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European Law

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I. EU Constitutional Law

A. THE EU CONSTITUTIONAL CONVENTION—A FURTHER STEP TOWARDS A UNITED STATES OF EUROPE?

On December 15, 2001, the European Council adopted the Laeken Declaration, which established a “Convention on the Future of Europe.” This Convention brought together European and national parliamentarians with representatives of national governments, including the European Union (EU) candidate countries, and of the European Commission. The task of the Convention was to debate a number of issues concerning the constitutional framework of a larger Union and its fundamental political system with a view to efficiency and transparency. Although the Convention was not an instrument foreseen by the EU Treaty, there is little doubt that it symbolised an important innovation in the processes used to develop and change the Union. The Convention, which required ratification by the national parliaments, was a welcome reform of the EU that is no longer left solely up to the complex negotiations of Intergovernmental Conferences. The fact that representatives of the people and the public had the opportunity to take part in the reform of the Union can be regarded as a positive development. A draft of a coherent constitutional treaty was presented by the Convention Chairman at the plenary session on October 28, 2002.¹ The Convention, if successful at the European Council of Rome in December 2003, will have a positive influence on the acceptance of the EU within the Member States’ population.

1. *Central Issues*

During the first few months of its work, the Convention avoided confrontations about terminology such as “constitution” and “federalism.” Currently, the Convention relies on

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1. Cf. CONV Doc. 369/02.

a broad base consensus about the term “constitutional treaty.”² However, the consensus reached regarding matters of terminology did not extend to the content of the treaty. A central bone of contention is the issue of whether it is more desirable to strengthen the intergovernmental elements or to increase the use of the so-called “Community method”³ in the institutional structure of the future EU. While the former option was favoured by the larger Member States, especially France, Spain, and Britain, the latter was the option preferred by the smaller States.⁴ This argument was conducted outside of the Convention and manifested itself in the opposing positions adopted by the Member State governments, for example, as “double-headed leadership” of the EU. The leadership would consist of a Commission President elected by the European Parliament and a President of the European Council elected for a period of several years.

2. *The Tasks and Results of the Working Groups*

In June 2002, six working groups began intensive discussions on the issues of subsidiarity, the Charter of Fundamental Rights and Freedoms, the legal personality of the Union, the role of national parliaments, the distribution of competencies, foreign and security policy, and police and judicial co-operation. Within the working group “Distribution of Competencies,” a consensus was achieved for a dynamic system of competencies based on the principle of subsidiarity, but which maintained the present distribution. A shift in the balance of power in favour of the EU was not expected.

A particularly high level of agreement was reached in regard to the integration of the Charter of Fundamental Rights into the Treaties and the conferring of legal personality on the EU. A single legal personality would facilitate a fusion of the existing treaties and thus a more coherent constitutional structure for the EU.

The “Subsidiarity” working group was concerned with how to institutionally guarantee the principle of subsidiarity. It was suggested that a special subsidiarity committee be set up and linked to the Parliament as part of a new and stronger COSAC⁵ in which the members of the national parliaments would allow EU legislation against the standard laid down by the principle of subsidiarity. However, doubts were expressed about the ability of such organs to make real contributions that have the potential to unnecessarily complicate the decision-making procedure of the Community. It may be more appropriate to introduce a mechanism whereby aggrieved national parliaments could bring an action before the European Court of Justice (ECJ) against the Union for alleged breaches of the principle of subsidiarity.

The discussions of the working group entitled “Foreign and Defence Policy” did not produce new suggestions concerning the legal structure of the European Security and

2. Cf. Foreign Secretary Jack Straw, Speech at the Edinburgh Chamber of Commerce (Aug. 27, 2002), available at http://trade.uk.emb.gov.au/content/news/speeches/straw_edinburg_27082002.htm.

3. In the view of the Commission, this should include the sole right of initiative resting with the Commission as well as the extension of the co-decision procedure, decision-making by qualified majority, and the jurisdiction of the Court of Justice to all three pillars of the EU. See European Union, *Explanatory note on the “Community Method”* (May 22, 2002), available at http://europa.eu.int/futurum/documents/other/oth220502_2_en.pdf.

4. Cf. Daniela Spinant, *Seven Small EU Countries Opposed to Council Reform* (Jan. 21, 2002), available at <http://www.euobserver.com/index.phtml?aid=6747>; Honor Mahoney, *Austria Criticises EU Presidency Plan* (June 10, 2002), available at <http://www.euobserver.com/index.phtml?aid=6563>.

5. COSAC is the Conference of Community and European Affairs Committees of Parliaments of the EU. See *Protocol on the Role of the National Parliaments in the European Union (Treaty of Amsterdam)*, available at <http://www.cosac.org/eng/basic/index.html> (last visited Apr. 4, 2003).

