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I. European Union Law

A. Financial Markets

There have been a substantial number of developments in the field of financial markets over the last year. The European Commission (Commission) has emphasized, in its 1999 Action Plan and in its general attitude towards policy making in this area, that the drive

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toward a single market in financial services is of prime importance. A number of legislative advances can be expected in the near future.

1. *Financial Services*

a. Financial Services Action Plan

The Financial Services Policy Group (FSPG), consisting of representatives of Finance Ministers of the Member States, is urging the Commission to adopt ambitious reforms for securities markets. The Financial Services Action Plan published on May 11, 1999, established a number of measures to improve the single market for financial services over the next five years by completing the single wholesale market, developing open and secure markets for retail financial services, eliminating tax obstacles to market integration, and ensuring that there is continued stability in EU financial markets.[1] However, in view of the rapid change in the securities markets, the FSPG considers that further measures should be implemented to facilitate raising capital and trading securities across the EU. These include development of efficient exchange and market infrastructures to allow individuals to purchase or trade shares in another Member State without undue delay, formality, or cost, and harmonization of the supervision of securities markets so as to ensure a high degree of protection for investors.

The FSPG has called for urgent reform to harmonize market information issued to investors (e.g., prospectus, listings, regular financial reporting, and company accounts), which is currently prepared on differing accounting bases, making the information difficult to compare and thus limiting cross-border investment. The FSPG is backing the proposal to use the International Accounting Standards as a benchmark for financial reporting, and considers that the development of an effective EU accounting strategy is a priority. The Commission is to publish a consultation document late in 2000 to examine how present arrangements under the 1993 Investment Services Directive (Directive) should be amended to ensure that they are consistent with e-commerce regulations and the e-commerce environment.[2]

b. Distance Selling of Financial Services

The proposal on the Distance Selling of Financial Services[3] is intended to:

- Provide a high level of protection to consumers that will encourage consumer confidence.
- Facilitate the development of innovative methods of selling with the introduction of new technologies.
- Encourage cross-border sales of financial services, encourage competition, and facilitate market integration.

The Directive will relate to all contracts for the provision of banking, insurance, investment, or payment services made between suppliers and consumers (acting outside their

1. *See* Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM(99)232 final.

2. Investment Services in the Securities Field, Council Directive 93/22/EEC, May 10, 1993, 1999 O.J. (L 141) 27. The Directive sets out certain rules for harmonizing the conduct of business rules but does not eradicate duplication between national supervisory bodies.

3. COM(99)385 final.

trade, business, or profession) that are concluded under an organized distance sales process exclusively by means of distance communication (i.e., telephone, Internet, or post). The proposal seeks to ensure that all consumers are provided with sufficient information to make informed decisions. The consumer must be supplied with specific information before the contract is entered into, including a description of the main characteristics of the service; the total price, including any applicable taxes; the arrangements made in relation to payment, delivery, and performance of the contract; the length of time the offer will remain open and valid; any factors that may cause the contract price to vary between the time the information is given and the time the contract is concluded; sufficient information to allow the customer to verify the price at the time the contract is concluded; information on how to cancel the contract; and any out-of-court redress procedures.

The proposal also gives consumers the right to withdraw from the contract within a period of time without indicating his reasons and without penalty (currently fourteen to thirty days depending on the type of service, but this is under discussion) from the date of the conclusion of the contract or from receipt by the customer of the necessary information. This right of withdrawal will not apply to certain contracts, such as foreign exchange contracts; receipt, transmission, and execution of orders of transferable securities, financial futures and options, or exchange and interest rate instruments; nonlife insurance for less than two months; and mortgages and real estate credit where monies have already been transferred to the seller of the property (or representative) under the consumer's instruction or where the consumer has validly executed and recorded a notarial act relating to the real estate credit.

The proposal requires that customers be allowed in law to request cancellation of a payment and obtain a credit or reimbursement where their credit or debit card is used fraudulently. Member States must also legislate to ensure that financial services are not supplied without prior requests from customers. The absence of a reply should not amount to consent. Under the proposal, the consumer must consent to the use of automated calling systems without human intervention. The use of fax machines and other long distance communications may be used if the customer has not expressed his manifest objection.

c. Money Laundering

The Commission has published a proposal to extend the scope of Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.[4] The proposal extends the obligations to report suspicious transactions in the 1991 Directive currently limited to transactions involving money received from drug trafficking alone to transactions involving money received from other criminal activities such as organized crime, fraud, and corruption. The duty to report is also extended from the banking sector to other professions that are increasingly being used to launder money. These include accountants and auditors, the real estate sector, casinos, and lawyers.[5] The proposal will

4. *See* Commission Proposal of January 31, 2000, for a European Parliament and Council Directive Amending Council Directive 91/308/EEC of June 10, 1991, On Prevention of the Use of the Financial System for the Purpose of Money Laundering, *available at* http://europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0352.html.

5. The legal profession will be given an exemption to cover the representation or defense of clients in legal proceedings to allow lawyers to adhere to their duty of client confidentiality. The Commission intends that individual member states will have the ability to allow the profession to report to their professional body rather than the usual money laundering authorities.

also include an annex setting out the requirements needed to identify customers in distance contracts.

d. Capital Adequacy

In November 1999, the Commission issued a consultation paper on the capital adequacy requirements for banks and investment firms, supervisory review, and the potential for market discipline to act as an aid in strengthening safe and secure banking practices.[6] The consultation paper envisages two strategies to assess the economic risk of financial institutions and resulting capital charges based on either the internal credit assessment systems of the institutions or a revised standardized credit risk weighting system.

e. Retail Payments in the Internal Market

The Commission has issued a Communication in which it concludes that European banks and credit institutions must make greater efforts to guarantee "inexpensive, efficient and secure" credit transfers between EU Member States.[7] One of the main points in the report is that the infrastructure for small value cross-frontier credit transfers should be improved, by requiring banks to provide clear information on tariffs, complete the transfers within six days, compensate for any lost transfers, and clarify to the customer that the originator pays all fees incurred. The Commission will publish an evaluation of the level of such transfer charges every six months. The Commission considers that banks should inform customers of ATM credit card charges, end discrimination in fees between domestic cards and cross-border payment cards, and ensure that there is a clear statement on who is liable in the event that a card is lost. The Commission is also understood to be working on a text that would improve financial supervision of cross-border operations for financial authorities both within the EU and with third countries.

f. Pensions

No EU legal framework currently exists for pension funds. The Commission has issued a Communication and is actively preparing a draft Directive, the objective being to make pension funds benefit from the Internal Market principles of free movement of capital and services, while establishing rigorous prudential standards to guarantee that pension fund beneficiaries are protected.[8] A report on pensions, entitled "Rebuilding Pensions," researched by the FSPG and published by the Commission in November 1999, contributes to the current debate surrounding the drafting of the proposal.[9] Its objective is to define the best practices for the prudential control of pension funds. Commission officials have cautioned that the report does not constitute a reflection of the Commission's position in the field.

6. A Review of Regulatory Capital Requirements for EU Credit Institutions and Investment Firms, Consultation Document MARKT/1123/99-EN (Nov. 22, 1999). The Review complements the consultation exercise undertaken by the Basle Committee in June 1999.

7. Communication on Retail Payments in the Internal Market, COM(00)36 final.

8. Communication Towards a Single Market for Supplementary Pensions, COM(99)134 final.

9. Recommendations for a European Code of Best Practice for Second Pillar Pension Funds, *available at* http://www.europa.eu.int/comm/internal_market/en/finances/pensions/pensions2.pdf.

2. *Insurance*

a. Insurance Intermediaries

Work on a Commission draft proposal for a Directive on insurance intermediaries is progressing. The aim of the proposal will be to improve consumer protection and to promote the freedom to provide insurance services. The new draft would require insurance intermediaries to supply certain information to their clients regarding their professional situation and their financial resources.

At the end of September 1999, the Commission asked EU Member States to comment on the draft Directive. Many Member States have called for the redrafting of parts, in particular concerning the definitions and the scope of the Directive, as well as provisions concerning the freedom to provide services and the freedom of establishment. The Working Group has redrafted the definitions to emphasize that every person or undertaking (be it a bank, an agent, a post office, a car dealer, or a broker) mediating in insurance is defined as an insurance intermediary, excluding those persons employed by an insurance or reinsurance undertaking. Travel insurance may be exempted from the scope of the Directive, except where such insurance includes other risks such as medical treatment or third-party liability. A de minimis rule may also be introduced to include only those intermediaries that can be expected to engage in cross-border mediation. Regarding the freedom to provide services, the draft Directive states that all insurance and reinsurance intermediaries will be subject to professional requirements. Therefore, it should be possible for insurance and reinsurance intermediaries to work cross-border without additional requirements.

The draft Directive is a follow up of the Commission's Financial Services Action Plan.[10] The proposal for a Directive on insurance intermediaries is likely to be adopted by the Council of Ministers by 2002, and the timetable in the Financial Services Action Plan envisages the adoption by the Commission of a proposal for a Directive by mid-2000.

b. "General Good" Principle in Insurance Services

The Commission has adopted a Communication on its interpretation of the principle of "general good" and on the freedom to provide services as applied to the insurance industry.[11] The aim of the Communication is to guarantee that the existing EU Insurance Directives are applied in compliance with an integrated Internal Market in insurance and that obstacles preventing insurers from selling their products throughout the Single Market are removed. The Communication identifies the scope of the freedom to provide services and clarifies the separation between the concepts of freedom of establishment and freedom to provide services. It also defines the conditions under which a Member State may invoke the "general good" for regulating insurance business in its territory, as developed by the Court of Justice. The Communication notes that the Commission is to bring out a Green Paper examining whether the existing Insurance Directives provide an appropriate regulatory framework for the developing market in e-commerce and financial services, while ensuring consumer protection.

3. *e-Commerce*

a. The Future of e-Banking

The Commission is seeking to facilitate the development of e-commerce and the use of electronic money by setting out a clear regulatory framework to promote confidence among

10. COM(99)232, *supra* note 1.

11. Freedom to Provide Services and the General Good in the Insurance Sector, COM(99)5046 final.

consumers and business. The Commission supports the view that electronic money institutions should be able to offer their services throughout the EU on a level playing field with traditional credit institutions. However, the supervision of electronic money institutions is to be borne by the home Member State of the credit institution.

The Commission has proposed that electronic credit institutions be brought within the definition of "credit institution" in the First Banking Coordination Directive, thus bringing them within the regulatory regime of the First and Second Banking Directives.[12] It is hoped that a "single passport" concept will be introduced, meaning that enterprises that do not wish to carry out the full range of banking operations may operate throughout the Single Market, but will only need authorization in the home Member State. All issuers of electronic money would thus be subject to reserve requirements imposed by the European Central Bank, currently an initial capital of $500,000 and not less than two percent of the present amount (or, if higher, the average of the preceding six months) of their outstanding financial liabilities relating to outstanding electronic money. Issuers that do not carry out the full range of banking operations would be exempt from some of the supervision rules in the First and Second Banking Directives, but would be subject to specific rules on issuing electronic money.

b. e-Commerce Directive

The objectives of the Commission's proposed e-Commerce Directive are to create a legal framework for the European internal market for e-commerce, to remove legal insecurities and barriers to cross-border electronic commerce, to stimulate investment and strengthen the competitiveness of European industry, and to reinforce the position of the EU in international negotiations.[13] The proposed Directive establishes that control of the service provider will be in the Member State where it is established ("country of origin" principle) and prevents Member States restricting the free movement of services provided from other Member States. As this internal market clause is very wide in application, a number of derogations have been established. The proposed Directive reduces legal uncertainty by providing a definition for place of establishment of an information society service provider, prohibits prior authorization regimes from specifically targeting on-line activities, and establishes transparency requirements.

The proposed Directive establishes transparency requirements in the area of unsolicited commercial communications and authorizes the use of commercial communications by regulated professions in the context of information society services subject to rules of professional ethics. The proposal also provides for an adjustment of national legislation to the on-line environment. The Directive is intended to ensure that contracts can be concluded on-line and will require that service providers provide certain types of information concerning on-line contracting. It will also remove legal uncertainty with regard to the moment of conclusion of the contract.

The proposal establishes a "mere conduit" exemption for intermediaries and limits liability for data caching and storage under certain specified conditions. It also seeks to prevent Member States from imposing general obligations on service providers to monitor third-

12. Proposal for European Parliament and Council Directives on the Taking Up, the Pursuit and the Prudential Supervision of the Business of Electronic Money Institutions, 1998 O.J. (C 317) 7.

13. Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, 1999 O.J. (C 30) 4, amended by COM(99)337 final.

party information received. The proposed Directive encourages EU-wide codes of conduct and alternative dispute resolution systems that, it is hoped, will offer more appropriate redress procedures for e-commerce contracts. It also encourages quick and efficient administrative cooperation between Member States. The Council adopted its common position, with Belgium abstaining, on the e-commerce Directive in early March 2000.[14]

4. *Data Protection*

The Commission has initiated enforcement proceedings against several EU Member States in relation to the Data Protection Directive.[15] The Member States in question (France, Luxembourg, the Netherlands, Germany, and Ireland) have, according to the Commission, failed to notify all the measures necessary to implement the Directive. Portugal, Sweden, Italy, Greece, Finland, and Belgium have notified the measures and the United Kingdom and Denmark have done so partly—the two latter countries still have to complete their implementation by adopting some additional measures. Individuals are nevertheless entitled to invoke some of the provisions of the Directive before national courts. These implementation infringement procedures may have a negative effect on the negotiating position of the EU vis-à-vis the United States regarding data protection. In the meantime, EU companies are complaining that some Member States' implementation of the EU rules on data protection are too restrictive and are driving business out of the market.

For almost two years, the EU and the United States have been trying to reach accord on the question of data protection. The Data Protection Directive allows EU Member States to ban exports of data to third countries that do not meet EU standards of protection, whereas the United States does not have any legally binding rules on data protection. Instead, the United States is proposing a voluntary "safe harbor" scheme where U.S. companies would subscribe to a series of principles on protection of privacy.

In November 1999, the U.S. Department of Commerce proposed a set of international "safe harbor" privacy principles.[16] According to this document, "compliance with the principles . . . would rely on a combination of private-sector dispute resolution mechanisms and U.S. law which forbids unfair and deceptive acts."[17] The Commission has been studying the U.S. proposal, and, if it decides to accept it, a decision could be issued under the EU Data Protection Directive recognizing the "safe harbor" principles as providing sufficient protection for the transfer of data from the EU to the United States. EU Member States and representatives of the Data Protection Commissions are also examining the U.S. proposal. An EU Working Party on the question has recently published an opinion in which it states that the implementation of "safe harbors" does not provide adequate guarantees.[18] One of the criticisms regards the lack of prior checks by the U.S. Department of Commerce of the organizations' qualification criteria for participating in the "safe-harbor" system.

14. *See* Council Press Release IP 6450/00 (Feb. 28, 1999).

15. Directive 95/46/EC of the European Parliament and Council of October 24, 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1999 O.J. (L 281) 31.

16. Draft, International Safe Harbor Principles, *available at* http://www.europa.eu.int/comm/internal_market/en/media/dataprot/news/harbor2.htm.

17. *Id.*

18. Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, Opinion 7/99.

Under the current terms of the proposal, companies essentially self-certify that they meet the criteria.

The December 1999 EU-U.S. summit in Washington failed to reach agreement on the question. Nevertheless, negotiations between the U.S. Department of Commerce and the Commission have succeeded in establishing an area of common ground, according to the Commission. Significant progress toward the agreement was made in late February 2000 when both sides met and reached some agreement on the issue of enforcement that had been one of the matters delaying political agreement. There appears to be general agreement on both sides at present, subject to the political and public consultation processes of both the EU and the United States.

B. International Trade

In general terms, EU trade policy in 1999 has been characterized by continuity. The succession of EU Trade Commissioner Sir Leon Brittan by Pascal Lamy was feared by many as a signal of trade protectionism to come. This has not—as yet—materialized, but there most certainly is a change in the tone with Sir Leon being a consummate diplomat and Pascal Lamy being more of a down-to-earth businessman.

1. *Trade Defensive Instruments*

a. Anti-Dumping Developments

The Anti-Dumping Regulation remained the main trade-defensive instrument used, albeit less intensively than in the early part of the 1990s.[19] Many investigations carried out in 1999 involved the review of existing anti-dumping measures rather than new initiations. Investigations into steel products did not materialize to the extent anticipated, notwithstanding the investigation into flat rolled products of iron or nonalloy steel.[20] A variety of countries and products were targeted with lesser emphasis on electronic products, or countries such as Japan and Korea, than in the past.

At the end of 1999, the amendments to the Anti-Dumping Regulation permitting the treatment of Russia and China as market-economy countries[21] were applied for the first time.[22] The decisions that have been released signal the EU's intention to make affirmative use of these provisions, albeit after a strict examination of the conditions applied when granting market-economy status.

Following a similar occurrence in the cotton fabric case in 1998, the Commission has again been compelled to let the compulsory deadline for imposing anti-dumping measures expire on large electrolytic capacitors from the United States and Thailand in the absence of a sufficient majority of EU Member States in support of their imposition. Plans to tighten existing anti-dumping rules, including tackling, inter alia, the voting requirements that led to the deadlock in the cotton fabric and the capacitor cases, never materialized.

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19. Council Regulation 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries Not Members of the European Community, 1996 O.J. (L 56) 1.

20. *See* Commission Decision 283/2000/ECSC of 4 February 2000, 2000 O.J. (L 31) 15 (on flat rolled iron/nonalloy steel).

21. Council Regulation 905/98 of 27 April 1998, 1998 O.J. (L 128) 18.

22. *See* Council Regulation 2563/1999 of 3 December 1999, 1999 O.J. (L 310) 17; Council Regulation 2722/1999 of 17 December 1999, 1999 O.J. (L 328) 1.

