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ADDENDUM: ANNEXE

WHITE PAPER

PREPARATION OF THE ASSOCIATED COUNTRIES OF CENTRAL AND EASTERN EUROPE FOR INTEGRATION INTO THE INTERNAL MARKET OF THE UNION

(presented by the Commission)

Personal Data

Comapny Law

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PROTECTION OF PERSONAL DATA

GENERAL INTRODUCTION

In recent years, technical progress in the field of information and the increasingly frequent processing of personal data for the most diverse reasons (administrative checks, business purposes, scientific research, in particular epidemiology, public statistics, etc.) have highlighted the need to protect the private life of individuals and, more generally, their fundamental freedoms and rights.

There is evidence of a marked increase in flows of personal data within the European Union, in particular because of the completion of the single market. These flows include flows between firms, between divisions of the same firm, between national administrations required to provide mutual assistance, between centers of epidemiological research, etc.

The increase in these flows is a direct consequence of the completion of the single market. They are the necessary corollary to the exercise of the freedoms that characterize the internal market: free movement of goods, persons, services and capital. The greater the effective use of these freedoms, the more will the flows of information on persons grow.

Given this situation, it has also been found that serious malfunctions in the single market may arise if legislative differences are too wide.

Such differences may create obstacles to the free movement of personal data in the Community. Because of the insufficient degree of protection in the Member State of origin or destination of the data, a Member State could invoke the general interest and oppose the free movement of data from its territory.

And distortions of competition may emerge between economic operators in the Community, some having to carry the burden of protective legislation, while others are free from it, depending on the Member State in which they are established. It is therefore particularly important to ensure that no "data havens" are formed which seek to capitalize on the absence or inadequacy of protection in a particular part of the Union.

DESCRIPTION OF THE LEGISLATION

The Commission has presented to the Council a package of measures which are still being discussed.

These measures include the amended proposal of October 1992 for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which is in the process of being adopted. On 20 February 1995 the Council adopted its common position, which was sent to Parliament under the co-decision procedure.

The purpose of the proposal is to abolish the obstacles to the free movement of personal data and distortions of competition by creating an equivalent and high level of protection throughout the Community.

The Directive will apply to all processing of personal data in the private and public sectors, excluding processing carried out by agencies whose activity falls outside the scope of Community law, such as defense, national security, etc.

The proposal clarifies and extends the harmonization laid down by the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. Much of it is modeled on the Convention; thirteen of the fifteen Member States are Contracting Parties. However, the Convention is not a sufficiently powerful instrument for completion of the single market since it authorizes each Contracting Party to derogate from the free movement of data if it considers that the law of another Contracting Party does not provide protection equivalent to its own.

The proposal spells out, in particular, the obligations on the controllers of data-processing operations, for example with regard to data quality, technical security, notification of processing to the supervisory authority, and the circumstances in which data processing may be lawfully carried out - the consent of the individuals concerned is required in certain cases. It also specifies the right of the data subject to be informed about processing, to have access to the data, to request corrections, and even to object to processing in certain circumstances. The proposal also deals with areas not dealt with specifically in the Convention, such as notification of processing to the supervisory authorities, the transfer of data to third countries, and it covers not only automatic processing but also manual processing where the data are included in or will be included in a structured file. It has been accepted that the protection of data subjects should not depend on the technology used (computerized or manual) for data processing.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

Protection of the private life of individuals and of their fundamental rights may be ensured by various legal rules, such as those on civil liability, professional secrecy or confidentiality of sensitive information.

In order to provide the most appropriate response to the requirements of protecting the private life of individuals with regard to the processing of personal data, a new legal discipline has been developed, commonly called 'data protection'.

The aim of the rules that it lays down is to establish the conditions under which processing of personal data may be carried out and, in particular, to allow individuals to exercise control over the information concerning them which others (government authorities, firms, centers of scientific research, associations) collect and use by traditional means such as manual or computerized files, and even more recent applications such as electronic money, interactive systems and magnetic badges.

Experience has shown that the effective implementation of legislation in this field requires a supervisory authority to be set up. The authority must have complete independence in carrying out its duties, in particular with regard to the public agencies subject to its control.

in order to perform its functions, it must, in addition, have investigative powers and powers of intervention such as access to the data being processed, the ability to deliver opinions before processing is carried out, the power to bring an action before the courts or to present a periodic public report on compliance with national legislation. It must also have the necessary technical powers for carrying out supervision in all economic and social fields. It is clear, too, that it must have adequate financial resources and qualified staff.

KEY MEASURES

The above two proposals should be regarded as essential measures, once adopted by the Council.

During the first stage, the CEECs could raise awareness among professionals in the private sector and among the public authorities of the need for protection of personal data. To this end they could encourage professionals to draw up codes of conduct, which are a very important instrument in this field. At that stage, an independent supervisory authority could be set up in order to ensure the transition to the legislative phase.

- *CHOICE OF STAGE I MEASURES*

  None.

- *CHOICE OF STAGE II MEASURES*

  DESCRIPTION AND JUSTIFICATION :

  During this stage, the CEECs would have to introduce legislation on protection of personal data that was compatible with the Community standard as laid down in the Community instruments under discussion.

  General Directive:

Proposal for a Directive * COM(92)422 final OJ C 311, 27.11.1992 Common position adopted by the Council on 3.2.1995 - Ref. 12003/1/94	Proposal for a Directive of 15 October 1992 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Sectoral Directive in the field of telecommunications:

COM(90) 314 final - SYN 288 * COM(94) 128 - COD 288	Amended proposal for a Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks.

GENERAL INTRODUCTION

The principal aim of the European Community is the establishment of a single market whose effective operation is guaranteed by the fundamental freedoms accorded to Community citizens; those are the free movement of goods, services and capital of which all economic operators can benefit irrespective of whether they are natural or legal persons and the free movement of persons which the Treaty, by its *Articles 52 and 58,* grants to companies allowing them to create secondary establishments in a country other than that of their incorporation.

Establishment means mainly integration in the economic life of Member States. It implies for a company of a Member State the right to set up in the territory of another Member State agencies, branches or subsidiaries without being compelled to seek prior authorisation.

In addition, *Article 221* provides for the companies the right to participate in the capital of companies of another country without any discrimination.

Companies are organisations which are created and administered according to legal requirements. They involve different categories of persons - shareholders, employees, creditors and third parties - who are all concerned in some way in the activity of the undertaking. Equal protection of these diverse interests helps to create a suitable environment for companies.

In all Member States the companies' relationship with the different group of persons just mentioned, is the subject of detailed legal provisions giving them the appropriate protection. Nevertheless, the laws providing such protection differ from one country to another. With the constant growth in cross border dealings between companies, the existing disparities between national legislations are the main barriers to companies' freedom of establishment in the Community.

It was therefore necessary to proceed to an approximation of laws. The objective of the approximation or harmonisation of company law at Community level is to ensure an equivalent degree of protection of the interests of shareholders, employees, creditors and third parties throughout the Community.

DESCRIPTION OF THE LEGISLATION

The **basic legal approach** to create a suitable environment for companies to operate in Europe is the harmonisation of national laws through directives. Such a harmonisation has a twofold aim : first to remove obstacles to the companies' exercise of freedom of establishment offering thus to undertakings the means to expand and improve market competitivity; second to establish an equivalent degree of protection throughout the Community thereby ensuring to shareholders, employees, creditors and third parties contracting with companies equivalent safeguards of their interests (Legal basis : *article 54 § 3g* of the Treaty).

The **second approach** is the introduction through regulations of a uniform law at Community level which supersedes or complements national law. The idea pursued is to create specific legal instruments permitting enterprises to create new or combine existing cross-frontier operations on the basis of European rather than national laws. Such legislation on a European level is to provide enterprises with additional possibilities which will exist alongside those provided for by national law. The choice of law will be left to enterprises (Legal basis : *Articles 235, 100 A*).

The experience in the EU of legislating in this sector is that the co-ordination of Member States' company laws did not in general provoke problems. That was especially because the national company law systems and theories within the EU were more or less interrelated. With the exception of workers' participation there has not so far been any major political issue.

Nevertheless, the usual delays have been observed in some Member States as far as it concerns the implementation of the directives.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

Legislative approximation in the field of Company law presupposes the existence of the following requirements :

- Designation of a register for undertakings and of a national Gazette for the publication of certain information such as the company's organisation, financial details, and system of publicity to inform third parties.

- Designation of an administrative or judicial authority which will ensure the control of the incorporation of a company or the legality of certain acts.

- Designation of independent experts who will evaluate the financial situation of the company in different stages of its function (constitution of its capital, merger, etc.).

- Training of modern business administrators.

The establishment of regulatory structures such as private or public sector bodies or other administrative authorities is not required for the approximation of company law.

KEY MEASURES

The measures identified as key measures are all essential for the creation of a favourable business environment for undertakings.

The measures identified as being not key measures are all still proposals except for one.

These proposals contain important provisions in the field of company law, and it is advisable that the CEECs examine whether they have parallel or similar provisions in their legislations. Nevertheless, these proposals are not considered as key measures for the sole reason that it is difficult to predict when they will be adopted by the Council of the European Union.

The only adopted measure which is not a key measure is the Directive which deals with divisions of public limited companies. Member States are not obliged to introduce such a procedure into their national legislation. If they do so, they must conform to the sixth Directive. In fact, divisions are not often used for the restructuring of companies.

- ***CHOICE OF STAGE I MEASURES***

  DESCRIPTION & JUSTIFICATION :

  At a first stage the following Directives should be included:

  The **first directive**, defines a system of public disclosure applicable to all companies. This system ensures that the same type of information is available to the public in respect of all companies in the Community. This kind of information covers the instruments of constitution of a company, the identity of those empowered to represent it, the financial situation of the company, any change of its status, etc.

  Member States must maintain an official register of companies containing all relevant information, accessible to the public and must ensure the publication of certain information in an official Gazette. This disclosure system has been extended to new categories of documents or information by subsequent directives.

  The first directive also deals with the validity of obligations entered into by a company. For example, a company cannot invoke against a third party the fact that, in a legal transaction, the object of the enterprise has been exceeded (doctrine of ultra vires). Member States may only award this right in cases where the third party in question could not reasonably have been unaware of the breach.

  In order to prevent cases of nullity of a company, a control must be established at the time of the formation of the company.

  The nullity of the company can only be ordered by a Court and only on severely restricted grounds such as the non-compliance with formalities, the incapacity of all the founder members, the unlawful object of the company.

The **second directive**, deals with the raising, maintenance and alteration of the capital of public limited companies (PLCs). Because this capital is an essential guarantee for shareholders and creditors, the minimum subscribed capital of a public limited company must be at least ECU 25.000. Subscribed capital may be in cash or in kind; when it is in kind, it must be evaluated by an independent expert. All relevant information about the company's capital must be published. Distribution of profits are defined so as to prevent the distribution to shareholders of "profits" which would effectively erode capital or reserves. Whenever capital is to be increased, the new shares must be offered first to existing shareholders, in proportion to their existing holdings (pre-emptive right).

