EC UPDATE

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A. COMPLETION OF THE INTERNAL MARKET

On 31 December 1992, the long-waited completion of the Internal EC Market has, officially, become a reality. To achieve this result the following last barriers have been removed:

1. Physical Barriers

No customs documentation will be required for the movement of goods inside the Community. Thus new arrangements will have to be made for the elimination of controls at internal frontiers and for consistent management of external frontiers. However, the member states retain the power of control over their territories subject to the principle of non-discrimination. Some exceptions are made in respect of Spain and Portugal for the duration of the transitional period, and baggage checks on flights and sea crossings within the EC as well as the special provisions regarding counterfeit goods and illegal drug traffic.

2. Technical Barriers

The Community has accomplished significant progress in the field of technical harmonization mainly due to the "new approach" based on the notification of national technical regulations to the Commission, effective transposition of Community directives by the member states, the adoption of European standards, and the policy on certification. Harmonization has been achieved in a number of sectors such as motor vehicles, foodstuffs, pharmaceuticals and chemical products, but the development in the transposition of the relevant directives into the national system has shown differences among the member states.

As regards public procurement, the Community approach is based on trans-

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parency in the opening up of public procurements to competition, transparency of selection criteria, procedures for tenders and contract awards at all levels of public services. In this field difficulty lies in the diversity of national practices. Transposition of EC rules without effective policing will not be of any use in reaching the desired objectives.

As for the regulated professions, the Second Directive (92/51) for the recognition of professional qualifications has met obstacles in some member states. Therefore, its application has been delayed. Work continues on the recognition of some 209 non-regulated professions.

The White Paper programme for services has been completed. Credit institutions and banks will be controlled by a complete set of rules involving licensing, solvency and supervision on a home basis. Stock exchanges and securities will be more readily accessible and subject to tighter supervision. As with banking, prudential supervision will be carried out by the member state in which the head office is situated.

The transport sector legislation has been almost completed, including air transport, cabotage system for the carriage of goods and passengers by road and by inland waterways.

The Directive on the liberalization of capital movements has taken effect also in countries which were granted transitional arrangements.

The controversy over the inclusion of the principle of worker participation has prevented the completion of the company law harmonization programme. The harmonization of company taxation has not yet been realized.

Development in the field of intellectual property has been partially attained. The adoption of the Convention on the Community patent and the implementation of the trademark regulation has been delayed, and the recommendations of the Commission's Green Paper of 1988 in copyrights have been only partially accepted. However there is a directive on the protection of computer software and a common position has been adopted on a proposal for a directive on rental and lending rights and on certain rights related to copyrights.

3. Tax Barriers

The basic legislation enacted in this field to this date, consists of the transitional arrangements governing VAT, the regulation on administrative co-operation in the field of indirect taxation and the Directive on excise duties. However, the approximation of VAT and excise duty rates and the harmonization of the structure of excise duties have to be accomplished as well, in order to complement the system.

Conclusion:

The completion of the Internal Market is an important stage in the consolidation of the Common Market, leading to the establishment of the European Economic and Monetary Unions. Outwardly, it has been concluded by the Community Code of Customs Law.

B. THE CODE OF CUSTOMS LAW

Council Regulation 2913/92 of 12 October 1992 establishing the Community Customs Code:

Scope:

The Council Regulation establishing the Community Customs Code entered into force on 22 October 1992 and is being applied since 1 January 1994. It applies to trade between the Community and third countries throughout the customs territory of the Community. The regulation consolidates and repeals 28 regulations and directives previously governing the customs regime of the Community.

Content:

The Regulation, as published in the Official Journal dated 19 October 1992, includes chapters on scope of the Regulation and basic definitions for terms mentioned in the text of the Regulation, general provisions on the rights and obligations of persons with regard to customs rules, determination of the customs tariff and tariff classification of goods as well as rules governing origin of goods, value of goods for customs purposes, entry of goods into the customs territory of the Community, presentation of goods to customs, customs procedures, release for free circulation, external transit, inward processing, outward processing, export, internal transit of goods and customs debt.