In the wake of the WTO Ministerial in Seattle, the EU and Japan, often on opposite sides in many anti-dumping investigations, rallied against the United States to request the review of WTO anti-dumping provisions.

b. Anti-subsidy Developments

In 1999, recourse to the Anti-Subsidy Regulation remained frequent even though the number of new initiations was less than the sudden increase experienced in 1998.[23] The Commission has encouraged transparency in enforcement by publishing guidelines for the calculation of subsidies. It is noteworthy that the same transparency is lacking in the anti-dumping field for which guidelines, although many times announced, have never been published.

c. Safeguard Measures

As in the past, no use was made of the Safeguard Regulation concerning products originating in market-economy countries.[24] The EU is clearly worried about the compatibility of safeguard measures with WTO rules. In addition, it considers these measures offensive and likely to affect trade and political relations with many of its trading partners. Softer measures such as negotiated agreements (mentioned below) remain the preferred instrument. Some EU quantitative restrictions continue to exist, mainly for products originating in nonmarket economy countries or as a result of agreements negotiated in the steel or textile sector. Nineteen hundred ninety-nine witnessed the expiration of EU quota limitations on Japanese cars, which the EU had been authorized by the WTO to maintain during a transitional period.

2. *Market Access Instruments*

a. Trade Barrier Regulation

The use of the EU's Trade Barrier Regulation (frequently referred to as the EU's version of U.S. section 301) remained scarce, notwithstanding the great hopes of the Commission for this to become the key instrument in dismantling trade barriers in third-world countries.[25] Following investigations under the Regulation concerning the U.S. Copyright Act and the Brazilian import licensing system, the EU decided instead to resort to WTO dispute settlement. Investigations have been initiated into Canadian provisions regarding imports of Parma ham, into Korean provisions governing pharmaceutical products, and, most recently, into provisions covering the importation of textile and clothing products into Argentina. The method favored for the dismantling of trade barriers now focuses on the negotiation and conclusion of trade agreements. Thus, the EU has adopted a program towards the removal of some 1,200 trade barriers identified in approximately fifty-four countries. This is to be accomplished through WTO dispute settlement procedures where needed or, preferably and more often, softer procedures such as negotiated trade agreements

23. Council Regulation 2026/97 of 6 October 1997 on Protection Against Subsidized Imports from Countries not Members of the European Community, 1997 O.J. (L 288) 1.

24. *See* Council Regulation 3285/94 of 22 December 1994 on the Common Rules for Imports and Repealing Regulation 518/94, 1994 O.J. (L 349) 53.

25. Council Regulation 3286/94 of 22 December 1994 Laying Down Community Procedures in the Field of the Common Commercial Policy in Order to Ensure Exercise of the Community's Rights under International Trade Rules, in Particular Those Established under the Auspices of the World Trade Organization, 1994 O.J. (L 349) 71.

or a direct market access dialogue. This is in line with what is sometimes referred to as the "soft-soft" approach of the EU towards trade barrier dismantlement in contrast with the more offensive section 301 approach and the imposition of retaliatory measures.

b. Market Access Through Negotiated Agreements

As was the case in 1998, the EU sought to finalize many different types of agreements with trade implications, including partnership and cooperation agreements, as well as full-fledged preferential trade agreements aiming at the establishment of a free trade area. Two outstanding achievements were the conclusion of free trade agreements with Mexico[26] and South Africa[27] that will dismantle customs duties for the majority of products. Although the conclusion of the agreement with South Africa was hailed by the Commission as a historic event, the EU's trading position was shaken when a rift occurred with Italy and Greece refusing to ratify the agreement until such time as EU spirits such as Grappa and Ouzo would be protected. A compromise has been found in 2000 but the dissension in the ranks may jeopardize the EU's position in other negotiations.

Cooperation and Partnership Agreements with a significant number of the now independent states of the former USSR were concluded or entered into force, including agreements with Azerbaijan, Uzbekistan, Kyrgyzstan, and Georgia. Negotiations towards an association agreement with Egypt are underway. A green light has been given by the Council for the negotiation of trade agreements with MERCOSUR and Chile. Negotiation towards a preferential trade agreement with the Gulf States stalled due to a lack of economic integration within the region. Of direct importance in facilitating day-to-day trade is the mutual recognition agreement concluded with the United States that was published in 1999. More agreements of this type are likely to be negotiated in the future. Negotiations started with the amendment of the Lomé Convention between the EU and the former colonies of its Member States in the African, Caribbean, and Pacific regions.[28] These amendments are aimed at changing the current preferential trade regime afforded by the EU in favor of regional trade agreements.

3. *Customs Developments*

In the area of customs, there has been a complete overhaul of the list of products subject to duty suspensions and tariff quotas.[29] In line with past experience, electronic components continue to benefit disproportionately from the suspensions and quotas. The Commission continued its work on identifying a harmonized position for the customs classification of various products without there being, this year, any particular product entering the EU attracting the anger of the international community as was the case in preceding years over products such as CD-ROMs or LAN equipment. Noteworthy is the opposition between the Commission and the Member States over a proposal to change the Customs Code

26. EC–Mexico Free Trade Agreement, Jan. 31, 2000, *available at* http://europa.eu.int/comm/trade/bilateral/mexico/fta.htm.

27. Trade, Development and Cooperation Agreement between the EC and the Republic of South Africa, October 11, 1999; *see* Council Regulation 2793/1999 of 17 December 1999, 1999 O.J. (L 337) 29.

28. Negotiations were concluded in February 2000. *See* Information Memorandum 10 on Conclusion of the Brussels Ministerial of February 2–3, 2000.

29. Reduced or zero-rated customs duties up to a certain quantitative threshold beyond which the normal customs duty rate is automatically levied in the case of tariff quotas or following a decision to do so in the case of tariff suspensions.

provisions on post-clearance recovery. This would shield an importer against post-clearance recovery where the issuing authorities of a third country knew or should have known that the conditions applying to the issuance of a certificate of origin were not met. The Commission considers that this change would not offer sufficient protection against fraud and instructed the competent Commissioner to withdraw the proposal.

4. *The U.S. and the EU: More Love and Hate*

Nineteen ninety-nine witnessed a spate of existing and new disputes between the EU and the United States on various issues extending from bananas and beef with hormones (on which the WTO has ruled) to hushkitted aircrafts, data protection, GMOs, vitamins, and allegations that the EU market is not sufficiently open to steel products. These disputes do not seem to have affected the Transatlantic Initiative but, at the same time, none of these disputes have as yet been resolved and plans to deepen U.S.-EU trade relations into a system closer to a free trade area have not been pursued after they were disrupted by France. An early warning system to head off trade frictions was agreed upon during the 1999 EU-U.S. Summit in Bonn.

C. Competition

1. *Overview*

Nineteen ninety-nine was a momentous year for EU competition law. The Commission implemented the reforms announced in its 1997 Green Paper on Vertical Restraint with the issuance of a new block exemption for vertical restraints.[30] In April, the Commission published its White Paper on modernization of the system for implementing articles 81 and 82 EC (formerly articles 85 and 86 EC), the key element of which was the proposal of making the exemption provision article 81(3) EC directly applicable, thus ending the system of notification.[31] The employment of collective dominance as a concept of merger control has been further developed by the Commission and has received the approval of the Court of First Instance.[32] A number of important merger investigations have been initiated, and decisions taken, in the energy, avionics, transport, and banking sectors. The extraterritorial application of EU merger control to non-EU transactions continues to grow. Overall, the trend in EU competition law in 1999 has been in the direction of a greater resemblance to U.S. antitrust law and structures.

2. *Vertical Restraints*

In January 1997 the Commission published its Green Paper on vertical restraints in EU competition policy.[33] Following an intensive consultation period, the Commission issued, in September 1998, a Communication setting out the direction of future reform[34] and submitted to the Council two proposals for the amendment of Council Regulations 17/62[35]

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30. Green Paper on Vertical Restraints in EC Competition Policy, COM(96)721 final.

31. White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, COM(99)27 final.

32. *See* Case 102/96 Gencor Ltd. v. Commission, CFI, Judgment of March 25, 1999, *available at* http://europa.eu.int.

33. Green Paper, *supra* note 30; *see* Commission Press Release IP/97/35.

34. Communication on the Application of EC Competition Rules to Vertical Restraints, COM(98)544 final; *see* Commission Press Release IP/98/853 (Sept. 30, 1998).

35. Council Regulation 17/62 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty, 1959-1962 O.J. Spec. Ed. 87.

and 19/65.[36] The Council adopted the new regulations on June 10, 1999.[37] Council Regulation 1215/99 amends Regulation 19/65, authorizing the Commission to adopt a broad block exemption in the field of vertical restraints.[38] Regulation 1216/99 amends article 4(2) of Regulation 17/62, exempting vertical agreements from the requirement of notification.[39] On September 24, the Commission published a draft block exemption and draft guidelines on vertical restraints.[40] On December 22, 1999, the new vertical restraints block exemption, Commission Regulation 2790/1999, was adopted.[41] Regulation 2790/1999 applies article 81(3) EC to exclusive supply and distribution agreements, and franchise agreements, for the sale and purchase of goods or services. The Regulation replaces Regulations 1983/83, 1984/83, and 4087/88 that will all now expire on June 1, 2000. Regulation 2790/1999 will not modify existing rules on motor vehicle distribution and servicing agreements, but it will apply to the beer and petrol sectors.

The new Regulation establishes a broad exemption for vertical agreements, creating a "safe harbor" wherein agreements between two or more firms whose combined market share is below thirty percent will benefit from exemption. Importantly, agreements between firms whose combined market share exceeds thirty percent are not exempted, but are not presumed to violate article 81(1) EC. The Regulation contains a familiar black list of hard-core restraints that will remove the benefit of the exemption, including fixed or minimum resale prices, restrictions on passive sales in the territory of another distributor, restriction of active or passive sales to consumers by members of a selective distribution system, restriction of cross-supplies between distributors within a selective distribution system, and agreements restricting sales of spare parts to independent repairers and service providers. A gray list is also included of provisions not exempted, but may under specific circumstances be compatible with article 81(1) EC, including noncompetition obligations of greater than five years' duration. These provisions imply a more vigorous role for the national courts in interpreting vertical restraints, consonant with the Commission's new policy of enforcement decentralization. Publication of the Commission's Guidelines on Vertical Restraints is expected in the spring of 2000.

3. *Decentralizing the Implementation of EU Competition Law*

On April 28, 1999, the Commission adopted its White Paper on the Modernization of the Rules Implementing articles 85 and 86 of the EC Treaty (now renumbered as articles 81 and 82 EC).[42] The key reform proposed by the Commission is the surrender of its monopoly over the exemption provisions of article 81(3) EC. Henceforth, the Commission, national competition authorities, and national courts would be competent to exempt re-

36. Council Regulation 19/65 of 2 March 1965 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1965 J.O. (L 36) 533.

37. *See* Commission Press Release IP/99/286 (May 7, 1999).

38. Council Regulation 1215/1999 of 10 June 1999 Amending Regulation 19/65/EEC on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1999 O.J. (L 148) 1.

39. Council Regulation 1216/1999 of 10 June 1999 Amending Regulation 17; First Regulation Implementing Articles 81 and 82 of the Treaty, 1999 O.J. (L 148) 5.

40. Commission Press Release IP/99/699 (Sept. 24, 1999).

41. Commission Regulation 2790/1999 of 22 December 1999 on the Application of Article 81(3) of the EC Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21.

42. White Paper, *supra* note 31; *see* Commission Press Release IP/99/275 (Apr. 28, 1999).

strictive agreements under article 81(3) EC, which would be directly applicable. A number of important ancillary reforms are also proposed.

The reform initiative is motivated by the Commission's stated desire to focus its resources on cross-border cartel activity, maintenance of competitive market structures, merger control, market liberalization, and international cooperation. In particular, the Commission plans to shift from a reactive to a proactive role in competition enforcement, where self-initiative investigations will play a much greater part in its overall activities. To achieve this, the Commission intends to end the system of *ex ante* notification of restrictive agreements under article 4 of Regulation 17/62, the cornerstone of current implementation and enforcement of article 81 EC, replacing it with a system of *ex post* control. Under the new system, restrictive agreements will not require notification, nor suffer from a presumption of invalidity until a refusal to exempt is made by the Commission, national competition authorities, or national courts. Once the benefit of exemption is refused, article 81(2) EC will have the legal effect of making the restrictive agreement void ab initio. Partial-function industrial joint ventures will not be covered by the new Regulation, but will be placed under the procedures of the Merger Regulation where they will be subject to joint analysis under article 81 EC and the article 2(3) dominance test of the Regulation.[43]

The Commission intends to retain overall control of EU competition policy. This would be achieved by continuing to issue block exemption regulations, notices, and guidelines setting out rules for interpretation of articles 81 and 82 EC. To make control effective, national authorities would be prevented from prohibiting, under national law, agreements benefiting from an EC block exemption. The Commission will also adopt individual prohibition decisions in areas of special interest, as well as positive decisions to provide guidelines for emergent areas of policy.

Significant changes will occur in the relationships between the Commission and national authorities and courts. National authorities will be authorized (indeed required) to enforce article 81 EC, and will be given the power to remove the benefit of EU block exemptions where block exemption market share thresholds have been exceeded and the relevant market is the national territory or a part thereof. To deal with multijurisdictional cases, both the Commission and national authorities would be permitted to transfer investigation files to other authorities and to use that information as evidence in national proceedings. However, separate penalties or commitments could not be imposed both by the Commission and national authorities. Even so, confidentiality and double jeopardy issues will most likely arise. National courts would be required to inform the Commission of EU competition cases pending before it. The Commission intends to make *amicus curiae* interventions in important national cases, and will encourage national courts to ask it questions "of a precedential, legal or economic nature" impliedly in preference to an article 234 EC (formerly article 177 EC) preliminary ruling. One remarkable consequence of reform would be the Commission's ability to take a decision on a case after a national court judgment that is still open to appeal, or being appealed, that would bind the appeal court with respect to that decision, unless legally challenged in an article 234 EC (formerly article 177 EC) preliminary reference to the Court of Justice. A consequence of this system would be the creation

43. Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 257) 1, amended by Corrigendum to Council Regulation 1310/97 of 30 June 1997, 1998 O.J. (L 40) 17.

of an alternative appeal route directly to the Court of Justice against Commission competition decisions, bypassing the Court of First Instance. Unless the Court of First Instance is given jurisdiction over such references, an unintended opportunity for judicial forum shopping between the Court of Justice and Court of First Instance could be created in such cases.

4. *Collective Dominance*

The Court of First Instance has approved the employment of collective dominance as a tool of merger control even where parties lack financial links. In *Gencor Ltd. v. Commission*, the CFI held that the determination of "economic links," required for a finding of collective dominance, could be based on the interdependent relationship of firms in a tight oligopoly of sufficient concentration, transparency, and product homogeneity that parallel behavior by the parties is legally presumed to be structurally determined.[44] This ruling gives considerable backing to the Commission in its current reliance on collective dominance to address the risk of collusion in merger cases where a single-firm dominant position is not created.

The Commission's prohibition of the takeover of First Choice by Airtours provides a graphic example of the use collective dominance as a tool for oligopoly control.[45] The merging parties were the second and fourth largest firms on the UK market for foreign package holidays to short-haul destinations in Southern Europe and North Africa. The four highly vertically integrated firms collectively controlled eighty percent of the market. The Commission concluded that the takeover of First Choice by Airtours would create a market structure where the three remaining players would be capable of coordinating capacity decisions. The loss of First Choice as a supplier of charter airline seats and travel agency distribution channels to small operators was also a significant factor in the decision.

5. *Merger Control*

The Commission made a number of important merger decisions in 1999. In the field of transport, the Commission opened a full investigation of KLM's merger with Martinair in February 1999.[46] The parties subsequently withdrew their notification.[47] The strategic alliance between Alitalia and KLM was cleared.[48] However, on October 1999, the Commission launched a second-phase investigation into the proposed acquisition by a new market entrant of the two main Canadian airlines, Canadian and Air Canada, serving routes between Canada and London Heathrow.[49] The effect of the acquisition would be to make One World the only airline strategic alliance serving the Canada–London Heathrow route. The Commission cleared a number of global mergers in the energy and industrial sectors, including Cockerill Sambre/Usinor,[50] Hoechst/Rhône-

44. *Gencor Ltd.*, *available at* http://europa.eu.int; *see* Commission Decision of 24 April 1996 Declaring a Concentration to be Imcompatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.619 - Gencor/Lonrho), O.J. 1997 (L 11) 30.

45. Commission Decision of 22 September 1999 (Case No. IV/M.1524 - Airtours/First Choice); *see* Commission Press Release IP/99/695 (Sept. 22, 1999).

46. *See* Commission Press Release IP/99/62 (Feb. 2, 1999).

47. *See* Commission Press Release IP/99/421 (June 24, 1999).

48. Commission Decision of 11 August 1999 (Case IV/JV.19 - KLM/Alitalia) (not yet published) *available at* http://www.europa.eu.int/comm/competition/press_release/rapid.htm; *see* Commission Press Release IP/99/628 (Aug. 11, 1999).

49. *See* Commission Press Release IP/99/772 (Oct. 20, 1999).

50. Commission Notice of 4 February 1999 (Case No. IV/M.1329 - Usinor/Cockerill), 1999 O.J. (C 69) 17; *see* Commission Press Release IP/99/92 (Feb. 4, 1999), *available at* http://europa.eu.int.

Poulenc,[51] Exxon/Mobil,[52] and Arco/BP.[53] Several of these approvals involved the divestiture of substantial assets. The Commission opened a second-phase investigation in November 1999 into the proposed merger of aluminum producers Alcan, Alusuisse, and Pechiney.[54]

In the first action of its kind, the Commission took a decision under article 21 of the Merger Regulation preventing a Member State from blocking a concentration having a Community dimension that the Commission had cleared. The Commission decided that attempts by the Portuguese authorities to prevent the merger of Banco Santander Central Hispano (BSCH) and assets of a prominent businessman on prudential grounds were unfounded.[55]

6. *Extraterritoriality and International Cooperation*

Multijurisdictional merger analysis under EU law continued strongly in 1999. In addition to those already mentioned, the Commission approved the merger of Newell and Rubbermaid (employing again its "portfolio power" analysis);[56] the acquisition of U.S. firm AMP by Tyco Ltd., a Bermuda-based group;[57] the acquisition by Cargill Inc. of the Commodities Marketing Group of Continental Grain (both U.S. companies);[58] the acquisition of Morton International by Rohm & Hass (both U.S. firms) subject to withdrawal of Rohm & Haas from its Italian joint venture;[59] the merger of Allied Signal and Honeywell, subject to substantial commitments in the avionics sector;[60] and the takeover of Bankers Trust by Deutsche Bank.[61] On December 22, 1999, the Commission opened a second-phase investigation into the concentration involving Dow Chemical and Union Carbide Chemicals.[62]

On June 18, 1999, the EU and Canada signed a competition cooperation agreement substantially similar to that existing between the EU and the United States.[63] The agreement provides for notification where a competition investigation by one authority affects the other party's important interests, as well as for the exchange of nonconfidential information. A party may request that enforcement action be taken by the other party against

51. Commission Notice of 9 August 1999 (Case No. IV/M.1378 – Hoechst/Rhône Poulenc), 1999 O.J. (C 254) 5.

52. Commission Notice of 29 September 1999 (Case No. IV/M.1383 – Exxon/Mobil); *see* Commission Press Release IP/99/708 (Sept. 29, 1999).