Defence Policy (ESDP). It was suggested that the status of the High Representative for the Common Foreign and Security Policy (CFSP) (as a future European Foreign Minister) be enhanced by affording a right of initiative in the field of crisis management. Furthermore, the question of whether or not to integrate the collective defence clause of article V of the Brussels WEU-Treaty into the European Union itself was difficult because of the serious problems that the clause posed for the “neutral” Member States of the EU. The integration of the collective defence clause could be done through the means of a protocol annexed to the EU Treaty.⁶

B. HUMAN RIGHTS DEVELOPMENTS—CONSISTENCY OF DECISIONS IN STRASBOURG AND LUXEMBOURG?

Today, the protection of fundamental rights in Europe is based on two pillars, namely, the European Convention on Human Rights (ECHR) and the human rights case law of the ECJ. The latter is complemented by the recently proclaimed EU Charter of Fundamental Rights and Freedoms. To be effective together, the relationship between the pillars must be characterised by coherence and legal certainty. In reality, the still-evolving architecture of human rights in Europe continues to be far from transparent. The lack of clarity in the status within EU law of the ECHR and its Strasbourg case law resulted in the two courts adopting diverging interpretations over the last few years. The proclamation of the EU Charter of Fundamental Rights and its impact on the status of the ECHR in EU law further complicated the legal situation.

1. Increasing Relevance of the EU Charter of Fundamental Rights and Freedoms

The EU Charter did not possess the character of legislation. Nevertheless, since being solemnly proclaimed on December 7, 2000, the Charter has been described as essential to the European constitutional process. The incorporation of the Charter within the European Treaties is likely to form part of the agenda of the next IGC, which would help to ensure legal certainty, achieve consistency in human rights standards, and make fundamental rights more visible to European citizens. The Charter may already be regarded as an important source of inspiration for the European Courts when ruling on human rights matters. In a number of cases last year, Advocate Generals of the ECJ⁷ referred to the new Charter of Fundamental Rights in order to establish a firm basis for the protection of human rights. The first occasion of such reference was in the *BECTU* case,⁸ in which Advocate General Tizzano cited article 31(2) of the Charter in order to support his argument for a general entitlement to paid annual leave.⁹ In the case of *British American Tobacco (Investments)*

6. Cf. CONV Doc. 246/02 and CONV Doc. 252/02 (Sept. 10, 2002).

7. See, e.g., opinions of Advocate General Alber in Case C-340/99, *TNT Traco SpA v. Poste Italiane SpA*, 2001 E.C.R. I-040109 (May 17, 2001), available at <http://europa.eu.int>; Advocate General Tizzano in Case C-173/99 *Broad., Entm't, Cinematographic and Theatre Union (BECTU) v. Sec'y of State for Trade & Indus.* (Feb. 8, 2001), available at <http://curia.eu.int/jurisp>; Advocate General Stix-Hackl in Joint Cases C-34/01 to C-38/01, *Enirisorse SpA v. Ministero della Finanze* (Nov. 7, 2002), available at <http://euria.eu.int/jurisp>.

8. Case C-173/99, *Broad., Entm't., Cinematographic and Theatre Union (BECTU)*, (Feb. 8, 2001), available at <http://euria.eu.int/jurisp>.

9. In the Opinion delivered on February 8, 2001, *Tizzano* found that:

[I]n proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where

Ltd.,¹⁰ Advocate General Geelhoed stated that article 47 of the Charter, whilst itself not legally binding, proclaimed generally recognised principles concerning the right to an effective remedy before a tribunal.¹¹ Even the Court of First Instance (2nd Chamber) made reference to the EU Charter. In the case of *Max.Mobil*,¹² concerning alleged infringements of articles 85 and 86 of the EC Treaty, the CFI held that the failure of the Commission to undertake judicial review constituted a breach of article 47 of the Charter of Fundamental Rights.

Lastly, three judges of the European Court of Human Rights in Strasbourg, which interprets and applies the ECHR, referred to the non-discrimination clause in article 21 of the EU Charter in their dissenting speeches in *Fretté v. France*.¹³ The applicant in this case complained that the dismissal of his request to adopt a child amounted to an arbitrary interference with his private family life because it was based exclusively on prejudices relating to his sexual orientation.

2. Control of Community Law by the European Court of Human Rights

Aside from the increasing relevance of the EU Charter for Union Human Rights Law as a whole, problems relating to the liability of the EU Member States under the ECHR became more acute. As State parties to the ECHR, EU Member States are under a duty to guarantee effective protection of the rights contained in the ECHR to every individual within their jurisdiction. This includes protection of the effects of EU law within the domestic legal systems. In proceedings before the ECHR, in which a breach of this duty was alleged, the Member State concerned appeared as the sole defendant, despite the fact that the act or omission challenged was performed pursuant to an obligation imposed on the State by EU law. The famous *Matthews* case decided by the ECHR in 1999¹⁴ did not resolve the issue of identifying the defendant in cases relating to acts of the Community enforced directly and so requiring *no implementation on the part of the Member States*. To hold a single Member State responsible would be an ineffective solution as the execution of such a Strasbourg judgment could not be carried out by the State alone. Instead, the necessary amendments to Community law would need to be performed by all Member States on a joint basis. Pending such amendments, EU Member States could find themselves required to fulfil incompatible international obligations, derived from both the Convention on the one hand and from EU law on the other.

In a pending Strasbourg Court case, the shipping company Senator Lines lodged a complaint against all fifteen Member States of the EU on the grounds that its rights to an effective remedy and a fair trial under articles 6 and 13 of the Convention were violated.

its provisions so allow, as a substantive point of reference for all those involved . . . in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.

Id. at n.28.

10. The Queen v. Sec'y of State for Health (Sept. 10, 2002), available at <http://euria.eu.int/jurisp>.

11. *Id.* at n.47.