Relevance for Turkey:

Considering the customs union to be established between the Community and Turkey in 1995, the Community customs code is of special importance to Turkish business and trade sectors. According to Article 10 of the Ankara Agreement, the treaty of association between the EEC and Turkey, the realization of the customs union will entail "the adoption by Turkey of the common customs tariff of the Community in its trade with third countries and an approximation to the other Community rules on external trade". Therefore, Turkey should abide by the rules layed down in the Community customs code in its trade with third countries if the current negotiations will integrate Turkey with the EC customs territory.

Other legislation enacted by the Community recently, concerning the customs code are as follows:

* Regulation 222/93 (OJ 1993, L27) on the administration of a Community tariff quota for fresh or dry hazelnuts originating in Turkey.

* Regulation 339/93 (OJ 1993, L40) on checks for conformity with the rules on product safety in the case of products imported from third countries.

* Regulation 482/93 (OJ 1993, L51) on rules for the import arrangements applicable to products falling within CN codes originating in third countries which are not contracting parties to GATT.

* Regulation 579/93 (OJ 1993, L61) on the whole or partial suspension of the Common Customs Tariff duties on certain agricultural products originating in Turkey.

* Regulation 679/93 (OJ 1993, L76) on the common organization of the market in fishery and aquaculture products.

* Regulation 979/93 (OJ 1993, L101) on the declaration of particulars relating to customs value and on documents to be furnished.

* Regulation 958/93 (OJ 1993, L103) on a Community procedure for administering quantitative import restrictions and of monitoring of textile and clothing products originating in certain third countries.

C. EUROPEAN ECONOMIC AREA

The European Economic Area Agreement, which entered into force on 1 January 1994 without the inclusion of Switzerland, aims to promote the trade and economic relations between the EC and EFTA countries with the intention of creating a homogenous European Economic Area (EEA). This aim is to be achieved through;

1. free movement of goods,
2. free movement of persons,
3. free movement of sevices,
4. free movement of capital,
5. the rules on competition, and
6. closer co-operation in certain fields, notably, research and development, the environment, education and social policy.

1. Free Movement of Goods:

The principle of the free movement of goods is established in the EEA only in respect of products originating in the Contracting Parties. Customs duties and quan-

titative restrictions on imports and exports as well as all other charges and measures having equivalent effect will be eliminated (article 10-12 of the EEA Agreement). The Agreement provides for safeguard measures which may be taken by the parties to protect their national interests in specific circumstances, according to set procedure. Also a Contracting Party may take limited unilateral action in the case of serious economic, societal or environmental problems of a sectorial or regional nature.

2. Free Movement of Persons:

Free movement of workers in the EEA is ensured, subject to derogations on grounds of public policy, public security, or public health and the exception in respect of employment in the public service. Article 29 provides for the aggregation of social security rights acquired in the EEA countries and the payment of benefits to persons resident there.

As regards freedom of establishment, Contracting Parties are bound to eliminate restrictions on the exercise of the right to take up and pursue activities of self-employed persons and to set up and manage undertakings with the exception of activities connected with the exercise of official authority and subject to derogations on grounds of public policy, public security, or public health.

3. Free Movement of Services:

The freedom to provide services within the EEA territory will not be restricted (article 36). However, this principle is subject to provisions on professional qualifications, exercise of official authority, and corporate bodies.

4. Free Movement of Capital:

Article 40 of the EEA Agreement lifts all restrictions between the Contracting Parties on the movement of capital belonging to persons resident in the EEA and all discrimination on the ground of nationality or the place of residence of the parties or on the place where capital is invested.

In the field of economic and monetary policy, the Contracting Parties shall cooperate by means of the exchange of information, views and discussions between each other.

5. The Rules on Competition:

The rules on competition enshrined in articles 85 and 86 of the EEC Treaty shall be applied in the EEA territory (articles 53 and 54). The implementation of these

rules fall upon the EC Commission and the EFTA Surveillance Authority. As for the administration of state aids, article 61 of the EEA Agreement prohibits and exempts state aids in the same terms and on the same conditions as article 92 of the EEC Treaty.