53. Not yet reported. *See* Commission Press Release IP/99/712 (Sept. 29, 1999), *available at* http://europa.eu.int.

54. *See* Commission Press Release IP/99/835 (Nov. 11, 1999), *available at* http://europa.eu.int.

55. Commission Decision of 29 October 1999 (Case No. IV/M.1616 – Antonio de Sommer Champalimaud/Banco Santander Central Hispanoamericano) (not yet reported); *see* Commission Press Release IP/99/774 (Oct. 20, 1999), *available at* http://europa.eu.int.

56. Commission Notice of 13 January 1999 (Case No. IV/M.1355 – Newell/Rubbermaid), 1999 O.J. (C 109) 3; *see* Commission Press Release IP/99/21 (Jan. 14, 1999), *available at* http://europa.eu.int.

57. Commission Notice of 3 February 1999 (Case No. IV/M.1382 – Tyco/AMP), 1999 O.J. (C 60) 10; *see* Commission Press Release IP/99/8 (Feb. 4, 1999), *available at* http://europa.eu.int.

58. Commission Notice of 3 February 1999 (Case No. IV/M.1376 – Cargill/Continental Grain), 1999 O.J. (C 52) 8.

59. Commission Notice of 19 April 1999 (Case No. IV/M.1467 – Rohm & Haas/Morton), 1999 O.J. (C 157) 7; *see* Commission Press Release IP/99/233 (Apr. 20, 1999), *available at* http://europa.eu.int.

60. Commission Notice of 1 December 1999 (Case No. IV/M.1601 – Allied Signal/Honeywell) (not yet published).

61. Commission Notice of 20 April 1999 (Case No. IV/M.1384 – Deutsche Bank/Bankers Trust), 1999 O.J. (not yet published); *available at* CELEX 31999M1384; *see* Commission Press Release IP/99/256 (Apr. 23, 1999), *available at* http://europa.eu.int.

62. *See* Commission Press Release IP/99/1049 (Dec. 22, 1999), *available at* http://europa.eu.int.

63. *See* Commission Press Release IP/99/405 (June 18, 1999), *available at* http://europa.eu.int.

anticompetitive behavior injuring its undertakings or consumers, but taking place in the other party's territory.

D. State Aids

Nineteen ninety-nine has seen a remarkable level of activity at the European level with respect to the modernization of the rules on state aid control. In its Seventh Survey on State Aid, the Commission has emphasized modernization and effective enforcement of the state aid rules as its main policy themes.[64]

1. *Modernization of European State Aid Policy*

Under the direction of former Commissioner for Competition Karel Van Miert, the Commission has undertaken to modernize EU state aid law and practice.[65] The object of the Commission's process of modernization is threefold: to facilitate improved efficiency in state aid control; to reinforce state aid control itself, especially in circumstances involving large amounts of aid; and to provide procedural simplification for less significant cases. This initiative has received continued support from the new Commission, evidenced by the plethora of legislative activity in 1999. The result of an active year pursuing the modernization process has yielded new state aid Regulations, Guidelines, Notices, and Communications in several areas.

a. Council Regulation on Procedure[66]

In line with the Commission's statements on the need to enforce the rules on state aid in Europe more effectively, 1999 saw the introduction of a Procedural Regulation adopted on April 16, 1999, and of an enabling regulation, which will be discussed below. The Procedural Regulation has the effect of codifying the rules and procedures of state aid control, thus providing for greater transparency and legal certainty in accordance with the principles of the Treaty of Amsterdam. No new rules are introduced by the Regulation, which does, however, contain new procedural instruments.[67]

b. Council Enabling Regulation and Draft First Group Exemption Regulations

On May 7, 1998, the Commission adopted Regulation 994/98, which empowers and enables the Commission to adopt group exemptions for certain categories of horizontal aid.[68] The group exemptions for which the Commission may issue regulations are exemptions for aid to small- and medium-sized enterprises, professional training aid, regional and employment aid, de minimus aid, research and development aid, and environmental aid.

64. Seventh Survey on State Aid in the European Union in the Manufacturing and Certain Other Sectors, Commission of the European Union, Brussels, Mar. 30, 1999, 1.

65. *See* Mario Monti, European Commissioner for Competition Policy, Modernizing Community Competition Law: State Aids and Antitrust Meeting of the Committee on Economic and Monetary Affairs of the European Parliament (Jan. 11, 2000).

66. Council Regulation 659/99, 1999 O.J. (L 83) 1 (laying down detailed rules for the application of art. 93 EC [now art. 88]).

67. Examples of which are information requests, suspension or provisional recovery injunctions in instances of unlawful aid, and inspections of recipients of aid, such inspections taking place "on-site."

68. Council Regulation 994/98 of 7 May 1998 on the Application of Articles 92 and 93 [now 87 and 88] of the EC Treaty to Certain Categories of Horizontal Aid.

Aid falling within the ambit of the exemption will not be subject to prior notification by Member States, nor will Commission authorization be required.

In July 1999, drafts of the first group exemption regulations concerning aid for SMEs[69] and for training[70] and the de minimus rule[71] were adopted. Following successful discussions with Member States and interested parties, it is envisaged that the entry into force of the draft regulations will take place in Summer 2000. In general, the group exemption regulations focus on decentralization and procedural simplification for these areas.

2. *Financial Transfers and Transactions—Notice on State Guarantees*

A Commission Notice on State Guarantees outlines the principles on which the Commission will base the application of articles 87 and 88 EC (formerly articles 91 and 92 EC) to state guarantees.[72] State guarantees, for the purposes of this Notice, include all forms of guarantees irrespective of whether they are fixed by contract or law. The Notice establishes no new rules, but the principles of assessment that are in operation currently are restated. The Notice makes clear that aid contained in state guarantees is granted when a guarantee is given and not only when it is actually honored. Aid calculation guidelines are provided by the Notice with respect to measuring the level of state aid in the form of guarantees. State guarantees for the liabilities of public undertakings will also fall within the ambit of the Notice.

3. *New Guidelines on Rescue and Restructuring Aid*[73]

Despite a decrease in the level of aid given on an ad hoc basis for the years 1995 to 1997,[74] the Commission adopted new guidelines on July 8, 1999, in this controversial area. The new Guidelines on rescue and restructuring aid reflect the Commission's continuing intent to combat the distortive effects of ad hoc aid on the single European market. The Guidelines, replacing the 1994 Guidelines, introduce the "one time, last time" rule, preventing aid being given to a company for a second time, if the aid proposed is made available within ten years of the first phase of restructuring. Aid to the New German Länder has also been addressed by the Guidelines, with the result that the special treatment of aid given to the New Länder emerging from a nonmarket economy will now be subject to time limits. Although already in effect (with some exceptions) for aid to large firms since October 1999, the Commission's Guidelines will be applicable to all firms from July 1, 2000, and will be valid for five years from the date of publication.

69. Draft Commission Regulation on the Application of Articles 87 and 88 of the EC Treaty to State Aid to Small- and Medium-Sized Enterprises, *available at* http://europa.eu.int/comm/dg04/lawaid/aid3.htm.

70. Draft Commission Regulation on the Application of Articles 87 and 88 of the EC Treaty to State Aid to Training Aid, *available at* http://europa.eu.int/comm/dg04/lawaid/aid3.htm.

71. Draft Commission Regulation on the Application of Articles 87 and 88 of the EC Treaty to State Aid to De Minimis Aid, *available at* http://europa.eu.int/comm/dg04/lawaid/aid3.htm.

72. Commission Notice of 24 November 1999 on the Application of Articles 87 and 88 of the EC Treaty to State Aid in the Form of Guarantees, *available at* http://europa.eu.int/comm/dg04/ lawaid/aid3.htm.

73. Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, adopted July 8, 1999, 1999 O.J. (C 288); *see* Commission Communication Concerning the Extension of the Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, 1999 O.J. (C 67) 11.

74. Decrease from EUR 15,500 million to EUR 12,400 million based on annual averages.

E. TELECOMMUNICATIONS

1. *The Commission's 1999 Communications Review*

In November 1999, the Commission launched its 1999 Communications Review, with the publication of a document entitled *Towards a New Framework for Electronic Communications Infrastructure and Associated Services.*[75] The 1999 Review process amounts to a major review of existing EU telecommunications regulations. It provides the Commission with the opportunity to reassess its regulatory regime following the full liberalization of telecommunications markets in EU Member States and to take account of the major impact of increasing convergence of the telecommunications, broadcasting, and computer industries.

The Commission proposes that regulation at the Community and national levels should be based on the following five principles:

- Regulation should be based on clearly defined policy objectives;
- Regulation should be the minimum necessary to meet these objectives. The Commission proposes the adoption of a Framework Directive, identifying general and specific policy objectives and for specific Directives on licensing, access and interconnection, universal service, privacy, and data protection. It also proposes greater reliance on non-binding measures, which may provide a more appropriate regulatory response, given rapidly changing market circumstances;
- There is a need to further enhance legal certainty in a dynamic market;
- Regulation should aim to be technologically neutral. It should take account of the fact that, as a result of technological convergence, similar services can be provided over a variety of networks, including fixed and mobile telecommunications networks and broadcast networks; also, with regard to the continued application of certain (but not all) ex ante regulatory requirements, the Commission favors the application of a standard competition law trigger of market dominance rather than the current "significant market power" trigger; and
- Regulations should be enforced as closely as practicable to the activities being regulated.

The Commission concludes that it does not propose, at this stage, to establish a European Regulatory Authority to regulate communications services. It is anticipated that the Commission will issue drafts of the proposed new legislation around mid-2000.

2. *Fifth Annual Report on the Implementation of the Telecommunications Regulatory Package*

In November 1999, the Commission published its Fifth Annual Report on the implementation of the Telecommunications regulatory package.[76] This Report notes increasing competition for the supply of telecommunications services throughout the EU. It does, however, also point out a number of issues to be addressed. These include wide divergences in the implementation of Community rules at the national level, creating a barrier to single market integration; failure of many Member States to impose proper cost accounting requirements on their respective incumbent operators, contributing to excessive pricing and

75. Toward a New Framework for Electronic Communications Infrastructure and Associated Services, COM(99) final.

76. Fifth Annual Report on the Implementation of the Telecommunications Regional Package, COM(99)537 final.

anticompetitive price squeezes by the incumbent; and a lack of competition in local access markets.

3. *e-Commerce*

In December 1999, Commission President Romano Prodi launched an "e-Europe" initiative aimed at accelerating Europe's transformation into an Information Society.[77] The initiative identifies ten priority areas for EU action including:

- Internet access. The Commission aims, inter alia, to reduce leased line tariffs, following the conclusion of an ongoing competition investigation into leased line prices throughout Europe. Member States should undertake to ensure that their respective incumbent telecommunications operators offer unbundled local loop access by the end of 2000.
- Facilitate wider take-up of e-commerce through legislative measures, such as the 1999 Electronic Signatures Directive,[78] as well as education and publicity campaigns.
- The Commission will be centrally involved in efforts to establish common "smartcard" specifications for secure electronic transactions.
- Obstacles to the creation of a fully integrated pan-European risk capital market should be removed.

4. *Regulation*

The communications industry throughout the world is currently undergoing a process of fundamental reform. The two key factors influencing this reform are the opening up of national telecommunications markets to competition, and the increasing convergence of broadcasting, telecommunications, and computer industries. In accordance with the timetable for liberalization of national telecoms markets within the EU, most Member States fully liberalized their national markets on January 1, 1998.[79] EU Member States and other countries throughout the world have also entered into liberalization commitments on the basis of WTO agreements. In order to meet these new challenges, telecommunications companies are increasingly merging to increase their scale of operations to compete in the international marketplace. They are also increasingly entering into ventures with companies in previously distinct computer, broadcasting, and content supply industries.

Accordingly, during 1999, a number of large-scale telecommunications-related ventures raising important competition issues were reported to the European Commission. Two of these transactions, BT/AT&T and Telia/Telenor, were reviewed and approved by the Commission in the context of phase two in-depth investigations under the EC Merger Regulation during 1999. The BT/AT&T transaction involved the creation of the Concert joint venture between BT and AT&T.[80] The Concert joint venture aims to provide global telecommunications services to multinational corporate customers and international carrier services to telecommunications carriers. Telia/Telenor involved the merger of Telia (the

77. *eEurope—An Information Society for All*, *available at* http://europa.eu.int/comm/information_society/eeurope/index_en.htm.

78. Council Directive 1999/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures, 1999 O.J. (L 13) 12 [hereinafter 1999/93/EC].

79. Derogations from the timetables for liberalization were granted to a few countries, the longest derogation period being granted to Greece that must liberalize by December 31, 2000.

80. Commission Notice (Case No. IV/JV.15 - BT/AT&T) (not yet published), *available at* http://europa.eu.int/comm/dg04/merger/closed/jv0/en/jv0015.pdf.

state-owned telecommunications operator in Sweden) and Telenor (the state-owned telecommunications operator in Norway).[81] The merger was approved on the basis of undertakings given by the parties, including divestiture of their respective cable television interests and the provision of local loop unbundling.[82] Subsequent to the approval, the parties announced that they would not go ahead with the merger. A further significant transaction, approved under the Merger Regulation, was the merger of the two major mobile operators, Vodafone and Airtouch.[83]

In September 1999, the Commission granted an individual exemption under article 81(3) of the EC Treaty in respect of the BiB joint venture.[84] BiB (now marketed as Open) is a joint venture between BSkyB, BT, Midland Bank, and Matsushita to provide digital interactive television services to consumers in the UK. The joint venture involves putting in place the necessary infrastructure (including digital set-top boxes) and contracting with service providers, such as banks, supermarkets, and travel agents, to enable consumers to interact directly with service providers via their televisions. The notification raised a number of important questions (e.g., the extent and pricing of third-party service provider access) and the transaction was exempted, subject to undertakings from the parties.

5. *Legislation*

In June 1999, the Commission adopted Directive 1999/64, which addresses the competition problems created by the co-ownership of both telephone networks and cable networks by a number of incumbent telephone operators in the EU.[85] The Directive requires that, under specified conditions, a telephone network and cable network owned by a single organization must be distinct legal entities. This requirement may prompt future competition investigations and, possibly, make it easier to impose divestiture conditions, if appropriate, in the context of future mergers involving these companies. It is also intended that the Directive will encourage the development of both networks to provide high-speed communications services. The Directive must be implemented in the Member States by April 2000.

In November 1999, the Commission adopted Directive 99/93, establishing a Community framework for electronic signatures.[86] This Directive, which is to be implemented by member states by July 19, 2001, aims to facilitate the legal recognition of electronic signatures throughout the EU.

F. Social Policy

1. *Social Policy in the Treaty of Amsterdam*

Nineteen ninety-nine was a year of some significance in the field of social policy. Towering above all other developments in the social policy field has been the coming into force

81. *See* Commission Notice (Case No. IV/M.1439 - Telia/Telenor) (not yet published), *available at* http://europa.eu.int/comm/dg04/merger/closed/m14/en/m1439.pdf.

82. Local Loop Unbundling allows competitors access to the incumbent's local access networks in order to provide any technically feasible services, using these networks, on nondiscriminatory terms.

83. Commission Notice of 15 October 1999 (Case No. IV/M.1430 - Vodafone/Airtouch), 1999 O.J. (C 295) 2.

84. Commission Decision of 6 December 1999 (Case No. IV/36.539 - BiB), 1999 O.J. (L 312) 37.

85. Commission Directive 1999/64 of 10 July 1999, 1999 O.J. (L 175) 39.

86. *See* 1999/93/EC, *supra* note 78.

of the Treaty of Amsterdam on May 1, 1999. This has had various consequences regarding social policy, by virtue of the amendments inserted by the Amsterdam Treaty into the Treaty of Rome.

Among the most important of these has been the formal end that the coming into force of the new Title XI of the EC Treaty (a considerably restructured version of the old Title VIII) has brought to the self-imposed exclusion of the United Kingdom both from several substantive areas of social policy and from association with the process of social dialogue at the European level. Prior to the coming into force of the Treaty of Amsterdam, Community involvement *strictu sensu* in the social policy field was quite limited, with broader involvement in the legislative area being regulated by the Social Policy Protocol annexed to the EC Treaty by the Treaty of Maastricht. Under the Social Policy Protocol (or more accurately under the Agreement, which was annexed in turn to the Protocol), all of the Member States except for the United Kingdom had agreed to more wide-ranging legislative powers at the Community level in the social field than had existed prior to Maastricht. The new post-Amsterdam "Social Chapter"—inspired both by its forerunner, the Social Policy Protocol, and by an earlier political declaration known as the Community Charter on the Fundamental Social Rights of Workers (as well as by the much more restrictive social provisions that were to be found in the EC Treaty prior to Amsterdam)—now unites all Member States of the EC, this time with no exceptions. However, not too much should be made of this since, for the most part, it unites the Member States only in repeating what all but one of the Member States had agreed to in any case at Maastricht in the Social Policy Agreement.

The Community is now, therefore, formally empowered to support and complement the activities of the Member States in fields such as (a) improving "in particular" the working environment so as to protect workers' health and safety; (b) working conditions; (c) the information and consultation of workers; (d) the integration of persons excluded from the labor market; and (e) equality between men and women with regard to labor market opportunities and treatment at work.[87] Directives establishing minimum requirements may be adopted by the Council with the usual legislative procedure to involve co-decision,[88] and hence qualified majority vote in the Council.[89] In certain new policy areas, however—although there has been an expansion in the legislative powers of the Community—a unanimous vote in the Council will be required before legislation can be adopted. This will be the case as regards measures concerning (a) social security and social protection of workers; (b) protection of workers where their employment contract is terminated; (c) representation and collective defense of the interests of workers and employers; (d) conditions of employment for legally resident third-country nationals; and (e) financial contributions for promotion of employment and job creation.[90] The Member States were careful to exclude certain sensitive areas from the scope of Community policy-making power altogether: "pay, the right of association; the right to strike or the right to impose lock-outs."[91] Insofar as the procedure by which legislation to be adopted under the new Social Chapter is concerned, the Social Policy Agreement is once again used for inspiration, with consultation

87. *See* EC TREATY art. 137.
88. *See Id.* art. 251.
89. *See Id.* art. 137(2).
90. *See Id.* art. 137(3).
91. *Id.* art. 137(6).

of management and labor being required on the possible direction of Community action as well as on the content of any proposal envisaged.

