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I. General Overview

The European Union (EU) had a number of very major concerns throughout the year 1996. The Intergovernmental Conference, designed to propose the third revision of the European Treaties, was launched with three burdensome objectives: bringing Europe closer to people; correcting imperfections in the Maastricht Treaty, notably by strengthening EU action on foreign and security policy and by increasing cooperation on justice and home affairs; and preparing EU institutions for the future shock of enlargement to East European countries (which implies, in particular, negotiations on the decision-making process of the EU).

The year 1996 was also devoted to preparations for the third stage of the Economic and Monetary Union and the changeover to the single currency. It was explicitly confirmed, at the end of the year 1995, that the third stage of the EMU will be an irreversible process that will begin on January 1, 1999. Finally, the scenario for the introduction of the single currency, called the Euro, was adopted.

There were also significant developments in the field of the EU's external relations. As far as EU-U.S. relations are concerned, there were, during the first half of 1995, calls from a number of European sources for a new initiative in transatlantic relations.[1] A number of proposals were made, including high profile negotiations on a Transatlantic Free Trade Area and more detailed and pragmatic cooperation.

In October and December of 1995, officials drew up an agenda for EU-U.S. cooperation that was adopted by the presidents at the Madrid EU-U.S. summit in December 1995. Two documents came out of Madrid: the new Transatlantic Agenda and a joint EU-U.S. Action Plan. Both documents deal with four broad subjects: political issues, global challenges, building transatlantic bridges, and creating a New Transatlantic Market Place by removing business barriers while working to expand world trade. At the same time, "Transatlantic Business Dialogue" (TABD) was set up in Seville by a group of U.S. and European corporate leaders anxious to lower the costs of doing business in international markets.

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1. See *inter alia* the Paper of the European Commission entitled "Europe and the U.S.: The Way Forward" (Com (95)411 final).

In November 1996, following the pressure of the TABD, U.S. and EU negotiators reached a compromise (which has still to be formalized) on Mutual Recognition Agreements (MRAs) on tests that have been made on products in the sector of telephone and information technology equipment, electrical products, pharmaceuticals, and medical devices. Apart from the issue of tests, the TABD devotes energy to other issues covering sectors such as information technology, government procurement, intellectual property and patents, tax, R & D, and competition policy.

This list should not omit one of the most debated issues of this year: the Cuba Liberty and Democratic Solidarity Act 1996, also known as the Helms-Burton Act, enacted by the United States on March 12, 1996. The EU is strongly opposed to the extraterritorial nature of this law, considering that it is contrary to international law and harms European businesses. On October 28, 1996, the EU adopted measures to neutralize the U.S. legislation.[2] On November 20, 1996, upon request of the EU, the WTO decided to set up an arbitration panel to render a decision on the dispute between the United States and the EU.

II. Community Law—General

The year 1996 was very important with regard to the enforceability of EC law. Answers were provided to outstanding questions regarding the highly debatable issue of the liability of Member States vis-à-vis individuals for infringements of Community rules and the possibility to impose fines when a Member State does not comply with a judgment of the Court of Justice.

A. State Liability for Infringements of EC Rules

The principle of the financial liability of Member States for breaches of Community rules was established by the Francovich Judgment in 1991[3] in the specific hypothesis that the Member State failed to implement an EC Directive in its national law. In five judgments of 1996, the Court ruled on the application of the principle of state liability to other situations: (1) where a legislation of a Member State infringes directly applicable rules of the EC Treaty,[4] (2) where the Member State incorrectly transposed an EC Directive in its national law,[5] (3) where a public administration violates directly applicable Treaty provisions,[6] and (4) where the Member State implemented the EC Directive in its national law but after the delay prescribed by the Directive.[7]

B. Monetary Penalties to Member States for Noncompliance with a Judgment of the Court of Justice

The Maastricht Treaty has set up the possibility for the Commission to request the Court of Justice of the European Communities to impose monetary penalties to Member States for noncompliance with a judgment of the Court.[8] While recognizing that it is for the Court to take the final decision on the penalties to be imposed, the Commission deemed it useful to

2. Not yet published.
3. ECR 1991 I-5237.
4. ECJ 5 March 1996, Joined cases C-46/93 and C-48/93, Brasserie du Pecheur and Factortame, ECR I 1029.
5. ECJ 26 March 1996, Case C-392/93, British Telecom, ECR 1996 I-3/1631.
6. ECJ 23 May 1996, Case C-5/94, Hedley Lomas, not yet published.
7. ECJ 8 October 1996, Case C-I 78/94, Dillenkofer, not yet published.
8. See Article 171.2 of the EC Treaty.

publicly state in its guidelines[9] the criteria it means to apply in specifying to the Court the monetary penalties it considers appropriate.

