consult with interest groups in an effort to redefine ecological criteria for various products. The criteria for awarding eco-labels should ensure that the "high level of environmental protection, be based as far as possible on the use of clean technology and, where appropriate, reflect the desirability of maximizing product life." The committee will also ensure the uniform application of the eco-label scheme.

The eco-label scheme will be administered on the national level. This will be accomplished by the designation of a "competent body" in each member state to apply the provisions of the Regulation. Both the Committee and the Commission may contest the competent body's preliminary decision to award an eco-label, and the Commission will periodically report on which products have received an eco-label. Strict confidentiality is to be maintained for any information given to authorities concerning products.

E. Shipment of Waste


180. Id. art. 7.
181. Id. art. 5(4).
182. Id. art. 9.
183. Id. arts. 7, 10.
184. Id. art. 14.
185. Id. art. 13.
instructions in case of danger of accident. Details must also be provided concerning the intended method of waste disposal and the existence of any recycling plans.

One of the most significant amendments in the Proposal is a provision which permits waste exported for recovery purposes to be shipped under specific guidelines. The Commission’s goal is to ensure that a member state which undertakes recovery work manages its activities in an environmentally sound manner.

F. Civil Liability for Environmental Damage

The Commission has proposed to draft a green paper that provides for a harmonized system of assessing liability and providing remedies for environmental damage. This would accomplish two goals. First, it would introduce the concept of civil liability based on strict liability principles. Second, it would create a system of joint compensation for cases where the responsible party is either insolvent or cannot be located.

Also, an amended proposal for the Civil Liability Directive was submitted by the Commission on June 28, 1991. Many modifications have been proposed by the Commission, but the form has yet to be finalized.

188. Amended Waste Proposal, supra note 186, art. 20(2); see also Commission Submits Amended Proposal on Shipments of Waste, supra note 187, ¶ 96,429 (comparing the Amended Waste Proposal to the initial proposal).
189. Amended Waste Proposal, supra note 186, art. 7.
190. Id. art. 9; see Commission Submits Amended Proposal on Shipments of Waste, supra note 187, ¶ 96,429. However, the European Court of Justice (ECJ) decided that member states cannot refuse entry of hazardous waste into their country under existing EC law. See David Gardner, EC Court Refuses to Block Toxic Waste, FIN. TIMES, July 10, 1992, at 3. The case was brought by the European Commission against the government of Wallonia, the French-speaking part of Belgium, which had issued in 1984 and 1987 general restrictions against waste imports. Id. The ECJ found that existing law only covers restrictions on the importation of general waste for recycling or dumping. Id.
192. Id.
VII. ENERGY

A. Single Market for Gas and Electricity

The Commission has agreed upon proposals for completion of the single market in the gas and electricity industries. The completion of the internal market requires that the energy market be free of any internal barriers to the movement of goods and services. Previously, the Council has adopted directives concerning the transmission of electricity, the transmission of natural gas, and the transparency of gas and electricity prices. It has now submitted its proposal for electricity and gas in furtherance of the creation of the internal market. These proposals complement the Commission’s progress in creating an internal energy market. The Commission also intends to liberalize the energy markets by opening them up to all parties within the internal market which will provide consumers with greater freedom to choose among competing products.

The Commission’s program includes four main principles. First, the Commission hopes to create a progressive program for developing an open market that will enable the industry to adjust to the new regime. Second, the principle of subsidiarity, which allows the member states to remain in control of regulating the gas and electricity industry, provides the basis for the program. Third, the Commission seeks to avoid excessive regulation, a task made more difficult

201. See id. at 5, para. 12; Commission Details Proposals for the Completion of the Internal Market in Gas and Electricity, 4 Common Mkt. Rep. (CCH) ¶ 96,243 (1992).
202. Hydrocarbon Proposal, supra note 195, Explanatory Memorandum, at 6, para. 13. National legislation should be implemented only when necessary. Id.
203. “The aim of the proposal is not to establish detailed regulations but to lay down a framework for the general principles to which those rules must conform.” Id.
because liberalization of the market in the energy industry, traditionally highly regulated, will require additional new regulations. Finally, the Commission seeks to implement a cooperation procedure for this proposal in order to foster political dialogue between the Parliament and the Council, as well as to allow the Commission to consult with interested parties.\footnote{204}{Id. at 11 (the Proposed Directive is based on Articles 57(2), 66, and 100A of the Treaty of Rome); Commission Details Proposals for the Completion of the Internal Market in Gas and Electricity, \textit{supra} note 201, ñ 96,243.}

The Commission’s proposal envisions a three-stage approach. The first stage consists of the implementation of directives already adopted.\footnote{205}{See \textit{supra} notes 197–198 and accompanying text.} Beginning on January 1, 1993 the second stage will implement a licensing requirement for the production of electricity, the building of gas pipelines, or any similar activities.\footnote{206}{This would be in accordance with Directive 90/531, enacted September 17, 1990. Hydrocarbon Proposal, \textit{supra} note 195, Explanatory Memorandum, at 5, para. 11.} This will help create a nondiscriminatory system that opens the market to independent operators and users. It will also introduce a system of separating management while at the same time increasing vertical integration of production, transmission, and distribution.\footnote{207}{See \textit{Commission Details Proposals for the Completion of the Internal Market in Gas and Electricity, supra} note 201, ñ 96,243.} This will create greater transparency and a system of open accounting. In addition, and most importantly, the second stage will offer third party transmission and distribution companies the ability to access the market on a limited basis if certain eligibility requirements are first met.\footnote{208}{Completion of the Internal Market in Electricity and Gas, Agence Europe, Jan. 29, 1992, available in LEXIS, Europe Library, Alleur file.} In addition to propounding the principle of subsidiarity, the second stage will allow member states to oversee and create rules for the operation of distribution companies. As with all directives, member states will have the ability to choose the means of implementation.\footnote{209}{See Hydrocarbon Proposal, \textit{supra} note 195, art. 14.} The third stage of the Commission’s proposal extends third party access to the market. This stage is scheduled to begin on January 1, 1996 and will result in the completion of the internal market for electricity and gas.\footnote{210}{Commission Details Proposals for the Completion of the Internal Market in Gas and Electricity, \textit{supra} note 201, ñ 96,243.} Definition of this stage will depend upon the results obtained
in the second stage, but in any case should involve the establishment of more detailed criteria for third party access to these markets.\textsuperscript{211}