The directive also imposes limits on the proportion of their own shares which domestic legislation may authorise companies to acquire. However nothing in the Directive prevented a company from using a subsidiary to buy its own shares, thereby circumventing the safeguards of the second Directive.

To fill this loophole, the Second Directive was amended in order to extend the restrictions imposed on the acquisition of a company's own shares to include the acquisition of the parent company's shares by subsidiaries.

The First and the Second company law Directives are key measures for the approximation of laws. They have to be considered to be appropriate for inclusion in the first stage because they guarantee the necessary protection for creditors and investors, both local or foreign who want to enter into contact with companies incorporated in the associated countries.

In particular:

The **First company law Directive** because it contains a) restrictions on the reasons for the annulment of companies, b) requirements on the disclosure of information, both a) and b) necessary for the protection of creditors and c) provisions which determine the validity of obligations entered into by a company indispensable for the protection of any third party contracting with the company .

The **Second company law Directive** because it contains a) important provisions concerning the maintenance of the PLC's capital (non distribution of dividends without profit - non acquisition of company's own shares-interdiction of financial assistance) which all aim mainly at the protection of creditors b) provisions concerning increase and reduction of the capital, which aim to avoid an alteration of the shareholders' position in a company without their previous agreement.

STAGE I MEASURES

1st company law Directive (68/151/EEC) OJ No. L65 of 14. 3.1968):	First Council directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

2nd company law Directive (77/91/EEC) OJ No L26 of 31.1.1977 *as amended by Directive 92/101/EEC* OJ No L347 of 28. 11.1992	Second Council Directive of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent

- **CHOICE OF STAGE II MEASURES**

DESCRIPTION & JUSTIFICATION :

No additional infrastructure is required for the implementation of the Stage II measures.

These are the following:

The **third Directive,** introduces into the legislation of all Member States a common procedure for company mergers, whereby the assets and liabilities of the acquired company are transferred to the acquiring company without winding-up procedures. Shareholders in the acquired company receive shares in the acquiring company in line with an exchange ratio defined by an independent expert. Creditors' protection is ensured by their right to appropriate guarantees when the financial state of the merging companies justifies it. This Directive is essential because it permits concentration of companies or restructuring of groups.

The creation of branches (legally subordinate) is one of the ways in which a company can exercise its right to freedom of establishment in all Community countries. However, different legislative systems in the Member States, particularly as concerns information on the management and financial situation of companies, effectively raise obstacles to the exercise of this right. According to the **eleventh Directive,** branches created by a company in another country would not be obliged to publish annual accounts of their own activity, provided they submitted a consolidated and duly audited report for their parent company.

The **twelfth Directive** on the creation and operation of limited liability companies by a single person gives individual business operators access to a legal regime, which excludes their personal liability in respect of commitments made by their undertaking.

The Directive contains certain disclosure requirements concerning agreements between the sole member and the company as well as disclosure requirements concerning decisions taken by the sole member in his capacity as the general meeting.

Both the eleventh and twelfth company law Directives are important because they make easier the running of small entities (branches and agencies as the single member companies).

With the **Regulation on the European Economic Interest Grouping (EEIG)**, the Community has created an original instrument, directly connected to the Community legal system, for co-operation between companies in different Member States. By availing themselves of it, companies in several Member States can jointly pursue certain activities while continuing to retain their national legal incorporation and economic independence. This Regulation became effective on 1 July 1989 and it is important because it is the only legal means which permits the co-operation of undertakings by a uniform corporate form at European level.

STAGE II MEASURES

3rd company law Directive (78/885/EEC) OJ No L295 of 20.10. 1978	Third Council directive of 9 October 1978 based, Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies
11th company law Directive (89/666/EEC) OJ No L395 of 30. 12.1989	Eleventh Council directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another Member State
12th company law Directive (89/667/EEC) OJ No L395 of 30. 12.1989	Twelfth Council directive of 21 December 1989 concerning single member private limited companies
Regulation of EEIG No 2137/85 OJ No L199 of 31.7.1985	Council Regulation (EEC) on the European Economic Interest Grouping (EEIG)

Sixth Council Directive (82/891/EEC) of 17 December 1982 based on Article 54 (3) of the Treaty, concerning the division of public limited liability companies (OJ L378 of 31 December 1982)

Amended proposal for a Fifth Council Directive founded on Article 54 (3) (g) of the EEC Treaty concerning the structure of public limited companies and the powers and obligations of their organs (OJ C240 of 9 September 1983).

Proposal for a Tenth Council Directive based on Article 54(3) (g) of the Treaty concerning cross-border mergers of public limited companies (OJ C23 of 25 January 1985).

Amended proposal for a Thirteenth Council Directive on company law concerning take-over and other general bids (OJ C 240 of 26 September 1990).

Amended proposal for a Council Regulation (EEC) on the Statute for a European company (OJ C176 of 8 July 1991).

GENERAL INTRODUCTION

Accounting harmonisation is part of the company law harmonisation program, which aims at furthering freedom of establishment. As part of the company law harmonisation program, the objective of the Accounting Directives is not limited to the protection of the investors only, but of all third parties (including employees and creditors as well as shareholders) who have dealings with companies in order to give them equivalent protection.

The harmonisation is carried out through Directives. As a result, Accounting standards have become part of the law in each Member State. Those standards must be interpreted by reference to the relevant Accounting Directives. In the same way, Accounting standards developed by a national standard-setting body cannot override the standards based upon the Accounting Directives. Otherwise, there would be no harmonisation.

The Accounting Directives are not meant to develop uniform Accounting standards for the EU. The objective is to make the financial information published by companies both equivalent and comparable. Accordingly, the Accounting Directives contain options which either Member States or companies can adopt for themselves. These options reflect differences in the legal or economic situation in the Member States.

DESCRIPTION OF THE LEGISLATION

Up to now all legal Community measures in the accounting field have been put through in the form of Directives. The legal base for these Directives is in all cases Article 54 (3) (g) of the EEC Treaty.

Several Member States already had in place laws and professional accounting and auditing requirements which substantially met or surpassed the requirements of the Directives. Other Member States did in fact use the impetus of the Directives to enact major accounting, financial reporting and auditing reforms, some of which also go beyond the requirements of the Directives.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

Legislative approximation in the accounting field presupposes the existence of national regulatory systems (register for undertakings, scope of undertakings concerned, rules of Accounting, of auditing and of publication).

All CEEC's have proceeded with an Accounting reform which was largely inspired by the EU-Accounting-Directives.

Although a relatively modern Accounting legislation might be in place now in the CEEC's, it is almost certain that many practitioners are not capable of applying this legislation because they never received an appropriate training. This training has to go in two directions

- training of book keepers and accountants
- training of auditors.

For the publication of the accounts the CEEC's follow partly the rules laid down in the First Company Law Directive of 1968.[1]

In the Member States, Accounting rules are laid down in the form of laws, decrees and standards. The Chartered Accountancy profession is regulated by law and decrees which create in general institutes and (or) chambers. These bodies lay down the rules of the profession, prepare the training, supervise and represent their members. In many cases they also lay down Accounting standards.

The institutes and chambers of most of European countries (33) are organised on an European level in the *Fédération des Experts comptables européens (FEE)*, rue de la Loi 83, 1040 Bruxelles.

KEY MEASURES

All five mentioned Directives are Key measures, because they have introduced a set of accounting rules which together form a high level code of European Accounting.

- ***CHOICE OF STAGE I MEASURES***

  DESCRIPTION & JUSTIFICATION :

  The Fourth Directive intends establishing a minimum of equivalent legal requirements as regards the extent of the financial information that should be made available to the public. With regard to the introduction of a free market economy this Directive, with its general principles (recognition of assets or liabilities, valuation of assets or liabilities) differing largely from those of a centrally-planned economy, is of great importance.

  Concerning the Eight Directive :

  Well qualified statutory auditors are necessary, not only to ensure the quality and reliability of the published accounts, but also to ensure the quality of their work in cases of privatisation, merger, acquisition etc..

1 OJ No L 65 of 14 March 1968

It should be stressed at the beginning that priority should be given to legally binding rules.

The first stage should include

[The system for publishing accounts (lodging with a central register and publication in a national gazette) is laid down in the First Council Directive on company law of 9th March 1968 (see company law fiche). It is important to note that pursuant to this Directive, Accounting documents must be made available to any interested party, who must be able to obtain copies without having to demonstrate a legitimate interest. This is the only way of achieving transparency in the market.]

a) The Fourth Directive

This Directive is the basis for Accounting harmonisation within the Community. It lays down the rules to be followed by some three million limited companies in drawing up their annual accounts. It also provides the frame of reference for the Seventh Directive on consolidated accounts and for the sectoral directives on the financial information to be published by banks and insurance companies (see stage II).

The Fourth Directive does not set out to standardise Accounting rules. It rather aims at comparability and equivalence of the financial information to be published by limited companies. To that end, it lays down the minimum conditions to be fulfilled while allowing Member States to go beyond those conditions by imposing additional or more detailed rules.

In accordance with Article 2 (1) of the Fourth Directive, the annual accounts comprise the balance sheet, the profit and loss account and the notes on the accounts. Those documents constitute a composite whole. This is a particularly important aspect of the harmonisation process. Since the notes form an integral part of the annual accounts, the Directives can enable companies to apply different valuation rules provided that an explanation is given in the notes. In this way, the accounts remain comparable. This harmonisation technique has been applied in particular to value adjustments for tax purposes and to valuation methods based on other criteria than the purchase price.

The Fourth Directive introduces as an overriding principle in the concept of true and fair view. According to this principle, companies are obliged to go beyond the mere application of legal provisions in order to give the reader a more reliable picture of the financial position of the company.

The Directive has introduced a layout for the balance sheet and the profit and loss account. A compulsory layout will obviously enhance the comparability of accounts. Some Member States have also introduced a layout for the notes on the accounts, not prescribed in the Directive, in order to improve comparability.

The valuation rules are set out in Article 31 of the Directive. This Article is particularly important. It combines rigidity and flexibility.

Paragraph 2 in fact makes it possible, in exceptional cases, to depart from such general principles as the obligation to carry out valuations on a prudent basis, the presumption that the company is carrying on its business as a going concern, the principle of separate valuation and the obligation to apply consistent methods of valuation from one year to another, provided that such departures are disclosed in the notes on the accounts and the reasons for them are given together with an assessment of their effect on the assets, liabilities, financial position and profit or loss. This possibility of departing from the general valuation principles should provide a solution to a number of problems in cases where the traditional rules do not.

According to Article 32, valuation in the accounts is based on the principle of purchase price or production cost. Member States may however, allow one or more alternative methods, such as valuation by the replacement method, inflation Accounting or revaluation, to be used. Irrespective of the alternative method employed, the same rules apply: the amount of the difference between valuation by that method and valuation according to the purchase price must be entered under "Liabilities" in the revaluation reserve, which may not be distributed; disclosure in the notes on the accounts of any changes in the amount of the reserve; and indication of the purchase price in the notes on the accounts. Those rules are aimed at both maintaining the capital and ensuring the comparability of information. Member States may introduce one or more of those methods.