12. Case T-54/99, *Max.Mobil Telecomm. Serv. GmbH v. Comm'n of European Cmty.* (Jan. 30, 2002), available at <http://euria.eu.int/jurisp>.

13. *Frette v. France*, App. No. 36515/97, Eur. Ct. H.R. (1997) (Feb. 26, 2002), available at <http://hudoc.echr.coe.in/hodoc>.

14. *Matthews v. United Kingdom*, App. No. 00024833/94, Eur. Ct. H.R. (1999) (Feb. 18, 1999), available at <http://hudoc.echr.coe.int/hudoc>.

In its role as cartel authority, the European Commission imposed a fine on the shipping company which sought a preliminary injunction on the grounds that provisional enforcement of the fine would lead to bankruptcy. This application was rejected both by the European Court of First Instance and the ECJ. Against the background of the *Matthews* case, the Strasbourg Court is faced with making a decision based on the responsibility of all fifteen Member States regarding the Brussels Commission.

3. Accession of the EU to the ECHR

The issue of Member States' liability cannot be settled until the protection of fundamental rights in Europe is accompanied by mechanisms capable of ensuring legal certainty in the increasingly intensive relationship between the ECHR and EU law. The concern for maintaining legal coherence in this field was expressed in a recent declaration of the Council of Europe, which consists of representatives from all EU Member States.¹⁵ Within the EU Constitutional Convention the discussion centered mainly on the accession of the EU to the ECHR, a step, regarded by Convention Vice-President Amato, as a necessary *addition* and not merely an *alternative* to make the Charter legally binding. Strasbourg representatives made propositions on the technical side of a possible accession.¹⁶ The accession of the EU to the ECHR would solve the two main problems faced by the EU in the protection of fundamental rights and for which even a binding Charter provides no solution. First, the Courts would not divulge their interpretations. Second, the absence of a procedure of direct scrutiny by the Strasbourg Court on the compatibility of the acts of EU institutions with the ECHR would no longer be detrimental to the protection of rights, because accession would result in greater coherence.

C. DEVELOPMENTS IN EUROPEAN SECURITY AND DEFENCE POLICY (ESDP)— READY FOR TAKE-OFF?

1. Realisation of EU-Led Operations

"Following a Capabilities Improvement Conference in November 2001, the European Council at Laeken declared in December 2001 that through the continuing development of ESDP, the strengthening of its capabilities, the creation of the appropriate structures, the Union is now able to conduct some crisis-management operations."¹⁷ The EU Council Joint Action of March 11, 2002¹⁸ not only appointed the EU Special Representative in Bosnia and Herzegovina (Lord Ashdown), but also established the European Union Police Mission (EUPM) in Bosnia and Herzegovina, which is the successor to the UN Interna-

15. Declaration on the Protection of Human Rights in Europe Guaranteeing the long-term effectiveness of the European Court of Human Rights, Council of Europe Committee of Ministers, 109th sess. (Nov. 8, 2001), available at <http://cm.coe.int/stat/E/Public/2001/adoptedtexts/declarations/2001dec7.htm>.

16. Study of the Technical and Legal Issues of a Possible EC/EU Accession to the ECHR, Council of Europe Steering Committee for Human Rights, 53rd mtg. (Sept. 16, 2002), available at http://www.coe.int/T/E/Communication_and_Research/Press/events/6.-other_events/2002/2002-09_Symposium_01_Judges_-_Luxembourg/CDDH2002.010.asp.

17. EU Military Structures, *The European Union Military Structures and Capabilities*, available at <http://ue.eu.int/pesc/military/en/homeen.htm> (last visited Apr. 4, 2003).

18. Council Joint Action 2002/211/CFSP of 11 March 2002 on the Appointment of the EU Special Representative in Bosnia and Herzegovina, 2002 O.J. (L 70) 7 (Mar. 11, 2002), available at <http://ue.eu.int/eupm/PDF/jo170p7EN.pdf>.

tional Police Task Force. The EUPM commenced on January 1, 2003 and will last three years.

The proposition of the Spanish Presidency to take over the command of the NATO-led operation "*Allied Harmony*" (*Task Force Fox*) in Macedonia as of March 2003 was welcomed by the EU Member States as an opportunity to prove the capabilities of ESDP.

2. *Funding EU Crisis Management Operations*

During the Spanish Presidency of the EU, the main political obstacles to the funding of the EU Rapid Reaction Force were overcome, for the most part. Prior to a compromise reached at the European Council of Seville in June 2002, Member States were divided as to how the costs of EU crisis management operations would be apportioned. Germany, together with the UK and some of the Scandinavian countries were in favour of the "costs lie where they fall-principle" to retain maximum control over their national contributions. France, Italy, and the Benelux countries pushed for an expanded definition of "common costs," arguing that ESDP required maximum solidarity with regard to expenditures in order to be successful. The solution on how to fund EU crisis management operations that have military implications is a general framework agreement. The arrangements for funding civilian aspects of such operations are still subject to negotiation. The framework agreement allows Member States, harbouring concerns about escalating costs, to retain financial control of military capabilities such as troops and technical devices. The costs will be borne by the Member States on a voluntary basis, according to a catalogue of armed forces for operations of the EU Rapid Reaction Force. The notion of "common expenditure" was restricted to fixed and deployed headquarters and included transport, communication, logistics, and support. These aspects of the Rapid Reaction Force were commonly funded by the contributions of all Member States according to their respective GNP. More detailed arrangements are made on a case-by-case basis by means of a unanimous Council decision to launch the operation.