B. Energy Tax

On May 27, 1992 the Commission, after much debate and in an attempt to strengthen its stance on carbon dioxide emissions, adopted a Proposal for a directive that would impose a tax on energy combustion and carbon dioxide emissions.\textsuperscript{212} The tax will apply to gas, coal, oils, petrol, and certain types of electricity. The tax will be levied partially on the source’s carbon dioxide content and partially on its energy value.\textsuperscript{213}

The tax amount is set at $3.00 per barrel of oil and will take effect on January 1, 1993. This tax will rise $1.00 per year until reaching $10.00 per barrel in the year 2000, the year by which the EC is committed to stabilizing carbon dioxide emissions.\textsuperscript{214} Furthermore, minimal taxes will be imposed on various product bases as defined in the Proposed Directive.\textsuperscript{215} The Proposed Directive also taxes energy itself, with electricity, for example, to be taxed in the amount of ECU 2.1 per megawatt/hour of electricity produced. The Proposal also allows for a reduction in the tax rates for major energy users.\textsuperscript{216} Although the tax would be applied community-wide, each member state would be responsible for its collection and administration.\textsuperscript{217}

This energy tax is the source of much controversy. Industrial lobbyists and representatives from Persian Gulf countries argue that the tax serves only to increase costs without reducing carbon dioxide emissions.\textsuperscript{218} In addition, many member states believe that their own national energy conservation plans would be sufficient to meet the Community goal of reducing emissions by the year 2000.\textsuperscript{219} But Mr. Carlo Ripa di Meana, former EC Environment Commissioner and a strong advocate of the tax, believes that measures adopted at the

\begin{itemize}
  \item \textsuperscript{211} Id. For an examination of some of the problems in the EC energy market, see \textit{A Single EC Energy Market}, \textit{FIN. TIMES}, Jan. 31, 1992, at 18.
  \item \textsuperscript{212} \textit{Commission Proposes Energy Tax}, 4 Common Mkt. Rep. (CCH) ¶ 96,441 (1992).
  \item \textsuperscript{213} Id. The carbon dioxide content composes 50 percent of the tax, and the other half is based on energy value. \textit{Id}.
  \item \textsuperscript{214} \textit{Id}.
  \item \textsuperscript{215} For example, natural gas is ECU 2.81 per ton of carbon dioxide emitted on combustion and petrol is ECU 13.46 per 1,000 liters. \textit{Id}.
  \item \textsuperscript{216} \textit{Id}.
  \item \textsuperscript{217} \textit{Commission Proposes Energy Tax, supra note 212, ¶ 96,441}.
  \item \textsuperscript{218} \textit{Violent Assault on Carbon Tax' Angers di Meana}, \textit{FIN. TIMES}, May 15, 1992, at 3.
  \item \textsuperscript{219} \textit{Id}.
\end{itemize}
national level would not be sufficient. The application of the tax is subject to adoption of similar tax measures by the Organization for Economic Cooperation and Development (OECD). Thus far, the United States has been reluctant to commit to this plan.

VIII. PUBLIC PROCUREMENT

On February 25, 1992 the Council adopted Directive 92/13 which coordinates the laws, regulations, and administrative procedures for entities which operate in the water, energy, transport, and telecommunications sectors. The purpose of the Directive is to ensure that potential contractors and suppliers have an equal opportunity to bid on available contracts. Containing provisions designed for the effective application of procurement procedures outlined in Directive 90/531, Directive 92/13 requires member states to properly review decisions made by contracting parties that may have infringed Community procurement procedures contained in Directive 90/531.

Along these same lines, Council Directive 92/50, which relates to the coordination of procedures that govern awards of public service contracts, was adopted on June 18, 1992. This Directive is aimed at the liberalization of public service contracts in those sectors previously mentioned (energy, transport, telecommunications, and

220. David Gardner, Brussels Warns on Fuel Tax, FIN. TIMES, May 28, 1992, at 2. Only Germany, Denmark, and The Netherlands have submitted plans to the Commission to save energy. Id. The UK has only committed to stabilizing emissions by 2005. Id.