Article 43 sets out the minimum information to be included in the notes on the accounts. Article 46 does likewise for the annual report.

Annual accounts must be audited by a person authorised by national law to audit accounts. Such auditors must fulfil the minimum conditions laid down by the Eighth Directive.

The Fourth Directive is the first company law Directive to contain specific exemptions for small and medium-sized companies. Such companies are defined by reference to three criteria (balance sheet total, turnover and number of employees) in order to reflect as accurately as possible the socio-economic significance of the company. The criteria (balance sheet total and net turnover) are amended regularly in order to bring them into line with economic and monetary developments within the Community. The exemptions relate primarily to the extent of the financial information to be published as well as to the audit requirement.

The Fourth Directive also set up a Contact Committee under the auspices of the Commission. The function of this Committee is to facilitate harmonised application of the Directive through regular meetings dealing in particular with practical problems arising in connection with its application. It also has the task of advising the Commission, where necessary, on additions or amendments to the Directive.

b) The Eighth Directive

This directive lays down minimum conditions for the approval of auditors and firms of auditors carrying out audits required by Community law. Those conditions relate to competence and independence. As regards competence, the Directive requires auditors to have attained university entrance level, then completed a course of theoretical instructions, undergone practical training for a period of at least three years and passed an examination of professional competence of university final examination standard organized or recognised by the State. The Directive does not contain any precise rules concerning independence.

The Eighth Directive is concerned neither with freedom of establishment nor with freedom to provide services in the case of persons responsible for carrying out statutory audits of Accounting documents. However, Article 11 permits the authorities of a Member State to approve as auditors persons who have obtained all or part of their qualifications in another State provided that their qualifications are deemed equivalent and they furnish proof that they possess the requisite legal knowledge. This position changed with the entry into force of the Council Directive of 21 December 1988 [2] on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. This Directive obliges Member States to approve professionals from other Member States.

Gaps remain however, on two points relating specifically to the statutory audit of accounts. Firstly, the concept of the independence of auditors requires clarification and, secondly, the content of audits and the auditing standards to be applied require further definition.

STAGE I MEASURES

Fourth Company Law Directive (78/660/EEC) OJ No L222 of 14.8.1978 as amended by - Directive 84/569/EEC OJ No L 314 of 4.12.1984 - Directive 90/604/EEC OJ No L 317 of 16.11.1990 - Directive 90/605/EEC OJ No L 317 of 16.11.1990 - Directive 94/8/EC OJ No L 82 of 25.3.1994	Fourth Council Directive of 25 July 1978 based on Article 54 (3)(g) of the Treaty on the annual accounts of certain types of companies
Eighth Company Law Directive 84/253/EEC OJ No L 126 of 12.5.1984	Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents.
Insurance Accounting Directive 91/674/EEC OJ No L 374 of 31.12.1991	Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings.

2 OJ No L 19 of 24 January 1989

- *CHOICE OF STAGE II MEASURES*

DESCRIPTION & JUSTIFICATION :

Also in the Member States, the Seventh Directive was introduced some years after the introduction of the Fourth Directive.

As the Seventh Directive deals with the more sophisticated consolidated accounts, they could be given a lower priority as compared to the annual accounts which are dealt with in the Fourth Directive. Furthermore, it could be of advantage to introduce them only after a certain experience with the so-called basic Directives.

The same can be said for the Bank Accounts Directive and the Insurance Accounts Directive. Moreover, these sectors are already subject to supervisory controls.

a) The Seventh Directive adopted a pragmatic solution on the definition of a group. It requires Member States to make consolidation compulsory in cases where a parent company has the legal power to control one or more subsidiaries and it permits Member States to make consolidation compulsory in other cases where a parent company actually controls one or more subsidiaries through a minority shareholding. This pragmatic solution is combined with a series of exceptions, i.e. cases in which a company may or may not be excluded from the consolidated accounts.

It is important to note in this respect that it was considered desirable not to apply the principle of a true and fair view to the definition of a group. This principle may be applied to exclude a company from the consolidated accounts only if the activities of that company are so different that their inclusion would be incompatible with the obligation of giving a true and fair view.

The Seventh Directive also makes provision for a number of cases in which a parent company may or must be exempted from the obligation to draw up consolidated accounts. Those are cases where the parent company is a financial holding company or is itself a subsidiary heading a sub-group, or where the group concerned is small. A parent company which is not established in the Community may be exempted from the obligation to draw up consolidated accounts for a sub-group located in the Community provided that it publishes consolidated accounts which are at least equivalent to consolidated accounts drawn up in accordance with the Seventh Directive. It is interesting to note that Community accounting legislation does not go so far as to require absolute conformity. The same condition of equivalence is applied to branches.

For the structure of consolidated accounts and for the valuation rules, the Seventh Directive refers back to the Fourth Directive. In the majority of Member States, consolidated accounts have no direct effects on tax treatment. It is interesting to note that, in those Member States, there is a trend towards a greater separation between accounting rules and tax rules governing consolidated accounts. Accounting rules which would not be permitted in the case of individual accounts are accordingly applied to consolidated accounts in order to give a truer and fairer view of the economic position of the group.

The Seventh Directive also contains provisions concerning the technique of consolidation. It allows Member States to permit or prescribe proportional consolidation and requires the equity method to be applied to associated companies. The list of information to be included in the notes on the accounts is modelled on the provisions of the Fourth Directive.

b) Since the Directive on the annual and consolidated accounts of banks concerns a specific sector, it was possible for it to prescribe a single layout for the balance sheet and for the profit and loss account (horizontal and vertical layout) and to limit the scope for adjusting the layout. As for the information to be provided, the Directive defines the contents of off-balance sheet items, which are of particular importance in the banking sector. Similarly, the notes on the accounts must contain additional information, such as a breakdown of loans and advances and liabilities on the basis of their remaining maturity, information on the supply of management and agency services to third parties and a statement of the types of unmatured forward transactions outstanding at the balance sheet date.

As for the valuation rules, the Directive contains special rules on the valuation of debt securities including fixed-income securities and on transferable securities which are not held as financial fixed assets. Where such securities are shown in the balance sheet at purchase price, the difference between the purchase price and the higher market value at the balance sheet date must be disclosed in the notes on the accounts. Member States may even require or permit such securities to be shown in the balance sheet at the higher market value provided that the difference between that value and the purchase price is disclosed in the notes on the accounts. This valuation rule departs substantially from the principles of the Fourth Directive.

The Directive authorises hidden reserves in certain circumstances. Where such reserves have been formed, Member States must permit credit institutions to include on the liabilities side a fund for general banking risks. The fund draws on the profit and loss account . It is an open fund comprising the amounts which a credit institution decides to set aside to cover such risks where that is required by the prudence dictated by the particular risks associated with banking.

The Directive also endeavoured to tackle the difficult subject of transactions denominated in foreign currencies. Only partial harmonisation has been achieved on this point, which was not dealt with in the Fourth Directive.

Where consolidated accounts are concerned, a few changes have been made to the rules laid down in the Seventh Directive. Those rules apply only where the parent company is a credit institution or a bank holding company. The Directive also requires the drawing-up of an annual report, auditing by an auditor fulfilling the conditions of the Eighth Directive and the publication of Accounting documents.

c) The Directive on the annual and consolidated accounts of insurance undertakings takes into account the particular characteristics of those undertakings.

The directive applies to all undertakings dealing with insurance. Concerning the general principles it refers to the Fourth Directive.

In order to facilitate comparison between the accounts of insurance undertakings, the directive only retains one format (the horizontal format) of the balance sheet.

As compared with the Fourth Directive, the assets side of the balance sheet has been substantially modified to take account of the fact that by far the greater part of the assets of insurance undertakings consists of investments which cannot be readily or appropriately separated between fixed assets and current assets. The categories of fixed assets and current assets found in the Fourth Directive are therefore entirely dispensed with and a new main heading, investments, is introduced.

On the liabilities side of the balance sheet, by far the most important group of items for any insurance undertaking is the technical provisions, which broadly speaking represent the amount set aside by the undertaking to enable it to meet the future obligations to policyholders, which cannot be known with accuracy at the balance sheet date. The main point of principle to be decided here was the treatment to be given to the share of reinsurers in the gross obligations of direct insurers or where appropriate the share of other reinsurers to whom business is retroceded in the gross obligations of first reinsurers.

For the profit and loss account, the Directive has also retained only one format, the vertical one, in order to make comparisons more easy. The profit and loss account is divided into two parts, namely a so-called technical account, reflecting the results of insurance activities in the narrower sense, and a so-called non-technical account. Furthermore, in the case of those undertakings which carry on both non-life and life insurance separate technical accounts are in principle required for the two categories. In addition, there are important differences in the content of the non-life and life technical accounts.

The technical account is regarded in the case of non-life insurance as reflecting the result of the underwriting activity before taking into account investment income. The investment income appears in the non-technical part of the profit and loss account. In this way, the fact is recognised that the results of underwriting and of investment activity may vary in accordance with quite different factors and may follow different cycles. In the case of life insurance, different considerations apply. Most kinds of life insurance involve a substantial investment element and most of the investment return achieved by a life insurance undertaking is used for the benefit of policyholders. Since the investment return is used in the calculation of the surplus in which policyholders usually have the right to participate, it appears appropriate to include the investment income in the technical account.

The figures in the profit and loss account are generally shown net with "gross minus reinsurance" figures for the important items, such as premiums, claims and operating expenses.

Because investments of insurance undertakings are held almost exclusively for the purpose of meeting future liabilities to policyholders, considerable interest attaches to the question of their valuation. Doubts have been cast by some on the suitability of historical cost for this purpose. It is true that historical cost is something that can be ascertained with certainty. However, its usefulness as a measure of the ability of an insurance undertaking to meet present and future obligations is by others considered to be less than that of current value.

The Directive did not want to choose between the rival merits of these points of view. It allows Member States to require or to permit investments to be shown as assets on the basis of their current value. The choice may be exercised either for all investments taken together or for categories of investments. The same valuation method must however be applied to all investments included in any item denoted by an Arabic numeral or shown as assets under "Land and buildings".

Where investments are shown at their current value, their purchase price must be disclosed in the notes on the accounts. In the same way, where investments are shown at their purchase price, their current value must be disclosed in the notes. These additional disclosures were felt necessary in order to establish comparability between those insurance undertakings which want to show their investments at a value which reflects to market value at the balance sheet date.

The amount of technical provisions must at all times be such that an undertaking can meet any liabilities arising out of insurance contracts as far as can reasonably be foreseen. Technical provisions may not be used for other purposes and by implication deliberate over provisioning is as much to be avoided as under provisioning. The directive includes a number of provisions which deal specifically with the he valuation of technical provisions.

Besides a large number of disclosures following from the Fourth Directive or from the Insurance Directive, it requires disclosure in the notes of the total amount of commissions for direct insurance business.

It also requires some segment information, which is the equivalent of similar information required under the Fourth Directive concerning lines of business and geographical representation. Assurance undertakings must have their accounts audited by a qualified professional (natural person or firm of auditors) who satisfies at least the requirements of the Eighth Directive.