6. Closer Co-operation:

The EEA Agreement calls for co-operation between the Contracting Parties in the fields of research and development, education and training, small and medium sized enterprises, tourism, the environment, social policy etc.

The Agreement also includes provisions on such issues as the improvement of the standard of living and working conditions, equal pay and equal treatment for women, dialogue between management and labor at European level, consumer protection, preservation and protection of the environment, and company law.

Institutional Provisions
The Structure of the Association:

1. The EEA Council:

The Council consists of the EC Council of Ministers and members of the EC Commission and of one member of the government of each of the EFTA countries. The office of President is held alternately for a period of six months by a member of the EC Council and a member of the government of an EFTA state.

Decisions of the Council are taken by agreement between the EC and the EFTA countries. This means unanimity on both sides and unanimity in Council between the two sides.

The function of the Council is to provide leadership in the implementation of the Agreement and to lay down the general guidelines for the EEA Joint Committee.

2. The EEA Joint Committee:

The EEA Joint Committee consists of representatives of the Contracting Parties. It shall meet regularly at least once a month or at the initiative of its president or one of the Contracting Parties. The Committee takes its decisions by agreement between the EC and EFTA countries.

3. The EEA Joint Parliamentary Committee:

The joint parliamentary committee consists of equal numbers of the members of the European Parliament and members of the Parliaments of the EFTA countries.

Its function is to contribute to a better understanding between the EC and EFTA through "dialogue and debate". It shall examine the annual report of the EEA Joint Committee, debate issues relevant to the EEA, and express its views in reports and resolutions.

Although its functions are very limited, the Parliamentary Committee as an institution, testifies to the fact that the EEA is not merely an economic arrangement and brings parliamentary democracy to the EEA.

4. The EEA Consultative Committee:

The Consultative Committee consists of representatives of the EC Economic and Social Committee and the EFTA Consultative Committee. It shall express its views in the field of its competence by means of reports and resolutions.

The Decision-making Procedure:

The EEA Agreement acknowledges the legislative autonomy of the Contracting Parties. Thus, each Contracting Party is free to amend its internal legislation, subject to the condition of informing the other and the principle of nondiscrimination, in the areas covered by the Agreement. The "acquis communautare" is accepted as the basis of the EEA. Therefore, any further developments in EC law is of vital importance to the EEA.

In this context, the EC Commission, which initiates EC legislation, shall, informally, seek advice from the EFTA experts on any proposal for legislation that falls within the field of the EEA Agreement (article 100). The purpose here is to take into account the views of the EFTA countries before presenting the proposal to the Council of Ministers.

Whenever the EC adopts legislation on an issue governed by the Agreement, it must inform the other Contracting Parties in the EEA Joint Committee. Then, the Joint Committee shall take a decision "as close as possible" to the EC measure. During this process, all parties must make an effort to arrive at an agreement, but the EEA Joint Committee in particular, must make every effort to find a mutually acceptable solution to any serious problem arising in any area, regarding which the EFTA countries must enact the appropriate legislation.

Unless otherwise provided, the decisions of the EEA Joint Committee shall be binding upon the Contracting Parties on their entry into force.

Conclusion:

The EEA Agreement entered into force on 1 January 1994 without the participation of Switzerland, due to the negative result of the referandum in that country.

It encompasses the 12 member states of the EU plus Sweden, Finland, Austria, Norway and Iceland. Turkey has also signed a Free Trade Agreement with EFTA in 1992.

The diplomatic conference to be convened to review the position of the EEA will have as the first item on its agenda the question of the ratification of the EC-EFTA Agreement on which the existence of the EEA depends.

D. EC-TURKEY CUSTOMS UNION

Negotiations for a customs union between the EC and Turkey are currently in the way, and although the exact form of the Union cannot as yet be anticipated, it is expected that the Union will be in operation, as from 1 January 1995.