221. Commission Proposes Energy Tax, supra note 212, ¶ 96,441.


water) which, until the adoption of Directive 92/13, had been "excluded sectors." 228

IX. COMPETITION

A. United States-EC Competition Agreement

On September 23, 1991 the Commission and the United States government signed an historic agreement designed to improve cooperation and coordination in the area of competition enforcement activities. 229 The agreement involves the joint efforts of the Commission on the one hand, and the United States Federal Trade Commission (FTC) and Department of Justice on the other. The purpose of this agreement, as outlined in its eleven articles, is to reduce the possibility of, or effects arising from, differences between American antitrust laws and EC competition laws. 230

On the same day, the FTC announced a new rule whereby EC lawyers who are not qualified to practice law in the United States would be permitted to represent clients at FTC proceedings. 231 To benefit from this new rule, an EC lawyer must be qualified to practice in an EC member state and before the Commission, in accordance with Regulation 99/63. 232 Also on this date, the EC Commission and the United States Securities and Exchange Commission signed a joint statement aimed at improving the regulation of securities on both sides of the Atlantic. 233

B. Procedure

1. PVC Cases. In a procedurally significant decision, the European Court of First Instance (CFI) held that a Commission decision penalizing polyvinyl chloride (PVC) producers for violation

228. Id. Annex 1(A)–1(B). These sectors were originally excluded from the provisions of the White Paper, which outlined legislation in various sectors necessary to complete the single market. See WHITE PAPER, supra note 196, at 4–8 (explaining objectives of White Paper).


230. Id.

231. Id.

232. Id.

of the Commission's competition rules was void. Accordingly, the ECU 23.5 million fine imposed by the Commission was overturned.

This ruling was based upon several procedural errors committed by the Commission. Article 3 of Council Regulation 1 and Article 12 of the Commission's Rules of Procedure taken together require that decisions such as this, where the decision is binding on legal persons whose native languages are different, must be published in each of the languages in which it is binding. A number of disparities between the measures as adopted and as published were found in the different official language versions of the decision. In its amended published form, the decision diverged from the Commission's intention in adopting the measure. This deviation clearly violates the rule against alteration of an adopted measure.

An additional procedural error consisted of defects in the signatures appearing on the reported measures. The mandate of Commission members who signed the measures had expired before they were finalized for reporting and publication. The measures notified and published were therefore issued by an incompetent authority.

2. Steetley-Tarmac. In another important procedural development, the Commission exercised its powers for the first time on February 12, 1992 under Article 9 of the European Merger Control Regulation 4064/89. In so doing, the Commission referred the pro-

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235. See id.
236. Id. at 380.
238. Id. This rule is designed to insure legal certainty and stability within the EC legal order. Id.
239. Id. at 5.
240. Id.; see also PVC Cartel, 4 C.M.L.R. at 381-82 (holding that the Commission was unable to establish the existence of a finished measure because various language versions were not finalized).
posed Steetley/Tarmac Joint Venture to relevant authorities in the United Kingdom.\textsuperscript{242}

This case involved a proposed joint venture which was reported to the Commission. There was a subsequent request that the case be transferred under Article 9(3)(b) to authorities in the United Kingdom. According to Article 9, a member state may inform the Commission that a merger threatens to create or strengthen an excessively dominant market position.\textsuperscript{243} The Commission may then: (1) deal with the case itself; (2) refer the case to the proper authorities of the member state concerned; or (3) decide that no distinct market or threat to a distinct market exists and adopt a decision accordingly.\textsuperscript{244}

Under Article 6(1)(b) of the Merger Control Regulation, the Commission issued a decision declaring the merger in the form of a joint venture compatible with the common market as it pertains to concrete and masonry products, but refrained from deciding on the clay brick and tile sectors.\textsuperscript{245} The British Secretary of State was then required to decide whether to refer the merger that relates to the latter sectors to British merger authorities for investigation, or to otherwise announce the findings of any investigation that may have taken place concerning the mergers.\textsuperscript{246}

3. \textit{Use of Information Supplied to Commission}. On July 16, 1992, in a case involving an investigation by Spanish competition authorities of Spanish banking practices, the ECJ ruled that national competition authorities may not use as evidence unpublished company information that is supplied to the Commission in national or EC competition cases.\textsuperscript{247} This ruling applies to information provided in response to Art. 11 letters from the Commission or in an instance in which the Commission has received notification.\textsuperscript{248}

\textsuperscript{242} \textit{See Proposed Tarmac/Steetley Merger, supra} note 241, at 6-7.
\textsuperscript{243} \textit{Id.}; \textit{European Merger Control Regulation, supra} note 241, art. 9.
\textsuperscript{244} Alan Riley, \textit{EC Merger Regulation: Steetley/Tarmac and Article 9}, LAW. EUR., Spring 1992, at 3.
\textsuperscript{246} \textit{Proposed Tarmac/Steetley Merger, supra} note 241, at 7.
\textsuperscript{248} \textit{Id.}
4. Commission Powers to Adopt Decisions. In *Kingdom of The Netherlands and Ors v. Commission of the European Communities*, involving the Dutch express postal delivery business, the ECJ annulled Commission Decision 90/16 because of procedural errors which related to the Commission's failure to provide adequate information concerning its complaints to the Dutch authorities. The Commission also failed to give the parties sufficient time to answer its complaints.

Another important aspect of the Decision was the explanation by the ECJ of the extent of the Commission's powers to make decisions based on the Community's competition rules. The ECJ confirmed the Commission's power under Article 90(3) of the EEC Treaty to decide whether a member state has infringed the competition rules and what damage may have resulted. The case was significant because it affirmed the Commission's review powers under Article 90(3) of the EEC Treaty, but was decided on separate procedural grounds as previously outlined.

C. Abuse of Dominant Position

A number of important decisions citing infringement of competition rules were recently handed down by the Commission. Perhaps the two most relevant provisions from the EEC Treaty used to oversee this area are Articles 85 and 86. Article 85 forbids anticompetitive agreements and concerted practices that may affect trade between member states. Article 86 prohibits an abuse of a dominant position that may affect trade between member states.

