# European Law

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## I. European Union

### A. FINANCIAL MARKETS*

Among the many legal initiatives in the financial services sector this year, there were two predominant themes: (1) liberalization of the market and (2) ensuring a high level of investor and consumer protection. Such initiatives and legislation will increase in volume in 1999 based on the European Commission's Financial Services Action Plan.

#### 1. *Economic and Monetary Union*

The most fundamental generic development was the introduction of the Euro as the single currency in eleven of the fifteen EU member states on January 1, 1999. This has had a major impact on areas such as continuity of contracts, information technology, and the international financial markets.

#### 2. *Electronic Commerce*

The European Commission (Commission) has proposed a directive designed to facilitate the development of electronic commerce within the EU while ensuring a high level of consumer protection. The fundamentals of the directive are the principles of country of origin and mutual recognition. This means that a provider of financial services based in the United Kingdom should be able to sell services throughout the European Union, provided he complies with the EU directive and the domestic law of the United Kingdom, regardless of the fact that he would be subject to more severe restrictions in other EU member states if he were established there. The directive also sets out rules for on-line contracts, the liability of intermediaries, on-line sponsorship advertising, direct marketing, and the protection of consumers.

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*Section A of the report on the European Union was prepared by David Church of Dibb, Lupton & Alsop in Brussels.

3. *Financial Services Framework for Action*

The Commission has proposed a Financial Services Action Plan with the goal of ensuring the maintenance of deep and liquid European capital markets. It covers both retail and wholesale financial markets, supervisory cooperation between national regulators, and proposals to eliminate so-called harmful tax competition. The action plan will also form a basis for new directives in areas such as public offer and listing prospectuses, the use of venture capital funds on a pan-European basis for financing start-ups, and the dismantling of investment restrictions on supplementary pension funds, bringing EU financial reporting frameworks closer to the standards developed by the International Accounting Standards Committee. The Commission also plans to identify and catalogue the differences between the general good rules in the member states so as to improve transparency, further facilitate the free movement of financial services, and introduce proposals for adequate levels of consumer redress. Under the heading of closer supervisory cooperation, the Commission will make proposals for a supervisor's charter that sets down relative responsibilities and the mechanism for coordination at the EU level between different supervisory bodies.

4. *Proposal on the Distance Selling of Financial Services*

The Commission put forward a proposal for a directive governing the distance selling of financial services, which would apply to any form of direct marketing—telephone, mail, Internet, fax or any other medium. The proposal contains strict provisions concerning a consumer's right to have the full terms and conditions before signing; the right to be free from unfair pressure or influence; the protection of cooling-off periods, allowing withdrawal from a contract within a certain number of days after signing; and prohibitions on inertia selling and cold calling.

5. *Financial Services UCITS*

The Commission also proposed a directive to improve and extend the rules on collective investment undertakings. The aim is to extend the existing directive in order to liberalize the market for the provision of Undertakings for Collective Investments in Transferable Securities (UCITS) throughout the European Union, while ensuring a high degree of investor protection at the same time.

6. *Data Protection*

The implementation date for the EU Directive on Data Protection was October 25, 1998. The goals of the directive are to facilitate the free flow of data throughout the European Union while ensuring a high level of protection of the rights of data subjects.

Besides giving individuals the right to prevent the use of their personal data for direct marketing purposes, the directive also provides the right to access and correct personal information. The directive imposes very strict rules regarding sensitive information such as ethnic and racial origin, political and religious beliefs, union membership, sexual orientation, and health.

Finally, the directive establishes restrictions on transfers of data from the European Union to third countries that do not provide adequate data protection. This controversial provision is already the subject of friction between the European Union and the United States.

## B. Trade Regulation*

### 1. *Trade Defensive Instruments*

#### a. Antidumping Developments

Antidumping measures remained the European Union's prime trade defensive instrument, targeting mainly countries in the Far East and in Eastern Europe. Court decisions continue to uphold the discretionary powers of the European Commission and the Council of the European Communities in antidumping investigations. The United States was not spared EU antidumping duties in 1998—they were imposed on polysulphide polymers and some aluminum capacitors. The Commission failed to convince the member states to impose antidumping duties on cotton fabric from Middle- and Far-Eastern countries. Consistent with its explicit support of the accession of China and Russia to the World Trade Organization (WTO), the European Union relaxed its position on the non-market economic status of these countries.

### 2. *Antisubsidy Developments*

Antisubsidy investigations targeted export promotion schemes, duty exemptions for export products, reduced airfreight, and port fees. Among the products targeted by new investigations were antibiotics, stainless steel bars and polyethylene terephtalate from India, stainless steel wire and polyester filament yarn from India and Korea, and polypropylene binder or baler twine from Saudi Arabia.

### 3. *Market Access Instruments*

#### a. Trade Barrier Regulation

The EU Trade Barrier Regulation allows the EU authorities to impose protectionist measures when third countries establish obstacles to trade in violation of the rights of the European Union under international, multilateral or bilateral agreements that affect European producers on the EU market or on their export markets. When an investigation demonstrates that WTO provisions have been violated, no defensive measures can be adopted unless in accordance with a WTO dispute settlement procedure.