SUMMARIES OF RECENT CASES AT THE EUROPEAN COURT OF JUSTICE

Case C-106/89 Marleasing v La Comercial (1990) ECR 4135

The **Marleasing** case concerned the interpretation of the First Company Directive. In **casu,** a Spanish company claimed that the Memorandum and, Articles of another Spanish company were devoid of any legal purpose and, therefore, violated the Spanish Code of Civil Law. The respondent relied on Article 11 of the Directive which contains a list of grounds upon which the nullity of a company may be declared but the legal purpose does not figure in the list. However, Spain has failed timerously to implement the Directive.

On reference, the ECJ answered in the negative the question whether a private party could plead the provisions of an unimplemented Directive against another private party. However for the interpretation of national law the Court relied on the **Von Colson** case where it held that "in applying the national law ... national courts are required to interpret their national law in the light of the wording and purpose of the Directive". Consequently the Spanish court was obliged to interpret the provisions of the Code so as to preclude a declaration of nullity of a company based on a ground which is not listed in the First Company Directive. Thus the obligation written into a Directive becomes a rule of national law via judicial interpretation. This has the same effect as if the provisions of a Directive had a horizontal effect.

Cases C-6/90 and 9/90, Francovich v Italy (1991) ECR I-5357

The **Francovich** case raises the question of State responsibility to individuals for failure to implement a directive protecting their rights in the event of their employer's bankruptcy. Italy failed to implement **Directive 80/987** which required the State to provide specific guarantees for the payment of unpaid wages and to that end enact appropriate national legislation ensuring the setting up of a guarentee fund. In the enforcement proceedings brought by the Commission it was clear that Italy was in breach of Community law. The next point was whether the State's failure triggered off a State liability grounded in Community law in the absence of a remedy under the national law.

This question was answered in the affirmative in the subsequent case in which certain employees sued the State, in the national jurisdiction, for compensation in re-

spect of wages owed to them by the bankrupt employer on the ground of the State's failure to implement the Directive. The ECJ ruled the for the State to be liable to make good the resultant damage suffered by the employees, three conditions had to be satisfied i.e. the Directive had to accord rights to the individuals, the contents of their rights had to be identifiable from the Directive itself and there had to be a causal connection between the State's breach of duty and damage suffered by the individuals. These conditions were satisfied in the instant case.

The Court conceded that the Directive was not directly effective because the institutions to guarantee the wages were not identified but, following its own judgment in the **Factortame** case, ruled that the State was obliged to provide an effective remedy to safeguard the rights of individuals guaranteed by the Directive. Such conslusion was inherent in the Treaty since the State was in duty bound to carry out its obligations. The potential of the **Francovich** ruling is quite wide since, bearing the three conditions, it opens up the possibility of individuals claiming compensation in the event of the State failing to implement a directive or, even, implementing it incompletely or incorrently. A judgment in compensation may be more effective than enforcement proceedings.

Case C-275/92 Commisioners of Customs and Excise v Gerhart Schindler and Another

The case concerned the interpretation of Articles 59 and 60 of the Treaty on the freedom to provide services. In **casu,** two independent agents of a public body organizing lotteries in Germany sent letters with application forms from the Netherlands to the UK, inviting people to participate in the lottery. These letters were confiscated by the UK Customs and Excise which argued that they had been imported in breach of the relevant UK legislation prohibiting lotteries in the country with the exception of small scale lotteries for charitable purposes and the national lottery.

Upon reference to the ECJ, the Court decided to treat the matter in the context of the freedom to provide services within the scope of Article 59. As to the question whether the Treaty provisions on the freedom to provide services prevented national legislation prohibiting the holding of lotteries, the Court ruled that the UK legislation did not involve any discrimination on the basis of nationality and could not be regarded as a measure involving an unjustified interference with the freedom to provide services.

Having in mind the limited scope of the case law on the interpretation of the freedom to provide services, this case is of utmost importance in defining the scope and meaning of Article 59 and 60 of the Treaty and the derogations from the principle of the freedom to provide services. The Court's treatment of the matter, that is the importation of lottery material, within the scope of the freedom to provide services and

its opening the way for a derogation to the effect that national legislation which prohibited the holding of lotteries on the grounds of the protection of consumers and maintenance of order in society is justifiable, are significant judgments concerning the interpretation and implementation of the related provisions of the Treaty.