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251. Joined Cases C-48/90 and C-66/90, No. 5/92, slip op. at 4; *Court of Justice Annuls Decision on the Provision of Express Courier Services in the Netherlands*, supra note 250, ¶ 96,267.
252. Joined Cases C-48/90 and C-66/90, No. 5/92, slip op. at 3-4.
253. *Id.* at 4.
255. EEC TREATY art. 85.
256. *Id.* art. 86.
1. Dutch Construction Cartel. On February 5, 1992 the Commission adopted a decision ruling against twenty-eight construction associations in The Netherlands as well as their joint federation, the SPO, for the operation of a cartel in the construction sector. The Commission found that the cartel’s practices of coordinating the award of public and private building contracts breached Article 85(1) of the EEC Treaty, which prohibits collusive practices that may affect trade between member states. The Commission imposed a total fine of ECU 22.5 million on the twenty-eight associations.

After the judgment was handed down, the Commission learned that the SPO intended to continue its former activities until the CFI had decided on its appeal. As a result, the Commission issued a reminder stating that, among other things, only the CFI could suspend the effects of a Commission decision.

2. Akzo. The recent decision in the Akzo Chemie BV v. Commission case indicates the position of the ECJ on predatory pricing, a position that supports the Commission’s approach in this area. Predatory pricing occurs when an enterprise lowers its prices to drive its competitors from the market. The problem lies in deciding when this hinders competition because lower prices can also be a means of supporting competition.

In the Akzo decision, the ECJ found the organic peroxides market to be the relevant product market and also the market where Akzo held a dominant position. According to the ECJ, Akzo abused its position through activity in the different flour additives market which

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257. Vereniging van Samenwerkende Prijsregelende Organizaties in de Bauwnijverheid.
260. Id.
261. Recently, the President of CFI partially suspended the Commission’s decision that required dissolution of the cartel. See EC: Commission’s Decision Condemning Dutch Construction Cartel Partially Suspended, Agence Europe, Aug. 8, 1992, available in LEXIS, Europe Library, Alleur File.
265. Id. at 6.
266. Id.
affected the relevant organic peroxides market. In previous Article 86 cases the ECJ only looked at the market where the abuse was committed as constituting the relevant product market. The examination of the two interrelated markets in *Akzo* represents a new approach by the ECJ.\footnote{267} A second aspect of the ECJ's application of Article 86 was its use of a two-stage test in examining a predatory pricing scheme. This test examines not only the economics of cost, but also considers strategy, that is, the entity's intent behind its pricing decisions.\footnote{268}

The ECJ reduced the ECU 10 million fine imposed by the Commission to ECU 7.5 million, because of previous uncertainty regarding the law in this area.\footnote{269} Nonetheless, for a breach of a poorly defined area of Community law, this still constitutes a substantial fine.\footnote{270}

3. **Sealink.** The *Sealink* case involved a complaint by B&I, an Irish ferry operator, against Sealink, a British ferry operator that also acts as the port authority at Holyhead, Wales.\footnote{271} The Commission found that Sealink had abused its dominant position in violation of Article 86. Sealink had allowed changes to its own ferry sailing times which, for various reasons, could adversely affect B&I. Reasoning that a company owning a shipping line and controlling a port should not be allowed to take advantage of this position by allowing access to the port by competitors on less favorable terms, the Commission ordered a return to the previous schedule or to one which would not interfere with B&I's operations.\footnote{272} The Commission also ordered interim measures against Sealink, making the company alter its sailing times until the end of the summer season.\footnote{273}

Sealink and B&I have since, in principle, reached an agreement for a shipping timetable before a hearing of the CFI.\footnote{274} This marks

\footnote{267. Id. at 7.}
\footnote{268. Id.}
\footnote{269. Id.}
\footnote{270. Id.}
\footnote{271. *Interim Measures Ordered Against Sealink*, Common Mkt. Rep. (CCH), No. 709, at 1 (June 25, 1992).}
\footnote{272. Id.}
\footnote{273. Id.}
\footnote{274. *EC: Court of First Instance—Compromise Between Sealink and B&I Concerning Port of the Holyhead*, Agence Europe, July 9, 1992, *available in* LEXIS, Europe Library, Alleur File.}
the first occasion on which the CFI has acted as mediator in a competition case.

4. Tetra Pak-II. Tetra Pak has appealed to the CFI a Commission decision\(^{276}\) in which Tetra Pak was fined ECU 75 million for violation of Article 86 of the EEC Treaty in a segment of the packaging and cartons market. This decision is significant because of the severity of the fine imposed. Through its appeal, Tetra Pak also seeks to have this fine annulled or reduced. Tetra Pak is also challenging the Commission’s definition of the relevant product market and its application of Article 86(d) to the exclusivity provision in Tetra Pak’s standard contract. In addition, Tetra Pak is challenging the Commission’s allegations that the Company was guilty of predatory pricing in Italy.\(^{277}\)

D. Mergers and Joint Ventures

1. Nestle/Perrier. Nestle, the Swiss foods group, received Commission approval of its bid for Perrier, the French mineral water group.\(^{278}\) This decision establishes the Commission’s authority to examine the market impact of duopolies and oligopolies as part of its investigations.\(^{279}\) As part of the Commission’s decision, Perrier has agreed to sell a number of its brands, representing approximately 20 percent of French mineral water capacity, in order to create a viable competitor.\(^{280}\)

Although this decision has been criticized on the grounds that the Commission exceeded its authority, it is nevertheless a landmark development. In theory, the decision allows the Commission to apply the merger regulation to large, cross-border deals in industries

\(^{275}\) Id.


\(^{277}\) Case T-83/91, Tetra Pak Int’l S.A. v. Commission, 1991 O.J. (C 331) 15; see also Libby Ancrum, Survey of Key Developments, LAW. EUR., Spring, 1992, at 10-11 (noting important developments in Community competition policy).