#### b. Market Access Strategies

The European Commission launched its publicly accessible market access database. The database contains not only the commitments that WTO members have made during the Uruguay Round, but also information regarding the access of EU products or services to markets in non-EU countries, whether or not they are WTO members. Along the same vein, the Council of the European Communities decided that the following were necessary to achieve a more integrated market: identification and analysis of market access barriers, development of databases and dissemination of information, studies concerning the implementation by third countries of their obligations under international trade agreements, and business seminars. The WTO Agreements are vital to intensifying international trade and the European Union has firmly declared itself to be in favor of another Millennium Round.

*Section B of the report on the European Union was prepared by Paulette Vander Schueren of Coudert Brothers in Belgium.

The European Union's market access strategy is demonstrated by its discussions and conclusion of numerous bilateral and multilateral trade agreements, including:

- the Mutual Recognition Agreement on Conformity Assessment for a number of electrical and mechanical products with Australia;
- the Agreement on the Enforcement of Competition Laws with the United States;
- the Mutual Recognition Agreement with New Zealand;
- Partnership and Cooperation Agreements to further trade with countries such as Ukraine, Uzbekistan, Yemen, Pakistan, Turkmenistan, and Moldova;
- a framework agreement for most-favored-nation treatment and trade cooperation with members of the Cartagena agreement (Bolivia, Colombia, Ecuador, Peru, Venezuela); and
- agreements establishing free trade areas with Mexico and the Mercosur countries.

Some EU Member States have questioned the multiplication of agreements and the compatibility of the free trade agreements with WTO provisions. For example, France rejected a proposal for establishing a wide-range free trade area with the United States. The European Union then proposed negotiations towards the establishment of a less ambitious Transatlantic Economic Partnership, which began during the latest EU-U.S. Summit in December 1998.

c. The European Union and the United States: Between Love and Hate

Last year was characterized simultaneously by closer relations and hotly debated controversies between the United States and the European Union. The European Union continues to oppose the extraterritorial application of U.S. sanctions laws such as the Helms-Burton Act, the Iran Libya Sanctions Act, or the Massachusetts provisions on Myanmar. An agreement was concluded whereby EU companies would be spared from sanctions under the provisions of the Helms-Burton and the Iran Libya Sanctions Act. The European Union nevertheless challenged the Massachusetts law, subjecting it to a pending review before a WTO panel.

The WTO Dispute Settlement Body has ruled that the EU provisions prohibiting hormones in meat and the EU licensing system in favor of certain banana growing countries are improper. However, the controversies are not over yet. The United States currently alleges that the European Union is delaying the adjustment of its meat legislation and that the new banana provisions continue to violate the WTO decision.

After more controversies regarding the European Union's subsidizing of its agriculture and aviation industries, the United States and the European Union initiated reciprocal WTO dispute settlement procedures. The United States initiated dispute settlement procedures in May 1998 concerning income tax practices in France, The Netherlands, Belgium, Greece, and Ireland. In June, the European Union filed an application for a dispute settlement procedure concerning tax exemptions for U.S. companies exporting through Foreign Sales Corporations.

In spite of the existing and looming trade conflicts between the European Union and the United States, discussions were never interrupted and negotiations on closer trade ties were and are being pursued. It is unlikely that either the European Union or the United States will jeopardize the chances of a successful Millennium Round.

## II. Belgium*

### A. Arbitration

Major changes were made to the Belgian arbitration rules, as set out in Sections 1676–1723 of the Belgian Civil Code. Most notably, government-owned companies are no longer prohibited from having recourse to arbitration and including arbitration clauses in their contracts and tenders. The new law also abolished the previous rule that an award between two non-Belgian companies or persons was final and not subject to review by the courts. While parties remain free to exclude in their arbitration clauses the possibility of review by the Belgian courts, finality no longer flows automatically from the mere fact that neither of the parties is a Belgian resident or national. The new statute also authorizes arbitrators to order periodic penalty payments in order to enforce their awards.

### B. Statute of Limitation Rules for Liability Actions

Prior to changes enacted in 1998, the limitation period for most liability claims was thirty years. For personal as opposed to property claims, the period has been reduced to ten years. There is, however, a special rule for personal injury and tortuous damage claims for which the limitation period is now either five years from the time the plaintiff became aware of the injury or damage, or twenty years from the date of the event causing the injury or damage.

### C. Company Law

The rules allowing for the compulsory sale of minority shareholdings—up to a maximum of five percent—the so-called squeeze out rules, have been modified so as to allow minority shareholders in non-traded companies to oppose or refuse the purchase of their shares by majority shareholders. This change only affects companies whose shares are not listed or publicly traded. For listed companies, it remains possible to effect a squeeze out, notwithstanding the refusal or opposition of minority shareholders.

### D. Bankruptcy Law

Belgium has completed a major overhaul of its bankruptcy laws intended to facilitate court-controlled general arrangements with creditors. The new law also validates, with certain limitations, retention of title clauses that were previously deemed to be of no effect in case of bankruptcy of the purchaser.

### E. Advertising Law

Belgium has now introduced legislation specifically aimed at banning cigarette advertising, with certain limited exceptions.

### F. International Conflicts of Jurisdiction

In January 1998, Belgian statutes, which were effective October 1, 1997, approving the Lugano and San Sebastian Conventions were published. These conventions, which supple-

*The report on Belgium was prepared by Charles Price of Price & Partners in Belgium.

ment and/or replace the Brussels Judgments Convention, provide for new rules on conflicts of jurisdiction within certain EU and EFTA member states. In particular, there are major changes to the jurisdictional rules for employment contracts and to the rules regarding contractual choices of forum or jurisdiction by the parties.