3. *Assuring NATO Assets for EU-Led Operations*

Until the EU Summit of Copenhagen in December 2002, Turkey blocked the conclusion of security arrangements on the guaranteed access of the EU to a range of Alliance assets for a number of years. Its abandonment of this policy meant that the NATO Council is able to adopt a series of decisions which aim to maintain a close and transparent relationship with the EU and which enable the support of EU-led operations in which the Alliance as a whole is not engaged on a military level. The availability of access to NATO assets to assist with the military planning of EU-led operations was assured by the permanent arrangements made between the EU and NATO under article 24 of the EU Treaty. This was done by implementing each of the elements of "Berlin Plus." The EU-NATO Declaration on Strategic Partnership in ESDP Crisis Management of December 16, 2002¹⁹ is considered to be a vital milestone in the history of NATO-EU relations, so the EU can equip itself for any Petersburg tasks.

4. *EU Responses to Terrorism*

At the Seville European Council meeting on June 22, 2002, the EU Heads of State made a declaration on the "Contribution of ESDP in the Fight Against Terrorism." This decla-

19. Cf. Press Release No. 142, NATO, EU-NATO Declaration on ESDP (Dec. 16, 2002), available at <http://www.nato.int/docu/pr/2002/p02-142e.htm>.

ration stated that the instruments of the Common Foreign and Security Policy can be employed in an effort to combat terrorism. However, it remains unclear how the EU crisis management capabilities will be affected. Most importantly, there was no attempt to define or to specify how the Petersberg Tasks and the Helsinki Headline Goal were affected by the incorporation of counter-terrorism capabilities.

D. STRENGTHENING THE ACCESS OF INDIVIDUALS TO EU DOCUMENTS: THE WAY TOWARDS A MORE TRANSPARENT UNION?

The ECJ made a considerable contribution in achieving a greater level of transparency within the Union by clarifying the extent of access enjoyed by individuals to sensitive documents of the EU organs.²⁰ In its decision of November 4, 1997, the Council refused the applicant by Ms. Hautala, a Member of the European Parliament, to access a report on the conventional arms exports. The Council asserted that the document contained sensitive information, disclosure of which would harm the European Union's relations with non-member countries. Under Decision 93/731/EC on public access to Council documents,²¹ the Council may refuse access to a document in order to protect the public interest in the field of international relations. The ECJ pointed out that the public must have the widest possible access to the documents held. The principle of proportionality obliges the Council to consider partial access to a document which is deemed to contain items of information whose disclosure would endanger one of the protected interests. The Court stated that the Council may not systematically limit the public's right of access to documents. Instead, the Council is obliged to analyse the questioned document and to provide access to any information according to Council Decision 93/731/EC.

II. English & Welsh Criminal Law

Like the month of March, the year 2002 could be summarized as the year Labour started like a lamb, lax on crime,²² but ended like a lion. Labour's initial image problem came from several incidents. Young criminals were released to alleviate overcrowded jails.²³ The Lord Chancellor issued an appeal to judges to stop sending so many criminals to jail.²⁴ The Crown Court reported that acquittals rose to 46 percent in jury trials.²⁵ The Home Secretary, David Blunkett, announced in July that cannabis was downgraded to a Class C drug, making personal possession a non-arrestable offense.²⁶ The three criminal bills that attained the royal assent and became acts in 2002 were:

20. Cf. Case C-353/99P, Council of the European Union v. Hautala (July 10, 2001), available at <http://cura.eu.int/jurisp>.

21. Council Decision 93/731/EC of 20 December 1993 on Public Access to Council Documents, 1993 O.J. (L 340) 43.

22. To further the image as a government lax on crime, the Home Office farcically reported that crime rose by 9 percent, that it rose by 2 percent, and that it fell by 7 percent. The press speculated whether the Home Office's contradicting reports were intentional or a major muddle. *Criminal Confusion*, TIMES ONLINE (Jan. 10, 2003), available at <http://www.timesonline.co.uk/article/0,,542-538227,,0.html>.

23. Richard Ford, *Young Criminal Let Out Early to Ease Jail Crowding*, THE TIMES (LONDON), May 24, 2002.

24. Richard Ford, *Stop Sending so Many People to Jail, Judges Told*, TIMES ONLINE (June 15, 2002), available at <http://www.timesonline.co.uk/article/0,,2-327431,00.html>.

25. Acquittals have risen to 12.1 percent in 2001 from all cases, and if one only looks at jury trials, acquittals are 46 percent. Frances Gibb, *Ministers Haunted by Rise in Acquittals*, THE TIMES (LONDON), Mar. 15, 2002.

26. Richard Ford & Philip Webster, *Cannabis Reforms Sow Police Confusion* (July 11, 2002), available at <http://www.mapinc.org/drugnews/v02.1294.a05.html>.