\(^{278}\) Andrew Hill & Guy de Jonquières, Commission Clears Bid for Perrier, FIN. TIMES, July 23, 1992, at 2.

\(^{279}\) Id.

\(^{280}\) Id.
involving limited competitors.\textsuperscript{281} Mergers could also be challenged if they threaten competition in a single member state.\textsuperscript{282}

2. \textit{Virgin Music-Thorn EMI}. On April 27, 1992 the Commission approved the proposed acquisition of Virgin Music Group, Ltd. by Thorn EMI plc. after examining the new group’s market share in music recording and publishing under Regulation 4064/89.\textsuperscript{283} The Commission gave particular attention to the music recording market where the market share of the new concern, combined with those of four other major competitors, would amount to an 83 percent market share. Upon examination of the market, however, the Commission found that the level of concentration did not cause anticompetitive effects.\textsuperscript{284}

3. \textit{TNT}. The Commission, in a press release on December 3, 1991, approved a joint venture involving the Australian transport group TNT and a consortium of major postal administrations (French La Post, Dutch PTT Post, Sweden Post, Canada Post, and German DBO Postdienst).\textsuperscript{285} The main joint venture was examined under Regulation 4064/89.\textsuperscript{286} The combination of TNT’s international express delivery business with that of five member state postal administrations means that the primary impact of this joint venture will be in the international express delivery market.\textsuperscript{287} The new joint venture will become the third largest international express operation in the world and the second within the EC.\textsuperscript{288} This joint venture demonstrates the Commission’s willingness to allow large conglomerates to operate in the Community so long as competition is not adversely affected.


\textsuperscript{282} Id.

\textsuperscript{283} See Commission Non-Opposition to a Notified Concentration (Case No. IV/M.202—Thorn EMI/Virgin Music), 1992 O.J. (C 120) 30.


\textsuperscript{286} Id.

\textsuperscript{287} Id.

\textsuperscript{288} Id.
E. Other Developments

Sir Leon Brittan, the current Competition Commissioner, has helped to shape recent developments in the controversial area of merger control. In a speech given in Brussels on October 28, 1991, Brittan made several comments on the Merger Control Regulation during its first year of implementation. He first noted that merger control needs to be undertaken on a community-wide level. He also suggested that the Commission's role in this area should be to determine what substitutes existed for the products of merging firms and the extent of power held by competitors of the new entities created after mergers. According to Brittan, the Commission should look at two factors in assessing whether a merger results in market dominance. It should first look at the market shares of the competitors and then examine the strength of these competitors in terms of their ability to prevent the merging firms from acting independently.

Brittan explained that with oligopolistic structures existing in a market, it was possible for firms to consciously or unconsciously follow their competitors' prices, which has the potential to cause higher prices for consumers and stifling innovation by businesses. Therefore, when a merger involves the likelihood of price collusion or parallelism, such a concentration should be deemed incompatible with the common market.

X. ANTIDUMPING

Efforts by the Community and member states to combat dumping continue to expand. The Commission has recently approved its tenth antidumping report which covers activities occurring during 1991. This

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290. Market dominance is evidenced by a firm's ability to act independently of competitors, customers, and ultimately of consumers. Id. at 2.

291. Id. at 2–3. Brittan noted that in Akzo, for example, the Court considered a 50 percent market share alone to be per se dominant, in the absence of exceptional circumstances, although market shares alone generally are insufficient to determine dominance. Id. Aérospatiale-Alenia/De Havilland is another case Brittan used to illustrate application of this approach. In De Havilland, the Commission ruled against the proposed takeover of De Havilland on the grounds that it would create an unassailably dominant position on the world market for turbo-prop aircraft. Id. at 3–4. This would have an unacceptable impact on customers and on the balance of competition within the EC market. Commission Vetoes Franco-Italian Bid for De Havilland, 4 Common Mkt. Rep. (CCH) ¶ 96,087 (1992).

292. Brittan Reflects on First Year of Merger Control, supra note 289, at 4.

293. Id.
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The report provides a statistical comparison of the number of inquiries opened in 1991 with the number in the period from 1987 to 1990. It also contains details on the various provisional and definitive duties imposed during this period. The report additionally includes the most significant cases heard by the ECJ, as well as a short study of the Community's antidumping policy within the scope of the Uruguay Round, the European Economic Area (EEA), and the recent European agreements with Poland, Hungary, and Czechoslovakia.

XI. TELECOMMUNICATIONS

A. Trans-European Networks

On February 24, 1992 the Commission submitted a proposal for a Council regulation under Article 235 of the EEC Treaty which announces a declaration of European interest in establishing a trans-European telecommunications network. The proposal is also designed to mobilize private capital to be used in this area. A number of conditions of eligibility must be satisfied before this project is approved. The project would need to be clearly described and defined in all respects. In addition, technical and economic feasibility studies would have to be carried out showing that this project would generate direct economic benefits in the Community. Finally, an environmental impact study would have to be performed. This trans-European communications network concept represents one facet of a larger Community plan which also includes trans-European networks in transportation, electricity, and natural gas.