## III. Germany*

### A. Significant Changes in Corporate Law

#### 1. *Non-disclosure of Annual Accounts Held to Violate EU Law*

According to the German Commercial Code, a court can only order a company to disclose its annual financial statements upon the application of a shareholder, a creditor, or the works council of the company. The Düsseldorf Court of Appeals held that this provision violates the Article 6 disclosure requirements of the first EU Company Law Directive. Unless the German Commercial Code is changed, Germany will be obliged to pay damages for harm resulting from incorrect or non-implementation of a directive, in accordance with EU principles.

### B. Bundestag Adopted Reform of Stock Corporation Act

On March 5, 1998, the Bundestag passed a law on corporate control and transparency, which regulates the Aufsichtsrat (board of directors). In the future, Aufsichtsrat members may not hold more than ten Aufsichtsrat positions. For publicly held companies, the Aufsichtsrat is now required to meet four times per year. Shareholder proposals relating to the election of new Aufsichtsrat members must state the candidates' legal duties and main occupations, helping shareholders recognize and avoid members with too many duties or conflicting interests. In addition, the law strengthens the control of management through shareholder meetings. This ensures that the exercise of proxy voting by financial institutions is more in line with the shareholders' interests.

Financial institutions may not exercise proxy votes in a general meeting where they own shares amounting to more than five percent of the company. The law abolishes all variations in voting power that violate the principle of one share, one vote. Maximum voting and multiple voting are no longer permissible for publicly held companies. Existing multiple votes will lapse in five years, after their holders are compensated.

## IV. Ireland*

### A. Liberalization of Public Utilities

The government announced in May that full liberalization of the Irish telecommunications market would occur in December 1998, a year ahead of schedule. Draft legislation will allow an initial public offering for shares in Telecom Eireann in mid-1999 and increase the powers of the independent telecommunications regulator. Proposals for an independent regulator of the electricity market are well advanced and plans are underway to restructure

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*The report on Ireland was prepared by Denise Kenny of McCann-Fitzgerald in Dublin.

the state-owned Electricity Supply Board and Bord Gais Eireann in 1999. Both Aer Rianta and Bord na Mona were reconstituted as public limited companies, though still state-owned, in 1998.

### B. Competition and Mergers

The Irish Takeover Panel, established in 1997, conducted its first formal hearing in 1998. It rejected a shareholder's allegations that directors were not independent in their consideration of a takeover bid. While the Competition Authority clarified the application of the 1991 Competition Act, which applies domestic rules similar to Articles 85 and 86, EC Treaty, to mergers and acquisitions, disagreements persist. The authority unsuccessfully sought an injunction in November to restrain a merger.

### C. Environmental Law and Judicial Review

Many significant Irish judgments in 1998 concerned environmental issues. For example:

- the Supreme Court, in a case taken by a company formed to contest approval of a large urban development, frowned on the use of judicial review where a statutory appeal process designed to protect the public already exists;
- the grant of an integrated pollution control license for a hazardous waste incinerator was upheld despite the applicant's objection that the regulator had not properly assessed the risks;
- permission for field trials of genetically altered crops was upheld despite objections about the environmental risks; and
- parents fearing their children would contract diseases from the operation of mobile phone masts near their school were refused an interlocutory injunction to restrain the development of the masts on grounds that the contraction of disease before trial was highly improbable.

### D. Employment Law

The Parental Leave Act, which implements an EU directive, recognizes new rights for employees. The far-reaching Employment Equality Act outlaws discrimination by employers on nine distinct grounds: sex, marital status, family status, sexual orientation, religion, age, disability, race, and membership in a traveling community.

### E. Intellectual Property Law

A 1998 act strengthened presumptions in favor of a copyright holder seeking to assert his or her rights in legal proceedings. Further legislation to implement EU directives in this area is expected in early 1999.

### F. Tax Law

Major changes in the 1998 tax law included reduction of the capital gains tax rate by half to twenty percent, and an announcement of the intended reduction of corporation tax rates in stages to 12.5 percent. New measures were introduced to support local schemes for the physical and socioeconomic renewal of poor urban areas.

### G. Prevention of Political and Institutional Corruption

Public Tribunals of Inquiry are now a regular feature of Irish legal life. In 1998, tribunals were established to investigate alleged irregular payments to politicians, particularly those related to planning decisions. The Comptroller and Auditor-General were given sweeping powers to investigate new allegations that some financial institutions fraudulently designated bank accounts as non-resident to help customers avoid deposit interest retention tax.

### H. EU Obligations and International Conventions and Laws

In 1998, Ireland gave domestic effect to a number of EU measures and international conventions, including: the Amsterdam Treaty on closer EU integration, approved by referendum; the EU directive on investor compensation; the accession of Austria, Finland, and Sweden to the EU's 1968 Brussels Convention on jurisdiction and its protocol; the UNCITRAL model law on international commercial arbitrations, establishing a framework for conducting such arbitrations in Ireland; constitutional and other measures to give effect to Good Friday agreement on the future of Northern Ireland; the ADR agreement on transport of dangerous goods by road (relevant rules will apply to intra-state as well as to trans-frontier transport); protocols to conventions on liability and compensation for oil pollution damage, requiring bulk oil carriers to maintain insurance coverage for human rights issues; protocols to the Geneva Conventions dealing with the protection of victims of international and domestic armed conflict; UN resolutions establishing war crimes tribunals for Yugoslavia and Rwanda conflicts; and EU and UN measures to prevent child sexual exploitation and Internet pornography.