There is also the further possibility of agreements being reached by the social partners with potentially far-reaching legislative consequences.[92] This latter possibility was neatly illustrated shortly after the coming into force of the Treaty of Amsterdam, when the Council adopted Directive 1999/70/EC of June 28, 1999, concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP (representing employers, trade unions, and public sector enterprises respectively).[93] This measure that, inter alia, prohibits discrimination against part-time workers consisted, as was the norm under the Social Policy Agreement, of a Directive annexed to which is the unamended agreement reached by the social partners. A more sectoral example of the same legislative process at work had already been provided exactly one week before this on June 21, 1999, when the Council adopted Directive 1999/63/EC concerning the Agreement on the Organization of Working Time of Seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Worker's Unions in the European Union (FST).[94] Here again, the same approach was adopted of annexing to the text of an otherwise substantively featureless Directive a collectively bargained agreement on the organization of working time of seafarers.

Under Title XI of the Amsterdam Treaty, apart from the substantive areas alluded to above, in which Community-level legislation is now rendered possible, cooperation between Member States is to be encouraged and coordination facilitated (in both cases by the Commission) in various other areas such as employment, labor law and working conditions, social security, and the right of association and collective bargaining between employers and workers.[95]

It should be noted that the innovations contained in Title XI are not the only provisions introduced by the Treaty of Amsterdam into the EC Treaty (Treaty). Elsewhere, for example, article 13 of the Treaty confers power on the Council (acting unanimously) to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.[96] Article 13 is a provision that, although somewhat radical in its breadth, is in some ways nonetheless a conservative measure. Thus, unlike article 12 of the Treaty[97] that prohibits any discrimination on grounds of nationality, article 13 per se prohibits nothing, but rather merely empowers the Council to take action to combat discrimination on any of the listed grounds. The provisions of article 13 are not directly effective. Furthermore, any such action taken by the Council must be taken by a unanimous vote, which will undoubtedly act as a brake on the use to which article 13 is put.

92. *See Id.* art. 138 and art. 139.

93. Council Directive 1999/70/EC of 28 June 1999 Concerning the Framework Agreement on Fixed Time Work Concluded by ETUC, UNICE, and CEEP, 1999 O.J. (L 175) 43.

94. Council Directive 1999/63/EC of 21 June 1999 Concerning the Agreement on the Organization of Working Time of Seafarers Concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), 1999 O.J. (L 167) 33.

95. *See* EC Treaty art. 140.

96. *Id.* art. 13. Provision is made here for the consultation of Parliament, and the initiative must come from the Commission.

97. TEU, art. 6.

Notwithstanding these limitations on the usefulness of article 13, the Commission has not been slow to utilize the potential for legislative initiative that the new Treaty article offers. Thus, already on November 15, 1999, the Commission presented a Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation.[98] This measure seeks to establish a general framework within the European Community for the respect of the principle of equal treatment between persons irrespective of race, ethnic origin, religion, belief, disability, age, or sexual orientation. Areas covered by the proposal include access to employment and occupation, promotion, vocational training and employment conditions, and membership of certain bodies. On the same day, the Commission also put forward a Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.[99] Areas targeted by this measure will include access to employed and self-employed activities and working conditions, membership of organizations, social protection and social security, social advantages (within the broad meaning of this concept under Regulation 1612/68), education (including grants and scholarships), and access to the supply of goods and services. Simultaneously with these two legislative proposals—and also based on the new article 13—the Commission presented a Proposal for a Council Decision establishing a Community Action Program to Combat Discrimination 2001–2006.[100] The object of the program will be to promote measures to combat discrimination based on any of the grounds listed in article 13, within the given period.[101]

Apart from article 13, another new feature of the Treaty is that a mechanism is laid down that provides for the promotion of employment as a matter of "common concern," although care was taken to exclude any possibility of attempts at harmonization of the laws and regulations of Member States under this rubric.[102]

2. *Secondary Legislation*

Moving from the field of primary (Treaty) law to that of secondary legislation, significant legislative measures were adopted in 1999 in the social policy field. One such measure was the Part-Time Workers Directive already mentioned that seeks to effect important advances, both in the right to equal treatment and in other rights of part-time workers.[103] Other, quite disparate areas were also touched by legislation. A vital element of the attainment of true free movement of persons in the EU is the mutual recognition of qualifications. Some progress was made here with the adoption of a Directive[104] that supplements the general systems for the recognition of qualifications in respect of the professional activities covered by earlier Directives on liberalization and transitional measures. As usual, the law on health and safety in the workplace saw some legislative activity.[105] Further, a number of

98. COM(99)565 final.

99. COM(99)566 final.

100. COM(99)567 final.

101. *Id.* arts. 1–3.

102. *See* Title VIII TEC and art. 129 thereof.

103. Council Directive 1999/70/EC, *supra* note 93.

104. Directive 1999/42/EC of the European Parliament and Council of 7 June 1999 Establishing a Mechanism for the Recognition of Qualifications in Respect of the Professional Activities Covered by the Directives on Liberalization and Transitional Measures and Supplementing the General Systems for the Recognition of Qualifications, 1999 O.J. (L 20) 77.

105. *See* Council Directive 1999/38/EC of 29 April 1999 Amending for the Second Time Directive 90/394/EEC on the Protection of Workers from the Risks Related to Exposure to Carcinogens at Work and

regulations and soft-law measures were adopted in a range of social policy areas. The former instruments tended to be used to set out the fine details of the less integrated areas of social policy.[106] Soft-law measures, by contrast, tended (as one might expect) to be adopted where the Community role is one more of exhortation than of regulation.[107] Some such measures may ultimately be seen to have presaged future action on the part of the Community, however.[108]

3. *Legislative Initiatives*

Apart from the measures that were adopted in the course of 1999, a number of new initiatives were proposed. The gradual process of the extension of Community law to third-country nationals will continue if the proposal for a directive on the posting of workers who are third-country nationals for the provision of cross-border services is adopted.[109] Such proposals have added to the list of legislative proposals that predate 1999, which the Council, and in some cases the Parliament too, must consider for adoption. Some such proposals have greater chances than others. It is not clear, for example, that the 1998 Commission Proposal for a Council Directive establishing a general framework for informing and consulting employees in the European Community[110] has any immediate prospect of adoption.

4. *Litigation*

The European Court of Justice made some significant decisions in the area of social policy during the course of 1999. Brief mention may be made of Calfa,[111] in which it was held that Community primary and secondary law precluded legislation that required na-

Extending It to Mutagens, 1999 O.J. (L 138) 66. In addition, the Commission in the course of 1999 proposed a number of legislative initiatives in the area of worker health and safety. *See* Commission Proposal for a Council Directive on the Protection of Workers from the Risks Related to Exposure to Carcinogens at Work, COM(99)152 final. *See also* the Amended Commission Proposal for a European Parliament and Council Directive on Minimum Requirements for Improving the Safety and Health Protection of Workers Potentially at Risk from Explosive Atmospheres, COM(99)283 final; and the Commission Proposal for a European Parliament and Council Directive on the Protection of Workers from Risks Related to Exposure to Biological Agents at Work, COM(99)432 final.

106. *E.g.*, Council Regulation 530/1999 of 9 March 1999 Concerning Structural Statistics on Earnings and on Labor Costs, 1999 O.J. (L 63) 6. *See also* Council Regulation 1726/1999 of 27 July 1999 Implementing This as Regards the Definition and Transmission of Information on Labor Costs, 1999 O.J. (L 203) 28; *Cf.* Commission Regulation 1924/1999 of 8 September 1999 Implementing Council Regulation 577/98 on the Organization of a Labor Force Sample Survey in the Community as Regards the 2000 to 2002 Program of Ad Hoc Modules to the Labor Force Survey, 1999 O.J. (L 238) 14.

107. *See* Council Resolution of 22 February 1999 on the 1999 Employment Guidelines, 1999 O.J. (C 69) 2. *See also* Council Resolution of 17 June 1999 on women and science, 1999 O.J. (C 201) 1.

108. At the risk of offering hostages to fortune, it is suggested that potential harbingers of eventual "hard" legislative action here may be, *e.g.*, Council Resolution of 17 June 1999 on Equal Employment Opportunities for People with Disabilities, 1999 O.J. (C 186), or the Resolution of the Council and the Representatives of the Governments of the Member States Meeting within the Council of 22 April 1999 Concerning the Combating of Transnational Social Security Benefit and Contribution Fraud and Undelivered Work, and Concerning the Transnational Hiring-Out Workers, 1999 O.J. (C 125).

109. COM(99)3 final; Compare the attached Commission Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community.

110. COM(98)612 final.

111. Case C-348/96 Criminal Proceedings against Donatella Calfa, Judgment of the European Court of Justice of January 19, 1999.

tional courts to order expulsion for life from a Member State's territory (in this case, that of Greece) of nationals of other Member States found guilty of drug offences on that territory. Also of interest was the ruling in *Seymour-Smith*[112] that compensation for unfair dismissal constituted "pay" within the meaning of article XX EC (formerly article 119 EC), and thus that a requirement of two years' continuous service in order to come within the scope of unfair dismissal legislation fell to be assessed for indirect discrimination under article XXX EC.[113]

II. Austria

A. Overview

Significant legislative developments in 1999 included, in particular, the new Austrian Takeover Act regulating public offers for shares in listed companies and an amendment of the Austrian Cartel Act, which, inter alia, resulted in a significant change in merger control thresholds.

B. Corporate Law

1. *Austrian Takeover Act*

The Austrian Takeover Act,[114] which entered into force on January 1, 1999, provides rules for mandatory and nonmandatory offers in cases of public tender. The Act follows the ideas expressed in the EC Draft Public Takeover Directive.[115] It obliges, in particular, potential acquirers of a controlling share in a listed company to make a compulsory offer to minority shareholders. A specific body—the Takeover Panel (*Übernahmekommission*)—was created to monitor the new rules.

The Takeover Panel is authorized to issue regulations under the Act. The First Takeover Regulation (*Erste Übernahmeverordnung*), published on March 9, 1999, relates to the definition of "controlling holdings" and "acting in concert."[116] The Regulation provides exceptions for banks and defines the period of acceptance of the bids for an offeree company. It is expected that the Takeover Panel will soon issue further regulations. In particular, the Takeover Act authorizes the Takeover Panel to further regulate creeping-in as well as mandatory notification duties.

2. *New Act on Repurchase of Own Shares*

The 1999 Austrian Act on Share Repurchase[117] (AReG) amends section 65 AktG (Stock Corporation Act) and section 229 HGB (Commercial Code). The AReG, which took effect

112. Case C-167/97 R v. Secretary of State for Employment ex parte Seymour-Smith, Judgment of the European Court of Justice of February 9, 1999.

113. The Court held that such a measure would be regarded as indirectly discriminatory if a considerably smaller percentage of women than men was capable of fulfilling its requirements and the member state was unable to show that it was proportionate to a legitimate social policy aim, which was unrelated to any discrimination based on sex.

114. BGBl 127/1998 of 14 August 1998.

115. Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids, 1996 O.J. (C 162).

116. *See* §§ 1 and 2 of the First Takeover Regulation, Übernahmekommission Regulation of March 9, 1999.

117. BGBl 187/1999 of 19 August 1999.

on September 1, 1999, enables listed companies to repurchase its own shares to stabilize stock prices. The new law amends the restrictive rules on own shares repurchases, which was possible only in exceptional cases, for example, to protect the company from serious damage. The Act's three principle requirements allowing listed companies to repurchase their own shares for stock market reasons are the following: (i) the repurchase must be authorized by a resolution of the shareholders meeting; (ii) the company must be able to finance the repurchase from free (distributable) reserves; and (iii) the shares must be listed on the Vienna Stock Exchange (VSE) or listed or traded on regulated markets within the EU or on similar markets outside the EU. The new law gives Austrian-listed companies an instrument to control their capital structure in line with international standards. This should allow Austrian-listed companies to save costs by optimizing their capital structure, in particular, by undertaking action to prevent an undervaluation of their shares. Another goal of the Amendment Act is to encourage stock exchange trading activity and share ownership as an investment strategy.

C. Competition Law

The Cartel Act 1988[118] was recently amended by the Cartel Act Amendment 1999, which became effective on January 1, 2000.[119] The most noticeable innovations concern merger control.

1. *Pre-merger Control*

The former pre-merger notification thresholds (Austrian annual turnover of at least ATS 3.5 billion with at least two participants having minimum annual Austrian turnover of ATS 5 million each) were replaced by a new threshold regime likely to capture many more foreign mergers. Under the Amendment Act, pre-merger control applies if the combined relevant turnover of the participating enterprises amounts to or exceeds (i) *worldwide* ATS 4.2 billion (EUR 200 million); (ii) *in Austria* ATS 210 million (EUR 15 million); and if (iii) the turnover of each of at least two participants amounts to or exceeds *worldwide* ATS 28 million (EUR 2 million).

2. *Post-merger Control*

The former obligation to notify ex-post mergers exceeding a turnover threshold of at least ATS 150 million was abolished.

3. *Ex officio investigations*

Under the 1988 Cartel Act, competitors have no possibility to request a second-phase investigation of a merger; such right of request is currently limited to the Austrian Attorney General's office, the Austrian Chamber of Commerce, the Federal Labor Chamber, and the Austrian Agricultural Chamber (so-called Statutory Interveners). Under the Amendment Act, competitors still cannot lodge such a request. However, the Act now explicitly provides for a right of competitors to comment on a notified concentration within fourteen days of publication of the intended merger. The Cartel Court may then act on its own initiative and start a merger investigation.

118. BGBl 600/1988 of 18 November 1988.
119. Kartellgesetznovelle 1999 — KartG Nov. 1999, I NR BGBl 126/1999 of 22 July 1999.

D. Tax Law

The rules governing exemptions from Austrian stamp duty by way of abroad documentation have been changed as of January 1, 2000.[120] This will affect in particular foreign documentation of loan agreements and real estate lease agreements involving non-Austrian parties.

III. Belgium

In Belgium in 1999 there was a change of government. Notwithstanding this, the Belgian Parliament adopted the following major pieces of legislation.

A. Company Law

In effect since from July 2, 1999, Belgium introduced legislation pursuant to which companies, nonprofit associations, and other legal entities may be held criminally liable.[121] Previously only private individuals could be held liable for criminal offenses. Such liability may arise in relation to any criminal offense that was committed to further the company's objects or interests or for its account. Dual liability between the company and any other private individual is excluded such that a company and one of its officers may not both be liable for the same offence. There is, however, an exception where the private individual acts "knowingly and willingly." Penalties that may be imposed on companies include fines, confiscation of assets, winding-up, close-down, and publication of the judgment.

In the course of 1999, the Belgian Parliament also adopted a mammoth law codifying all Belgian company law rules.[122] The new Code, which also has the effect of introducing a number of new rules, has not yet entered into force but the necessary implementing legislation is likely to be passed in the course of 2000.

B. Competition Law

The basic law on competition was significantly modified in 1999.[123] For mergers, a new double threshold that, unlike the old test, relates only to sales in Belgium has replaced the previous market share threshold. The merger must be notified if the combined turnover in Belgium exceeds EUR 40 million and provided that at least two of the participants each has a turnover in Belgium of at least EUR 15 million. The law also introduces new procedural and administrative rules relating to both merger filings and investigations of anti-competitive practices.

C. Trade Practices

Belgium has now finally implemented EU Directive 97/55/EC and, subject to very strict conditions, has authorized comparative advertising.[124] These conditions include the re-

120. Art. 16, para. 2, Stamp Duty Act as amended by BGBl 106/1999 of 14 July 1999.
121. Law of May 4, 1999.
122. Law of May 7, 1999.
123. Laws of April 26, 1999, and Royal Decree of June 14, 1999.
124. Law of May 25, 1999.

quirement that the two compared products or services must correspond to the same consumer needs or have the same purpose. Further, the comparison must be objective and relate exclusively to essential characteristics that are pertinent, verifiable, and representative of the products or services in question. Price comparisons are deemed to meet this test. Advertising may not denigrate the other product.

Legislation was also introduced to implement EU rules on distance selling.[125] The new law, which will apply, inter alia, to e-commerce, imposes a series of information obligations on the seller and allows the consumer a right to retract during a seven-day period after delivery. No down payment may be required before the end of this period. The law also imposes new requirements on credit, debit, and payment card companies for electronic payments.

D. Data Privacy

Belgium implemented the EU Data Processing Directive in 1998. Implementing legislation in relation to the new law has been adopted in 1999 and there is now a workable system of data protection and privacy.

E. Stock Options and Share Issues Reserved to Personnel

New tax rules have been introduced with regard to the taxation of stock options granted to company employees. For stock options, tax is payable at the time of the grant of the option with no subsequent taxation of any capital gain at the time that the option is exercised or sold. The tax payable is calculated on a lump-sum basis that in principle is favorable to the grantee, but this favorable tax treatment is subject to a number of conditions. Tax and social security exemptions have also been introduced for shares issued at a preferential price and that are specifically issued by a company for subscription by its personnel.

F. Share Offerings

Invitations to subscribe shares are subject to prospectus and other requirements if they are deemed to be addressed to the general public. The definition of a nonpublic invitation falling outside the scope of these rules has been somewhat extended to include various specified offerings reserved exclusively to professional investors.

G. Penalty Clauses

Under the previous law clauses that were pure penalties were null and void. This has now been changed, and the court is empowered to reduce excessive clauses and apply them at the level determined by the court.

IV. France

A. Overview

There were several significant changes in French law in 1999, including in particular the reform of the *Société par actions simplifiée* (SAS); the second law on the thirty-five-hour work

125. Law of May 25, 1999.

week; the law permitting "civil partnerships," granting unmarried couples (including homosexual couples) tax and other benefits formerly available only to married couples; and new regulations on the import and export of cryptography intended to accelerate the expansion of the information economy.