297. Id. art. 2.
298. Id., Annex, at 13, para. 2.
299. Id., paras. 1, 3–4.
300. Id., Annex, at 14, para. 5.
301. See Commission Proposal for a Council Regulation Introducing a Declaration of European Interest to Facilitate the Establishment of Trans-European Networks in the Electricity and Natural Gas Domain, 1992 O.J. (C 71) 9; Commission Proposal for a Council Regulation
B. TV Satellite Broadcasting

On May 11, 1992 the Council adopted Directive 92/38 which sets forth standards and a time frame for satellite broadcasting of wide screen high-definition television (HDTV) signals. In addition to the Directive, a memorandum of understanding (Memorandum) was also produced. The Memorandum was designed to bring together the various players in the market so that markets would develop as a result of their cooperation. Support in this area was demonstrated on June 15, 1992 when almost forty companies and professional associations from across Europe approved the Memorandum promoting HDTV.

The success of this program now depends upon whether the Community approves the action plan contained in the Memorandum which provides for ways of obtaining financial support for the extra costs associated with the technical changes needed for implementation. These changes provide incentives for the purchase of new equipment for broadcasters and cable operators, the production of new programs, and the rescanning of old ones. A current EC budget proposal is aimed at supporting the advancement of HDTV. This proposal will be submitted on November 19, 1992 to the telecommunications council under the British presidency and, if approved, development in this area would run through 1996.

XII. COPYRIGHT PROTECTION

Integration of copyright legislation among the member states is part of the creation of a single market. The Commission has

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305. Id.
307. Id.
308. WHITE PAPER, supra note 196, at 37.
proposed a harmonized copyright protection period of seventy years after the death of the author as well as fifty years for "neighboring rights." The Commission has established this provision as a means of encouraging creativity throughout the Community. At present, member states have copyright laws containing protection periods which range from twenty to seventy years. These varying measures create barriers to the free movement of creative products and distort competition. Thus, the Commission, after extensive consultation with groups interested in intellectual property rights development and after review of the international developments within the World Intellectual Property Organization and GATT, has proposed an increased term of copyright protection.

The Directive would help to create a single market for intellectual property. The Community will also benefit from a long harmonized protection period that is applicable to all literary, cinematographic, musical, and artistic works.

A. Database Protection

On April 15, 1992 the Commission submitted a proposal for a Council directive on the legal protection of databases. In addition to copyright protection, the Proposed Directive protects electronic database producers for a ten-year period against unfair duplication of their work. Only a few countries previously had such protection. Given the importance of databases as a medium for informa-

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310. Currently, ten of the member states provide copyright protection for fifty years, Spain protects copyright for sixty years, and Germany is the only member state that currently has protection for seventy years. See id.


312. Id.


tion storage, the Commission views this as a vital Directive. The Proposed Directive would extend the protection of databases beyond that afforded by copyright provisions. This additional protection is necessary because the arrangement of certain databases, such as statistical ones, would not be considered original work and thus would not qualify for copyright protection. As the single market continues to develop, more information will be crossing national borders. This will create an increased need for harmonized protection measures to allow creators of databases the ability to store information and compete on a world basis.

B. Rental and Lending Rights on Copyright

A common position was adopted by the Council on June 18, 1992 concerning a directive for rental rights, lending rights, and certain other rights related to copyright protection. The Commission had submitted an Amended Proposal concerning this Directive on April 30, 1992 pursuant to Article 149(3) of the EEC Treaty in order to provide harmonized community-wide rights for authors of copyrighted work over the authorization or prohibition of the rental and lending of this work. This Directive establishes criteria for the distribution and communication of copyrighted works.

316. Pattison, supra note 313, at 115. Article 2(3) of the Draft Directive provides: "A database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied in determining the eligibility of the database for this protection." Id.

317. EC: Commission Proposes Harmonised Legal Protection for Fighting Piracy of Electronic Databases, supra note 314. The intellectual property sector is important to the economic development of the Community. The European turnover in this section was ECU 2.9 billion in 1991, and should approximate ECU 3.5 billion in 1992. Id. Thus, the Community views the stakes as high. Id.

318. Common Position Adopted by the Council on 18 June 1992 with a View to Adopting a Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, Council Position 6968/1/92.


320. Id. pmbl.

321. Id. art. 7; see also Amendments to Proposed Directive on Rental and Lending Rights, 4 Common Mkt. Rep. (CCH) ¶ 96,432 (1992) (discussing Commission submission of a proposed directive on rental rights, lending rights, and certain rights in the field of intellectual property); Raymond Snoddy, Concern Over EC Copyright Provision, FIN. TIMES, May 12, 1992, at 8 (discussing concern of British broadcasters over copyright proposals).
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XIII. AGREEMENTS BETWEEN THE EC AND OTHER COUNTRIES

A. The EC and EFTA—Agreement on the European Economic Area

On October 22, 1991 member states of the EC and of the European Free Trade Association (EFTA) reached agreement on a treaty establishing the European Economic Area (EEA). The purpose of the EEA Treaty is to allow the free movement of goods, persons, services, and capital between the EC and EFTA countries. The extension of the EC’s rules on the freedom of capital movement to the EFTA countries would allow joint access to financial services markets across Europe. Because the EEA Treaty does not cover all aspects of the EEC Treaty, EFTA countries may retain certain restrictions which would not be permitted within the EC itself.