## V. Italy*

The Italian Parliament passed significant legislative changes in corporate and financial law, tax law, and administrative law. The year also saw unprecedented legislation on data protection, with a new law implementing the EU Directive on Data Protection.

### A. Corporate Law and Financial Markets

The Draghi Decree extensively modified Italian corporate law and the regulation of financial markets.[1]

#### 1. *Corporate Law*

With regard to corporate law, the Draghi Decree followed the principles of greater transparency and increased protection of minority shareholder interests. The most important changes concern shareholder agreements, tender offers, notification of material invest-

*The report on Italy was prepared by Jeffrey Greenbaum and Maurizio Vasciminni of Pavia e Ansaldo in Rome.

1. Legislative Decree No. 58 of February 24, 1998, effective July 1, 1998.

ments, and protection for minority shareholders in listed companies. In order to protect minority rights and to guarantee greater transparency, the Draghi Decree established new obligations regarding publication of shareholder agreements. Failure to comply with these obligations renders agreements voidable.

The Draghi Decree simplifies the regulations of tender offers for both listed and unlisted shares. Where a purchaser acquires more than thirty percent of the shares of a listed company, the purchaser is required to make a tender offer for the remaining shares. If, however, an initial tender offer was made for more than sixty percent of the listed shares, the purchaser is not required to make a tender offer for the remaining shares, except in certain cases.

An acquirer must notify the Italian National Securities Exchange (CONSOB) when acquiring more than two percent of a listed company. Listed companies acquiring more than a ten percent interest in an unlisted company or a limited liability company located in any EU Member State or establishing cross shareholdings must notify CONSOB. Generally, cross-shareholdings above these thresholds are not permitted.

The Draghi Decree protects minority shareholders by providing that articles of incorporation of listed companies must give minority shareholders the right to designate at least one statutory auditor. Calling a shareholder meeting requires ownership of ten percent of the share capital. The articles of incorporation may provide for a lower necessary percentage.

2. *Financial Markets*

The Draghi Decree created the savings management company, a new type of management entity that manages collective savings investment entities such as open-end mutual funds and personal portfolios. The decree has simplified and reorganized the regulations regarding solicitation of public savings. It provides new regulations for selling and purchasing offers. CONSOB is to issue regulations providing a safe harbor for solicitations to a limited number of investors. Limited liability companies may now centrally manage securities. Due to this change, Monte Titoli, the central securities administration organization that until now exclusively managed the clearing, deposit, and centralization of securities, will be subject to the normal rules governing limited liability companies. The decree also introduced measures to accelerate the introduction of foreign UCITS, including open-end mutual funds, closed-end mutual funds, pension-fund investment companies, and real estate closed-end funds into the Italian market.

## B. Law No. 675/96: Data Protection/Privacy

Italy, which had not previously legislated in this area, enacted a Data Protection law, implementing the EU Directive on Data Protection.[2] In some respects, Law 675/96 is more strict than the EU Directive. The new law applies to the handling or processing of personal data, from recording and filing through deletion, relating to either a natural person or a legal entity (the data subject), carried out in the Italian territory by any natural person or legal entity (the owner of the data), either electronically or manually. Law 675/96 protects the right of privacy and right to identity, the fundamental freedoms and dignity of any data subject towards the handling or processing of its personal data. The subject matter of the protection is the single handled datum—even if not contained in a structured collection of

2. Directive 95/46/CE of the European Parliament and of the Council, 1995 O.J. (L 281) 31 Law No. 675/96 took effect in 1998.

data—and not databases. The owner of the data has various duties regarding notification, obtaining consent and ensuring data confidentiality. Criminal and civil sanctions apply to breaches of this law.

## C. Tax

### 1. *Dual Income Tax*

Legislative Decree 466 of 1997 (Decree) introduced the Dual Income Tax (DIT), which is intended to provide an incentive for the capitalization of Italian companies.

### 2. *IRAP*

As of January 1, 1998, Local Income Tax (ILOR) was abolished and was replaced by a new form of tax, Local Tax on Productive Activities (IRAP). While ILOR was applied to the result of the profit and loss statement—except for lesser adjustments—IRAP applies to the value of production, taken from the balance sheet results plus the cost of work and the cost of interest from debts to third parties.

### 3. *Stock Option Plans*

As of January 1, 1998, Legislative Decree 314, passed on September 2, 1997, has modified the Consolidated Income Tax Text (CITT). Under this Legislative Decree, the income of employees "is constituted by all sums and valuables in kind, for whatever reason paid to them during the tax period, also under the form of disbursements as gifts, with respect to the work relationship."[3] However, under certain conditions, the offering of a stock purchase plan need not constitute taxable remuneration in kind.[4]

## D. Public Contracting

Law No. 415 of November 18, 1998, (Merloni Ter) introduced several important changes regarding bidding and awards for public construction contracts. The legislative goals were simplification, cost reduction and greater transparency. Under the new law: (1) the supervisory authority of public works has been granted extensive control powers; (2) enterprises executing public works must organize their own activity in accordance with the principles of quality, professionalism and correctness; (3) companies deemed to be controlled under Italian law by another bidder cannot participate in public bids; (4) the execution of public works programs must be carried out in accordance with an annually updated three-year program; and (5) the activities of works planning and works management must be carried out by technical offices of contract awarding bodies, single or associated professionals, or by engineering companies.