B. Company Law Reform

The types of corporations available in France have traditionally been defined by the law of July 24, 1966, which provides for the *société anonyme*, used by companies that solicit funds from the public (i.e., outside a small circle of investors); the *société à responsabilité limitée*, used for small and closely-held companies; and other corporate forms that are less used. The SAS has existed for several years, and had been intended to be used only for significant joint venture projects between large companies. The initial share capital required was FF 1,500,000, and the parties were free to create their own internal rules using bylaws much like a shareholders' agreement, since the law was largely silent on these issues.

The law governing the operation of the SAS was significantly modified by the Law of July 12, 1999, in order to enable smaller companies to take advantage of the great flexibility of this type of corporation. Prior to 1999, the creation of an SAS required at least two corporate shareholders. Under the new law, a sole corporation or individual is allowed to create and be the sole shareholder of an SAS. Further, the minimum capital requirement was reduced to FF 250,000, of which only one-half is required to be paid in at the time of incorporation, provided the balance is paid in within five years.

The simplicity in incorporation and operation of this form of company after the 1999 reform is likely to make the SAS the favored form of corporation for French subsidiaries of foreign companies, technology and other start-ups, and generally any company that does not solicit funds from a large number of investors.

C. Labor Law

The Second Law on the thirty-five-hour work week, officially published on January 19, 2000, confirms and further defines the terms by which the length of the work week for salaried employees is reduced from thirty-nine to thirty-five hours, following the adoption of the first law on this issue of June 13, 1998. Since January 1, 2000, companies employing more than twenty workers must reduce their work week to thirty-five hours. The maximum number of weekly working hours permissible, calculated on average over a twelve-week period, is shortened to forty-four hours (instead of forty-six previously), while the absolute maximum for any one-week period remains forty-eight hours.

Concerning overtime, that is, hours worked in excess of thirty-five hours in one week, a one-year transitional period is established during which the hours worked between the thirty-sixth and the thirty-ninth hour will result in a ten percent bonus in those companies where the weekly working hours set by collective bargaining or other agreement are thirty-five hours or less. In the other companies, such overtime hours will include a ten percent contribution to the French social security fund as a penalty. At the end of the transitional period, the ten percent penalty will become twenty-five, while the bonus granted to employees will only be fifteen percent in other cases, the ten percent contribution to the social security fund still being due.

Flexible working hours may be adopted by employers, and are now submitted to one single plan, instead of the complicated three-tier system that applied previously. The num-

ber of overall annual working hours can neither exceed thirty-five hours per worked week nor a ceiling of 1600 hours in one year. Flexible working hours can only be set up through collective bargaining agreements or through a company agreement (so-called *accord d'entreprise ou d'établissement*), on condition that such plans are not opposed by the nonsignatory trade unions.

Concerning the minimum wage (SMIC), the law creates a new guarantee system in order to avoid any decrease in the minimum wage that might result from the reduction of legal working hours. The employer will have to pay an additional contribution to compensate the difference, which will be distinctly mentioned on the pay stub.

There are a number of new provisions that extend the hourly work restrictions to management employees, such that nearly all such employees are covered by the new law. Management personnel are divided into three categories:

- The situation of senior managers remains unchanged: legal restrictions on the number of hours worked do not apply.
- The so-called integrated executives, who follow the rules and regulations applying to their team, department, or workshop, and which can include many types of management personnel, are subject to all of the new provisions on working hours.
- All other executives are included in an intermediate category, for which the law has set up three types of working hour packages (*forfaits d'heures*). The fixed number of hours can either be calculated on a weekly or monthly basis, or even on an annual basis, and if a collective bargaining agreement allows it, then it is possible to calculate the working hours in days per year, limited to 217 days.

Regarding part-time work, the new law introduces a definition that is in conformity with European law. A part-time worker is now defined as an employee who works fewer hours than the legal working week (now thirty-five hours). Previously, part-time employees worked at least twenty percent less than the legal work week. Finally, the new law also introduces certain reductions in employer payroll taxes, provided that the companies make new and further commitments regarding future employment and job creation.

D. Civil Solidarity Pact

The law of November 15, 1999, instituting the *Pacte civil de solidarité* (i.e., the civil solidarity pact or PACS), permits nonmarried couples, of whatever sexual orientation, to take advantage of tax and other benefits that had previously been reserved exclusively to married couples (by definition heterosexual). The adoption of this new law resulted in a major debate within French society, including a number of colorful though peaceful demonstrations, and triggered very clear-cut opinions on this issue along political and religious lines.

The objective of the law, originally proposed by the Socialist government in power, is to enable the "partners" to organize their life together, but subject to certain rules set forth in the law. Two individuals, whether of the same sex or not, can sign a PACS, provided they are over eighteen and not under guardianship. The law forbids the following people from joining together under a PACS: direct ascendants and descendants, direct relatives by marriage, cousins to the third degree, and people already married or a party to a PACS.

Partners who wish to sign a PACS must comply with the following administrative procedure. The partners make a joint declaration to the *greffe du tribunal d'instance* (TI), that is, the clerk's office of the civil trial court of limited jurisdiction, and the clerk records this

declaration on a register and has it recorded on a register of the places where each partner was born. All modifications made after the initial declaration should also be registered. The PACS is binding with respect to third parties as soon as it is published on the register where both partners live together.

The obligations of the partners are as follows. Property acquired after the signing of the PACS is presumed to be commonly owned by both partners. They are jointly and severally liable for all indebtedness arising from expenses relating to their household. These are only minimal obligations, which can be detailed or enlarged by the partners.

In order to terminate the PACS, the partners may either make a joint written declaration to the clerk's office of the court where one of the partners resides, or one partner can decide unilaterally to terminate the PACS, provided he/she gives notice to the other partner. In that case, the termination will come into effect three months after the notice. The PACS will also be terminated if one of the partners gets married or if one of them dies. Finally, the PACS can also be terminated if one partner is put under guardianship. The partners must themselves organize the consequences of the termination. Where a difficulty arises concerning property, the dispute may be submitted to a judge.

As for the tax consequences of the PACS, the law provides for a common taxation of both partners for income tax and local rates, but only commencing from the third anniversary of the registration of the PACS. The partners will benefit from special lower tariffs and deductions for the death and gift taxes.

The partners will also benefit from each other's medical and/or maternity insurance. They will be entitled to have simultaneous holidays, and to benefit from the two-day work leave in the event of the death of their partner. Civil servants are allowed to claim appointment and transfer priority (i.e., have the administration take into account the existence and location of their partner for transfers and initial appointments).

The existence of a PACS will also be taken into account for the granting of a residency permit to foreign immigrants. Finally, the partners will benefit from the provisions regulating residential leases, and may, for example, keep the joint accommodation even when the partner who signed the lease no longer resides there.

E. French Crypto Policy

French law has traditionally treated encryption technology as a highly regulated product with military applications, such that only weak encryption could be imported into France without any prior authorization. The need to encrypt information in connection with the developing Internet economy, however, has galvanized France into a series of recent regulatory reforms on this subject that greatly simplify the importation of new encryption technology into France.

Decree 99–1999 of March 17, 1999, in effect simplified the importation process for all encryption technology using a key that is less than 128 bits long; importation of this technology is subject only to a simple form of declaration, but there is no official license or other authorization that must be obtained. Administrative authorization is still required for importation of encryption technology with key lengths longer than 128 bits, and generally takes up to several months to obtain under current rules.

V. Germany

A. Banking and Financial Services

The Third Act for the Promotion of Financial Markets (FiMaFöG) introduced several new forms of investment funds in domestic investment law. As a result of the FiMaFöG,

investment companies may establish *Dachfonds*,[126] funds that permit investment in other German investment funds as well as open-ended foreign investment under the regulatory control of the Foreign Investment Act.[127] The introduction of balanced securities and real estate investment funds opens investment opportunities in securities, note loans, real estate, and participation in real estate companies, thus allowing a new combination of securities and real estate investment funds. The legislation also provides new business opportunities for existing investment funds in the form of equity index investment funds.[128] Investment caps on general securities investment funds have been reduced. The FiMaFöG has also introduced a new form of investment corporation, the investment stock corporation.[129]

B. Competition Law

In January 1999, the sixth major revision of the German Act Against Restraints of Competition entered into force.[130] The revision has as its aim the further harmonization of German and European Competition Law to bring the structural differences that exist in the GWB into line with EU standards.

Many of the changes promulgated by the revision occurred in the area of merger control. Pre-merger notification is now compulsory for all mergers falling within the ambit of GWB regulation. Due to the increase in turnover thresholds (section 35 GWB), all proposed mergers must be notified where the enterprises concerned have a collective recorded turnover of at least DEM 1 billion. This new requirement has a startling impact on the level of mergers that will be subject to the compulsory pre-merger notification requirement. It is estimated that two-thirds of merger cases will no longer be subject to merger control as a result of the increased turnover thresholds. The system of defining mergers has been shortened and is now partly in line with European Merger Control policy. The merger control procedure itself has undergone significant changes (section 40 GWB).

With respect to the issue of market-dominating firms, section 19(1) now provides that an abuse of a dominant position can be directly prohibited in contrast to the pre-revision rules of section 22. As a result of the review, the essential facilities doctrine has been incorporated into the GWB for the first time. The amendments to section 20 indicate a legislative intent to protect small to medium-size enterprises against larger competitors with superior market power. A new provision in section 20 prohibits undercost pricing of products for sale on a regular basis without justification. This may prove to be a controversial amendment. Concerns have been voiced that the section 20 amendment creates a price control effect.

The revision of the GWB has not harmonized the German and European Competition law in relation to restraints of trade. The GWB continues to make a distinction between vertical and horizontal restraints on trade.

C. Public Procurement

The revision of German competition law brought about an important development in public procurement law. Administrative law has traditionally regulated public procurement.

126. *See* §§ 25k–25m Kapitalanlagengeselleschaften (KAGG).
127. *See* Auslandinvestment Gesetz.
128. *See* Aktienindexfonds, § 8cIII KAGG.
129. *See* Investmentaktiengesellschaft §§ 51–67 KAGG.
130. Gesetz gegen Wettbewerbsbeschränkungen (GWB).

Sections 97–129 have now incorporated controversial new rules on procurement. Section 97(6) introduces a new subjective right for the benefit of tenderers, ensuring governmental compliance with procedural rules in the form of a guarantee. Section 107(2) provides that where the rights of parties have been injured or infringed, parties with an interest in the order for procurement may bring legal action. The GWB review also provides for procedural measures in relation to procurement actions. Section 105(1) provides that procurement review bodies are independent and the final decisions of these bodies constitute administrative acts in accordance with section 114(3). Decisions of the procurement review bodies, and the High Court on appeal, are required by section 113(1) to be delivered within five weeks of receipt of the complaint. Under section 115, an application for judicial review results in preventing the award procedure from continuing. Where an infringement of procurement rules has occurred, damages can be awarded to bidders in accordance with section 123 in addition to claims for damages under the German Civil Law Code (BGB).

D. Intellectual Property

On December 28, 1999, the new Budgetary law (HsanG) provided for an overall increase in fees charged by the German Patent and Marks Office in addition to fees charged by the German federal Patent Court. This increase of fifteen percent (average) becomes effective from January 1, 2000.

E. German Crypto Policy

On June 2, 1999, the German Federal Cabinet approved a statement on Crypto policy. This statement is in line with statements declared by the French and U.K. governments with respect to the restriction of cryptography. The German Crypto policy will promote and support the further use and development of secure encryption products by ensuring that consumer trust in encryption is enhanced. German manufacturers will receive support from the government in the manufacture and sale of secure encryption products, with the government taking measures to strengthen the competitiveness of German companies. Federal ministries with special responsibilities in this area will monitor progress, providing a report in two years' time. The government intends to ensure that the legal powers available to criminal prosecution authorities as well as security authorities will not be undermined. The government has stated its commitment to international cooperation on this issue, and supports the development of open standards.

VI. Ireland

A. Corporate Regulation

Two Companies Acts were passed in 1999. The first permits defined stabilizing activity after IPOs and other public offerings.[131] The second tightens regulation of the incorporation of Irish companies.[132] A company will not be incorporated unless it appears to the

131. Companies (Amendment) Act, No. 8 (1999).
132. Companies (Amendment) (No. 2) Act, No. 30 (1999).

Registrar of Companies that it proposes to carry on an activity in the State. An Irish-incorporated company must now have at least one Irish-resident director unless it maintains an IEP 20,000 bond (which can be called to pay fines or penalties under company or tax law). The Act removes the statutory requirement to have accounts audited for certain private companies and partnerships. It limits the number of directorships any person can have to twenty-five and enhances the powers of the Registrar of Companies to strike off companies that fail to fulfill certain statutory obligations, such as filing of annual returns.

B. Public Utilities

The former state-owned telecommunications provider, Telecom Eireann, was floated in mid-1999 and is now known as Eircom plc. The flotation required legislation disapplying statutes applicable to state-owned corporations. Legislation has been proposed to ensure equality of treatment between Eircom and other operators in the regulation of telecommunications infrastructure, to enable all operators to obtain access to land to construct infrastructure, and to provide for infrastructure sharing.

Telecom Eireann's pre-flotation sale in a tender process of its interest in cable television company Cablelink led to an attempt to restrain the sale. The High Court dismissed an unsuccessful bidder's claim that a "formula bid" by the successful bidder, NTL, in the penultimate round of the process should have been rejected and its own bid accepted.[133] The liberalization of the mobile telephone market suffered a setback when the award of Ireland's third mobile license led to a protracted court challenge by the unsuccessful applicant with the court concluding that the decision to award was not properly taken.[134] That judgment has been appealed.

The Electricity Regulation Act of 1999 creates a regulatory framework for competition in the generation and supply of electricity.[135] It establishes an independent Commission for Electricity Regulation to license and regulate the generation and supply of electricity and to authorize the construction of new generating plant.

A new Broadcasting Bill has been published to provide for the regulation of digital terrestrial television (DTT), involving the designation of a licensed operator to construct and operate DTT infrastructure.[136] The Bill will also extend the powers of the Independent Radio and Television Commission (to be renamed the Broadcasting Commission of Ireland) to the regulation of digital broadcasting on all platforms (terrestrial, cable, MMDS, and satellite).

C. Intellectual Property

A substantial new Copyright and Related Rights Bill has been presented to update Irish copyright law and to give effect to EU directives.[137] A significant 1999 High Court decision

133. Howberry Lane Limited v. Telecom Eireann, Radio Telefis Eireann, NTL Incorporated and NTL Communications Corporation, Unreported, High Court, Morris P, May 6, 1999.

134. Orange Communications Limited v. Director of Telecommunications and by order Meteor Communications Limited, [1998] 2 ILRM 81 and Unreported, High Court, Macken J, Oct. 4, 1999.

135. Electricity Regulation Act, No. 23 (1999), and Electricity Regulation Act 1999 (Criteria for Determination of Authorizations) Order 1999 (S.I. 309 of 1999).

136. Broadcasting Bill, No. 29 (1999).

137. Copyright and Related Rights Bill, No. 18b (1999). This bill is intended to restate the law under EU Council Directives 91/250/EEC on copyright and performance rights and 93/98/EEC on copyright terms and

held that a defendant beer company could be liable in passing off where its company name was similar to the name of the plaintiff beer company's product, even though the defendant's product would be marketed under an entirely dissimilar name. As the public could form the impression of an association between the defendant's business and the plaintiff's, there was a real likelihood of confusion.[138]

D. TAX AND BUDGETARY MATTERS

The Stamp Duties Consolidation Act of 1999 consolidates the stamp duty rules previously contained in the Stamp Act, 1891; the Stamp Duties Management Act, 1891; and many Revenue and Finance Acts since then.[139]

A government decision to pre-fund part of the future costs of social welfare and public service pensions out of a once-off allocation of a major portion of the proceeds of the Telecom Eireann flotation and by setting aside one percent of GNP annually was given effect in legislation establishing a temporary fund for Exchequer monies set aside for this purpose (about IEP 3 billion in 1999) pending more detailed legislation.[140] The National Treasury Management Agency is responsible for the control and management of the fund.

E. ENVIRONMENTAL AND PLANNING ISSUES

Legislation in 1999 gave statutory footing to a national architectural heritage inventory and increased local authorities' powers to protect buildings and structures of special historical, archaeological, artistic, scientific, or technical interest.[141] A major Planning & Development Bill is in process to consolidate, revise, and extend the existing Planning Acts and much of the EU Environmental Impact Assessment Regulations. It also includes measures intended to increase the supply of affordable housing.

F. POLITICAL AND INSTITUTIONAL PROBITY

Tribunals of Inquiry to investigate alleged irregular payments to politicians continued throughout 1999. The parliamentary Public Accounts Committee, whose investigative powers were recently enhanced, reported on its investigations into allegations of tax evasion by use of bank accounts improperly designated nonresident. The Local Elections (Disclosure of Donations and Expenditure) Act of 1999 established a statutory requirement of disclosure of election expenses at local elections by candidates, political parties, and others.[142] The Supreme Court delivered an important judgment on the extent of the right to silence in investigations under the Companies Acts and the subsequent use of admissions made to Inspectors.[143]

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gives effect to EU Council Directives 92/100/EEC on rental and lending rights, 93/83/EEC on coordination of copyright rules applicable to satellite broadcasting and cable retransmission, and 96/9/EC on the legal protection of databases.

138. Guinness Ireland Group, E. Smithwick Limited & Sons Limited and by order Irish Ale Breweries Limited v. Kilkenny Brewing Company Limited, unreported, High Court, Laffoy J, Feb. 10, 1999.

139. Stamp Duties Consolidation Act, No. 31 (1999).

140. Temporary Holding Fund for Superannuation Liabilities Act, No. 33 (1999).

141. Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act, No. 19 (1999).

142. Local Elections (Disclosure of Donations and Expenditure) Act, No. 7 (1999).

G. The Constitution

Two amendments to Ireland's Constitution took effect in 1999. The 19th Amendment, which replaces articles 2 and 3 (dealing with the territory of the State and relations with Northern Ireland), took effect following a declaration by the Irish Government on December 2, 1999. The 20th Amendment inserts a new article 28A, which recognizes the role of local government and provides for periodic local elections.