The creation of the EEA, the most integrated economic area to date, was jeopardized by the ECJ ruling of December 14, 1991 stating that the EEA Treaty was incompatible with the EEC Treaty. The ECJ objected to the proposed judicial framework of the EEA Treaty and to the establishment of an EEA court which would have the power to interpret the EEA Treaty with resulting binding decisions on the Community. The ECJ's decision focused on the goal of the EEA Treaty and its compatibility with Community law. The ECJ took the view that the EEA Treaty was aimed at creating a level playing field for free trade provisions and at providing corresponding rights and obligations to participants in this new market. Conversely, the EEC

322. The seven EFTA countries are Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland. EC and EFTA Agree on Creation of a European Economic Area, 4 Common Mkt. Rep. (CCH) ¶ 96,107 (1992).
324. EC and EFTA Agree on Creation of a European Economic Area, supra note 322, ¶ 96,107. It should be noted that the EEA Treaty does not involve the removal of all barriers. For example, border controls will continue to exist and the EC custom tariffs will not apply to the EEA. EFTA countries can also adopt their own rules in certain areas. Id.
325. EC directives on insurance and banking will be adopted by the EFTA countries. Accordingly, companies will be able to set up branches across the EEA region. Id.
326. Id. For example, Norway may retain its restriction prohibiting more than 33 percent ownership of banks until 1995. Id. Austria, Finland, and Iceland have restrictions on real estate investments until 1996 and Switzerland's law imposing restrictions on foreigners purchasing property has received a five-year transition period. Id.
Treaty goes beyond merely creating an internal market by also providing a constitutional basis for its establishment and "a new legal order for the benefit of which the States have limited their sovereign rights ... ."\textsuperscript{328} Thus, the ECJ concluded that its case law cannot be applied to the EEA Treaty, because the EEA Treaty lacks essential elements on which decisions would be based.\textsuperscript{329}

As to the second premise, the ECJ rejected the system of judicial supervision proposed by the EEA stating that it was incompatible with the EEC Treaty.\textsuperscript{330} The ECJ has the sole jurisdiction in resolving disputes concerning the interpretation of the EEC Treaty.\textsuperscript{331} Allowing the EEA court to rule on the competencies of the ECJ was therefore contradictory to Community law.\textsuperscript{332} Finally, the EEA Treaty provides that a court in an EFTA country may request the ECJ to give its opinion on the interpretation of the provisions of the EEA Treaty.\textsuperscript{333} The ruling of the ECJ would not be binding and enforceable on the national court which referred the question. This procedure, as noted by the ECJ, would undermine legal certainty because on the one hand a member state of the EC would have to regard such opinions as the law, while on the other, their effects would be uncertain in the EFTA countries.\textsuperscript{334}

A revised text of the EEA Treaty incorporating the ECJ opinion was published in February 1992 and approved by the ECJ on April 11, 1992. The new agreement gives the ECJ jurisdiction over competition law and those rules of the EEA that mirror provisions adopted under the EEC Treaty.\textsuperscript{335} A special joint committee of EC and EFTA political ministers will have jurisdiction on disputes relating to provisions specific to the EEA Treaty and will be responsible for its

\textsuperscript{328} Id. at 271, 275; see Court Rules Against EEA Treaty, supra note 323, at 2.
\textsuperscript{329} See Re the Draft Treaty on a European Economic Area, 1 C.M.L.R. at 269.
\textsuperscript{330} Id.
\textsuperscript{331} EEC TREATY art. 219 (as amended 1987). Member states pursuant to this Article undertake not to submit disputes concerning interpretation or application of the EEC Treaty to methods and procedures other than those outlined therein. Id.
\textsuperscript{332} See Re the Draft Treaty on a European Economic Area, 1 C.M.L.R. at 271. The threat posed by the initial draft of the EEA Treaty is not dismissed by the fact that the agreement provided for judges from the ECJ to sit on the Court of the EEA. Id. at 272.
\textsuperscript{333} Id. at 273.
\textsuperscript{334} Id. at 274; see also Court Rules Against EEA Treaty, supra note 323, at 3 (suggesting that the ECJ objects to an EFTA country asking its opinion because any such opinion rendered would not be binding on national courts in the EFTA countries).
\textsuperscript{335} COUNCIL & COMMISSION OF THE EUROPEAN COMMUNITIES, AGREEMENT ON THE EUROPEAN ECONOMIC AREA 14 (reprinting text of EEA Treaty, signed May 2, 1992).
effective operation and implementation. Although this committee reached a compromise and the EEA Treaty was finally signed on May 6, 1992, the EEA Treaty may have limited application since the EEA joint committee can not contradict rulings by the ECJ.

Additionally, the debate over the EEA Treaty has brought to light concern about its actual value. The EC has demonstrated that it is unready to give any EFTA countries any real say in the future development of the EC. As a result, despite the fact that an agreement was reached on the EEA, EFTA countries continue to apply for full membership in the EC thus bringing into doubt the future of the EEA.

The Parliament approved the EEA Treaty on October 28, 1992 and now all EC countries and the seven EFTA countries must ratify the Treaty. Approval by the Parliament was necessary for the Treaty to take effect on January 1, 1993 for those countries that have ratified it.

B. Europe Agreements

On December 16, 1991 the Europe Agreements were signed. These are association agreements between the EC and Hungary, Czechoslovakia, and Poland. The Agreements are viewed as a stepping stone to possible future Community membership for these formerly eastern bloc countries. The Agreements provide the basis for the establishment of a framework for free trade between the Community and these countries. In addition to trade, these Agreements cover

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337. Id.
338. EFTA countries are not able to vote on EC provisions or proposed directives. See EC and EFTA Agree on Creation of a European Economic Area, supra note 322, ¶ 96,107 (1992).
339. Robert Taylor, EFTA Sidetracked by the Lure of EC Membership, FIN. TIMES, May 2, 1991, at 2. Austria, Sweden, Finland, and Switzerland have applied for membership in the EC. Id.
341. Id. One of the EFTA countries, Switzerland, has scheduled its vote for December 6, 1992. Swiss Ministers Say Vote on Accord Should Go Ahead, WALL ST. J. EUR., Aug. 18, 1992, at 2. The Swiss vote is viewed as an important test of public opinion regarding membership in the EC. Id.
other economic and commercial concerns, such as the free movement of capital, services, and workers, as well as the freedom of establishment.\textsuperscript{343}