Merloni Ter provides a simplified procedure for public contracts for less than 750,000 ECU. Moreover, all legal disputes concerning the performance of a contract may be submitted to arbitration. A prominent position is given to private funding of public works or project financing. Private entities may submit bidding proposals for the financing of public works included in the three-year plan.

3. Article 48, para. 1, of the Consolidated Income Tax Text.
4. Article 48, para. 3, of the Consolidated Income Tax Text.

Law No. 192 of June 18, 1998, is the first specific Italian regulation of public subcontracts in the supply area. Unless the subcontract is in written form, it shall be considered void. The subcontract must specifically describe the required goods or services, their price and terms of delivery, inspection, payment, and discounts for advance payment with respect to delivery.

## VI. Netherlands*

### A. Competition Law

On January 1, 1998, the Dutch Competition Act took effect, replacing the lenient misuse system of the old Economic Competition law of 1956. The act introduced a rigorous prohibition system along the lines of EU competition law. The act also introduced a system of merger control for concentrated industries that affect the economy of the Netherlands. This merger control copies the system of the EC merger control.

The act established the Dutch Competition Authority (NMa) under the authority of the Ministry for Economic Affairs. Decisions of the NMa are subject to review by the District Court of Rotterdam, whose decisions may be appealed to the Court of Appeal for Industry. In its first year of operation, the NMa has rendered various decisions, the most recent of which deal with telephone number data,[5] right of third party access to television programming data,[6] cable tariffs,[7] and foreign book prices.[8] Numerous merger and concentration matters are currently under consideration.

#### 1. *Antitrust/Abuse of Dominant Position*

Article 6 of the Competition Act deals with antitrust and Article 24 concerns the abuse of dominant position. These articles practically replicate Articles 85 and 86 of the EC Treaty. The act itself refers directly to the EC Treaty for certain terms. Regulations of the Council of the European Union and the European Commission on the applicability of article 85(l) to certain types of agreements are declared self-executing in the act. Because the rules of procedure of Dutch competition law are different from those of European competition law, discrepancies may occur. The Competition Act and the Administrative Law Act share the same rules of procedure. In contrast to European law, these procedural rules provide both plaintiffs and defendants with a right of inspection. The European model does not provide the complainant with a formal right of inspection, but the defendant has a right of inspection based on case law. Consequently, decisions can be appealed only when permitted by Administrative Law.

#### 2. *Merger Control*

Merger control applies to all legal and/or economic concentrations that do not have a community dimension within the meaning of the EC competition law. Not only must these concentrations possess a combined aggregate revenue of NLG 250 million, but two of the

*The report on the Netherlands was prepared by Lisa Brownlee of Trenite Van Doorne of Amsterdam.

5. KPN, Dec 18, 1998.

6. Holdingmaatschappij De Telegraaf v. Nederlandse Omroep Stichting/Holland Media Groep, Sept. 10, 1998.

7. A2000, Dec 29, 1998.

8. BV. Van Ditmar Boekenimport et al., Dec. 18, 1998.

undertakings concerned must also have a revenue that exceeds NLG 30 million in the Netherlands. Because these threshold criteria apply to aggregate world-wide revenue and revenue realized in the Netherlands, the merger control provisions of the Competition Act are not limited to combinations or mergers that take place in the Netherlands.

Given that the European merger control provides for referral to the national authorities at the request of the Minister of Economic affairs, the NMa can still investigate mergers that have a community dimension. Since enactment of the Competition Act, only one merger has been referred to the NMa. After the investigation period of thirteen weeks, the NMa decided that the merger did not create or strengthen a dominant position. This case is now under review before the District Court.

### B. Telecommunications Law

On January 5, 1999, the NMa and Dutch Telecommunications Authority (OPTA) announced a protocol in which the two authorities will cooperate with respect to issues affecting competition in the telecommunications sector. On January 1, 1999, a new Dutch Telecommunication Act became effective. This act, which contains provisions on several topics, including registration, the use of frequencies, numbers and number portability, interconnection and special access, leased lines, broadcasting networks, universal services, equipment, privacy, and enforcement by OPTA, replicates the EU Regulations. The act also abolishes concession holdings in the Netherlands. In addition, the provision of fixed public telecommunication networks or public telecommunication services, leased lines or a public broadcasting network will no longer require a license, but solely registration with OPTA. The use of frequencies for the provision of mobile telecommunication, radio and television broadcastings or satellite communication still requires a license granted by the Minister of Transport and Public Works.

### C. Employment Law

On January 1, 1999, the Flexibility and Security Act became effective, impacting numerous aspects of Dutch employment law, including: the probationary period for indefinite and fixed term contracts; fixed term, flexible and temporary employment; agency relationships; unemployment benefits; and termination. The Allocation of Manpower by the Intermediaries Act, which provides that temporary employment agencies are no longer required to be licensed, and removes previous limitations on the period of temporary employment, became effective July 1, 1998. Restrictive covenants against employees seeking employment from third parties are now permitted in most cases.