H. Northern Ireland

Measures to establish new structures for Northern Ireland begun at the time of the (British-Irish) Good Friday Agreement led to significant legislative change in 1999. The British-Irish Agreement Act of 1999 contains detailed provisions on the Implementation Bodies (cross-border bodies) responsible for cooperation on (1) management and development of inland waterways; (2) the promotion of food safety; (3) coordination and information exchange on trade and business development; (4) management and implementation of special EU initiatives; (5) promoting the Irish and Élans (Ulster Scots) languages; and (6) promoting commercial aquaculture, marine tourism, and maintenance of navigational aids along the coast of the whole island.[144] A Human Rights Commission Bill (required by the Good Friday Agreement) has been presented to establish an independent commission to overview, and make recommendations on, the extent of human rights protection. The Commission would be permitted to initiate legal proceedings for declarations, to appear as *amicus curiae*, and to advise and assist individuals in human rights cases. The Good Friday Agreement also requires amendments to the law on Irish nationality and citizenship.

I. Equality

The new Equal Status Bill of 1999 would prohibit discrimination on any of ten grounds in the disposal of goods or the provision of services, in land dispositions, provision of accommodation and services, and amenities related to accommodation, or by educational institutions in admission, access to courses, and facilities.[145] The ten grounds are (1) gender, (2) marital status, (3) family status, (4) sexual orientation, (5) religion, (6) age, (7) disability, (8) race (including color, nationality, and ethnic or national origin), (9) membership of the traveling community, and (10) victimization by reason of involvement in action under this legislation.

J. EU Obligations and International Conventions and Laws

In 1999, Ireland gave domestic effect to a number of EU measures and international conventions, including:

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143. In the matter of National Irish Bank Limited (under investigation) and in the matter of the Companies Act, 1990, Unreported, Supreme Court (O'Flaherty, Barrington, Murphy, Lynch & Barron JJ), Jan. 21, 1999.

144. British-Irish Agreement Act, No. 1 (1999) and British-Irish Agreement (Amendment) Act, No. 16 (1999).

145. Equal Status Bill, 1999 (see especially § 5–7) reintroducing the provisions of the Equal Status Bill, 1997 except those found unconstitutional by the Supreme Court in In the matter of article 26 of the Constitution and the Equal Status Bill, [1997] 2 IR 387.

- EU measures to harmonize rules on road haulage and passenger operator licenses and establish a "one-stop shop" licensing regime.[146]
- Parts of the EU "Television Without Frontiers" Directive, intended to protect public access to free television coverage of designated "heritage" events.[147]
- IMO Oil Pollution Preparedness, Response and Cooperation Convention 1990 giving effect to measures requiring harbor authorities, operators of offshore installations, and oil-handling facilities to prepare oil pollution emergency plans, and the Minister for the Marine and Natural Resources to prepare a national oil pollution emergency plan containing OPRC-required elements.[148]
- Acceptance of the Fourth Amendment to the articles of Agreement of the International Monetary Fund (IMF) and participation in a $14 billion package for Brazil.[149] Draft legislation is well advanced to enable Ireland to subscribe to the twelfth replenishment of the International Development Association (IDA 12) and to an increase in the capital of Multilateral Investment Guarantee Agency.

VII. Italy

A. Corporate Law

1. *Securitization*

Before 1999, commercial operators in Italy encountered several obstacles in securitizing assets. In particular, Special Purpose Vehicle (SPV) financing of the purchase of assets by borrowing from banks or by issuing bonds was not possible within Italy.[150] Law No. 130 has partially solved these problems, opening an Italian market for securitization.[151] The Law has adopted the English model of the Special Purpose Vehicle, but it also contemplates French and Spanish methods of securitization by means of Collective Undertakings. Moreover, the Italian law provides for the securitization of "bad loans" by banks. The law defines securitization as the issue of notes to finance the purchase of receivables where all sums paid by the original debtors are utilized by the purchaser exclusively to meet the claims of the note holders. It provides that the purchaser of the receivables may be a different company from the company that is issuing the notes. Worthy of note are the rules relating the publicity of the sale and the validity of security given prior to the securitization. In this regard, article 4 of Law No. 130 cites article 58 of the Banking Law,[152] providing that notice of the sale of receivables is required via publication in the *Gazzetta Ufficiale*, and stating that any security given in relation to receivables before the sale remains valid and of the

146. Road Transport Act, No. 15 (1999).

147. Broadcasting (Major Events Television Coverage) Act, No. 28 (1999), implementing article 3(a) of EU Council Directive 89/552/EEC, as inserted by EU Council Directive 97/36/EEC.

148. Sea Pollution (Amendment) Act, No. 18 (1999).

149. Bretton Woods Agreement (Amendment) Act, No. 4 (1999).

150. The three major causes preventing the incorporation of SPV under Italian Law were article 2410 of Italian Civil Code, preventing a joint stock company from issuing bonds for an amount exceeding its authorized capital; the sale of receivables being subject to a tax equal to the five percent of the sale price; and the risk that the bonds issued by the SPV would be designated as "Atypical Securities" subject to a withholding tax of twenty-seven percent.

151. Law No. 130, Apr. 30, 1999, Gazz. Uff. No. 111 of May 14, 1999.

152. Leg. Decree No. 385, Sept. 1, 1993, Gazz. Uff. No. 230 of Sept. 30, 1993.

same grade. In the case of payments made by (subsequently insolvent) debtors to the purchaser of receivables, an express derogation from the provisions of the Insolvency Law relating to the revocation of payments made by insolvent firms has been created. Finally, domestic securitization has become more attractive thanks to the more favorable tax regime now applicable to notes issued in relation to securitization transactions.

2. *Company Law*

The spirit of reform of the Draghi Decree, which modernized the regulation of listed companies, is now being felt across company law in general.[153] A proposal for the reform of law of nonlisted companies law has been published by the Mironi Commission and, at the time of writing, is being considered by the Treasury and Justice Ministries. The main thrust of the proposal is the enhancement of shareholder autonomy in designing the structure of companies and a general reduction in legal regulation. Under the new regime, company regulation will be more stringent where a company is publicly financed. Additionally, the interests of minority shareholders and bondholders will receive special protection. In other cases, legal regulation will act only to supplement shareholder's intent. Central to the work of the Commission has been the debate on corporate governance. The principal governance model being adopted appears to be the German *Aufsichtsrat*. Another major issue is the regulation of groups of companies. The Commission appears to favor a power of direction for the company controlling the group, possibly tempered by a subsidiary's claim to indemnification.

3. *Tax Law*

Since the enactment of Legislative Decree 466 of 1997, the Italian government has focused on improving the capitalization of Italian companies through tax reform.[154] On May 19, 1999, the Italian Parliament passed Law No. 133 concerning the rationalization of tax law and tax federalism.[155] Law No. 133 has reinforced the effect of the Dual Income Tax introduced by Decree 466. In particular, it has raised the portion of company income subject to the "reduced rate" of nineteen percent. Regarding capital gain taxation, Legislative Decree No. 259 of July 21, 1999, has extended the exemptions from withholding tax on capital gains granted to nonresident companies and individuals.[156]

B. Data Protection/Privacy

The regulation of privacy and data processing began with Law No. 675/1996.[157] This Law has now been quite extensively amended by Legislative Decree No. 135/99 on the processing of "special categories"[158] of data by public entities,[159] Legislative Decree No. 281/99 on the processing of personal data in the field of scientific research,[160] and

153. Leg. Decree No. 58, Feb. 24, 1998, GAZZ. UFF. No. 71 of Mar. 26, 1998.
154. Leg. Decree No. 466, Dec. 18, 1997, GAZZ. UFF. No. 3 of Jan. 5, 1998.
155. Law No. 133, May 13, 1999, GAZZ. UFF. No. 113 of May 17, 1999.
156. Leg. Decree No. 259, July 21, 1999, GAZZ. UFF. No. 181 of Aug. 4, 1999.
157. Law No. 675, Dec. 31, 1996, GAZZ. UFF. No. 5 of Jan. 8, 1997.
158. "Special categories" of data refers to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union memberships, and data concerning health or sex life, in conformity with the definition of article 22 of Law No. 675/96 and article 8 of EC Directive 95/46.
159. Leg. Decree No. 135, May 11, 1999, GAZZ. UFF. No. 113 of May 17, 1999.
160. Leg. Decree No. 281, July 30, 1999, GAZZ. UFF. No. 191 of Aug. 16, 1999.

Legislative Decree No. 282/99 on the protection of privacy in the health care sector.[161] Data Processing Regulation No. 318, of July 28, 1999, has brought about a major innovation in standards for the protection of personal data.[162] The Regulation specifies minimum safety standards for the processing of personal data and "special categories" of data using electronic and nonelectronic means. Violations of the minimal standards imposed by the Regulation are subject to criminal sanctions.

C. Public Contracting

A new system regulating the public procurement of construction works was introduced by the *Merloni-ter.*[163] In some respects, however, the full establishment of the new system has been deferred. In the interim, on December 29, 1999, the Italian Council of Ministers approved Legislative Decree No. 502 on the new modalities of participation in bidding and awards of public works. The Decree was intended to mitigate the current legislative deadlock arising out of the difficulties in agreeing on a new system of quality certification. The Decree purported to end the Constructors National Register (ANC),[164] yet the new requirements introduced by *Merloni-ter* still required ANC registration as necessary proof of compliance. ANC registration also remained a necessary requirement to enter a bidding. Finally, on January 21, 2000, the Italian Council of Ministers approved the *Bargone Regulation* on the qualification of public constructors that ended the ANC system.[165] Construction firms are no longer required to be registered in the ANC. It is likely that this change will open up the public works market to nonregistered firms. A pivotal role will be played by a new entity, the *Società Organismo di Attestazione* (SOA), which will be responsible for ensuring that competing firms meet the requirements prescribed by the Regulation. The Regulation envisages a two-stage implementation of the new system, which will be fully effective in 2002.

VIII. Netherlands

A. Commercial Law

In the area of commercial law, Dutch legislation in 1999 focused mostly on securities regulation. A number of improved control measures were introduced, including the establishment of a new authority for the financial sector,[166] the introduction of daily fines for delay,[167] and improved public access to information.[168] Existing rules on sanctions already contained in the *Wet Toezicht Effectenverkeer* have been strengthened,[169] and a new law on exchanging lost share certificates has been adopted.[170] New proposals have elaborated upon

161. Leg. Decree No. 282, July 30, 1999, Gazz. Uff. No. 191 of Aug. 16, 1999.

162. The Regulation has been enacted in conformity with article 15 of Law No. 645/1996.

163. Law No. 415, Nov. 18, 1998, of Gazz. Uff.

164. The Constructors National Register (Albo Nazionale dei Costruttori ANC) was established in 1962. Since then, up to 50,000 companies have registered, quite a large number compared to the 5,000 operating in Germany and the 6,000 operating in France.

165. The Bargone Regulation has been issued in accordance with article 8(2) of Law No. 109/94, as modified by the Merloni-ter.

166. Kamerstukken, at 26 466.

167. *Id.* at 25 821.

168. *Id.* at 26 130.

169. *Cf., inter alia*, Stb. 1999, 342; Stb. 1998, 483; Stb. 1998, 320.

the review of the preventive supervision procedures in force during establishment and adaptation of a company's memorandum and articles of association.[171] Other initiatives include establishing protective rules for steering corporations,[172] liberalizing the tradability of shares and certificates, and ensuring the orderly course of meetings by permitting the acceleration of the date of registration.[173]

Legislative initiatives have been advanced in the wake of the continued development of EU commercial and corporate law. New Dutch rules have been created concerning the introduction of the Euro on corporate capitalization.[174] Dutch provisions have been changed concerning hostile takeovers and compulsory public bidding above certain financial thresholds with amendments for moving corporate head offices between Member States.

The leading commercial cases have centered on a cluster of rights of inquiry in the corporate sector and on co-management rulings in the public sector. The former, so-called *enquêterecht*, is contained in article 2:344 *et seq.* BW has mushroomed in the recent past to become a truly "commercial" procedure before the Amsterdam Court's special *Ondernemingskamer* (OK). Recent rulings of the OK and the *Hoge Raad* (HR) have clarified a host of issues, such as the revival of the right of inquiry after a recorded compromise had already been reached in *Uni-Invest*;[175] *de Blok*'s dealings with shareholders' rights in conglomerates;[176] the right of inquiry resulting from constant quarrelling and legal disputes between the main shareholders, manifested in *Chipshol*;[177] disputes arising in the context of acquisitions as in the *Gucci* cases[178] and *Breevast*;[179] the right of recovery of inquiry costs ex article 2:354 BW from management where business difficulties are the responsibility of management;[180] and a trustee's competence to request an inquiry in *De Haan.*[181]

The second prong of case law focuses on modifications in the rights of co-management pursuant to the *Wet op de Ondernemingsraden*, or works council law, as a result of the administrative reorganization of a number of southern Dutch counties. The timing requirements for works council consultation have been made more precise,[182] as has been the province's (viz. the state's) ability to act as a commercial entity,[183] its political nature notwithstanding.[184] Other important decisions deal with the conditions for reopening liqui-

170. Stb. 1999, 408.

171. Kamerstukken, at 26 277.

172. *Id.* at 25 732.

173. *Id.* at 26 668.

174. *Id.* at 26 823 (amending Book 2 BW).

175. Descamps-Spanoghe/Uni-Invest NV, OK 12 November 1998, JOR 29.

176. J.J.A. de Blok Holding BV/BV Houdstermaatschappij De Zuider Ster and BV De Zuider Ster, OK 12 November 1998, JOR 30.

177. Chipshol Holding BV/Forward Business Parks BV, OK 31 December 1998, JOR 62.

178. Gucci I-IV; *see* OK 3 March 1999, JOR 87; OK 22 March 1999, JOR 88; OK 27 April 1999, JOR 105; and OK 27 May 1999, JOR 121.

179. Uni-Invest NV/Breevast NV, OK 11 March 1999, JOR 89.

180. Bobel NV, HR 19 May 1999, JOR 145.

181. De Haan Beheer NV, HR 19 May 1999, JOR 170; HR 19 May 1999, JOR 171.

182. Ondernemingsraad Gemeente Rijswijk/Gemeente Rijswijk and Provincie Zuid-Holland, OK 5 November 1998, JOR 7; Ondernemingsraad Gemeente Leidschendam/Gemeente Leidschendam and Provincie Zuid-Holland, OK 26 November 1998, JOR 8. In both cases, the province acted as a commercial entity.

183. Ondernemingsraden van de Gemeente Hengelo/Gemeente Hengelo, Provincie Overijssel, OK 18 February 1999, JOR 102.

184. Ondernemingsraad Gewest Midden Limburg/Gewest Midden Limburg, OK 11 February 1999, JOR 14.

dation proceedings under article 2:23c I BW where settlement has been reached but additional claims that conditions that the *Hoge Raad* has ruled should be interpreted narrowly surface *ex post.*[185] The limitations to managerial liability in conglomerates and joint ventures have undergone further refinement;[186] as has executive liability for damages suffered by their company due to negligent behavior under the *ernstig verwijt* standard.[187]

B. Labor Law

Developments in labor law in 1999 have focused on the legislator's intent to implement the law on job flexibility and security (*Wet Flexibiliteit en Zekerheid*, Stb. 1998, 300), in force since January 1, 1999. The rules guiding dismissal have been completely overhauled in a bold move to advance the Dutch labor market's liberalization. "External" flexibility in determining the conditions for hiring and firing employees has been increased, as were the terms for "internal" flexibility in re-deploying employees within a company and adapting their working conditions. Follow-up initiatives, subsumed under the heading work and care (*Algemene Wet Arbeid en Zorg*), are modifying the rules regarding working hours and time[188] and the issues surrounding vacations and sabbaticals.[189] Additional attention has been focused on providing stimuli to young employees with children through extending child daycare facilities and augmented options for ensuring child medical care.[190] Concern for improving the labor market has also influenced the Dutch social security system, in that job-hunters are now confronted with a new organizational structure dealing with issues related to work and income, centered around the nationally established *Centrum voor Werk en Inkomen*, which also assists employers.[191]

The labor case law has further supported these legislative developments. The *Hoge Raad* made it clear in *Taxi Hofman* that heightened flexibility requires employees to agree to fair employer proposals to adjust working conditions under article 7:611 BW.[192] In order to protect employees, the *Hoge Raad* was equally categorical on the need to take the fairness test seriously.[193] Thus, for example, agreeing to a demotion implies no acceptance of any attached loss in wages without an explicit declaration to that effect.[194]

C. Tax Law

Tax law witnessed the debate over a full revision of the income tax legislation[195] and its accompanying introductory law (*Invoeringswet Wet Inkomstenbelasting 2001*), which will replace the current system with an analytical methodology, new classification, and numerical order.[196] The new regime will consist of a tripartite system of income tax based on work

185. Vereniging Industriebond FNV/Ventaz Engineering NV, HR 20 October 1998, NJ 194.
186. Simon Møkster Shipping AS/Wijsmuller Groep Holding BV, HR 20 November 1998, JOR 9.
187. Van Dooren q.q./Hendriks, HR 11 June 1999, RvdW 96 C.
188. Kamerstukken, at 26 358.
189. *See* Wet Financiering Loopbaanonderbreking, Stb. 1998, 544.
190. Kamerstukken, at 26 587.
191. *Id.* at 26 448.
192. Taxi Hofman, HR 26 June 1998, RvdW 140 C.
193. HR 4 December 998, RvdW 230 C.
194. HR 28 May 1999, Ars Aequi, Katern 72, pp. 3593–3594.
195. Kamerstukken, at 26 727.
196. *Id.* at 26 728.

and domicile, from the so-called *aanmerkelijk belang*, and from savings and investments based on the fiction of a four percent flat base of yearly overall assets, the so-called *vermogensrendementsheffing*, replacing the current real income-based standard. Income tax on wages and domicile is governed by a progressive system of up to fifty-two percent; savings and investments each top off at thirty percent. Discounting between wages, savings, and investments is not possible. Special rules apply to limited partnerships, the discounting of real costs for wages, and other exempt amounts.[197]

D. Telecommunications

In the telecommunication area, the regulatory authority (OPTA) has been busy supervising KPN's willingness to provide sufficient capacity to its competitors, and the related problems of interconnection and price-capping.[198] Dutch computing and digitalization are being steadily prepared for the coming of the information age, with the Ministry of Justice issuing its "Digital Delta" report,[199] and discussion continuing on the proposed legislation related to the Internet,[200] liability of agents thereto,[201] and the protection of personal data therein.[202]

IX. Norway

A. Overview

Important pieces of legislation were enacted in 1999. Among these were two new acts regulating the formal establishment and operation of privately and publicly held companies,[203] a new tax law,[204] and a new law governing bankruptcy and the establishment and registration of mortgages and liens.[205] Changes in these laws generally affect companies doing business in Norway. Other legal developments of greater interest to the international legal community are summarized below.