The duly approved annual accounts, together with the annual report and the audit report must be filed with a local or central registry and must be made available to all interested parties. Where an insurance undertaking is not established as a limited liability company and is not required by national law to publish its accounts, it must at least make the annual accounts, the annual report and the audit report available to the public at its head office.

All insurance undertakings which are parent undertakings must prepare consolidated accounts and a consolidated annual report in accordance with the provisions of the directive which refers in this repeat to a large extent to the Seventh Directive .

Where the parent undertaking is not an insurance undertaking, but a financial holding company, which has as its sole or essential object to acquire holdings in subsidiary undertakings and to turn them to profit, and where its subsidiary undertakings are either exclusively or mainly insurance undertakings, the consolidated accounts must also be prepared in accordance with the Insurance Accounts Directive.

STAGE II MEASURES

Seventh Company Law Directive 83/349/EEC OJ No L 193 of 18.7.1983	Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts.
Bank Accounting Directive 86/635/EEC OJ No L 372 of 31.12.1986	Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions.

CIVIL LAW

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INTRODUCTION

A frontier-free single market based on market economy principles must meet a number of fundamental requirements if it is to function efficiently. Paramount among these requirements are the basic principles of civil law and certain basic concepts such as civil (tortious) liability. One aspect that is particularly important for the free movement of goods is product liability. For the sake of consumer protection, it is important to ensure that proper compensation will always be available in the event of loss sustained by reason of a defective product.

Another area where harmonization is conducive to a smoothly functioning internal market is commercial agency; given the important role played by commercial agents in business life in general, it is worth spelling out the respective minimum obligations of the employer and his agent or agents. The differences in national laws concerning commercial representation substantially affect the conditions of competition and are detrimental to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions.

The Brussels Convention of 1968 on jurisdiction, recognition and enforcement of judgments and the Rome Convention of 1980 on the law applicable to contractual obligations are two other important instruments which facilitate the functioning of the Internal Market by providing a Community System for the conduct of legal proceedings in civil and commercial matters. This is achieved by laying down common rules on jurisdiction and by ensuring the mutual recognition and enforcement of judgments under the Brussels Convention and by harmonising the private international law rules of the Member States concerning contractual obligations under the Rome Convention.

The two Conventions, then, address the specifically international aspects of legal proceedings and resolve some of the more important issues when disputes arise between persons not residing in the same Member State. In so doing, economic operators, in particular, are given an easier legal environment in which they are able to carry on their activities.

Although Community action has been limited and many aspects of civil law and procedure remain within the competence of Member States, the Directives and Conventions adopted have made an important contribution to the functioning of the Internal Market and have given a greater degree of legal certainty to those concerned.

DESCRIPTION OF THE LEGISLATION

The Council adopted in 1985 a directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The Directive lays down a Community regime for compensation for damage caused by defective products. The Directive is based upon the principle of strict liability: this means that a producer of a defective product is liable for damage caused by his products without it being necessary for the injured person to show that the producer was in any way at fault or negligent.

The obligation on the injured person is to show that the product was defective and that the defect in the product caused him to suffer damage. If the plaintiff is able to do this, it is then for the producer to prove one of the defenses given to him by Article 7 of the Directive.

The Directive has a particular definition of defect, producer and damage.

A product is considered to be **defective** when it does not provide the safety which a person is entitled to expect taking all circumstances into account, including the presentation of the product and the time that the product was put into circulation.

The Directive gives a very wide definition of **producer** so that it includes not just the manufacturer of the product, but also the person who places his own name or trade mark on the product thereby presenting himself as its producer. A supplier of the product is also considered to be its producer but he can escape liability if he is able to identify the person who supplied him or the manufacturer. An importer of a product into the Community can also be liable for damage caused by a defective product which he has imported into the Community. The Directive thereby ensures that an injured person can make a claim within the Community in respect of harm suffered as a result of a defective product.

The Directive defines the concept of **damage**. It is damage caused by death or personal injury and damage to or destruction of property which is ordinarily intended for private use and actually mainly used by the injured person for private use. A claim cannot be made for damage to the defective product itself. It may also be possible, depending on the law of the particular Member State concerned, to seek compensation for non-material damage.

The date for implementation of the Directive was July 1988. The Directive does not appear to have had the effect of increasing the numbers of claims made or to increase the level of insurance premiums. Although experience is limited and there are only a few reported cases from the national courts, the Directive appears to be an important piece of legislation which has had a positive effect on product safety and to have assisted injured parties in seeking compensation for damage suffered.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

For the Directive to function there must be a possibility for those who have potential liability under the Directive to be able to insure against the risks involved. It is almost a pre-condition for the system of strict liability set up under Directive 85/374/EEC to function properly that there be in existence an effective insurance market. The producer held liable under the Directive must be in a position to insure against his potential liability so that first, he can remain in business despite the existence of legal proceedings concerning a product supplied and secondly, so that ultimately the injured person will receive compensation. A fundamental question which the Commission asked at the time it was drawing up its proposal for the Directive was whether the system created by the Directive would be capable of being insured against. This has proved to be the case for the EU.

Potential defendants need to have the means to keep accurate and extensive records of goods manufactured and sold, so for example in case of suppliers they are able to provide the name and address of the person who supplied them and for manufacturers so that they can prove whether they produced particular products, when they were sold etc. This will also enable them to assess risks and recall products which they have reason to believe are defective. Manufacturers will also need to be able to ensure a basic quality standard of their products and this may require improved testing and quality assurance systems. They also need a recall and warning system. If importers are to be open to liability, they will need to consider establishing their own testing capabilities. Also, similarly to suppliers, they may seek indemnities from their suppliers or the manufacturer. They may also need to take out extra insurance.

On the other hand, plaintiffs must be able to take proceedings and therefore there must be reasonable access to the legal system, which might be ensured by different mechanisms, but legal aid or legal insurance or free access to the courts are all possibilities. The cost implications will also need to be considered since the cost of products may rise.

KEY MEASURES

- ***CHOICE OF STAGE I MEASURES***

DESCRIPTION & JUSTIFICATION:

The Directive on Product liability was inspired by two concerns, first that consumers who were injured by defective products should be adequately protected and secondly to limit distortions in competition which resulted from differing liability laws within the Member States. Compensation paid in damages to injured persons add to the costs of the product and therefore lead to differing costs between Members States and to unequal conditions of competition. Further, it was feared that producers were influenced by legal considerations when deciding whether or not to place their products in a particular market. These considerations are equally as relevant to the present situation.

By bringing national law into line with the Directive there should be improved access to the Internal Market, since importers, who have potential liability, will be assured that the products produced for the domestic market face a similar liability regime and therefore may be able to take out lower insurance or carry out fewer quality checks.

More generally the Directive has been regarded by many non-EU countries as a guide for their own systems. One of the countries most recently to have adopted a similar approach is Japan.

The countries of Central and Eastern Europe should ensure as soon as possible that their legislation governing civil liability for damage caused by defective products is in line with the principles of Directive 85/374/EEC (no-fault liability of manufacturers, definition of damage, etc.).

STAGE I MEASURES

Council Directive 85/374/EEC OJ L210, 7.8.85, p. 29	Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

II. *COMMERCIAL AGENTS*

DESCRIPTION OF THE LEGISLATION

Council Directive 86/653/EEC on self-employed commercial agents sets up a legal regime for the relationship between a principal and his agent.

An agent is a self-employed person or a company who negotiates the sale or the purchase of goods on behalf of another person who under the Directive is referred to as the principal.

The Directive sets out the basic obligations that each party has to the other.

It lays down detailed provisions in relation to the remuneration of the agent, both as to level and time of payment. The basic principle behind these provisions is the freedom to contract, but the Directive applies either where the parties have made no agreement between themselves or where the Directive specifically prohibits the parties from derogating from its rules or only to the extent provided for.

The Directive has rules concerning the amount of notice each party must give to terminate the contract and provides for a system of compensation or indemnity for the agent on termination of the agency contract. This sum is payable except for cases where the agent is in fundamental default of his contractual obligations or where he terminates the contract unless it is due to reasons attributable to the principal or due to illness, infirmity or old age and finally where the agent has assigned the contract. The question of restraint of trade is also dealt with by the Directive.

The Directive is a valuable piece of legislation in an area of economic activity of considerable importance. Commercial agents have a significant role to play in the economic well-being of the Community.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

It goes almost without saying that the Directive assumes that there are agents who act on behalf of principals. The agent does not take on any financial responsibility or legal liability for the transaction, but acts on behalf of the principal, encouraging the sale of the principal products and selling them on his behalf - or he can be acting to purchase goods on the principals behalf.

For this Directive to function, there needs to be a certain level of stability and sophistication in the market place. There needs to be a continuing link between a principal and his agent. The Directive does not cover occasional transactions negotiated and/or concluded by one person on behalf of another.

The Directive pre-supposes that principals will have the resources available to offer an indemnity or compensate an agent on the termination of the contract; therefore the principal has to have a certain degree of viability.

KEY MEASURES

- ***CHOICE OF STAGE I MEASURES***

No Stage I measures.

- ***CHOICE OF STAGE II MEASURES***

DESCRIPTION & JUSTIFICATION :

At a second stage the countries of Central and Eastern Europe might envisage enacting legislation - or adapting existing legislation - concerning commercial agents on the basis of the principles of Directive 86/653/EEC.

Commercial agents carry out a very important economic activity and the Directive gives a solid basis to the relationship. The Directive also aims to deal with the issue of competitive disadvantage and to allow for the fullest possible inter-penetration of markets. Agents in particular have a significant impact in this regard and differing legal regimes can affect their effectiveness and ability to compete. It is thought that agencies are an important and a useful way to carry on business and they need to be supported by an appropriate legal framework.

STAGE II MEASURES

Council Directive 86/653/EEC OJ L382, 31.12.1986, p. 17	Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

III. *MUTUAL RECOGNITION OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*

INTRODUCTION

Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968. Consolidated version. OJ C189, 28.07.1990, p.3.

If the internal market is to function in a truly harmonious fashion, there will need to be measures to secure the "free movement" of judgments in civil and commercial matters so that judgments can be enforced rapidly and efficiently once given. In 1968 the Union States concluded the Brussels Convention, which, although not a Community measure *stricto sensu*, does help to ensure that there is a single legal environment for all the Member States. The Treaty of Rome already called on the Member States to deal with this problem (Article 220), which is in itself evidence of the importance it merits. Twenty years after the Brussels Convention was adopted, the EFTA countries signed a similar convention with the Community Member States - the Lugano Convention (OJ L 319, 25.11.1998, p. 9) - so that the principles of jurisdiction, recognition and enforcement are now common to 18 European States.

DESCRIPTION OF THE LEGISLATION

The Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters lays down rules on jurisdiction in legal proceedings concerning civil and commercial matters. It ensures that judgments given by the courts of the Member States are recognised throughout the whole Community and sets up a mechanism to facilitate the enforcement of judgments given in one contracting state in another contracting state.

The scope of the Convention is confined to civil and commercial matters and it is specifically stated that the Convention does not extend to revenue, customs or administrative matters, nor to family matters, social security, bankruptcy or arbitration.