## VII. Norway*

In a groundbreaking decision in the area of mobile phone carriers and competition, the national telecommunications authorities redirected the focus of the telecommunications policy. The case interprets the EU ONP Interconnection Directive (97/33/EC). The directive establishes competition rules governing business relations between telecommuni-

*The report on Norway was prepared in January 1999 by Anne-Kristi Brække and Catherine Herceg Eikland of Advokatfirmaet Steenstrup Stordrange in Oslo.

cations operators with significant market share and providers of public telecommunications services and networks. Thus far, the focus of Norwegian telecommunications policy has been to create optimum competition between owners of infrastructure. The *Sense Communications* case focuses on a change in policy towards more competition among service providers, assuring these providers unlimited access to fixed infrastructure. The issue of cost-based pricing—the principle governing interconnection duties and fees—may also come under greater scrutiny. Finally, the *Sense Communications* ruling will affect the extent to which applicable EU legislation requires a separation of regulatory and executive/ ownership authority over state-owned telecom companies.

When finally resolved, the *Sense Communications* case will represent a major leap forward in establishing the ground rules for competition in mobile telecommunications. So far, service providers have access to fixed networks, while mobile services could only be provided by companies holding their own GSM frequency license, that is, having their own mobile networks. The *Sense Communications* case is an introduction to a new phase of telecommunications liberalization for the benefit of end-users and society as a whole.

## VII. Sweden*

### A. Tax Law

A number of changes in Swedish tax legislation, designed to facilitate several business restructuring measures, were passed during December 1998 and entered into force on January 1, 1999. The types of restructuring measures covered by the new rules include share exchange offers, intra-group share transfers, mergers, business transfers, and spin-offs. Most of the changes provide for increased possibilities of tax deferral in connection with the aforementioned measures.

### B. Company Law

A number of changes to the Swedish Companies Act were entered into force on January 1, 1999. Among the most notable changes are the following:

- The Companies Act restriction on the number of shares that a person may vote has been abolished. Consequently, a shareholder may now vote all of his shares in a company, unless otherwise provided in the articles of association.
- The board of a company is now obliged to issue annually a plan specifying the distribution of work between the board members and the frequency of board meetings.
- The board of a company must also issue written instructions specifying the division of duties between the board, the managing director and any other board-appointed bodies.
- The auditor of a company now has a duty to notify the board of the company if he suspects that a board member or managing director has committed economic crimes such as fraud, misappropriation or tax fraud. Unless the crime is considered insignificant, the auditor must then resign within two weeks of notifying the board and report his suspicions and the circumstances pertaining thereto to the public prosecutor.

*The report on Sweden was prepared Cecilia Verneson of Lagerlof & Leman in New York.

C. Environmental law

A new Environmental Code, which incorporates and replaces the bulk of previous statutes on environmental issues, entered into force on January 1, 1999. In some respects, the Environmental Code introduces more onerous obligations for manufacturers and owners of real estate. The rules regarding environmental impact assessments are more elaborate in the new code than in previous legislation. Moreover, the new code emphasizes the role of the supervisory authorities and extends their authority to issue sanctions.

## IX. United Kingdom*

A. Competition Law

The Competition Act of 1998, now in a transitional phase-in period, marks a radical reform of UK competition legislation. Under the act, the majority of existing competition statutes will be repealed by effects-based legislation, closely modeled on Articles 85 and 86 of the EC Treaty, backed up by a raft of new enforcement measures, which include the following:

- Businesses engaged in anti-competitive practices or ones that abuse a position of market dominance run the risk of being fined up to ten percent of their annual UK revenue.
- In addition to fines, agreements that infringe the new prohibitions will be void and unenforceable. Innocent third parties who suffer loss as a result of an illegal agreement will be entitled to sue the parties to the illegal agreement for damages.
- Whistle blowing is likely to become more popular. Increased publicity of the effects of the new act should lead to more complaints to the UK competition authorities about the anti-competitive behavior of competitors.
- Before the new act, the UK competition authorities had limited powers to investigate and take action against anti-competitive abuses. Under the new act, the authorities will have power to investigate, including the power to enter and search premises, using force where necessary, if reasonable grounds exist to suspect a violation. Obstructing the right of entry or providing misleading information will be criminal offenses, punishable by fines and/or imprisonment.

Businesses will have a reasonable time to modify agreements and practices to comply with the new act. There is a transitional period of approximately one year between enactment and the commencement of the prohibitions. The complex and indecipherable Restrictive Trade Practices Act of 1976 will be repealed at the end of this transitional period. The act provides more exemptions than existing European competition rules. The government has also indicated that parties to unlawful agreements will not be fined where their combined market share does not exceed ten percent and their total annual UK turnover is below 50 million pounds; however, these figures are not yet confirmed.

## X. France*

Three areas of French law were the focus of significant legal developments in 1998: (1) the impact of EU legal initiatives in France; (2) information technology; and (3) the strengthening of labor law protections for French employees.

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## A. European Union Issues

### 1. *The Euro*

Until January 1, 2002, the Euro will coexist with the French Franc, both may be used as legal tender in France, and individuals and corporations may have both Euro and French Franc accounts. However, there is no legal obligation for any particular business to accept payment in Euros until January 1, 2002, and it is unlikely that many businesses will modify their accounting and banking practices until shortly before the disappearance of the Franc, at which time acceptance of the Euro will become mandatory.

### 2. *Implementation of the EU Products Liability Directive*

The French law of May 19, 1998, implements in French legislation the EU products liability directive of July 25, 1985. This law is incorporated into the French Civil Code.[9]

The new French law adopts a rule of strict liability with respect to claims arising from allegedly defective products. The plaintiff need not prove any negligence on the part of the manufacturer, as a product is deemed defective if it is not safe, as a consumer may reasonably and legitimately expect from the product, taking into account, inter alia, the marketing of the product, the particular use of the product, and the date the product is placed on the market.[10]

Importantly, the strict liability adopted by the new law applies whether or not contractual privity existed between the plaintiff and the supplier or the manufacturer. Indeed, the plaintiff may seek relief based either on a contract theory or a strict liability theory, an innovation in French tort law.