- Proceeds of Crime Act 2002, governing England, Scotland, Wales, and Northern Ireland, created an agency to determine when justice was served to confiscate money and crime proceeds from convicted drug traffickers.²⁷
- Football (Disorder) (Amendment) Act 2002 allowed the police to give a person written notice requiring him to appear before a magistrates' court, not to leave England and Wales, and under certain circumstances to surrender his passport, if the police have reasonable grounds for suspecting he contributed to violence or disorder in the United Kingdom or elsewhere.²⁸
- On February 1, 2002, the Misuse of Drugs Act, thirty-six Ecstasy-type drugs became controlled substances.²⁹

The Labour government became a lion in July when a criminal justice White Paper³⁰ was published, suggesting major criminal law amendments to "rebalance the system in favor of the victim."³¹ The most dramatic change was a call for exceptions to the 800-year-old double jeopardy rule, allowing defendants to be retried when there is compelling new evidence.³² The White Paper reforms were encapsulated in the current Criminal Justice Bill in the House of Commons, which includes the following changes to criminal law:

- "Street bail" could be collected by police for minor incidents rather than jail.
- Class C drugs, such as marijuana, could be arrestable.
- Complex Crown Court cases could be heard only by a judge rather than a jury.
- The numbers of cases going to Crown Court were decreased, thus eliminating the right to elect a jury trial.
- Jury service will be a civil duty for all without exemptions.
- A jury could be allowed to hear evidence of a defendant's previous misconduct when relevant.
- Hearsay rules would be relaxed to allow the judge to weigh the relevance.
- All sentencing guidelines would be reviewed by a council so all courts are consistent.
- A discretionary life sentence for sexual or violent criminal offenders.³³

27. Proceeds of Crime Act, 2002, ch. 29, available at <http://www.hmso.gov.uk/acts2002/20020029.htm> (last visited Apr. 6, 2003) (receiving Royal Assent on July 24, 2002).

28. Explanatory Notes to Football (Disorder) (Amendment) Act, 2002, ch. 12, available at <http://www.hmso.gov.uk/acts/en/2002en12.htm> (last visited Apr. 6, 2003) (receiving the Royal Assent May 1, 2002).

29. Leonard Jason-Lloyd, *New Laws Try to Stop Growth of Drug Culture* (Feb. 5, 2002), available at <http://www.cannabisnews.com/news/thread11929.shtml>.

30. A White Paper is a government initiated report commissioned to analyze and investigate events, systems or social problems. The "Justice for All" White Paper was published in July 2002 with the purpose to "send the clearest possible signal to those committing offences that the criminal justice system is united in ensuring their detection, conviction and punishment." Criminal Justice System, *'Justice for All' - CJS White Paper Published* (May 2002), available at http://cjsonline.org/publications/whitepaper_2002/cjs/white_paper_summary1.html [hereinafter *Justice for All*].

31. Jane Wardell, *Queen Outlines Agenda for Blair's Government*, THE SEATTLE TIMES, NOV. 14, 2002, at A11. Tony Blair announced his reforms during the Queen's speech for the opening of Parliament. The current Criminal Justice Bill was introduced in the House of Commons on November 21, 2002, but has not passed the House of Lords.

32. *Justice for All*, *supra* note 30, at 17. See also Richard Ford et al., *'Double Jeopardy' Rule is Dropped After 800 Years*, TIMES ONLINE, July 18, 2002.

33. The Criminal Justice Bill of 2002 is very far reaching. For a more complete explanation of the proposed criminal law changes, see The United Kingdom Parliament, *Criminal Justice Bill: Explanatory Notes* (Nov. 21, 2002), available at <http://www.publications.parliament.uk/pa/cm200203/cmbills/008/en/03008x.htm>.

The House of Lords must determine whether the Labour government's reputation for criminal justice is remembered as a lion or a lamb.

III. Spain

A. INFORMATION TECHNOLOGY ("*nuevas tecnologías*")

Law 34/2002 of July 11, regarding the services related to the "information society" and e-commerce, entered into force at the end of 2002. This law transposed EU Directive 200/31/CE and Directive 98/27/CE into Spanish law. The concept of "information society" used in this law is broad and includes not only the contracting of goods and services through the Internet, but also the provision of information, intermediation activities, transfer of data through telecommunications networks, and others. This law will apply when the service provider is established in Spain.

This new regulation aims to protect the interests of the consumers and, to this effect, guaranteed Internet contracts are foreseen (e.g., Internet site service providers must give their visitors access to the provider's identification data). Furthermore, this law favours contracting through the Internet by making contractual requirements more flexible. For instance, it admitted the validity of documents in electronic format as complying with the written requirement established by Spanish legislation for certain types of contracts. Finally, the law established a restraining order (*acción de cesación*) to stop acts or conduct that infringe the provisions established in the law, provided this implies a harm to the consumers' interests.

B. INTELLECTUAL PROPERTY

Law 10/2002 of April 29, 2002, regarding the legal protection of biotechnological findings, transposed European Directive 98/44/CE to Spanish legislation. This law modified certain provisions of the current Spanish Patent Law. It also provided for (1) determination of the biotechnological findings that can be patented; (2) regulation of the conditions for the deposit, storage and conservation of the biological matter in certain cases; (3) regulation of the protection of the patent taking into account the special characteristics of the biological matter; and (4) regulation of a new case of obligatory licence due to interdependence among the holders of biotechnological patent findings, and the holders of rights to plant extractions.

C. EMPLOYMENT LAW

Royal Decree-Law 5/2002 of May 24, 2002 contained new measures regarding unemployment benefits and increasing employment in Spain. The main modification was the elimination of process salaries, or those salaries the employees were entitled to as from their dismissal, until the resolution of the labour authorities ending the proceeding. Other substantial modifications were the timing and the requirement that the worker who requested unemployment benefits undertake certain activities. The employee was required to sign a document undertaking to actively search for a new job and to accept adequate positions and participate in specific information and formation activities. The legal framework of obligatory readmission of an employee, non-paid vacations, and the renewal of temporary contracts were also affected by this new regulation. This Royal Decree-Law aimed to

promote the geographical mobility of employees, but this issue shall be further developed by future legislation.

D. CONSUMERS AND RETAIL MARKET LAW

1. *Consumer Protection*

Law 39/2002 of October 28, 2002, modified several Spanish laws to include consumer protection measures required by certain EU Directives. Particularly, this Law modified (1) the Civil Procedure Law 1/2000 of January 7, 2002, in order to provide for restraining orders; (2) the General Publicity Law in order to permit comparative advertising and a collective restraining order in order to stop acts or conduct regarding illegal publicity; and (3) the Consumer Credit Law to include the calculation of the annual equivalent rate (TAE), and the collective restraining order for acts and conduct that are contrary to said Consumer Credit Law. In all cases, the associations and entities for the defence of the consumer are the ones entitled to file for a restraining order.

2. *Retail Market*

The provisions regarding contracts where the parties are not simultaneously present (distance contracts) were recently modified by Law 47/2002 of December 19, 2002. This Law introduced a new regime for distance contracts in order to transpose EU Directive 97/7/CE. Also included in this modification was a new regulation regarding the protection of consumer interests, certain guaranties, after-sales services, and payment to providers. However, these new provisions were very similar to previous legislation.

E. CAPITAL MARKETS

Recently enacted Law 44/2002 of November 22, 2002 (Finance Act) modified many aspects of the Spanish financial system and the applicable legislation. The main purpose of this reform was to (1) improve the efficiency and the competitiveness of the Spanish financial industry, (2) duly protect the users of financial services, and (3) to favour the financing of small and medium-sized companies given their importance in the Spanish market. This law transposed many EU Directives to Spanish law.

The main changes introduced by the Finance Act can be briefly summarized as follows:

- (a) Measures aimed at improving the efficiency and competitiveness of the Spanish securities market: (1) integration of the various existing securities compensation and settlement systems into one system, known as the Society of Systems; (2) creation of one or several Central Counterparties (*Entidades de Contrapartida Central*); (3) inclusion of provisions aimed at improving the solvency of Spanish markets (i.e., all transactions settled in a system integrated in the Society of Systems or backed by a central counterparty are protected from bankruptcy); and (4) new regulation regarding the exchange of information in the securities fields between regulators in different jurisdictions.
- (b) Creation and/or regulation of the following measures to increase the competitiveness of the Spanish financial industry: (1) creation of a new figure called territorial bonds (*cédulas territoriales*), a new type of debt security (similar to mortgage bonds) that may be issued by credit institutions, backed by loans granted by the issuer to Spanish or EU public entities; (2) creation of a new figure called mortgage transfer certificates (*Certificados de Transmisión de Hipoteca*), to facilitate securitisation of certain mortgage loans; (3) amendment of regulations applicable to guarantees under contractual netting agreements and venture capital entities, among others.

- (c) Provisions concerning electronic contracting and electronic money, in line with the Directives adopted on E-money.
- (d) Measures intended to protect users of financial services: (1) amendment of regulations on market abuse (by broadening the scope of inside information and setting specific conduct of business rules to prevent insider dealing) and introduction of other provisions to improve market transparency; (2) reinforcement of the Spanish regulator's scope of supervision to ensure compliance with provisions intended to protect investors' rights; (3) creation of new public entities for the protection of financial services clients (*Comisionados para la Defensa de los Clientes de Servicios Financieros*); and (4) obligation for all entities operating to implement a customer defender service to settle any claims posed by their clients.

F. TAX LAW

1. *General*

Apart from the usual modifications, some important changes regarding Personal Income Tax, Corporate Income Tax, Non-resident Income Tax, Non-profit Tax regime, and Local Taxes were approved.

2. *Personal Income Tax*

The tax scales in force for 2003 ranges from 15 percent to 45 percent (18 percent to 48 percent before). The 45 percent tax rate applies to a tax basis higher than 45.000€. The new general limit under which a person is not obliged to file a personal income tax return is 22.000€. Since January 1, 2003, capital gains derived from the transfer of assets that have been held for more than one year are taxed at a 15 percent flat rate.

The reduction applicable to irregular income has been increased from 30 percent to 40 percent. The average annual salary, which was needed for the purpose of computing the 40 percent limit applicable to irregular earned income, has been abolished except for stock options. In this latter case the average annual salary is fixed at 17.900€. This amount may be doubled if the stock option is considered to be a general stock option plan (all employees are entitled to receive stock options).

3. *Corporate Income Tax*

The most relevant change was the extinction of the tax transparency regime. This regime was substituted for the asset company regime, which was applicable to companies whose main assets are stock or valuables that are not used for business purposes. These companies are liable to pay a 40 percent tax rate on their current profits (only expenses related to real estate rentals are tax deductible) and a 15 percent tax rate on the capital gains derived from the sale of assets after a one-year term ownership. Dividends paid to individual stockholders are exempted.

The tax deduction on capital gains re-invested increases from 17 percent to 20 percent. A 10 percent rate tax deduction applies to the costs paid by a company on day-care centres for its employees' children. The deductible amount for salary payments to invalid employees has been increased up to 6.000€. Lastly, the withholding tax rate on payments to corporations has been reduced from 18 percent to 15 percent rate.

4. *Non-resident Income Tax*

The most relevant change in non-resident income tax affects the tax rate applicable to dividends, interests, and capital gains derived from the transfer of the participation in investment funds and similar entities. The rate was fixed at a flat 15 percent rate.

In Spain, the tax representatives of a permanent establishment or a legal body, such as partnerships, are now jointly and severally liable for the payment of the non-resident permanent establishment tax, or partnership tax that is due.

G. TELECOMMUNICATIONS

The most relevant pieces of legislation appearing in the telecommunications sector during 2002 were:

- (a) Royal Decree 163/2002 of February 8, 2002, regarding the regulation of administrative authorization to motorway companies for performing activities related to transport and communications infrastructures, establishing the conditions to obtain administrative telecommunications authorizations.
- (b) Order CTE/601/2002 of March 14, 2002, which introduced a new type of license for Mobile Virtual Operators (Type A2 Individual Licence). The Order created the figure of the Mobile Network Operators allowing them to operate in Spain using the access networks of network operators.
- (c) Order CTE/711/2002 of March 26, 2002, Ministerial Order for the liberalisation of information services, which established the conditions for the provision of telephone information services on subscribers' numbers and the elaboration of a unified directory. By means of this Order information services are effectively liberalized in Spain. Service providers have the right to access the subscribers' database off their main competitor, Telefónica.

H. ENERGY

Energy industry legislation recently experienced many modifications, especially in the electricity sector. The most relevant in this area are the following:

- (a) Royal Decree 1435/2002 of December 27, 2002, regulating the basic condition of the contract for the acquisition of energy and the access to the low-tension network.
- (b) Royal Decree 1436/2002 of December 27, 2002, has fixed the electricity rate for 2003 and established, among other things, that the rates applied for access to the electricity energy transport and distribution networks will increase by an average of 1.95 percent in 2003.

Within the natural gas sector, Royal Decree 1434/2002 of December 27, 2002, regulated the activities of transportation, distribution, commercialisation, supply, and authorization proceedings of natural gas installations. This law developed the new gas market and that resulted in an increase in the number of players in the market. It also established the right of the consumer to choose the supplier. This new Royal Decree completed the legal framework of the natural gas area by regulating (1) the necessary requirements to carry out certain activities (transportation, distribution, and commercialisation); (2) the supplying conditions; and (3) the proceedings for the administrative authorization of gas installations.

IV. Greece

A. INTRODUCTION

The past year has been a year of relatively minor legislative developments in Greece, as opposed to 2001, which was dominated by the revision of the supreme law of the Hellenic democracy, the Constitution. The 2002 developments were mainly in the fields of commercial and economic law.

B. COMMERCIAL AND ECONOMIC LAW

One of the most important developments in commercial law during 2002 was Act 3016/2002³⁴ on Corporate Governance, which regulates the administration and operation of corporations listed on the Stock Exchange. The Act aims to provide the framework for an internal and external audit of the company and to provide guarantees for the independence of the Board of Directors' members. Specifically, the Board of Directors must include at least two members that are not shareholders and have no other relationship making them dependant on the company.³⁵ However, article 10 strangely stipulates that the validity of the Board of Directors' decisions is not impaired by non-compliance to the Act's provisions. A necessary requirement to list a corporation on the Stock Exchange is the inclusion by the Board of Directors of an "Internal Regulation" that specifies the services of the company, the duties of the Board of Directors, the hiring and evaluation procedure of senior managers, as well as the way of monitoring the transactions of directors, senior managers, and all those who have internal information about the value of the company's stocks.³⁶ The existence of the "Internal Auditing Committee" is also a requirement to be listed on the Stock Exchange. Its members are hired by the Board of Directors, but remain independent, reporting to both the Board and to the Capital Market Committee. The Act has been severely criticized,³⁷ inter alia, because corporate audits remain essentially state controlled by the Ministry of Trade and Development and Regulators, which are both inadequate and malfunctioning.

Certain provisions of the Civil Code, which modify the seller's liability³⁸ in relation to material defects of the property sold, were replaced. The seller's liability is now clarified and extended by statute, and it expressly includes the defective installation of the good, if provided by the contract,³⁹ and increases limitation periods.⁴⁰ The buyer has a right to repudiate the contract, demand a proportionate price adjustment, or to demand the replacement or rectification of the sold property, which the seller must perform in due time and without substantial nuisance to the buyer.⁴¹ Clauses for the exclusion of liability for damage to goods relating to the life, health, honor, and freedom of the buyer are void.⁴²

An interesting and promising development, given the importance of the shipping sector to the Greek economy, was introduced with Act 2992/2002⁴³ concerning shipping investments through the Athens Stock Exchange.⁴⁴ The previous law set the framework for the creation of companies that invested in sea trading vessels⁴⁵ through the stock exchange, but failed to attract the interest of investors and ship owners. The current legislation brought about two important changes that will allow the creation of investment companies: (1) the

34. 2002 O. J. (A110).

35. *Id.* art. 3.

36. *Id.* art. 6.

37. See, e.g., L.N. Georgakopoulos, 84 *Bus. & Co. L. Rev.* 767; 84 *Bus. & Co. L. Rev.* 919 (2002).

38. 2002 O.J. (A192), Act 3043.

39. *Id.* art. 1 (citing Civil Code art. 536).

40. *Id.* (citing Civil Code art. 554); (period extended from two years to five years for real property and from six months to two years for movables).

41. *Id.* (citing Civil Code art. 540).

42. *Id.* art. 2 (citing Civil Code art. 332).

43. 2002 O.J. (A54).

44. *Id.* at Act 2843/2000; see also Act 1892/1990.

45. That is, merchant ships entered in Greek, EU, or EOA states.

simplification of the procedure, since the audit by Capital Market Committee was abolished, and (2) the abolishment of certain restraints on asset structure, such as the detailed description and quotation of the firm's investment policy.⁴⁶ Another important limitation was that the number of ships that a shipping company must own to establish an investment firm was changed from six to four. This gives owners of newer ships, who may have fewer ships, the opportunity to establish a shipping firm.⁴⁷

Act 3037/2002⁴⁸ on Games, sought to effectively deal with illegal gambling and to prohibit the resulting illegal revenues.⁴⁹ The Act prohibited the establishment and use for financial gain of electronic games in all public and private places, such as hotels and Internet cafes.⁵⁰ The Act also expressly prohibited any form of wagering on the outcome of games providing for both criminal and administrative sanctions.⁵¹ It was clarified that only the owners/managers of places that illegally use these games are sanctioned, not the users.

Presidential Decree 178/2002⁵² implemented Council Directive 98/50/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses. The Directive amended older provisions⁵³ in light of the need to clarify that the law applies to both private and public enterprises, to explain the concept of "employee," and to expressly exclude the application of the Directive's provisions to transfers effected during liquidation proceedings.⁵⁴ Employees must be informed of all the rights and obligations that are transferred, but non-compliance does not affect the transfer.⁵⁵

Presidential Decree 161/2002⁵⁶ implemented Council Directive 98/71/EC on the legal protection of designs. Greece ratified the Hague Convention on the International Deposit of Industrial Designs, which harmonized national design law with EU requirements, focusing on substantive issues, such as when a design is protectable and the rights conferred by registration.

C. FAMILY LAW

Act 3089/2002⁵⁷ on the medical support of human reproduction clarified the legal status of I.V.F.⁵⁸ treatment and expressly stated that it is permitted only to overcome a natural incapacity for childbearing or to avoid the transmission of a disease.⁵⁹ The identity of the donors is accessible only by the child and only for health reasons. Human cloning and selection of the fetus's sex are prohibited, except to avoid hereditary diseases. The

46. 2002 O.J. art. 5.

47. *Id.* art. 12, ¶ 1a.

48. 2002 O.J. (A174).

49. *Id.*; see also the explanatory notice of the Ministry of Economics that followed the publication of the act.

50. *Id.* art. 1. It was revealed that illegal gambling took place in Internet cafes and the act increased the relevant licensing requirements.

51. *Id.* art. 2, ¶ 2; *id.* arts. 4-5.

52. 2002 O.J. (A162).

53. Directives 77/187/EEC and 75/129/EEC.

54. See art. 6 of the PD and art. 4a of the Directive.

55. See art. 8 of the PD and art. 6 of the Directive.

56. 2002 O.J. (A149).

57. 2002 O.J. (A327).

58. "In Vitro Fertilisation."

59. 2002 O.J. (A327), art. 1 (citing Civil Code art. 1455).

transportation of fertilized ovum to the body of another woman requires a judicial permit and ascertainment that there is no financial benefit for either party.⁶⁰ Relevant provisions of the law of succession are amended, so that a child conceived with post mortem I.V.F. has full hereditary rights.⁶¹

D. INTERNATIONAL/EUROPEAN UNION LAW

In accordance with its international obligations, Greece ratified a series of international conventions. The most important, at least in the context of the European Union, was the Treaty of Nice. This treaty amended the Treaty of the European Union and the Treaties establishing the European Communities, which entered into force on February 1, 2003. The Treaty of Nice is a consolidated version of the former Treaty of the EU and the Treaty of the EC.⁶² Greek Act 3034/2002⁶³ ratified the United Nations Convention for the suppression of the financing of terrorism. Act 3017/2002⁶⁴ ratified the December 1997 Kyoto Protocol on Climate Changes. Finally, Act 3006/2002⁶⁵ ratified the International Civil Aviation Organisation Convention for the Unification of Certain Rules for International Carriage by Air signed in Montreal, Canada on May 28, 1999.

60. *Id.* (citing Civil Code art. 1458).

61. Civil Code arts. 1711, 1924.

62. See 2002 O.J. (A73) act 3001.

63. 2002 O.J. (A168).

64. 2002 O.J. (A117).

65. 2002 O.J. (A84).