The basic rule on jurisdiction is that a defendant shall, whatever his nationality, be sued in courts of the contracting state in which he is domiciled. The Convention also contains special rules on jurisdiction to allow the courts of other contracting states to have jurisdiction in matters relating, inter alia, to contract, maintenance, tort, trusts, insurance and consumer contracts. For certain matters certain courts have exclusive jurisdiction regardless of the domicile dependent. This is the case for disputes relating, inter alia, to immovable property and validity of public registers.

The Convention contains rules to regulate the circumstances where proceedings involving the same cause of action are brought to courts of two contracting states or where related actions are brought, so as to ensure that proceedings continue in the courts of only one contracting state.

The Convention demands that judgments shall be recognised without any special procedure being required. There are only limited circumstances in which recognition can be refused and in practice recognition and enforcement of judgments is not often refused.

The Convention sets out a specific system for the enforcement of judgments - it states to whom the application for enforcement must be made and the system to be followed for appeal. The procedure itself for the making of the application is governed by the law of the Contracting State in which enforcement is sought.

The Brussels Convention has proved to be an important convention for ensuring a basic legal environment in which commerce can prosper. The Convention is an EC Convention (based on Rome Treaty article 220) and all Member States are required to ratify it and it is a condition on accession to the EU that accession states accept the system, which has been achieved through accession conventions.

INTRODUCTION

Rome Convention on the Law Applicable to Contractual Obligations 1980 OJ L 266, 9.10.1980, p. 1 amended by Spanish and Portuguese Accession Convention 1992 OJ L 333, 18.11.1992, p. 1

The Rome Convention of 1980 on the law applicable to contractual obligations unifies the rules of private international law of Member States concerning the determination of which law governs a contract.

The basic principle is that of the freedom of choice of the parties to the contract to determine which law shall govern their contractual relations. The choice may be express or be implied. In the absence of choice by the parties the law governing the contract is that of the country with which the contract is most closely connected. The Convention lays down some factors which enable this law to be identified.

However, the choice of the parties does not affect the application of the mandatory rules of a country, where all the other relevant elements concerned with the contract are connected with that one country only. The mandatory rules of a country may also be applied where there is a close connection with the country and these rules apply regardless of the applicable law.

There are specific rules governing choice of law and mandatory rules regarding certain consumer contracts and individual employment contracts.

The Convention also has provisions concerning which law applies to inter alia, the existence and validity of a contract, incapacity, assignment, subrogation and burden of proof.

The Convention has been ratified by all the Member States although many Member States have not yet ratified the accession treaty concerning Spain and Portugal. The Convention is only open to ratification by the Member States, but third countries may adopt similar rules to those contained in the Convention, which would *de facto* bring their system within the Convention.

MUTUAL RECOGNITION OF PROFESSIONAL QUALIFICATIONS

GENERAL INTRODUCTION

In a market economy the general rule is that everybody is free to take up any profession. In the general interest of the society the exercise of some professional activities may however be submitted to the possession of given qualifications. It is for each State to determine if the general interest is sufficiently safeguarded by free competition or, on the contrary, if a given profession must be regulated, and how it is regulated (protection of the title or of the professional activities). The qualifications necessary to practice a regulated profession are generally based on the national education system, hence the obstacle to a migrant possessing qualifications acquired in another State.

For example, in most Member States the professions of doctor, lawyer, merchant-navy officer, and primary- or secondary-school teacher (especially in State education) are open only to those who have undergone education and training in accordance with the relevant legal requirements.

The level and content of such education and training are generally determined by reference to the national education system, entailing an element of discrimination if a national qualification is required. Moreover, an appropriate qualification is needed in order to practise a regulated profession. In each Community country, these requirements apply to nationals of that country and to nationals of the other Member States. For obvious reasons, the latter do not normally satisfy the requirements.

The mutual recognition of professional qualifications is an appropriate mechanism for overcoming this obstacle to the free movement of persons and to the freedom to provide services.

DESCRIPTION OF THE LEGISLATION

There have proved to be three main types of non-discriminatory measure which constitute particularly significant obstacles to the free movement of professionals and in respect of which specific action has been taken:

- recognition of professional qualifications;
- measures relating to proof of good health, good repute and sound financial standing;
- membership of professional organizations and compliance with codes of conduct.

1. Recognition of professional qualifications

The Community has taken action in this area on the basis of Article 57 of the EC Treaty. Action regarding the activities of employed persons (which are not covered by Article 57) has been taken on the basis of Article 49, either by itself or read in conjunction with Article 235. Generally speaking, since the adoption of Directive 92/51/EEC all the Directives in this area apply to the activities of employed and self-employed persons.

Between 1964 and 1994, the Community adopted around sixty Directives in this field. They can broadly be divided into three main groups, as summarized below. In the few cases not covered by a Directive, the provisions of the Treaty - as interpreted by the Court of Justice - apply directly.

A. Recognition of professional experience

This system is based on the assumption that, in the course of actually practising a professional activity continuously for a number of years, a certain expertise will have been acquired in the technical skills specific to that activity. Three to six years' experience is generally stipulated, together with requirements as to the migrant's good character, financial standing, and physical and mental health. These Directives, which were the first to be adopted (from 1964 onwards), are generally referred to as "transitional Directives", since the original intention was to replace them with education and training harmonization machinery - an approach that was abandoned as being too cumbersome and needlessly inflexible.

For the individuals concerned, the arrangements introduced have the advantage of being simple. They make it possible to pursue an activity anywhere in the Community, even if the activity in question is not regulated in some Member States and is subject to differing forms of regulation in others. While not requiring the national systems to be harmonized, the arrangements have the drawback of facilitating mobility only after a number of years' professional activity in the home Member State. Also, more generally, adopting specific directives is a highly cumbersome and complicated way of tackling the problem, since each relates to only one activity or profession. In the light of all these considerations the approach was gradually abandoned, with the last such directive being adopted in 1982.

Most of the measures in question relate to skilled trades, but some that are very broad in scope also cover the provision of professional services (e.g. by patent agents).

B. Automatic recognition of professional qualifications

This second system covers fully-qualified professionals who wish to practise in a Member State other than that in which they obtained their qualification. It comprises two variants, in the first of which automatic recognition is based on minimal coordination of education and training.

Member States' provision of education and training for the professions in question is governed by common rules that also require them to recognize such education and training undergone elsewhere in the Community. This variant applies to the health-care professions of doctor, nurse responsible for general care, dentist, midwife, veterinary surgeon and pharmacist.

The second variant applies only to architects. The purpose of the rules is not to harmonize the education and training provided by Member States, but to establish the criteria for recognition. The qualifications in question are likewise recognized automatically, once they have been approved by the Commission and the other Member States.

In the case of both variants, for each profession concerned an advisory committee on education and training has been set up by means of a decision. The members of the committees are drawn, in equal numbers, from the profession, education and training establishments, and the supervisory authorities. Their task is to help ensure a comparably high standard of education and training throughout the Community. To that end, they adopt reports and recommendations to the Member States and the Commission. The committee on architects' education and training may also express an opinion as to whether a qualification complies with the relevant Directive.

Also in the case of both variants, committees have been set up - either formally or informally - comprising just representatives from the Member States and the Commission. These permit direct contact between the competent authorities and facilitate the resolution of problems relating to the directives' application.

These arrangements are the result of a highly cumbersome legislative procedure, and administering the committees is complicated - particularly the advisory committees, which now have 90 members following the accession of the three new Member States on 1 January 1995. They also cover only one specific profession or activity. Consequently, this approach has gradually been abandoned since 1985 (apart from a 1993 Directive consolidating the "doctors" Directives), in favour of a general approach.

C. Recognition of qualifications without coordination of education and training

The third set of arrangements is based on Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and education and training of at least three years' duration, and Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and education and training to supplement Directive 89/48/EEC.

In principle, these arrangements apply to all regulated activities not already covered by a specific directive. Recognition under the system might be described as semi-automatic, since the principle is to recognize a migrant's education and training where the regulated professional activities which he wishes to pursue are the same as those which he is entitled to pursue or has pursued in the home Member State, and where the education and training required in the host Member State does not differ substantially from that which he has undergone. If that is not the case, the host Member State may require the migrant to compensate for the difference by completing an adaptation period or taking an aptitude test, the migrant being, in principle, free to choose between the two. In the case of the legal professions, however, the host Member State is entitled to require an aptitude test. The compensation measure may relate only to substantial differences in the education and training concerned.

The two Directives have the advantage of covering all regulated activities and professions that do not fall under a specific directive, while introducing machinery for the semi-automatic recognition of education and training. In order to ensure that the two general systems would be administered satisfactorily, the Directives set up a coordinating group - comprising representatives from the Member States and chaired by a Commission representative - with the specific task of discussing and resolving practical implementation problems.

The professional services covered by the machinery, both as regards freedom of establishment and freedom to provide services, include the activities of surveyors, accountants and engineers. With regard to lawyers, only establishment is actually covered, since there is a specific Directive to facilitate the effective exercise by lawyers of freedom to provide services (on the basis of the title used in the home Member State). Under the system introduced by that Directive, each Member State is required to recognize as a lawyer, for the purpose of pursuing the activities of a lawyer under the freedom to provide services, persons who have the right to use the professional title of lawyer in their home Member State. That recognition is comprehensive, since it covers not only the migrant's legal knowledge but all the requirements governing the taking-up and pursuit of the profession.

The Commission's adoption of a general approach with regard to the recognition of qualifications does not altogether rule out the possibility of future directives specific to certain professions. But it has stipulated three preconditions for the adoption of such directives: the agreement of the profession concerned, a broad consensus among the Member States, and advantages compared with the "general system" Directives. A proposal for a Directive on the right of establishment for lawyers was adopted by the Commission in 1994.*

D. Case-law

The basic substantive and procedural principles that Member States must observe as regards the measures to be taken in this area have been established by the Court of Justice through its judgments in the cases concerning the migrants Heylens and Vlassopoulou - Case 222/86 (*Unectef v Heylens* [1987] ECR 4097) regarding Article 48 of the EC Treaty (freedom of movement for workers) and Case C-340/89 (*Vlassopoulou* [1991] ECR I-2357) regarding Article 52 (freedom of establishment).

In the latter judgment, the Court established the principle whereby the national authorities to which an application is made by a Community national to practise a profession which he is already admitted to practise in another Member State are required to examine to what extent the knowledge and qualifications attested by the diploma obtained by the person concerned in his country of origin correspond to those required by the rules of the host State; if those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking.

2. Recognition of proof of good repute, sound health, etc.

The various directives all contain, in differing forms, provisions requiring the host Member State to accept certificates issued by the authorities in the home Member State as proof that the person concerned is of good character or repute, enjoys sound physical and mental health, has not been declared bankrupt, and has not committed an act of serious professional misconduct or a criminal offence.

A number of the directives - and particularly those on architects - stipulate that, where proof of sound financial standing is required, attestations issued by banks in other Member States must be accepted; the same applies with regard to certificates issued by insurance companies in other Member States as proof of cover against the financial consequences of professional liability.