The former eastern bloc countries stated in the Preamble of the Agreements their intention to become full members of the Community.\textsuperscript{344} Also significant, the Agreements contained provisions that cover political and cultural cooperation. The Agreements establish measures for regular meetings of political leaders of these countries to discuss their foreign policies and their future goals.\textsuperscript{345}

C. EC Agreements with Baltic States

On May 11, 1992 agreements were signed on trade, commercial, and economic cooperation between the EC, the three Baltic States, and Albania.\textsuperscript{346} This marks the first time that Lithuania, Estonia and Latvia have entered into agreements with the EC since the Community recognized their independence in August 1991.\textsuperscript{347}

These Trade Agreements are similar, with several modifications, to the Agreements recently entered into between the EC and the eastern bloc countries, discussed above. The Trade Agreements remove quantitative restrictions on imports from the Baltic states and Albania into the EC,\textsuperscript{348} and provide for reciprocal most-favored nation treatment in trade matters.\textsuperscript{349} They also cover economic

\begin{footnotes}
\footnote{343. The Commission commenced negotiations with these countries at the end of 1990, and continued talks until the agreements were finally initialled on November 22, 1991. \textit{Europe Agreements with Czechoslovakia, Hungary, and Poland Signed}, supra note 342, at 52,467-68.}
\footnote{344. \textit{Id.} at 52,468.}
\footnote{345. \textit{Id.} at 52,468-69.}
\footnote{347. \textit{See EC Initials Trade Agreements with Baltic States}, 4 Common Mkt. Rep. (CCH) ¶ 96,262 (1992).}
\footnote{348. \textit{See Trade Agreements with Baltic States Signed}, supra note 346, ¶ 96,417.}
\footnote{349. \textit{Id.}}
\end{footnotes}
cooperation in a variety of areas. Finally, the Trade Agreements propose the formation of joint committees in order to enhance communication and further development between the parties.

XIV. CONCLUSION: THE INTERNAL MARKET

On April 2, 1992 the Commission adopted its ninth report on the application of Community law by the member states. The Report examines member state implementation of EC directives during 1991 and shows that the member states are lagging behind the Community's legislative program. This is evidenced by the fact that more than 174 directives had not yet been implemented by the end of 1991.

According to the report, there was an increase in the number of infringement proceedings concerning the proper implementation of directives. Such proceedings are used to seek an expedient remedy for a breach of member state obligations to implement EC directives, so as to avoid ECJ enforcement proceedings. The number of cases referred to the ECJ decreased during the same period (comparing 1991 and 1990 figures). One cause for concern is the figures in the report that show an increased number of unexecuted judgments of the ECJ over the previous year, 105 in 1992 compared to 83 in 1991.

Two events occurred in 1991 that improved the prognosis for directive implementation. The first involved two judgments by the ECJ in the joint Francovich and Bonifaci cases. These judgments, delivered on November 19, 1991, confirmed the duty of the member states to compensate persons injured as a result of member state failure to implement directives. This joint opinion was significant in its reasoning that damages should be considered an essential aspect

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350. Id. There is also a proposal for a council regulation on a second emergency measure to supply food products to the Baltic states. Proposal for a Council Regulation (EEC) on a Second Emergency Measure to Supply Food Products to the Populations of Estonia, Latvia, and Lithuania, COM(92)302 final.
351. See EC Initials Trade Agreements with Baltic States, supra note 347, at 52,579.
353. Id. at 52,670.
354. Id.
355. Joined Cases C-6/90 and 9-9/90, Francovich and Others v. Italian Republic, No. 20/91, slip op. at 8-9 (Court of Justice, Nov. 19, 1991) [hereinafter Francovich] ("[E]ffectiveness of Community law would be undermined . . . if individuals were unable to obtain reparation when their rights were undermined by an infringement of Community law imputable to a member state."). For further discussion of the ECJ decision, see Helen Smith, The Francovich Case: State Liability and the Individual's Right to Damages, 3 EUR. COMPETITION L. REV. 129 (1992).
of the effectiveness of Community law.\textsuperscript{356} The second important event of 1991 was the amendment to Article 171 of the EEC Treaty by the Maastricht Treaty which, assuming it will be enacted, gives the ECI the power to penalize member states for failure to implement its rulings.\textsuperscript{357} As of March 25, 1992 the member states had achieved various levels of implementation of the single market directives, ranging from an implementation rate of 89.8 percent for Luxembourg to 99 percent for Denmark.\textsuperscript{358}

The Council of Ministers by mid-February 1992 had adopted 218 of the 282 measures needed to complete the single market.\textsuperscript{359} The member states had only been successful in implementing 194 of these 218 measures.\textsuperscript{360} As the projected deadline of January 1, 1993 for completion of the internal market approaches, skepticism for success mounts.

\textsuperscript{356} Frankovich, No. 20/91, slip op. at 8; see also Smith, supra note 355, at 132 (contemplating application of this principle to allow damage suits against individuals who breach their obligations under articles 85 and 86 of the EEC Treaty).

\textsuperscript{357} Maastricht Treaty, supra note 3, art. G(E)(51), 31 I.L.M. at 292 (amending art. 171 of the EEC Treaty to allow the Court of Justice to impose `lump sum or penalty payment' on member states); see Commission Adopts Ninth Report on Application of Community Law, supra note 352, at 52,670.

\textsuperscript{358} Id. (chart indicates levels of implementation among the member states as of March 25, 1992).


\textsuperscript{360} Id.