III. Competition Law

Apart from the traditional series of condemnations or exemptions of agreements and practices, 1996 is characterized by important regulatory initiatives.

A. Merger Control

On the basis of the EC Merger Control Regulation,[10] mergers and acquisitions with a Community dimension have to be reported to the Commission, which reviews whether these transactions do not cause antitrust concerns. At the beginning of this year, in a Green Paper[11] on the application of the Merger Regulation, the Commission suggested a few changes and improvements. After the debate following the presentation of this Green Paper, the Commission proposed amendments to the Merger Regulation.[12] Amongst the most important amendments, the proposal envisages the reduction in the thresholds above which the merger is of Community dimension. The current thresholds of 5 billion ECU for the combined aggregate worldwide turnover of the undertakings concerned and 250 million ECU for the Community turnover of at least two of the undertakings concerned should be reduced to 3 billion and 150 million ECU respectively.

The Commission also proposes to have exclusive jurisdiction as concerns transactions otherwise giving rise to multiple notifications. Transactions that fall below the new proposed thresholds but above the 2 billion and 100 million ECU levels will be examined by the Commission if they would otherwise be subject to notification, either on an obligatory or voluntary basis, to three national merger control authorities. Furthermore, solutions are proposed to the problems that arise from the current discrepancy in the treatment of concentrative and cooperative full-function joint ventures. The notion of concentration would be extended to all full-function joint ventures so that full-function joint ventures will be subject to the procedures of the Merger Regulation. Article 2 of the Merger Regulation concerning the assessment of the operation would be modified to allow the Commission to apply, in the framework of the Merger Regulation procedure, the criteria of articles 85.1 (prohibiting anticompetitive agreement) and 85.3 (exempting certain agreements) to the extent that the cooperative joint venture may lead to the coordination of the competitive behavior of the parent companies. In principle, decisions granting exemptions would be definitive unless changed circumstances afford the parent companies the possibility of eliminating competition in respect of a substantial part of the products in question.

B. Block Exemption on Technology Transfer Agreements

Article 85.3 of the EC Treaty empowers the Commission to exempt certain restrictive agreements from the general prohibition of Article 85.1 of the EC Treaty in cases where the economic advantages of such agreements outweigh the restrictions of competition. The

9. 1996 O.J. (C242) 6.

10. Council Regulation 4064/89 of 21 December 1989 on the control of Concentrations Between Undertakings, 1990 O.J. (L257) 13.

11. Green Paper on the Review of the Merger Regulation, COM (96)19.

12. Commission Proposal for a Council Regulation Amending Regulation 4064/89 of December 21, 1989, on the Control of Concentrations Between Undertakings, 1996 O.J. (C350) 8.

Commission can grant exemptions in individual cases, or it can do so for entire categories of agreements.

On January 31, 1996, the Commission issued a block exemption on technology transfer agreements.[13] The new block exemption merges the prior block exemptions on patent licensing and know-how agreements.[14] It applies to pure patent licenses, pure know-how licenses, and mixed patent and know-how licenses.

The Regulation exempts a number of exclusivity and territorial restrictions, which are commonly found in these types of agreements. The regulation also specifies in great detail the provisions that technology license agreements may or may not contain. For example, a license agreement may not lead to price-fixing or customer allocation. Parties that wish to enter into technology license agreements have a net interest in modeling their agreement after the provisions of the block exemption in order to obtain legal security and to avoid the burdensome notification procedure.

C. Commission's Notice on Fining Policy

In an effort to increase the effectiveness of its competition policy, the Commission recently established a leniency program in which the Commission announces substantial fine reductions for undertakings cooperating with the Commission during its investigation.[15]

The rules would be applicable to what, in the Commission's view, constitute the most serious anticompetitive practices: horizontal cartels whose aim is to fix prices, production or sales quotas, share markets, and import or export bans. In some cases, provided certain conditions are met (the undertaking must provide decisive evidence, put an end to its involvement in the cartel, provide the Commission with all the relevant information available to it, continue to cooperate throughout the investigation, and, finally, not have acted as an instigator or played a determining role in the cartel), the reduction may amount to at least seventy-five percent of the fine, or even a total exemption from the fine if the undertaking informs the Commission of a secret cartel before the Commission has undertaken any investigation. When the cartel is disclosed after the Commission has undertaken an investigation on the premises of the parties to the cartel, the reduction of the fine will vary from fifty percent to seventy-five percent. Significant reduction fixed at between ten percent and fifty percent of the fine may be granted to undertakings that do not satisfy all of the above conditions, provided such undertakings give relevant information to the Commission before a statement of objections is sent. Reductions can also be granted to an undertaking that, after receiving a statement of objections, agrees to not substantially contest the facts on which the Commission bases its allegations. It should be stressed, however, that the favorable treatment will not protect the undertaking concerned from the civil law consequences of its participation in an illegal cartel.

13. Commission Regulation 240/96 of 31 January 1996 on the Application of Article 85(3) of the Treaty to Certain Categories of Technology Transfer Agreements, 1996 O.J. (L31) 2.

14. Commission Regulation 2349/84 of July 23, 1984, on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L219) 15; Commission Regulation 556/89 of November 30, 1988, on the Application of Article 85(3) of the Treaty to Certain Categories of Know-How Licensing Agreements, 1989 O.J. (L61) 1.

15. Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. (C207) 4.

D. Towards an International Framework of Competition Rules

The Commission has adopted a Communication[16] suggesting that the Community should, at the next ministerial level meeting of the World Trade Organization (WTO) in December 1996, propose that the WTO launch a study on the possible development of an international framework of competition rules within the WTO. According to the Communication, the approach should be gradual. It should concentrate first on the adoption of domestic rules in each WTO country and then on a set of fundamental principles to be adopted at the international level. The application of the agreement should first be limited to a number of countries that already have experience in bilateral cooperation between competition authorities.

IV. State Aids

The year 1996 was an active year in the field of state aids with the adoption, by the Commission, of several guidelines on the conditions of compatibility of certain types of state aids that are designed to be granted to undertakings, such as state aids to Research and Development,[17] SME,[18] employment,[19] or to the synthetic fibres industry.[20] In the field of state aids, 1997 might be the year of radical changes. Indeed, the Commission is now studying the opportunity to propose Block Exemption Regulations (as in the field of competition agreements) to the Council for adoption. Due to the absence of any procedural regulation, such form of regulation is also envisaged.

V. Telecommunications—Full Competition

On March 13, 1996, the Commission completed the implementation of the principle of full competition in the telecommunications sector by adopting Directive 96/1 9/EC.[21] This new Directive amends Directive 90/388/EEC of June 1990,[22] which required Member States to abolish all exclusive and special rights for the supply of several distinct telecommunications services. Prior to the adoption of the latest amendments, Directive 90/388/EEC still allowed Member States to maintain exclusive and special rights for the supply of voice telephony. It was argued that the immediate opening of this service to competition would threaten financial resources of the existing voice telecommunications operators, which could obstruct the performance of tasks of general economic interest assigned to them. This especially concerned the provision of a universal service: a minimum set of services to all users at an affordable price. Recognizing that the continuation of a universal service can be ensured by less restrictive means than the provision of exclusive or special rights, the Member States are now required, pursuant to the amending Directive of March 13, 1996, to abolish all restrictions on the provision of public voice telephony services and public telecommunications networks by January 1, 1998, subject to an additional transition period for certain Member States.

16. COM (96)284 final.
17. Community framework for state aid for research and development, 1996 O.J. (C45) 5.
18. Community Guidelines on State Aid for Small and Medium-Sized Enterprises, 1996 O.J. (C213) 4.
19. Guidelines on Aid to Employment, 1995 O.J. (C334) 4. Accelerated Procedure for Processing Notification of Employment Aid—Standard Notification Form, 1996 O.J. (C218) 4.
20. Code on Aid to the Synthetic Fibers Industry, 1996 O.J. (C94) 11.
21. Commission Directive 96/19, 1996 O.J. (L74) 13.
22. Commission Directive 90/338, 1990 O.J. (L192) 10.

Moreover, in order to accomplish effective competition, the Member States are required to ensure that all restrictions concerning the use of (alternative) networks for the provision of telecommunications services other than voice telephony are lifted as of July 1, 1996. Consequently, as of July 1, 1996, all alternative networks, such as the telecommunications infrastructure of the railways, energy, and water companies, may be used for the provision of telecommunications services, other than voice telephony, to third parties. The same already applies to the cable TV networks, pursuant to Directive 95/51/EC.[23]

VI. Intellectual Property

Major events include the entry into force of the EC trademark and the adoption of legal protection of databases while works continue concerning the legal protection of biotechnological inventions[24] and the legal protection of designs.[25]

A. EC Trademark

From January 1, 1996, a Community trademark can be obtained by registration at the Office for Harmonization in the Internal Market (OHIM). The Community trademark does not replace national trademarks, and companies henceforth have the choice of applying for trademarks either from the national or the EC authorities, depending on the protection sought. The Community trademark grants a uniform right, valid throughout the EU. Non-EU residents can also apply for registration of a Community trademark. The right allows the holder to prevent any other person from using the trademark for the same products or services and for similar products if there exists a risk of confusion. A registration at the OHIM lasts for a period of ten years and may be renewed for further terms of ten years. Recently, the Commission adopted three implementing regulations with regard to the application procedure, the fees payable to the OHIM, and the appeals procedure.[26]

B. Legal Protection of Databases

On March 11, 1996, the Council adopted Directive 96/9/EC[27] on the legal protection of databases, which harmonizes copyright law applicable to the structure of databases and creates a "sui generis" right for makers of databases.

The Directive provides that, in order to benefit from the protection, databases must consist of the author's intellectual creation through the selection or arrangement of their contents. It must also be noted that the copyright protection granted by the Directive only covers the structure of the databases and does not extend to their contents (without prejudice to other rights in this respect). By reason of this copyright protection, the author is granted exclusive rights in order to control the exploitation and distribution of his work.

23. Commission Directive 95/51, 1995 O.J. (L256) 49.

24. Proposal for a European Parliament and a Council Directive on the Legal Protection of Biotechnological Inventions, 1996 O.J. (C296) 4.

25. Commission Amended Proposal for a European Parliament and Council Directive on the Legal Protection of Designs, 1996 O.J. (C142) 7.

26. Commission Regulation 2868/95 of December 13, 1995, implementing Council Regulation 40/94 on the Community Trade Mark, O.J. 1995 L303 1; Commission Regulation 2869/95 of December 13, 1995, on the Fees Payable to the Office for Harmonization in the Internal Market, 1995 O.J. (L303) 33; Commission Regulation 216/96 of February 5, 1996, Laying Down the Rules of Procedure of the Boards of Appeal of the Office for Harmonization in the Internal Market, 1996 O.J. (L28) 11.

27. Council Directive 96/9, 1996 O.J. (L77) 20.

The Directive also creates a new "sui generis" right that aims to protect the financial and professional investment of the makers of a database in the obtaining, verification, or presentation of the contents. Under the new Directive, makers of databases are granted the right to prohibit the extraction and reutilization by third parties of contents of the database. The sui generis protection will be valid for 15 years after the completion of a database. However, the protection is without prejudice to the rights of lawful users and to the competition rules, in particular as regards possible abuses of a dominant position.

VII. Environment—Community Waste Strategy

On July 30, 1996, the EC Commission adopted a Communication[28] establishing a new, comprehensive waste management strategy in that it redefined the principles that will guide its waste policy over the next five years. The first priority of the Commission remains the prevention of waste, followed by the recovery of waste and, in the last resort, the disposal of waste. The Commission admits that this priority list has to be applied with a certain flexibility, and that in practice one should look for the best environmental solution, taking into account the economic and social costs. In order to foster prevention, the Commission will continue to promote clean technologies and products. The Commission will also contemplate regulatory measures, such as a ban on certain substances, or it may try to intervene, via economic instruments, in the pricing mechanism of products in an effort to reduce waste. Furthermore, the Commission will continue to induce progressive changes in consumption patterns via its eco-audit and eco-labe schemes as well as via consumer information campaigns. However, in line with the "polluter pays" principle, the Commission expects most of the input to its preventive waste policy to come from the producers. The emphasis on the producers' responsibility is one of the major innovations of the new strategy.

As concerns recovery, after lengthy discussions the Commission eventually gave preference to material recovery over energy recovery (waste incineration with the extraction of energy) on the grounds that material recovery (recycling) has a greater effect on waste prevention than energy recovery.

With regard to final disposal, the Commission prefers waste incineration and describes landfill as the last solution. The Commission discards other final disposal methods, such as the discharge of waste into the sea.

Finally, the Communication contains a chapter on the instruments to be used in the waste management policy. In the regulatory field, the Commission prefers quantitative targets, which have the advantage of being transparent and easy to monitor. The Commission also shows an interest in "voluntary" agreements between public authorities and economic operators.

VIII. Tax Law

The harmonization of VAT has been a long-standing EC policy objective. Currently, total harmonization has not yet been achieved. In July of 1996,[29] the Commission presented a program aimed at establishing a common system of VAT. The main objectives of the proposed new system are first to guarantee the tax neutrality and second to ease the administrative

28. Communication from the Commission on the Review of the Community Strategy for Waste Management, COM (96) 399.

29. A Common System of VAT—A Program for the Single Market, COM (96) 328.

burden. Under the current system, VAT revenues are collected by the State on the territory of which the consumption of the goods is deemed to take place (principle of taxation at destination). Although some harmonized rules on the tax rate exist, there is still divergence in their application, creating legal uncertainty and thus another obstacle to cross-border economic activities. The Commission proposes to establish a Community-wide tax area in which all transactions are afforded equal treatment. Therefore, all transactions made within the EC would be taxed on the same basis, and all the exemptions Systems currently applicable would be abolished. The Commission recommends the adoption of the principle of taxation at the origin. The first step of the Commission program is to adopt a standard rate of VAT. The Commission's proposals are currently being studied by the Council of Ministers.