3. Membership of professional organizations and compliance with codes of conduct

In the case of establishment, migrants are normally required to register as necessary with the relevant professional organizations and to comply with their rules. The host country must ensure that registration with the organizations, and also appointment to their managing boards, is open to nationals of other Member States. The "general system" and "architects" Directives (for example) stipulate that, if necessary, migrants may provide proof in the form of a declaration on oath or a solemn declaration.

As regards provision of services, the specific directives on the recognition of (for example, architects') diplomas provide for exemption from registration with the professional organizations, or at least a simplified registration procedure or a straightforward declaration.

Lawyers providing services must observe the host Member State's rules of professional conduct without prejudice to their obligations in their home Member State and, when representing clients in legal proceedings, may be required to work in conjunction with a lawyer who practises before the judicial authority in question. Architects providing services are subject, in particular, to the host Member State's professional and administrative rules of conduct.

A complex set of legislation has thus been introduced in order to permit the cross-border practice of regulated professions in the European Union.

CONDITIONS TO OPERATE THE LEGISLATION

1. Principal legislation

The conditions governing professional activities are laid down mainly by national laws[1] requiring qualifications, such as diplomas, to be held in order to take up and pursue the activities in question.[2]

The purpose of the Community's legislation is merely to introduce machinery for the recognition of qualifications obtained in other Member States, in order to facilitate the exercise of the freedom of establishment and the freedom to provide services as provided for by Articles 52 to 66 of the EC Treaty.

The main features of the Community's legislation are:

(a) automatic recognition of:

- professional experience (skilled trades, commerce, industry, etc.);
- proof of good repute, etc. (all professions);
- authorizations to practise (lawyers, for provision of services);
- diplomas:
  - without prior examination of training content: through minimal coordination of education and training by means of directives[3] (in the case of six health-care professions[4] and, to a lesser extent, architects[5]);

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1 With a number of exceptions in the case of doctors (Article 23 of Directive 93/16/EEC), midwives (Article 1 of Directive 80/155/EEC), veterinary surgeons (Article 1 of Directive 78/1027/EEC) and, as regards the use of professional titles only, dentists (Article 1 of Directive 78/687/EEC).

2 In addition to the conditions governing qualifications, the national laws may also include - depending on the case - a *numerus clausus* as a means of restricting the numbers taking up the profession, and provisions on such matters as dealings with colleagues and members of the public, fees, the structure of the profession, continuing training, joint practice, disciplinary measures and the right of appeal, and incompatible activities. Rules of this kind apply not only to doctors, lawyers, etc., but also - especially in Germany and Luxembourg - to master craftsmen.

3 Backed up by opinions and recommendations from the advisory committees on education and training, comprising three experts (and their alternates) per Member State - from the profession concerned, training establishments and the supervisory authorities.

4 Those referred to in footnote 1, plus nurses responsible for general care and pharmacists.

- after prior examination of training content: on the basis of equivalence determined, where necessary, by applying a common standard (Article 3 of "general system" Directive 89/48/EEC);

(b) semi-automatic recognition of diplomas, i.e. recognition subject to completion of the compensation measures provided for by the general system (an adaptation period or aptitude test where the education and training undergone differs substantially from that required in the host Member State, or a period of professional experience where the duration of the education and training undergone is at least one year less than that required in the host Member State); where the levels of education and training required by the home and host Member States differ, the supplementary general system (Directive 92/51/EEC) provides for the transition;

(c) partnership with the professions' national supervisory authorities within the framework of committees or groups of senior officials, in order to administer the application of the specific and general directives on the recognition of qualifications;

(d) contact with the professions via their European or national associations and within the seven advisory committees on education and training set up with regard to the specific directives;

(e) compliance with the host Member State's code of conduct by migrants (except where Community law is breached - in the event of discrimination, for example).

2. Why the legislation is needed

National laws, which are often adopted at the professional organizations' request, generally cite the need to protect consumers (patients in the case of the health-care professions) and to safeguard the public interest. The general obligations inherent in the practice of the professions have been recognized as legitimate by the Court of Justice (see, in particular, Case 96/85 *Commission v France* [1986] ECR 1475), subject to certain conditions (non-discrimination, proportionality). However, with regard to the lists of professions annexed to the so-called transitional directives, it is questionable whether some of the national rules that necessitated those Community measures are still justified on socio-economic grounds - for example, in the case of professions that would be regulated in only a minority of Member States and if, in those circumstances, the free interplay of market forces would not be sufficient to ensure the provision of quality services to the consumer while promoting competitiveness and the creation of jobs.

Community legislation is necessary in order to overcome the obstacles posed by the legitimate imposition of qualification requirements in respect of the taking-up and pursuit of certain professions. That legislation is provided for by Article 57 of the EC Treaty (Article 49 in the case of employed persons and Article 66 in the case of services).

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5 The coordination relates only to qualitative and quantitative criteria for the assessment and mutual recognition of education and training whose validity is not disputed by the Commission or any of the Member States.

As explained above, in this area the Community's action limits itself to organising the mutual recognition of qualifications between Member States. The mutual recognition of professional qualifications in the Community is based, in general, on mutual trust between the different national authorities and, as regards professions or activities for which sectoral Directives were adopted, on the previous co-ordination of the national legislations, on training giving access to the profession, and on the guarantee of respect of and compliance with the minimal training requirements set out by those Directives.
This implies that each State must have adequate structures allowing the competent bodies (Ministries, professional organisations) to enforce compliance with the requirements mentioned above and with the professional and ethical obligations of those practising regulated professions.

3. Outline of a supervisory body

In the field of regulated professions the body ensuring compliance with the rules governing the profession is either a Ministry (or Ministries) or a professional organization (usually a professional Order), or both. The Ministry responsible for training, leading to access to the profession, is usually the Education Ministry in concert with other ministries which vary according to the profession in question (Labour, Health, Industry, Agriculture, Trade, Social Affairs, Employment, Tourism, Research). Professional Orders may also be associated at this stage.

In order to be allowed to practice a regulated profession the person in question must either register with or obtain a licence to practice from the competent Ministry/ professional Order. He or she must of course prove the possession of all the required qualifications. If the Ministry grants the licence or performs the registration and if a professional Order is set up of which membership is compulsory, the person in question must also register with that Order. It is also possible to establish a system in which the professional Order alone takes care of all the formalities regarding access to the profession in question.

The organization of the profession is left to the professional Order. Normally membership is compulsory or necessary to practice under a given professional title. The main tasks of the Order are the following:

1. to draw up the Order's register and keep it accurate and up to date;
2. to represent and promote the professional interests of the members;
3. to develop post-initial training and further vocational training;
4. to supervise professional duties and namely to ensure compliance with professional ethics;
5. to develop the reputation of the profession;
6. to co-operate with other Orders and bodies in the relevant areas of public law and national and international affairs;
7. to play a role as regards fees.

In some States the Orders are also empowered to take proceedings in the event of a criminal offence (illegal exercise of the profession, for instance).

The Orders are usually organized in the following way:

- the Higher (National) Council;
- the Regional/Provincial/District Councils.

The Higher Council is usually responsible for the overall management and hears appeals against decisions by the Regional Councils. The Higher Council is backed by the Regional Councils and advises them on how to apply the rules of the Order.

A breach of the professional and ethical rules may constitute a civil or a criminal offence as well as a disciplinary one. The Orders may be empowered to initiate criminal or civil procedures. They are certainly empowered to undertake disciplinary procedures and to impose disciplinary sanctions. The main disciplinary sanctions which may be imposed are the following:

- a period of probation;
- a warning/censure/reprimand;
- a temporary loss of the right to vote for the Council or Councils of the Order;
- a temporary ban on membership of the National or Regional Councils of the Order;
- a fine;
- a temporary suspension of the right to practice the profession, either only at regional level or at national level;
- expulsion/removal from the Order.

Some of these sanctions may be imposed, sometimes automatically, as a consequence of a conviction for a serious offence. There normally exists the internal right of appeal to the Higher Council and thereafter the right to lodge an appeal to the courts.

KEY MEASURES

The following measures are considered key because they facilitate the free movement of persons in the vast majorities of the regulated professions and especially in key and sensitive professions (i.e. doctors, dentists, lawyers, architects, accountants, engineers).

- *CHOICE OF STAGE I MEASURES*

DESCRIPTION & JUSTIFICATION :

As regards the "general systems" Directives (89/48/EEC and 92/51/EEC) the CEECs' authorities would progressively be invited to attend, as observers, the meetings of the group of co-ordinators who apply both Directives, in order to further develop mutual trust and knowledge between the different national authorities. These Directives are the priority since they cover a very wide range of professions and activities and do not require co-ordination of training. They do however require mutual trust between the different national authorities and good knowledge of each other's functioning, and that is why stage one should concentrate on these Directives. This stage should be concentrated on the technical assistance to enable the CEECs to set up or consolidate the necessary structures to ensure compliance with the Directives and enforcement thereof.

STAGE I MEASURES

Council Directive 89/48/EEC OJ N° L 19, 24. 01. 1989, p. 16)	Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years duration.
Council Directive 92/51/EEC OJ N° L 209, 24. 07. 1992, p. 25	Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.

- *CHOICE OF STAGE II MEASURES*

DESCRIPTION & JUSTIFICATION :

As far as the sectoral Directives (which concern doctors, nurses, dentists, mid-wives, veterinary surgeons, pharmacists and architects) are concerned, mutual recognition of qualifications depends on the previous co-ordination of training and the respect of the minimal training requirements prescribed by the Directives. This phase therefore concentrates on ensuring compliance with the Directives (or parts of Directives - see below footnote (6)) concerning minimal training requirements.

As far as the "general systems" Directives are concerned the CEECs authorities would participate more actively and regularly in the group of coordinators during this stage, in order to further develop mutual trust and knowledge between the different national authorities.

This is because the proper functioning of these directives requires a reasonable period of adaptation. Therefore without rendering these directives applicable in stage II, CEECs representatives would increase their participation in the group of co-ordinators which manages the two Directives.

STAGE II MEASURES

Health Professions :

Council Directive 93/16/EEC OJ N° L 165, 7. 7. 1993, p. 1[6]	Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications.
Council Directive 77/453/EEC OJ N° L 176, 15. 7. 1977, p. 8	Council Directive 77/453/EEC of 27 June 1977 concerning the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses of general care.
Council Directive 78/687/EEC OJ L 233, 24. 8. 1978, p.10	Council Directive 78/687/EEC of 25 July 1978 concerning the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners.
Council Directive 80/155/EEC OJ N° L 33, 11. 2. 1980, p. 8	Council Directive 80/155/EEC of 21 January 1980 concerning the co-ordination of provisions laid down by law, regulation and administrative action relating to the taking up and pursuit of the activities of midwives.
Council Directive 85/432/EEC OJ N° L 253, 24. 9. 1985, p. 34	Council Directive 85/432/EEC of 16 September 1985 concerning the co-ordination of provisions laid down by law, regulation or administrative action in respect of certain activities in the field of pharmacy.
Council Directive 78/1027/EEC OJ L 341, 23. 11. 1989, p. 19	Council Directive 78/1027/EEC of 18 December 1978 concerning the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of veterinary surgeons.