Case C-237/91 Kazım Kuş v Landeshauptstadt Wiesbaden (1992) ECR-I 6791

The case concerned the interpretation of Article 6 of Decision No 1/80 of the Council of Association established by the Association Agreement between the EC and Turkey. Article 6 (1) of the Decision provides that "a Turkish worker duly registered as belonging to the labor force of a Member State" shall be entitled to the renewal of his work permit with the same employer after a year of legal employment and free access to any paid employment of his choice, after four years of legal employment.

In this case, Mr. Kuş, a Turkish national, obtained a residence permit in Germany as the spouse of a German citizen. On his application for the renewal of the permit, he was refused due to the break up of his marriage although he held a valid work permit at the time. The German court submitted the case to the ECJ for a preliminary ruling.

In its ruling the Court stated that according to Article 6 (1) of the Decision, a Turkish national who has obtained a permit to reside on the territory of a Member State in order to marry a national of that Member State and who has worked for more than one year with the same employer on the basis of a valid work permit is entitled to have his work permit renewed. The fact that in the meantime the marriage has been dissolved is irrelevant.

The Court also ruled that the right to renewal of the work permit and the right of residence are closely linked and, a Turkish national after a year of legal employment with the same employer or after four years of legal employment having gained right of access to any paid employment of his choice, may obtain the extension of his residence permit as well as that of his work permit in accordance with Article 6 (1).

This case is significant in that it is one of the three cases subtitted to the ECJ setting precedents concerning the freedom of movement of Turkish nationals in the EC. It confirms the right to work and reside in a Member State for Turkish nationals who fulfill the conditions layed down in Article 6 (1) of Decision No 1/80.

Case C-286/88 Falciola v Commune di Pavia (1990) ECR I-191

The Court posed the following highly speculative questions:

(1) The Court of Justice is requested to state whether, apart from the Com-

munity and Italian legal orders, there is today also a third legal order (Community-cum-Italian) which accompanied by the Community-cum-English, Community-cum-German legal orders, and so forth, and which characterized:

(a) by the fact that the rules governing it are to be found primarily in the provisions of Community law and sub-primarily in the provisions of Italian law (the two categories of provisions - primary and sub-primary - merge to form a **unitary** legislative framework);

(b) by the fact that it concerns substantial Community interests which are realized **also** through Italian instruments.

(2) The Court of Justice is requested to state the third paragraph of Article 189, and Articles 177 and 5 of the EEC Treaty must be interpreted as meaning that the Member States, when they give effect to the Community directives, must also provide for the relevant procedural instruments regarded as necessary for ensuring adequate judicial protection, which entails the obligation to alter **for the better** the judicial instruments already in existence and, in any event, the duty not to alter those instruments for **the worse.**

(3) The Court of Justice is requested to state whether it **necessarily** follows from Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty, read together, that there is a duty - on the part of the Member States - to provide that disputes relating to matters governed by "Community-cum-Italian" law (and thus governed **primarily** by Community provisions and **sub-primarily** by Italian provisions) must be decided by national judges who, as regards the essence of the judicial function, are on the same footing as the Court of Justice (and accordingly are not **"less judicial"** than the Court).

(4) (In the alternative) the Court of Justice is requested to state whether it **necessarily** from Articles 5 and 177 and the third paragraph of Article 189 of the EEC Treaty, read together, that there is an obligation on the part of the Member States to provide, as regards the "implementation of the Community directives", that disputes relating to matters governed by "Community-cum-Italian" law shall be decided by institutions vested with "real", and not **"apparent",** judicial power **("utilis, non inutilis jurisdictio")".**

Such questions could not solve in any practical way the conundrum caused by artificial classification of the law or perhaps desirability of reforming the adjudicative system which exercised the minds of the judges. Such problems were clearly outside the jurisdiction of the ECJ and the Court considered the questions to be "manifestly irrelevant".