B. Internet Domain Name Registration

NORID, the Norwegian Registration Service for Internet Domain Names, has proposed easing its very strict domain name registration policy. Presently, NORID requires the registrant to show a strong connection to the requested domain name. In addition, organizations are currently permitted to register only one domain name—typically the name of the company—while registering trademark names has been denied.

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197. *See* WPNR 1999/6357 and 1999/6362. *See also* Maandblad Belastingbeschouwingen Oct./Nov. 1999.

198. *See* overview provided on OPTA's website, *available at* http://www.opta.nl.

199. *Available at* http://www.minjust.nl/ a_beleid/fact/cfact9.htm.

200. *See* Wetgeving voor de Elektronische Snelweg, Kamerstukken 25 880.

201. *See* Aansprakelijkheid van Tussenpersonen op Internet, Kamerstukken 25 880, Nr. 7.

202. *See* Wet Bescherming Personengegevens, Kamerstukken 25 892.

203. *See* Norwegian Limited Liability Companies (AS) Act, No. 44 (1977); Public Limited Liability Companies (ASA) Act, No. 45 (1977) (Nor.).

204. *See* Tax Act, No. 14 (1999) (Nor.).

205. *See* Bankruptcy Act, No. 72 (1999) (Nor.) (adopting changes in the Act); Payment Obligations Act, No. 59 (1958) (Nor.); Act on Mortgages and Liens, No. 2 (1980) (Nor.).

Responding to strong opposition from business and industry, NORID has now proposed a sweeping liberalization that will include permitting organizations to register up to fifteen domain names and eliminating the "strong connection" requirement.[206] Several new categories of domain names have been proposed that indicate the type of legal entity of the registrant (private company, public corporation, or organization), although only one registered name per category will be permitted. Unfortunately, the proposal, if adopted as written, is also expected to increase litigation over domain name rights, as occurred in Denmark recently when the domain name registration policy was liberalized. The establishment of several categories may also be confusing rather than convenient for Internet users trying to access the correct website for a company, as the user will need to know how a company is legally organized to search the correct category.

NORID's liberalization proposal has been released for a period of public comment, after which the Norwegian Post and Telecommunications Authority will render its official recommendation on the proposal. A final decision on NORID's future domain name registration policy is not expected until the spring of 2000.

C. Employment Law

1. *Employee Use of the Internet*

Norwegian employment law is developing rapidly to address the plethora of issues raised by increased use of the Internet by employees. In Norway, as elsewhere, Internet use in the workplace creates new issues and challenges for both employers and employees. The risks to employers of granting employees access to the Internet from the workplace, however, are several. Easy access can lead to abuse if the employees' use of the Internet infringes on the amount of time the employees devote to their jobs. In addition, employers can easily become associated with employees' actions and behavior associated with the use (and abuse) of the Internet while at work.

Advocates of a "zero tolerance" policy for employees' use of the Internet find that Norwegian law places limitations on the right to terminate employees for alleged abuse of Internet access privileges, so that an employer will have to show strong and relevant grounds for termination in such cases. However, if an employee has been warned—preferably several times—that abuse of Internet privileges will lead to termination, in this case, grounds for termination may exist in Norwegian law, even if the employee claims access only occurred during work breaks and after the end of the workday. If the employee's actions amount to a serious violation, such as sending particularly offensive e-mail messages, a prior warning may not be necessary before terminating the employee.

2. *Outsourcing*

Two recent decisions of the Norwegian High Court on June 30, 1999, address employee rights with respect to the outsourcing of certain tasks previously handled in-house. The High Court in both decisions stated the principle that employees, as a rule, do not have the right to choose to remain with their employer, but made an exception for cases where the transfer of the employee to a new employer leads to changes in the actual work to be done by the employee.

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206. Norwegian Registration Service for Internet Domain Names (NORID), *Domain Name Policy*, § 4.1 (1999).

In the first case, where receptionist and telephone-switchboard services in a company were transferred to a security firm, the High Court decided that the employee had the right to choose whether or not to move to the new company, based on the fact that the employee's relationship with co-workers changed significantly, and the new company was engaged in a completely different type of business than her original employer.[207] In the second decision, a meat-processing company transferred its cleaning and janitorial services to a large janitorial and maintenance firm.[208] Again, the High Court ruled that the employee had the right to choose whether or not to accept the transfer to the new company, because the ties to his previous employer would be weakened, and the new company had a much broader range of business than that of his original employer. The employee would also have a much longer commute to work should the new company lose the original employer as a customer.

If the employee in such situations chooses not to accept a transfer to the new company, the employer may want to terminate the employee. The Employment Environment Act states that refusing a transfer to a new company is not in itself sufficient grounds to terminate an employee, so the lawfulness of the employer's termination will depend on what other grounds for termination the employer can cite in each individual case.[209] Only one of the above-cited cases involved the validity of a termination. In this case, the High Court upheld the termination, declaring the interests of the other employees in the transfer must be given weight. In turn, this, combined with the fact that the employee was offered a position in the new company, should be determinative.[210]

D. Competition Law and Merger Control

By the end of 1999, the Norwegian Parliament was in the process of enacting changes in the Norwegian Competition Law relating to the authorities' control of mergers and acquisitions. Specifically, the new measures being considered, with passage expected in spring of 2000, would grant the Norwegian Competition Authority the power to issue a temporary "hold" order on a merger or acquisition while the Authority completed its review. Under present law, the Competition Authority lacks the power to stop a merger temporarily, with the consequence that by the time the Authority has completed its review of a case, many mergers and acquisitions have progressed to the point where undoing them would be virtually impossible. The power to freeze the process at an early stage is seen to be less drastic than forbidding a transaction altogether, while making the control of mergers and acquisitions more effective.

E. Corporate Law—The Granting of Credit from a Subsidiary to Its Parent Company

Section 8–7 of the new Norwegian Companies Act and the Norwegian Public Limited Companies Act states that a company may only grant credit or pledge security for the benefit of a shareholder or any person connected with a shareholder, equal to the funds available to the company for the distribution of dividends—and then only if adequate security is pledged.[211] This limit on the granting of credit or pledging of security to shareholders is

207. Rt. 1999 p. 977.
208. Rt. 1999 p. 989.
209. Employment Environment Act, § 73, No. 4 (1977) (Nor.).
210. Rt. 1999 p. 989.

based on the need to protect the share capital of the company and ultimately its creditors. Breach of this obligation may lead to damages and criminal liability. The limit does not apply to credit or security granted by a subsidiary for the benefit of a parent company or another company in the same affiliated group.

As originally passed, the legislation was probably not in accord with the European Economic Area Agreement governing Norway's relations with the EU. The original definition of "groups" in the Acts implied that only Scandinavian parent companies were exempt from the limit on credit or security grants from Norwegian subsidiaries. To correct this, section 1–4 of both Acts was recently changed so that parent companies established in an EEA country are now defined as parent companies in relation to section 8–7, provided that their home countries have similar or stricter legislation concerning credit and security grants to shareholders.[212]

Determining whether the legislation in an EEA country is considered similar to, or stricter than, Norwegian legislation is not without complications. Accordingly, the amended legislation may be more compliant with the EEA Agreement, but it is difficult to apply in practice and may lead to a reduction in the granting of credit or security by subsidiaries to parents, rather than the liberalization intended. This is especially true when directors feel apprehensive about the possibility of facing civil or criminal liability, even if this possibility is remote.

F. Tax Law

In 1996, the Norwegian Parliament adopted new and stricter rules for income taxation of share options granted to employees.[213] Employee options are taxed as employment income when options are granted at a rate of approximately fifty percent. Further taxation as employment income may take place at the time the option is exercised. The taxable amount will be the difference between the market value of the share less payment for the share or the subscription price, and the tax paid when the option was issued to the employee.

Due to criticism from both business and employee groups, changes have been adopted for options granted after January 1, 1999. Options may now be exempt from taxation at the time the option is granted if the calculated value does not exceed a total of NOK 600,000 (approximately $85,000). Tax relief, however, is not available for options in publicly listed stocks. For companies with more than ten full-time employees, tax relief is also conditioned on the availability of the option program. At least one-quarter of all employees, or a minimum of five full-time employees, must be offered options, and no person in the group can be offered an option advantage of less than fifty percent of the value of the option advantage offered any other persons in the group.

The Ministry of Finance is expected to suggest even more lenient rules for income taxation of share options in spring of 2000, making share options taxable as income only when exercised by the employee.

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211. *See* Norwegian Companies Act, § 8–7, No. 14 (1999) (Nor.).

212. *Id.* at § 1–4.

213. Tax Act, § 42, para. 13, No. 8 (1911) (Nor.); Tax Act, § 5–14, No. 14 (1999) (Nor.).

G. Litigation—Evidentiary Rules

A Norwegian Appeals Court issued a ruling in 1999 on the admissibility of evidence in a case where an employee sued her employer for improper termination.[214] The employer had accused the employee of theft after having secretly videotaped the employee at work. When confronted, the employee immediately and voluntarily resigned but later sued, claiming that in reality she had been fired. The employer sought to present the videotape as evidence in court, but the tape was ruled inadmissible. The court stated that such evidence, as a rule, should not be admitted, but that exceptions might be justified in specific instances.

X. Portugal

A. Corporate and Commercial Law

After January 1, 1999, new companies incorporated under the Portuguese Companies Code must have minimum capital requirements of EUR 5,000 for limited liability companies (*Sociedades por Quotas*) and EUR 50,000 for shareholders companies. Until January 1, 2002, companies are allowed to designate their capital stock in PTE. From that date onward, all companies must hold their capital stock in Euros and meet the new minimum capital stock requirements.

The new Securities Code (described below) provides derogations from March 1, 2000 to some of the articles of the Portuguese Companies Code related to registration, deposit, and the formalities required on transfer of shares.

B. Capital Markets

1. *General*

A number of important laws relating to capital markets were created in 1999 concerning Regulated Market Managing Companies[215] and authorizing and regulating the listing of "naked warrants" on the stock exchange.[216] The new Securities Code regulates more fully the activities of financial intermediaries. Listing of foreign securities on the stock exchange market is now permitted, provided all the normal requirements are fulfilled.

Decree-Law No. 453/99 of November 5, 1999 regulates, for the first time, the securitization of receivables in Portuguese Law.[217] Securitization operations may only be developed by securitization funds managed by a financial institution supervised by the Central Bank and subject to authorization and supervision of the Securities Market Commission (CMVM), and by securitization companies (commercial companies exclusively dedicated to these operations).

2. *Securities Law*

A new Securities Code was introduced in 1999, reducing the total number of regulatory articles by one third, adding several new concepts, and giving more flexibility to the regulations.[218] The Securities Code (SC) entered fully into force on March 1, 2000. Some of

214. RG 1999 p. 1640.
215. Decree-Law No. 394/99 of October 13, 1999 (Port.).
216. Decree-Law No. 172/99 of May 20, 1999 (Port.).
217. Decree-Law No. 453/99 of November 5, 1999, art. 3 (Port.).

its chapters, for example, the mandatory public offers for acquisition rules, hve beena applicable since December 28, 1999.

The SC is applicable to all securities whenever there is a relevant connection to the Portuguese territory, namely when: (i) orders are given to Portuguese registered financial intermediaries and the operations are made in Portuguese markets; (ii) activities are developed or acts are performed in Portugal; and (iii) information related with situations, activities, or acts ruled by Portuguese law is made accessible in Portugal.

The legal framework on public offers is applicable when the offers are addressed specifically to persons or entities residing in Portugal.

The existence of a list specifying all types of securities in the former Securities Market Code caused several problems relating to the possibility of issuing/listing on the regulated markets. Securities not included in the list were deemed "naked warrants." The present SC includes as securities naked warrants and rights detached from other securities. This has received favorable ruling from the CMVM.

The SC also establishes the concept of a public company (*sociedade aberta*) and laws to reinforce the transparency of its control and direction. In particular, information responsibilities in relation to qualified participations or shareholders agreements are addressed. The SC intends to protect the investor by imposing on any agent acting in the market a duty to supply complete, true, clear, and lawful information on securities, public offers, security markets, financial intermediation activities, and anything else that may affect the investment decision.

3. *Takeover Law*

On December 28, 1999, new rules relating to public offers became effective.[219] A public offer is defined by the SC as an offer of securities targeted to undetermined investors. However, other situations may also be considered as a public offer, particularly where the offer is addressed to the generality of the shareholders of a public company or if it is addressed to more than 200 investors.

In this regard, significant changes were introduced into the rules governing mandatory public offers for acquisition (OPA). The SC abolished the distinction between partial and total public offers. OPAs are now required for all acquisitions that exceed OPA thresholds. These thresholds are now one-third or one-half of the voting rights of a public company (depending on certain specific criteria). If exceeded, a public offer for acquisition of the remaining share capital and convertible securities of the public company must be launched. The minimum price to be offered in an OPA should be the highest of the maximum price paid by the purchaser during the last six months and the average weighted price during the last six months in regulated markets. In the case of the one-third limit, the bidder will not be compelled to launch a public offer for acquisition provided it proves that it has not acquired a controlling influence over the public company and does not have a group relationship with the public company. Derogations to the OPA regime are now limited to situations of merger and execution by the public company of a financial recuperation plan and acquisition of securities through a public offer that is launched without any quantitative restrictions. The possibility of waiver of OPA obligations by the CMVM was abolished.

218. Decree-Law 486/99 of November 13, 1999 (Port.).
219. *Id.* art. 5.

C. Tax Law

There have been a number of changes introduced into the Portuguese Tax Law during 1999. The most relevant are the following:

- On January 1, 1999, a General Tax Law entered into force that combines, clarifies, and simplifies the main principles of the Portuguese tax system, taxpayer guarantees, and tax authority powers.[220]
- The state budget for 1999 introduced a general anti-avoidance rule for legal acts and contracts. The rule states legal acts and contracts are not enforceable when those legal acts and contracts have been carried out with the unique or major aim of minimizing or eliminating taxes due.
- As of 1999, a five-year carry forward is permitted for unused tax credits to provide unilateral relief from international double taxation.
- Contractual tax incentives consisting of a five percent to twenty percent investment tax credit on IRC (Corporate Income Tax), tax reductions, or exemptions in Property Transfer Tax, Local Tax, and Stamp Duty may be given to investment projects in Portugal of PTE 1 billion or more, where the project is considered to be of strategic national economic interest. These incentives may be given for a maximum period of ten years. Investment projects in Madeira Region of PTE 350 million or more, with a strategic interest to the regional economy, may apply for similar reductions or exemptions (e.g., a ten percent to thirty percent investment tax credit on IRC).
- The capital gains of a foreign corporate shareholder are exempt from IRC in Portugal, unless Portuguese residents hold more than twenty-five percent of such corporate shareholder capital, either directly or indirectly.
- Since January 1, 1999, a tax audit may be requested by the taxpayer or by interested third parties. In turn, the resulting report binds the Tax Authorities. In addition, the Tax Authorities may charge a reasonable audit fee.
- Most deductible allowances (e.g., health, education) were converted to limited credits in the IRS (Personal Income Tax).
- The tax system of mainland Portugal was applied to the Azores with the following major modifications: (i) a fifteen percent reduction on the IRS national tax rates in force for each year (for the year 2000 the reduction will be twenty percent); (ii) a thirty percent reduction on the IRC national tax rates in force for each year; and (iii) a provision for tax incentives on investment contracts with the Azores Regional Government.

D. Public Law

New rules governing public construction contracts were introduced on March 2, 1999.[221] This new regime is now applicable to concessionaires of public interest and to public interest companies enjoying special or exclusive rights. The new law provides the possibility for a bidder to present a proposal with a fixed price and, therefore, waive bid-escalation. The new rules also alter the law relating to contract warrants and declare a prohibition on subcontracting works exceeding seventy-five percent of the total value of the construction. New rules relating to cost accounting in public constructions have also been incorporated.

220. Decree-Law No. 398/98 of December 17, 1998 (Port.).
221. Decree-Law No. 59/99 of March 2, 1999 (Port.).

Decree-Law No. 558/99 of December 17, 1999 introduced the legal framework for the state business sector and for state-owned companies, while establishing private law as the primarily applicable law to "business activity," whether of private or public nature.[222] This Decree-Law redefines the concept of a state-owned company and establishes the principle of transparency in the financial relationships between the state, public entities, and state-owned companies.

XI. Spain

A. Corporate and Commercial Law

1. *Venture Capital*

On January 5, 1999, the Act for the Regulation of Venture Capital Entities was enacted, establishing the legal framework applicable to those entities.[223] Venture capital is defined as a financial activity consisting of providing financial resources for a medium- or long-term period of time (but in any event with no aim of permanency) to companies having difficulties accessing other sources of finance. The new law unifies in a single legal text the provisions that had to now been dispersed in several legal provisions. It has clarified the definition of venture capital. It also allows venture capital entities to grant participative loans to any third parties and removes limitations that prevented such companies from investing in financial services or publicly quoted companies. The Act also affects part of the tax legislation. For instance, establishing in the Corporate Tax Act a partial tax exemption for income obtained by venture capital entities from the transfer of their participation in companies as long as participation has been maintained for a minimum period of time. A tax deduction is also available for dividends on partial income obtained from the company in which the venture capital entity invested.

2. *e-Commerce*

On September 17, 1999, the Electronic Signature Royal Decree Act was enacted, validating and giving legal force to signatures carried out by electronic means.[224] The Act provides that an electronic signature, when issued following special security requirements, will have the same force of law—even as evidence in court—as any nonelectronic signature. Most of the articles of the Act regulate the requirements and activities of the certifying entities, which are responsible for issuing digital certificates used for the purpose of identifying the signatory. In this Act, Spain followed very carefully the text of the EU Commission's Electronic Signature Directive proposal that will probably be enacted in 2000 with the aim of consolidating secure transactions in European e-commerce.

3. *Telephone and Electronic Sales*

On December 17, 1999, Royal Decree 1906/1999 was enacted, providing the market with certain rules applicable to distance selling but specifically addressing commercial transactions by telephone or other electronic means. Part of the provisions included in the Decree will be incorporated into the e-Commerce Act to be enacted later this year. The

222. Decree-Law No. 558/99 of December 17, 199, art. 7 (Port.).
223. Art. 366 of the Venture Capital Entities Act (B.O.E., 1999, 5).
224. Art. 33.593 of the Electronic Signature Royal Decree Act (B.O.E., 1999, 224).

Decree provides for a duty on the party that drafted the general conditions of sale to inform the other party of the clauses of these conditions before entering into the agreement, as well as the obligation to provide documentary evidence about the agreement once entered into. The other party has the right to terminate the agreement and return the goods, without penalty, within a period of time after having received the goods or, in the case of services, after having executed the agreement.

4. *Data Protection*

A new Data Protection Act was enacted on December 13, 1999, implementing the EU Data Protection Directive.[225] The new Act makes important amendments to the 1992 Data Protection Act.[226] In particular, the previous Act applied only to automatic treatment of personal data; the new law applies to any treatment of personal data, whether automatic or not. The new law also reinforces the requirement to have the consent of the individual concerned, and specifies the public sources from which data can be retrieved without consent (including the "promotional census," a census containing personal data created by public bodies that may be used for promotional purposes). Noncompliance with the law or any other related regulation can result in a fine of up to ESP 100 million (approximately $600,000) per infringement.

Royal Decree 994/1999, regarding the security of automatically processed files containing personal data was enacted on June 11, 1999.[227] This Decree establishes the level of security measures (basic, medium, or high) that every company possessing automatic files must implement. The level of security required depends upon the type of personal data stored.

B. Company Law

Law 55/99 of December 29, 1999 on Tax, Administrative and Social Measures[228] introduced important modifications with respect to the benefits systems for directors and managers when connected to the value of the company's shares in both listed and nonlisted companies. For listed firms, additional information requirements are imposed. The new rules apply to quoted companies that have had a benefits system in force before January 1, 2000 for directors and managers consisting (total or partially) in the delivery of stocks or stock options, or a system referenced to the value of a company's shares. Where such companies decide to cancel or implement their benefits system, they must register an addendum to the Prospectus in force (or register a new Prospectus) that contains individualized information on the stocks, options, or amounts accorded to its directors and managers. If a benefits system for directors or managers created before January 1, 2000 is not expressly established in the articles of association of the company, approval by the general shareholders of the company will be required prior to its implementation.

With respect to the situation after January 1, 2000, where a limited company acquires its own shares with the purpose of giving them directly to its personnel or directors, or as a consequence of the exercise by them of their option rights, there is an additional obligation of stating this purpose in the agreement that adopts the general meeting reso-

225. Art. 43.088 of the Data Protection Act (B.O.E., 1999, 298).
226. Art. 37.037 of the Data Protection Act (B.O.E., 1999, 262).
227. Art. 24.241 of the Royal Decree Security Measures Data Protection Act (B.O.E., 1999, 151).
228. Art. 46.095 of the Tax, Administrative and Social Measures Act (B.O.E., 1999, 312).

lution for the acquisition of treasury stock. In addition to the existing obligation of fixing the benefits of the directors in the articles of association, hereinafter, when the benefit consists (total or partially) in the delivery of stocks or stock options, or is referenced to their value, the benefits shall be expressly established in the articles of association. Implementation of the benefit system will require a resolution at the shareholders' general meeting that shall specify the number of shares conferred, the price of the exercise of the stock options, the value of the shares/stock used as a reference, and the term or duration of the benefit system.

For the application of benefits systems to managers based on the delivery of shares or stock options, and in general any remuneration system based on the value of the company's shares, the general shareholders' approval will be required prior to implementation. Furthermore, both managers and directors must notify the Spanish Stock Exchanges and the CNMV (National Commission of the Stock Markets) of shares and stock options they have received, or of any implantation or modification of the benefits system. No implementing rules regarding the fulfillment of these information obligations have yet been developed.

C. Capital Markets

1. *Acquisitions and Takeovers*

Royal Decree 1197/1991 has been recently modified by Royal Decree 1676/1999 of October 29, 1999. Pursuant to the new rules, should a company (the "Bidder") acquire a company that directly or indirectly holds shares in a third company listed on the Spanish Stock Exchange, and due to the acquisition the Bidder, directly or indirectly, reaches a participation of fifty percent or more in the listed third company, the Bidder will be required to launch subsequently a takeover bid of that company. This obligation applies even if the shares of the acquired company are not listed on a Spanish Stock Exchange and its corporate address is not located in Spain.

The Decree requires that the Bidder launch its takeover of the listed third company within six months following the date of the original acquisition seeking to achieve control over a specified percentage of the capital of the third company. Consideration may be offered in any of the ways established by article 10 of Royal Decree 1197/1991. These include cash, existing securities admitted for trading on any of the Spanish Stock Exchanges, and/or new securities that must be admitted for trading on any of the Spanish Stock Exchanges within a term of three months.

2. *Stock Exchange Markets*

Order of December 22, 1999 creates a new market (the "*Nuevo Mercado*") on the Spanish Stock Exchange for high growth and technologically-oriented companies. In this respect, the New Market introduces more flexible standards for both listing and negotiating the stock of these companies.

D. Tax Law

There have been important new developments introduced in the tax area by the General State Budget for the year 2000, Act 54/1999 of December 29, 1999,[229] and by the Tax,

229. Art. 46.027 of the General State Budget for the Year 2000 (B.O.E., 1999, 312).

Administrative and Social Measures Act 55/1999, of the same date. In both the corporate tax and personal income tax areas, the applicable withholding tax rates applicable to returns on capital (dividends, interests, etc.) have been set at eighteen percent.

1. *Corporate Tax*

- Deductions for research and development activities have been increased. The number of acceptable deductions regarding technological innovation has been expanded.
- The Spanish legislator has developed a new legal regime applicable to so-called unit-linked special life insurance products. Unit-linked products are those where the corporate taxpayer is the beneficiary, or is entitled to the divestiture right and at the same time bears the risk of the investment. The difference between the liquidation value of the assets subject to the policy at the end and at the beginning of each tax period must be integrated in the tax assessment base of the company holding the policy.
- A new exception from the obligation to carry out withholdings has been introduced, applicable to income obtained by companies from public debt issued by the public administrations of OECD countries and financial assets traded in organized markets in those countries.

2. *Private Income Tax*

- From October 1, 1999, irregular earned income, that is, income that has a period of generation greater than two years and is not obtained in a periodic or regular manner, as well as those legally defined as "income clearly obtained in an irregular manner," will no longer enjoy a total tax reduction of thirty percent. Henceforth, the application of the thirty percent reduction is limited to the amount that results from multiplying the average annual salary of those filing an income tax return, fixed for 1999 at PTS 2,500,000, by the number of years of generation of the income, taking five years for the income obtained in a clearly irregular manner.
- As a general principle, individuals who earned during 1999 an income below PTS 3,500,000 will be exempted from the obligation to present an income tax return.
- Unit-linked life insurance products are treated similarly to regular life insurance products provided that they meet requirements regarding investments in certain assets.

XII. Sweden

A. Tax Law

A new Income Tax Act was passed during 1999 and entered into force on January 1, 2000.[230] The new Act replaces thirty-five previous acts of legislation, and the purpose of the new Act has been to modernize the language used in Swedish tax legislation and make its provisions clearer. Thus, the new Act contains few material changes. The new Act will be applied as from assessment year 2002.

B. Company Law

1. *Company Purchases of Its Own Shares*

The Swedish Companies Act formerly prohibited companies from acquiring their own shares, except in a few, very particular instances. A debate has been going on in Sweden

230. Income Tax Act, No. 1999: 1229 (1999) (Swed.).

over the past few years as to whether to allow the repurchase of shares. In November 1999, the Swedish government put forward a proposal to Parliament that would make it possible for Swedish companies whose shares are listed or quoted on a stock exchange, authorized marketplace, or other regulated marketplace, to repurchase their own shares. This proposal has now been passed and the provisions entered into force on March 10, 2000.[231] The following is a short summary of the new legislation.

The legislation is based on the provisions of Directive 77/91/EEC. The provisions reflect the minimum requirements of the Directive, for example, limitation of the holding of such shares to a maximum of ten percent of the shares issued by the company, that the restrictions that apply to the distribution of dividends shall apply also to the acquisition of such shares, and that a decision to acquire such shares, or dispose of them, must be taken or authorized by a shareholders' meeting. The legislation, however, includes further limitations. In addition to the limitation in respect of the type of company covered, the proposal sets out that the acquisition by a company of its own shares and the sale of such shares may only be made on a stock exchange, authorized marketplace, or other regulated marketplace, or via an offer to all the shareholders of the company or all the holders of a certain class/classes of shares. In the case of a sale, rules equivalent to those that apply to new issues of shares must be observed. Moreover, a decision at the shareholders' meeting to acquire or dispose of the company's own shares shall be valid only if shareholders representing at least two-thirds of both the votes cast and the shares represented at the meeting are in favor of the decision.

2. *Accounting in Euros*

As of March 1, 2000, Swedish companies may keep their accounts in either Swedish Crowns or Euros. If a company chooses to prepare its account in Euros, its capital stock must also be determined in Euros. Tax returns, however, must still be prepared in Swedish Crowns.

3. *Commercial Arbitration*

A new Arbitration Act entered into force on April 1, 1999.[232] The new Act applies to arbitration proceedings carried out in Sweden, even if the dispute in question has international dimensions. The Act complies with the former legislation in the area and the principle of self-determination of the parties. On the other hand, the new Act is adjusted to modern conditions and circumstances. Thus, its provisions are intended to enable swift and secure proceedings. Furthermore, the prohibition of arbitration in cases that involve consumers is tightened, and the defendant's right to file a counterclaim is incorporated in the Act.

C. Employment Law

Three new acts of legislation relating to employment discrimination entered into force on May 1, 1999.[233] The new legislation outlaws discrimination on the grounds of race, disability, and sexual orientation. In particular, the legislation focuses on the following sit-

231. Income Tax Act, No. 2000: 66 (2000) (Swed.).
232. Arbitration Act, No. 1999: 116 (1999) (Swed.).
233. Acts No. 1999: 130, 132 and 133.

uations: recruitment, promotions, salaries, dismissal, termination, and other decisions made by the employer.

XIII. United Kingdom

A. Corporate Governance

An increasing awareness of the consequences of separation of ownership and control, in particular the perception that managements are out of control, has sparked a very lively debate about corporate governance in the United Kingdom[234] and given rise to a number of reviews addressing aspects of company law by the Department of Trade and Industry[235] and the Law Commission.[236] The U.K. government has ruled out legislation based on any of these initiatives during the course of this Parliament and, so far, the proposals have not led to an expectation of radical change.[237] For example, it is extremely unlikely that the core question of the purposes that a company serves will be resolved in a different way. The issue was outside the ambit of the Law Commission Report on Director's Duties[238] and the DTI review seems unlikely to stray far from the principle that the company's paramount duty is to serve its shareholders in an efficient way. Similarly, mechanisms for control seem set to rely solidly on shareholders with the possibility of better court access[239] and greater disclosure.[240]

What is, therefore, of more immediate interest is an initiative that has been implemented into the corporate governance structure. This is the "combined Code," which is the result of the work of the Cadbury,[241] Greenbury, and Hampel Committees that considered various aspects of Corporate Governance. One feature of interest is that the committees were initiatives of the Financial Reporting Council, the London Stock Exchange, and the accountancy profession in the case of Cadbury and Hampel and the Confederation of British Industries in the case of Greenbury. They were in no sense government initiatives[242] and the method of implementation adopted was to make a statement of compliance with a Code of Practice an annual requirement for all listed companies. In turn, in the event of non-

234. *See* S. Seikh and W. Rees, Corporate Governance and Corporate Control (1995). *See also* N. Maw, Corporate Governance (1994); J. Parkinson, Corporate Power and Responsibility (1993); Corporate Personality in the 20th Century (C. Rickett et al. eds., 1998); Regulating Enterprise: Law and Business Organisations in the UK (D. Milman ed., 1999); The Corporate Dimension (B. Rider ed., 1998); and The Realm of Company Law (B. Rider ed., 1998)

235. *Strategic Framework Document*, Modern Company Law for a Competitive Economy (1999).

236. *See* English Law Commission, *Law Commission Report No. 261, Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties September 1999*, http://www.scotland.gov.uk/news/releas98_2/pr1792.htm; English Law Commission, *Law Commission Report No. 246, Shareholder Remedies*, http://www.scotland.gov.uk/news/releas98_3/pr2198.htm.

237. *See* Milman, *supra* note 235. *See also The Comprehensive Review of Company Law*, Company Lawyer 82 (1998).

238. *The Comprehensive Review of Company Law*, *supra* note 237, at para 1.32.

239. Law Commission Report No. 246, *supra* note 236.

240. Law Commission Report No. 261, *supra* note 236.

241. *Report of the Committee on the Financial Aspects of Corporate Governance*, London, Gee 1992 (Cadbury Committee); *Director's Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury*, London, Gee (1995), *Committee on Corporate Governance: Final Report*, London, Gee 1998; (Hampel Report).

242. *See* V. Finch, *Corporate Governance and Cadbury: Self-Regulation and Alternatives*, J. Bus. L. 51 (1994); J. Dine and F. Brennan, *The Governance of Governance*, Company Lawyer 3 (1994).

compliance, reasons must be given. The Hampel Committee reviewed the work of both its predecessors and commenced with an attempt to lessen the drive for accountability by stating concentration on this aspect had obscured a board's principal responsibility, which was to enhance the prosperity of the business over time.[243] Further, it saw the need for *principles* of corporate governance as well as the more detailed rules contained in the Code of Practice. Whether the principles will be effective is doubtful as they are framed in very broad terms, for example, "Every listed company should be headed by an effective board, which should lead and control the company."

However, the combined Code, which has now been incorporated in the Listing Rules, requires the appointment of *independent* nonexecutive directors, making up at least one-third of the board; separation of the role of chief executive officer and chairman; establishment of an audit committee of at least three nonexecutive directors; resubmission of directors for election every three years; establishment of a remuneration committee made up of independent nonexecutive directors; and details of director's remuneration to be disclosed. On this last point it is interesting to note that such evidence as is available tends to indicate that disclosure of information on director's pay tends to *increase* the pay rather than decrease it as companies see the issue as one of competitive prestige.[244] An interesting departure is that the Code also requires "sound systems of internal control."[245] The board must consider the nature and extent of risks facing the company, the likelihood of the risks materializing, the company's ability to reduce the impact of the risks if they do materialize, and costs relative to benefits. It is also the board's task to review the effectiveness of internal control.

B. Competition

The Competition Act of 1998, which came into force on March 1, 2000, has fundamentally restructured U.K. competition law by introducing prohibitions against anti-competitive commercial agreements (Chapter I) and abuses of a dominant position (Chapter II) modeled upon articles 81 and 82 EC. The language of the U.K. statutory provisions is remarkably similar to the European rules. Moreover, section 60 of the U.K. Act requires that possible questions arising under the Act must be dealt with in a manner that is consistent with the treatment of corresponding questions arising in Community law, subject to the need to have regard to relevant differences. The principles laid down in the Treaty and judgments of the European Court of Justice must be followed and those taking decisions under the Act must have regard to the relevant decisions and statements of the European Commission. U.K. judges and competition authorities will have to interpret the new Act's provisions, where relevant, in accordance with European Community jurisprudence, past and present.

The new Act provides penalties for infringement including fines of up to ten percent of turnover and strong investigatory powers, including "dawn raids" similar to those of the Competition Division of the European Commission. The Director General of Fair Trading (DGFT), backed up by the Office of Fair Trading (OFT), will be responsible for enforcing the legislation. Utility regulators will be able to exercise the new powers concurrently within their special areas. A new Competition Commission, replacing the old Monopolies and

243. *See* Hampel, *supra* note 241, at para. 1.1.

244. *See* B. Cheffins, Company Law (1997).

245. *See* Code principle D2.

Mergers Commission, will hear appeals against decisions under the prohibitions as well as retaining the continued functions of the MMC.

Chapter I of the new Act replaces the former "registration" system of regulation of anti-competitive commercial agreements based upon the Restrictive Trade Practices Act of 1976 with a system that prohibits in section 2(1) "all agreements . . . or concerted practices which have as their object or effect the prevention, restriction or distortion of competition." The examples of prohibited agreements given in section 2 include: (a) price-fixing agreements; (b) agreements to limit markets, production, technical developments, or investment; (c) market sharing; (d) discriminatory pricing, etc.; and (e) tying-in contracts. Agreements or concerted practices such as cartels will be prohibited under section 2 and the parties to them will be subject to fines.

Vertical agreements and some horizontal agreements such as R&D agreements can be exempted from the prohibition if they meet the criteria of section 9 and are found on balance to be pro-competitive. There are three possible types of exemption: notification to the OFT for individual exemption, qualification under a U.K. block exemption, or qualification under an EU block exemption. In the latter case, the agreement will be regarded as parallel-exempted. Both the Restrictive Practices Act of 1976 and the Resale Prices Act of 1976 have been repealed.

Chapter II of the new Act introduces an equally fundamental change to the regulation of monopolies and near monopolies. The former investigative system under the Competition Act, insofar as it applied to monopolistic abuses, has been replaced by a prohibition of abuses of dominant positions based on article 82 EC. Mergers, insofar as they have a national rather than a European dimension, will continue to be regulated under the Fair Trading Act of 1973.

Under chapter II, victims can seek both injunctive relief and damages in U.K. courts. Moreover, the DGFT has the power to impose financial penalties for abusive conduct upon dominant firms of up to ten percent of turnover. The chapter II prohibition reproduces the language of article 82 EC, almost word for word. In any event, its express prohibition of "exploitive" abuses such as unfair pricing, limiting markets, discriminatory pricing, and tie-ins will be widened to include "anti-competitive" abuses such as refusals to supply and predatory pricing, which have been read into article 82 EC by the ECJ. The main difference between chapter II and article 82 EC is that whereas the latter requires a substantial effect upon interstate trade, the U.K. Act requires only an effect upon U.K. trade. It applies to all local monopolies such as bus lines and bus stations.