6 as far as the Directives 93/16/EEC and 85/384/EEC are concerned only the co-ordination of provisions in respect of the activities of doctors and architects respectively will be covered in stage two.

Architecture :

Council Directive 85/384/EEC OJ N° L 223, 21. 8. 1985, p. 15 [7]	Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.[7]

- ***CHOICE OF STAGE III MEASURES***

DESCRIPTION & JUSTIFICATION :

At the end of this stage the "general systems" directives, after evaluation of stages one and two, would become applicable between the EU States and the CEECs. CEEC representatives would become full members of the group of co-ordinators at the end of this stage.

Also at this stage, following evaluation of stage two, mutual recognition of professional qualifications (health professions and architecture) would gradually be set up. The CEECs would designate observers to the Advisory Committees and to the Groups of Senior Officials dealing with these professions.

This stage would also concern lawyers for which a sectoral Directive concerning provision of services and based on the recognition of the capacity to act has been adopted. This would greatly help firms and economic agents in general.

This Directive becomes applicable at this stage together with the "general systems" directives, of which directive 89/48/EEC covers establishment of lawyers. The simultaneous coming into force of the directive 89/48/EEC together with directive 77/249/EEC would fully ensure free movement of lawyers. It is not possible to deal with directive 77/249/EEC at an earlier stage, given that for the simple provision of services, it is necessary that a sufficient degree of mutual knowledge between Member States and CEECs is achieved.

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7 as far as the Directives 93/16/EEC and 85/384/EEC are concerned only the co-ordination of provisions in respect of the activities of doctors and architects respectively will be covered in stage two.

STAGE III MEASURES

Health Professions :

Council Directive 93/16/EEC OJ N° L165, 7.7.1993, p.1	Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications. The Directive in question gradually becomes applicable in its entirety (i. e. the part concerning mutual recognition of diplomas comes into play).
Council Directive 77/452/EEC OJ N° L176, 15. 07. 1977, p. 1	Council Directive 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.
Council Directive 78/686/EEC OJ N° L 233, 24. 8. 1878, p. 1	Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.
Council Directive 80/154/EEC OJ N° L 33, 11. 2. 1980, p. 1	Council Directive 80/154/EEC of 21 January 1980 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.
Council Directive 78/1026/EEC OJ N° L 362, 23. 12. 1978, p. 1	Council Directive 78/1026/EEC of 18 December 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.
Council Directive 81/1057/EEC OJ N° L 385, 31. 12. 1985, p. 25	Council Directive 81/1057/EEC of 14 December 1981 supplementing Directives 77/452/EEC, 78/686/EEC and 78/1026/EEC concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, dental practitioners and veterinary surgeons respectively, with regards to acquired rights.
Council Directive 85/433/EEC OJ N° L 253, 24. 9. 1985, p. 37	Council Directive 85/433/EEC of 16 September 1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy.

Architecture :

Council Directive 85/384/EEC OJ N L223, 21.8.1985, p.15	Council Directive 85/384/EEC of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services. The Directive in question gradually becomes applicable in its entirety (i.e. the part concerning mutual recognition of diplomas comes into play).

Legal Professions :

Council Directive 77/249/EEC OJ N° L 78, 26. 03. 1977, p. 17	Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

Remaining non-key measures not identified in preceding stages :

LIST OF TRANSITIONAL DIRECTIVES

I. COMMERCE AND INTERMEDIARIES

1. Council Directive 64/222/EEC of 25 February 1964 laying down detailed provisions concerning transitional measures measures in respect of activities in the wholesale trade and activities of intermediaries in commerce, industry and small craft industries (OJ N° 56, 4. 4. 1964, p. 857/64)

2. Council Directive 64/223 of 25 February 1964 concerning the freedom of establishment and freedom to provide services in respect of activities in wholesale trade (OJ N° 56, 4. 4. 1964, p. 863/64)

3. Council Directive 64/224/EEC of 25 February 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries (OJ N° 56, 4. 4. 1964, p. 869/64).

4. Council Directive 68/363/EEC of 15 October 1968 concerning the attainment of freedom of establishment and the freedom to provide services in respect of activities of self-employed persons in retail trade (ISIC ex Group 612) (OJ N° L 260, 22. 10. 1968, p. 496).

5. Council Directive 68/364/EEC of 15 October 1968 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in retail trade (ISIC ex Group 612) (OJ N° L 260, 22. 10. 1968, p. 6)

6. Council Directive 70/522/EEC of 30 November 1970 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the wholesale coal trade and activities of intermediaries in the coal trade (ISIC ex Group 6112) (OJ N° L 267, 10. 12. 1970, p. 14)

7. Council Directive 70/523/EEC of 30 November 1970 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the wholesale coal trade and in respect of activities of intermediaries in the coal trade and in respect of activities of intermediaries in the coal trade (ISIC ex Group 6112) (OJ N° L 267, 10. 12. 1970, p. 18).

8. Council Directive 74/556/EEC of 4 June 1974 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries (OJ N° L 307, 18. 12. 1974, p. 1).

9. Council Directive 74/557/EEC of 4 June 1974 on the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons and of intermediaries engaging in trade and distribution of toxic products (OJ N° L 307, 18. 12. 1974, p. 5).

10. Council Directive 75/369/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of itinerant activities and in particular, transitional measures in respect of those activities (OJ N° L 167, 30. 06. 1975, p. 29).

11. Council Directives 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents (OJ N° L 382, 31. 12. 1986, p. 17).

II. INDUSTRY AND CRAFTS

12. Council Directive 64/427/EEC of 7 July 1974 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) (OJ N° 117, 23. 07. 1964, p. 1863/64), as amended by Council Directive 69/77/EEC of 4 March 1969 (OJ L 59, 10. 3. 1969, p.8).

13. Council Directive 64/429/EEC of 7 July 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) (OJ N° 117, 23. 07. 1964, p. 1880/64)

14. Council Directive 64/428/EEC of 7 July 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in mining and quarrying (ISIC Major Groups 11-19) (OJ N° 117, 23. 07. 1964, p. 1871/64).

15. Council Directive 66/162/EEC of 28 February 1966 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons engaging in the provision of electricity, gas, water and sanitary services (ISIC Division 5) (OJ N° 42, 08. 03. 1966, p. 584/66)

16. Council Directive 68/365/EEC of 15 October 1968 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the food manufacturing and beverage industries (ISIC Major Groups 20 and 21) (OJ N° L 260, 22. 10. 1968, p. 9)

17. Council Directive 68/366/EEC of 15 October 1968 concerning laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the food manufacturing and beverages industries (ISIC Major Groups 20 and 21) (OJ N° L 260; 22. 10. 1968, p. 12).

18. Council Directive 69/82/EEC of 13 March 1969 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons engaging in exploration (prospecting and drilling) for petroleum and natural gas (ISIC ex Major Group 13) (OJ N° L 73, 27. 03. 1969, p. 82).

III. SERVICES INCIDENTAL TO TRANSPORT

19. Council Directive 82/470/EEC of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720) (OJ N° L 213, 21. 07. 1982, p. 1).

IV. FILM INDUSTRY

20. Council Directive 63/607/EEC of 15 October 1963 implementing in respect of the film industry the provisions of the General Programmes for the abolition of restrictions on freedom to provide services (OJ N° 159, 02. 11. 1963, p. 2661/63).

21. Second Council Directive 65/264/EEC of 13 May 1965 implementing in respect of the film industry the provisions of the General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services (OJ N° 85, 19. 05. 1965, p. 1437/65).

22. Council Directive 68/369/EEC of 15 October 1968 concerning the attainment of freedom of establishment in respect of activities of self-employed persons in film distribution (OJ N° L 260, 22. 10. 1968, p. 22).

23. Council Directive 70/451/EEC of 29 September 1970 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in film production(OJ N° L 218, 03. 10. 1970, p. 37).

V. OTHER SECTORS

24. Council Directive 67/43/EEC of 12 January 1967 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with:

    1. Matters of "real estate" (excluding 6401) (ISIC Group ex 640),

    2. The provision of certain "business services not elsewhere classified" (ISIC Group 839),

    (OJ N° 10, 19. 01. 1967, p. 140/67).

25. Council Directive 68/367/EEC of 15 October 1968 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the personal service sector (ISIC ex Major Group 85):

    1. Restaurants, cafes, taverns, and other drinking and eating places (ISIC Group 852)

    2. Hotels, rooming houses, camps and other lodging places (ISIC Group 853),

    (OJ N° L 260, 22. 10. 1968, p. 16).

26. Council Directive 68/368/EEC of 15 October 1968 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the personal services sector (ISIC ex Major Group 85):

    1. Restaurants, cafes, taverns and other drinking and eating places (ISIC Group 852).

    2. Hotels, rooming houses, camps and other lodging places (ISIC Group 853)

    (OJ N° L 260, 22. 10. 1968, p. 19).

27. Council Directive 75/368/CEE of 16 June 1975 on measures to facilitate effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities (OJ N° L 167, 30. 06. 1975).

28. Council Directive 82/489/EEC of 19 July 1982 laying down measures to facilitate the effective exercise of the right of establishment and freedom to provide services in hairdressing (OJ N° L 128 27. 07. 1982).

VI. AGRICULTURE

29. Council Directive 63/261/EEC of 2 April 1963 laying down detailed provisions for the attainment of freedom of establishment in agriculture in the territory of a Member State in respect of nationals of other countries of the Community who have been employed as paid agricultural workers in that Member State for a continuos period of two years (OJ N° 62, 20. 04. 1963, p. 1323/63).

30. Council Directive 63/262/EEC of 2 April 1963 laying down detailed provisions for the attainment of freedom of establishment on agricultural holdings abandoned or left uncultivated for more than two years (OJ N° 62, 20. 04. 1963, p. 1326/63).

31. Council Directive 65/1/EEC of 14 December 1964 laying down detailed provisions for the attainment of freedom to provide services in agriculture and horticulture (OJ N° 1/65, 08. 01. 1965, p. 1/65).

32. Council Directive 67/530/EEC of 25 July 1967 concerning the freedom of nationals of a Member State established as farmers in another Member State to transfer from one holding to another (OJ N° 190, 10. 08. 1967, p. 1).

33. Council Directive 67/531/EEC of 25 July 1967 concerning the application of the laws of the Member States relating to agricultural leases to farmers who are nationals of other Member States ((OJ N° 190, 10. 08. 1967, p. 3).

34. Council Directive 67/532/EEC of 25 July 1967 concerning freedom of access to co-operatives for farmers who are nationals of one Member State and established in another Member State (OJ N° 190, 10. 08. 1967, p. 5).

35. Council Directive 67/654/EEC of 24 October 1967 laying down detailed provisions for the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in forestry and logging (OJ N° 263, 30. 10. 1967, p. 6).

36. Council Directive 68/192/EEC of 5 April 1968 concerning freedom of access to various form of credit for farmers who are nationals of a Member State and established in another Member State (OJ N° L 93, 17. 04. 1968, p. 13).