The French legislators opted not to place any cap on possible damages available to plaintiffs relying on the new law. Indeed, any contractual limitation on the availability of such damages, contained for example in general conditions of sale, would be invalid as violating French public policy, except for sales of products between professionals and for professional use.[11]

Finally, the statute of limitations for claims under the new law is three years from the date at which the plaintiff knew or should have known of either the claim, the defect in the product, or the identity of the manufacturer, but no more than ten years from the date the allegedly defective product was placed on the market.[12]

## B. Information Technology Issues

### 1. *Digital Evidence of a Legal Obligation*

The Supreme Court ruled on December 2, 1997, that proof of a legal obligation may be made by fax instead of by a writing. Until that time, faxes, copies, e-mail, and other forms of writing could be considered by courts as indicia of formal consent, but were never considered to be written proof as required by article 1316 of the Civil Code. The Court held that the faxed acceptance by a debtor of an assignment of a factored debt, required by

9. Law No. 98–389 of May 19, 1998, J.O., May 21, 1998, p. 7744; Code Civil [C. Civ.] arts. 13861 to 138618 (Fr.).

10. *Id.* art. 13864.

11. *Id.* art. 138615.

12. *Id.* arts. 138616, 138617.

French law for the assignment to be valid, was sufficient proof that the debtor had accepted the assignment. The Court ruled that a legal document—in this case the acceptance of the assignment—may be established by any means, including by fax, providing there is certainty that the document was signed by or came from the party against which it will be enforced, and that the contents have not been modified.

This ruling is likely to be the precursor to acceptance by the French courts of all types of digital proof, such as digital signatures used in electronic commerce, and it is significant because it will have the effect of ushering the electronic age into the rules of evidence and proof established by the French Civil Code.

2. *Implementation of the EU Database Directive*

The EU directive of March 14, 1996, on the legal protection available to creators of databases, including in particular computer databases, was implemented in France by the Law of July 1, 1998, modifying thereby the Code of Intellectual Property.[13] The purpose of both the directive and the new French law is to afford compilers of information a legal protection from infringement similar to that afforded authors under the laws of copyright.

The French law achieves this result by creating a new law exclusively devoted to the protection of databases. A database is defined as a collection of works, data or other independent elements, organized in a systematic and methodical fashion, each of which may be individually consulted by electronic or other means.[14]

Neither the directive nor the French law defines whether employees who create a database for their employer have any proprietary right in the finished product, and it appears that there is flexibility accorded by the statute for negotiation on this issue. To the extent that the database is the result of a team effort, however, it is likely that the database would be considered a collective work under the French Intellectual Property Code, with the presumption that the employer is the owner of the finished product.

Protection from infringement is afforded to the owner of the database, defined as the person or company who takes the "initiative and the corresponding investment risk."[15] The owner of a database may prevent third parties from extracting significant portions of data from the database to another location or making available to the public significant portions of the database without the owner's consent.

3. *The Liability of Internet Web Hosting Services*

A significant judgment from the Paris Tribunal de Grande Instance of June 9, 1998, extends the potential liability of web hosting services for the content their clients place on their web sites. In the case giving rise to this judgment, a French model sought to enjoin a web hosting service from making available, through its client's site, nineteen pictures of her, lightly clothed, which had previously been found to violate her right to privacy.

The Paris court ruled that web hosting services have extensive obligations to ensure that their clients comply with the law and do not infringe on the rights of third parties. The burden of this oversight falls on web hosting services because, according to the court, they are in the best position to ensure such compliance and to take all necessary measures to

13. Law No. 98-536 of July 1, 1998, J.O., July 2, 1998, p. 10075; CODE PROPRIETE INTELLECTUELLE [C. PROP. INTELL.] arts. L. 112-3, 341-1.

14. *Id.* art. L. 1123.

15. *Id.* art. L. 3411.

police the sites under their control. Accordingly, the court enjoined the web hosting service from posting the pictures, subject to a daily fine of 100,000 F., about $17,000 (U.S. dollars), for non-compliance. Significantly, the web hosting service's client who had placed the offending content on his or her site was not a party to the proceedings

### B. French Labor Law

In one of the most contentious legislative acts of the year, the socialist government's proposal to reduce the workweek from thirty-nine to thirty-five hours was adopted by the Parliament, adding a new article to the French labor code.[16] The new reduced workweek will take effect starting January 1, 2000, for companies having more than twenty employees, and January 1, 2002, for all other companies.

The law does not prohibit an employee from working over thirty-five hours per week, but would require the employer to pay overtime starting at hour thirty-six rather than at hour forty. The law provides for decentralized negotiation of the reduction in the workweek between labor and management, at the plant, regional or industry level, such that the reduction may be implemented in the most rational way in each company. Accordingly, companies have significant flexibility in adopting revised work schedules. For example, companies may elect to vary the length of the workweek during the course of the year to take into account seasonal demand, providing the average workweek does not exceed thirty-five hours.

One of the most important issues left to labor and management to negotiate is whether the reduction in the workweek will result in a reduction in weekly salary, or whether salary will be maintained notwithstanding the reduced number of hours worked.

## XI. Switzerland*

### A. Telecoms Privatization

Since January 1, 1998, the new law on telecommunications has privatized the Swiss market by granting licenses. In view of the February 1998 telecommunication agreements with the WTO, the range of telecommunications services offered in Switzerland has increased and the prospects for Swiss telecom companies in foreign countries have improved.

The new telecommunications law takes into consideration market mechanisms while guaranteeing universal services, which include data transmission, access to emergency services and public phones. To guarantee the maintenance and financing of this service, the law provides a system of fixed-period licenses, granted by the Federal Communications Commission, to telecommunications service providers and universal service providers that meet the legal requirements. The use of radio frequencies is also subject to licensing. Interconnection rules must be negotiated directly by the competitors.

Moreover, the international telecommunications markets are now subject to privatization rules. According to the WTO agreements of February 5, operators have the right to furnish

16. Law No. 98-461 of June 13, 1998, J.O., June 14, 1998, p. 9029; Code du Travail [C. Trav.] art. L.212-1.

*The report on Switzerland was prepared by Thomas Legler of Python, Schifferli, Peter & Partners in Geneva.

telecommunications services and the right to be established in order to provide such services. Additionally, the agreements provide that the competition, universal service and interconnection policies of WTO members are subject to the rules of good community conduct.

Foreign telecom operators now have the right to establish and offer telecommunication services in the Swiss market, even from a foreign country.

### B. Federal Act against Money Laundering in the Financial Sector

The Federal Act against Money Laundering in the Financial Sector (Money Laundering Act) of April 1, 1998, is based on the principle of self-regulation and fills the gap left by the previous law, which did not sufficiently cover non-banking sectors.

The Money Laundering Act is applicable to all financial intermediaries who accept, hold or assist in the placing or transfer of assets belonging to third parties in a professional capacity (i.e., for compensation). Accordingly, banks, fiduciaries, asset managers, attorneys, currency exchange offices, and notaries acting as intermediaries fall under its purview.

The act imposes a general requirement of diligence, which includes the duty to verify the identities of contracting parties and beneficial owners, investigate the purpose of any transaction showing potential signs of money laundering and retain documents demonstrating such investigation.

Intermediaries must inform the newly created Office of Communications of Money Laundering Matters (Office of Communications) of any knowledge or well-founded suspicion of money laundering activity. If the Office of Communications believes there are sufficient grounds to suspect money laundering, it will transmit the necessary information to the Cantonal authorities in order to start a criminal investigation.

The Control Authority is another newly created agency, which is linked to the Federal Department of Finance. It is responsible for monitoring intermediaries in non-banking sectors that are not already subject to surveillance by other agencies, such as the Federal Banking Commission or the Federal Office of Private Insurance.

### C. The Federal Act on Stock Exchanges and Securities Trading

The Federal Act on Stock Exchanges and Securities Trading (Stock and Securities Act), which is to a large degree based on the principle of auto-regulation, came into effect on January 1, 1998. The main objective of the Stock and Securities Act is to protect investors and the functioning of the markets by ensuring transparency, efficiency, liquidity of the markets, security, and equal treatment for investors. The scope of the Stock and Securities Act includes supervision of the stock exchanges and professional traders.

The Stock and Securities Act imposes an obligation on each shareholder to declare any acquisition or sale of shares in a Swiss-registered company, in the event that the shareholder reaches, exceeds or drops below the threshold of 5, 10, 20, 33⅓, 50 or 66⅔ percent of the voting rights. This rule also applies to equity securities held in a Swiss-registered company that is not listed with the Stock Exchange. The supervisory authority is the Federal Banking Commission. If the reporting duty is violated, a fine of up to twice the amount of the purchase or sales price of the asset may be imposed.

The Stock and Securities Act also contains rules on public take-over bids. It distinguishes between voluntary, friendly or hostile take-over bids and bids presented upon attaining certain thresholds. The bidder must publish its bid in a prospectus, and the information contained therein must be complete and accurate. Furthermore, the bid must be examined by a recognized auditor or securities trader. After the bid period expires, the bidder must publish the results. The bidder, or anyone who holds directly or indirectly a stake of at least five percent in the voting rights of the target company, must report each transaction in equity securities to the Take-Over Commission and the respective stock exchange.

Finally, the Stock and Securities Act provides that all securities traders must obtain a license from the supervisory authority. This provision also applies to banks that act as securities traders, since securities transactions are no longer included in the ordinary bank license. Branches and representative offices of foreign securities traders in Switzerland are also required to obtain a license. A foreign securities trader without personnel in Switzerland may, however, offer its services on a cross-border basis without a license, as was the previous practice in banking business. The Stock and Securities Act and its respective ordinances specify the requirements for granting licenses, such as minimum amount of capital, requisite expert knowledge and an undertaking in respect of the proper conduct of business operations.

### D. Company Tax Reform

In order to improve the economic attractiveness of Switzerland, the laws on direct federal taxes (LDFT), on harmonization of direct taxes (LHDT), on anticipated taxes (LAT) and on stamp taxes (LST) have been modified. This reform of company taxation entered into force on January 1, 1998, (LDFT, LHDT and LAT) and April 1, 1998 (LST). It is comprised of the following measures:

- new holding and participation company taxation regulation;
- introduction of a proportional 8.5 percent profits tax and abolition of capital tax;
- reintroduction of a 2.5 percent stamp tax on life insurance premiums;
- reduction from two percent to one percent of the tax on issuance of participation rights; and
- legal regulation of an acquisition and its shares.