37. Council Directive 68/415/EEC of 20 December 1968 concerning freedom of access to the various forms of aid for farmers who are nationals of one Member State and established in another Member State (OJ N° L 308, 23. 12. 1968, p. 17).

38. Council Directive 71/18/EEC of 16 December 1970 laying down detailed provisions for the attainment of freedom of establishment in respect of self-employed persons providing agricultural and horticultural services (OJ N° L 8, 11. 01. 1971, p.24).

INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY

GENERAL INTRODUCTION

Proper and effective protection of intellectual, industrial and commercial property - which will be classed together here under the blanket term "intellectual property" - is an indispensable means of making the most of human ideas and creativity, and harnessing them in the cause of innovation. It allows a happy mean to be struck between the encouragement of intellectual creation and the need to ensure that society as a whole benefits as a result. Intellectual property developed in the context of a market economy; it is vital to the construction of a modern society and to the emergence of innovative and high-quality goods and services. Its ultimate objectives are to encourage R&D, to facilitate the dissemination of ideas and to protect creative effort. Copyright and related rights are at the same time closely bound up with freedom of expression and the free exchange of ideas, which are fundamental values in a democratic and pluralist society.

Intellectual property differs from many other areas of law in that over a long period a large body of legislation has been successfully built up at multilateral level, particularly in the framework provided by WIPO, the World Intellectual Property Organization. When the Community set out to establish a single market it naturally took account of the harmonization already accomplished here.

The Agreement on Trade-related Aspects of Intellectual Property Rights or "TRIPs", concluded recently as part of the GATT process, will also have a very marked effect on the degree of harmonization of legislation between Members of the World Trade Organization; it lays down minimum requirements for all the intellectual property rights - copyright and related rights, trade marks, geographical indications of origin, industrial designs, patents and the layout-designs or topographies of integrated circuits. It also for the first time extends to the intellectual property field two fundamental principles of international law, namely national treatment and most-favoured-nation treatment.

The Community and its Member States have ratified this Agreement. The Community has made the necessary changes in its own legislation. With the exception of Bulgaria the CEECs are all Members of GATT, and have all signed the agreements which emerged from the Uruguay Round negotiations.

The TRIPs Agreement is a great step forward, but it has to be recognized that most of the multilateral conventions, and especially those revised in the late 60s or early 70s, do not provide an answer - or at any rate a complete answer - to all the questions which arise, particularly in connection with technological development. In the nature of things, too, the single market often calls for closer and more structured harmonization of national legislation than do the international conventions. So that although multilateral action is necessary, it is not sufficient to meet the needs of the single market.

DESCRIPTION OF THE LEGISLATION

The Community took its first real steps in the field of intellectual property in the second half of the 70s, but it was the establishment of the single market which provided the decisive impetus for the harmonization of intellectual property rights. The objective was to ensure that goods and services protected by one of these rights could move freely. A right-holder had to be able to treat the Community as a single home market, which meant that the protection available had to be equivalent in all Member States. Differences which stood in the way of this objective were to be eliminated by means of measures adopted at Community level. Initially, therefore, Community action took the form of an alignment of the Member States' intellectual property legislation aimed at removing differences of treatment which interfered with the free movement of goods and services. Efforts were concentrated on areas where the divergences were most marked, or where there were unjustified obstacles to free movement. The same approach is still being followed with respect to those intellectual property rights where there has been no Community legislation as yet, such as industrial design.

Once an alignment of domestic legislation has been decided, it will sometimes be desirable to offer rightholders the possibility of securing protection throughout the European Union in one operation. In some areas Community action may culminate in the creation of specific Community-level rights: this is the case with the Trade Mark Regulation, or the proposal for a Regulation on Community design. Arrangements of this kind are intrinsically tied to membership of the European Union. But it should be noted that the systems are so designed that they can be opened up without any discrimination to all non-Community nationals, be they natural or legal persons.

CONDITIONS NECESSARY TO OPERATE THE LEGISLATION

The protection of intellectual property is rooted in the principles of civil law. The range of concerns it covers is reflected in the number of different types of property right which exist, all of them necessary: patents, trade marks, copyright and related rights, industrial designs etc. An initial distinction can be drawn between *industrial* property rights, which are obtained by registration with a government agency, and *copyright* and related rights, which are born with the creation of the work. Industrial property rights have to be administered by a government office with competent staff who keep constantly abreast of technological development; if the rights conferred are to be secure, therefore, it is important that the officers examining applications should undergo continuous in-service training in the various branches of the exact sciences.

Turning to copyright and related rights, it should be pointed out that it can be difficult or impractical for a rightholder to enforce his rights individually; rightholders have consequently set up management societies to administer their rights on their behalf, or in other words to monitor the use of their works, to negotiate with users, and to collect royalties and divide them between the holders of the rights. The legal recognition of a right clearly cannot be dissociated from the possibility of exercising it effectively.

The substantive rights protected and the mechanisms available to rightholders for the enforcement of those rights are two sides of the same coin. There is little point in recognizing a substantive right if there is no effective way of exercise it in practice; and procedural machinery will serve no purpose if there is no substantive right to protect.

For enforcement to work, therefore, there are administrative measures which must have been taken; but the organization of the courts has to be considered too. On the administrative side there must be an industrial property office with proper computer support and competent and well-trained staff. Customs and police authorities may also be called upon to play a part in the fight against fraud by preventing the movement of counterfeit goods on the territory of the State. On the judicial side, enforcement requires a structured system of courts, with specialized courts able to handle questions of intellectual property law, the possibility of appeal against the decisions of lower courts, and so on. The GATT TRIPs Agreement will have a noticeable effect here, because it obliges Members to establish civil and administrative procedures and remedies, to empower the courts to order provisional measures, to meet special requirements related to border measures, and to provide for criminal procedures.

KEY MEASURES

All the measures taken at Community level with respect to intellectual property are necessary to the operation of the single market, being designed to create a harmonized legal environment for the benefit of everyone operating in industry and commerce.

Intellectual property covers a range of different rights, which are being harmonized gradually with the ultimate aim of ensuring a high level of protection and a degree of alignment which guarantees the free movement of goods and services. To make a selection among the Community measures in force one would have to create gaps in the protection provided or to neglect important areas.

- *CHOICE OF STAGE I MEASURES*

DESCRIPTION & JUSTIFICATION:

Because some of these measures concern the free movement of goods even more directly than the others, they should be adopted as a matter of priority. They are Stage I measures.

For the CEECs, the first stage in the approximation of laws consists in aligning their legislation on certain current Community rules, mainly in the field of trade marks and copyright and related rights.

Directive 89/104/EEC approximating trade mark laws is important in that it has a triple objective: the protection of trade marks, the free movement of branded articles, and the protection of consumers who acquire branded articles. To this end, it harmonizes the definition of signs of which a trade mark may consist, the list of grounds for refusing registration, the rights conferred, and the requirements linked to the use, and sanctions for non-use, of a trade mark.

Directive 87/54/EEC on the legal protection of topographies of semiconductor products is an essential instrument for protecting information technology. It seeks to protect what is in effect the "heart" of a computer.

Directive 91/250/EEC on the legal protection of computer programs introduces effective protection and harmonizes the rules governing the protection of software, which is the principal component of data processing systems and of the utmost importance to industrial and technological development. The Directive provides for copyright protection of software.

Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, and Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights, are the cornerstones of Community harmonization in the area of copyright and related rights. The former is a "horizontal" Directive which introduces exclusive rental and lending rights whereby rightholders are assured of a share of the benefits to be derived from the new forms of exploitation of works and performances. It harmonizes related rights and thus helps to combat piracy. The latter Directive harmonizes at a high level the term of protection of all works and performances. In so doing, it promotes the free movement of cultural goods and services and removes the distortions of competition caused by differences in the level of protection.

Under the Europe Agreements the CEECs have undertaken to apply for membership of the European Patent Convention (Munich Convention) within five years. Applications ought therefore to be submitted to the European Patent Organization by the end of 1996 or 1997, depending on the country. But some countries have taken anticipatory action by concluding with the EPO agreements extending to their territory the effects produced by applications for European patents and by those European patents which are granted.

Pending such full membership of the Munich Convention, the extension agreements are of value to Community industry in that they enable those applicants for European patents who so wish to secure, by a simple and inexpensive procedure, protection for their patents in countries other than those which are full members of the Convention.

STAGE I MEASURES

Trade marks:

First Council Directive 89/104/EEC OJ L 40, 11.02.1989	First Council Directive 89/104/EEC of 21.12.88 to approximate the laws of the Member States relating to trade marks

Copyright and related rights:

Council Directive 87/54/EEC OJ L 24, 27.01.1987	Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products
Council Directive 91/250/EEC OJ L 122, 17.05.1991	Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
Council Directive 92/100/EEC OJ L 346, 27.11.1992	Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
Council Directive 93/98/EEC OJ L 290, 24.11.1993	Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

- *CHOICE OF STAGE II MEASURES*

DESCRIPTION & JUSTIFICATION:

A series of new Community measures were adopted recently by the Council of the European Union. They are either an extension of those already adopted previously in certain areas of intellectual property, for example in the field of copyright and related rights, or an appropriate response to certain legal and economic developments, such as the problem of erosion of the term of effective patent protection in the pharmaceutical sector.

The Commission considers that, bearing in mind the general legal context in which intellectual property is situated and the progress already made by the CEECs in bringing their legislation up to date, it is possible to envisage an approximation of laws in relation to these new Community measures as a whole. Among these measures, there is one which is particularly important, namely that concerning the campaign against counterfeiting and piracy.

A number of proposals for Community measures governing intellectual property are currently pending before the Community institutions. CEEC representatives have been kept regularly informed about these proposals, *inter alia* through the RIPP (Regional Industrial Property) and "Intellectual Property" (copyright and related rights) programs, and informal talks have even been held on certain sensitive aspects of the proposals. Once they have been adopted, the proposals will round off the Community legislative framework governing intellectual property on the basis of which the CEEC's laws may subsequently be approximated.

STAGE II MEASURES

Patents:

	Council Regulation (EEC) No 1768/92 OJ L 182, 2.07.1992	Council Regulation (EEC) No 1768/92 of 18.06.92 concerning the creation of a supplementary protection certificate for medicinal products
*	Proposal for a Parliament and Council Regulation (COM(94)579) (NOT YET PUBLISHED)	Proposal for a Parliament and Council Regulation concerning the creation of a supplementary protection certificate for plant protection products

Designs:

*	Proposal for a Parliament and Council Directive (COM(93)344) OJ C 345, 23.12.1993	Proposal for a Parliament and Council Directive on the legal protection of designs

Copyright and related rights:

	Council Directive 93/83/EEC OJ L 248, 6.10.1993	Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
*	Proposal for a Parliament and Council Directive (COM(92)24 final) OJ C 156, 23.06.1992	Proposal for a Parliament and Council Directive on the legal protection of data bases

Measures against counterfeiting:

Council Regulation (EC) No 3295/94 OJ L 341, 30.12.1994	Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods