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## LEGISLATION

### Directive 2001/95 on General Product Safety

Official Journal of the European Communities, L 11, 15 January 2002, p. 4

The Directive reinforces previous EC rules and requires producers (or their representatives) to place only safe products on the market. Products covered are those meant for, or likely to be used by, consumers, except foodstuffs which are covered by separate rules, and the Directive defines a "safe product" as "any product which, under normal or reasonably foreseeable conditions of use [...] does not present any risk or only the minimum risks compatible with the product's use".

Among other obligations, the Directive requires producers and distributors who have placed a product on the market to immediately inform the competent authorities of the relevant Member States if the product poses risks incompatible with the general safety requirement. Member States may, in consultation with producers and distributors, order the withdrawal, the recall or the ban of products which are considered dangerous. The Commission must be kept informed by the Member States of information they receive, and must circulate such information. The Commission, under certain circumstances, can decide to recall or ban products Community wide for a period of up to one year, renewable.

15 January 2004 was the deadline for the Member States to implement the Directive. These rules will become applicable in the ten next EU Member States on 1<sup>st</sup> May 2004. The Rapid Information System, also called RAPEX, is however already open to future EU Member States. Hence national authorities may report a domestic product event throughout the EU, via the Commission; they may also act

domestically upon receiving information on a product from abroad.

### Council Regulation no. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation)

Official Journal of the European Union, L 24, 29 January 2004

As a part of modernisation of the EC competition law system, the Council adopted on 20 January 2004 the long awaited new merger control regulation. The main rationale behind it is to ensure that mergers are examined by the best placed authority, that multiple filings in several EU Member States are avoided and that the timetable for the review is improved. The reform is also a response by the Commission to a series of judgements of the Court of First Instance in 2002 which annulled certain Commission decisions disapproving a merger.

To sum up, the new Merger Regulation, which shall replace the existing Merger Regulation no. 4064/1990, brings about three major changes.

Firstly, the key rule of the so called "one stop shop" continues to be applicable, however, the concept has been expanded so as to avoid that multiple filings must be made in several EU Member States in case the merger does not attain the so called Community dimension. Consequently, the companies will be able to ask, even during the pre-notification period, the benefit of the one stop shop if they have to notify in three or more Member States. Should none of such Member States oppose such a request, the concentration will be considered to be of a community dimension and will be reviewed only by the Commission. This should reduce costs, bureaucracy and legal uncertainty.

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Secondly, as regards the substantial test, the Commission, when deciding whether a merger must be challenged or not, shall appraise whether the merger would significantly impede effective competition, in the common market or in a substantial part of it. The concept of significant impediment should be interpreted as including the concept of dominance as applied so far, however, it will be extending also to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

Finally, certain important changes have been implemented from a procedural point of view. The merger will no longer need to be notified within the one-week deadline. Given that the merger may, as a rule, not be implemented prior to its authorisation by the Commission, it is in the companies' own commercial interest to obtain regulatory clearance from the Commission as soon as possible. It is also explicitly provided that a prior notification of a concentration, e. g. based on a letter of intent, is possible. Also, the timetable for a merger review by the Commission has been adapted to be more flexible while still predictable. The new timeline should allow enough of time for merging companies to discuss remedies to competition issues raised by a merger as well as to enable the Commission to perform its review up to the necessary standards. The first phase shall, instead of one month, take 25 working days after the notification and may be extended up to a total of 35 working days. Should the Commission find a need to open an in-depth inquiry into a merger, the second phase will take place over no more than 90 working days (as opposed to current four months) with possible extensions upon request of the notifying companies or, subject to their consent, upon request of the Commission.

In addition to the new Merger Regulation, the Commission has also issued Guidelines on the assessment of horizontal mergers under the Council Regulation on the control

of concentrations between undertakings and Best practices on the conduct of EC merger control proceedings. These two documents are not binding over companies or Member States and are aimed at providing legal certainty to companies and other interested parties as to how the Commission intends to act in this domain.

The Merger Regulation shall come into force on 1 May 2004.

### **Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information**

Official Journal of the European Union, L 345, 31 December 2003

This directive is aimed at extending the accessibility and re-use of documents held and produced by public authorities in the member states by setting minimum rules in the area. The term covers a subsequent use by a person who obtained the document from the authority and explicitly covers both non-commercial and commercial use. Even if the intended re-use is commercial, the authority may not charge fees higher than the actual costs for provision of the document. The authorities are also encouraged to produce and make electronic versions available without need to use specific software, thereby reducing costs and time necessary.

Existing rules of Member States on freedom of information and determination of accessible documents are not affected. The member states are obliged to announce if they are withdrawing a document from public access or are no-longer updating it.

Documents may be released without a licence or a standard licence agreement may be concluded, covering proper use, non-alteration, liability or acknowledgement of source. A licence offer shall be produced within 20 days of the application, in case of complex requests an extension of further 20 days is possible. Public authorities may only enter in exclusive agreements

regarding the dissemination of documents covered by the directive where this is "necessary for the provision of a service in the public interest", e.g. when it would not be otherwise feasible for a publisher to publish the document. Any such exclusive agreements should be reviewed at regular intervals. Even existing exclusive agreements shall be reviewed and, if non-compliant, terminated before 2008.

This directive entered into force on 31 December 2003 and Member States shall comply with it by 1 July 2005.

**Council Regulation (EC) No 1992/2003 of 27 October 2003 amending Regulation (EC) No 40/94 on the Community trade mark to give effect to the accession of the European Community to the Protocol relating to the Madrid Agreement concerning the international registration of marks adopted at Madrid on 27 June 1989**

**Council Decision of 27 October 2003 approving the accession of the European Community to the Protocol relating to the Madrid Agreement concerning the international registration of marks, adopted at Madrid on 27 June 1989**

Official Journal of the European Union, L 296 of 14.11.2003

The accession of the European Community to the Protocol relating to the Madrid Agreement ("the Protocol") allows, under a single procedure, the international registration of a trademark on the basis of an application for Community registration of a trademark or the Community registration of a trademark on the basis of an application for international registration.

Pursuant to the Regulation 1992/2003, a Community registration application with a request for international registration is to be submitted to the Office for Harmonization in the Internal Market, which forwards that application to the International Bureau of the World Intellectual Property Organisation. Such an

application is admissible regardless of whether a specific designation has already been registered as a Community trademark. The Regulation provides also detailed rules concerning language requirements regarding the application and further proceedings.

The international registration applications related to the territory of the Community, submitted under the Protocol, will have an effect identical to that of the Community registration application.

The Regulation also contains provisions on issues such as priority of trademarks registered in one of the Member States, definite grounds for refusal of registration, Community report on the review of the application, objections as to the international registration applications covering the EC, replacement of a Community trademark by international registration and invalidity of such registration.

The Regulation allows also to change the international registration application, as regards the Community territory, to an application for registration in a specific Member State. Such a change would be available when it is not possible to indicate the Community as the territory covered by the international registration application.

**Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States**

Official Journal of the European Union, L 7, 13 January 2004

Directive 2003/123 ("the Directive") introduces essential changes in the Community system of dividend taxation, whereas taking account of the various proposals of the Commission since 1993.

Firstly, the Directive significantly extends the exhaustive list of the entities covered by the

EC dividend taxation rules. What appears essential, the EC dividend taxation rules would be extended to cover also the European Company and the European Cooperative Society.

It is also worth noticing that when a Member State chooses to determine the share of the parent company in the profits of its subsidiary, it should either refrain from taxing these profits or allow the parent company to deduct from its tax liability that fraction of the corporate income tax which is related to that share in the profits and has been paid by the subsidiary, up to the amount of the tax due from the parent subsidiary. What is essential, the relief for the corporate tax would now include also the tax paid by any of the lower-tier subsidiaries. That benefit would be available under the condition that the subsidiaries fulfil the criteria provided for in the Directive 90/435.

Another important development is the extension of the EC dividend taxation system to permanent establishments of companies. As the amended Directive 90/435 provides, it applies also when permanent establishments, situated in the Member States, of companies from other Member States receive distributed profits from subsidiaries from Member States other than those in which the permanent establishments are situated. The amended Directive 90/435 would apply likewise to profits distributed or received by a permanent establishment of a parent company with a subsidiary in the same Member State, if the permanent establishment is situated in other Member State.

The Directive features also a gradual decrease of the shareholding level required for the EC dividend taxation rules to apply. The current minimum level of 25% is now reduced to 20%, down to 15% (by 1 January 2007) to reach 10% by 1 January 2009. For the purpose of the shareholding threshold calculation, the shareholding of a parent company in a subsidiary from the same Member State would be

accumulated provided that shareholding is held through a permanent establishment located in another Member State.

Please also note that the amended Directive 90/435 would enable a parent company or its permanent establishment to enjoy a tax credit not only for the tax on the dividends distributed withheld from the direct subsidiary but also from lower-tier subsidiaries.

The Directive is to be implemented by the 25 Member States by 1 January 2005.

Recapitulating, the Directive is a remarkable development of the EC dividend taxation regime, removing its present shortcomings and extending the resulting benefits to a greater scope of commercial operators in the Single Market. Inclusion of the European Company, in particular, may encourage corporate restructurizations which would otherwise be hampered for fiscal reasons. New provisions concerning permanent establishments may also be expected to enhance flexibility of investment policies across the enlarged EU.

### **Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market**

Draft proposal presented by the European Commission

The Commission has released a new proposal for a directive on services in the Internal Market ("the Draft") aiming at removing basic barriers to the freedom of establishment and to the free movement of services within the EU.

According to the Draft, the Member States would be prohibited to subject the access to service activities within their territories to certain specific requirements including discriminatory requirements based on nationality or the place of registered office of the service provider, the obligation to have the principal establishment on the territory of a Member State, restrictions on the freedom to choose between

establishment in the form of an agency, branch or subsidiary or a requirement of reciprocity.

The Draft would follow the country of origin principle, under which service providers should, in general, be subject only to domestic rules of their Member States. That would cover, amongst others, access to and the conduct of a service activity, including the quality or content of the service, advertising, contracts and the provider's liability.

The draft is expected to ensure that the Member States do not restrict the freedom to provide services by operators from other Member States. Significantly, the Draft mentions certain arrangements which are to be considered as unlawful restrictions, including e.g. an obligation to have an establishment, an address or a representative within the territory of a Member State.

According to the Draft, 'single points of contact' are to be established in the Member States, where a service provider would be able to complete all procedures and formalities needed for access to his service activities, in particular, all necessary declarations, notifications or applications for authorizations from the competent authorities, including applications for inclusion in a register, a roll, a database or for registration with a professional body or association.

The Draft would also feature measures proposed to combat discrimination of recipients of services provided by operators from other Member States. It would be prohibited to subject the recipients to any discriminatory treatment in regard of such services, such as the obligation to obtain authorization from or to make a declaration to authorities, discriminatory taxation of the recipient or of the equipment necessary to obtain the service, limits on tax deductions or financial assistance on the grounds that the provider of the service is established, or the service provided, in another Member State.

## CASE LAW

**Case C-322/01, Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval**

This case, referred to the Court of Justice of the European Communities by a German regional court, reviewed the compatibility of German legislation on the advertising and the sale of medicines with the provisions of the EC treaty on the free movement of goods and the provisions of secondary EC law on the advertisement of medicines, on distance contracts and on electronic commerce.

The Court recalled the principle that, when a national provision is the direct implementation of a provision of EC secondary law, such national provision does not need to be reviewed as to its compatibility with the EC Treaty, in the present case, article 28 EC and 30 EC. However, the Court also reaffirmed that decisions of the Members States taken on the basis of provisions of EC secondary legislation must be compatible with the EC Treaty.

In the present case, the Court decided that EC law does not authorize a Member State to fully prohibit the sale over the internet of non prescription medicines, or its advertising by the same means. The Court particularly rejects the argument that sales of non prescription medicines over the internet may be less safe than the sales of the same products directly at a pharmacy. The Court underlines that sales of non prescription medicines over the internet, are regulated and supervised in the same way as sales from existing pharmacies, and, in addition, permit orders from home, provide interactive information features and allow more time to reflect on possible questions.

**Judgment of the Court of Justice in Joined Cases C-2/01 P and C-3/01 P, Bundesverband der Arzneimittel-Importeure and Commission of the European Communities v Bayer AG,**  
6 January 2004

(Appeals - Competition - Parallel imports - Article 85(1) of the EC Treaty (now Article 81(1) EC) - Meaning of agreement between undertakings - Proof of the existence of an agreement - Market in pharmaceutical products)

The Court of Justice rejected an appeal against a decision of the Court of First Instance ("CFI"). In its ruling, the CFI had found that the Commission had incorrectly assessed the facts of the case and made an error in the legal assessment of those facts. The CFI had annulled the decision of the Commission and ordered the Commission to pay the costs of Bayer AG.

The Commission had taken the view that there was an agreement within the meaning of Article 81(1) EC, thus prohibited under Community competition rules, between the pharmaceutical company Bayer and its Spanish and French wholesalers to limit parallel exports to the United Kingdom of a drug against cardio-vascular disease (Adalat/Adalate). The Commission argued that the restrictions imposed by Bayer on its French and Spanish wholesalers in order to fight against the parallel imports from their countries to the United Kingdom were accepted and obeyed by the wholesalers, therefore forming an agreement restricting competition. The restrictions consisted of a reduction of supplies to those wholesalers, irrespective of their increasing demands.

There was however not an export prohibition established on behalf of Bayer. Contrary to the findings of the Commission, the wholesalers did not submit to the restrictions and discovered new ways, including orders by separate agents. The conditions for an agreement were therefore not met, as there was no intention nor any action on the side of wholesalers to come to such an agreement and their formal reduction of ordered drugs was deemed by the Court not to constitute a proof of the Commission's finding.

**Judgment of the Court of Justice in Case C-453/00, Kühne & Heitz,**  
13 January 2004

Review of administrative decisions by the European Court of Justice (ECJ)

A Dutch company received refunds following specific customs classification of goods it exported. Following a disagreement between the company and national authorities as to that classification, the company was ordered to return the refunds. The ECJ subsequently gave a judgement in a similar case which appeared to support the point of the Dutch company. The company, therefore, initiated proceedings which resulted in the decision discussed here.

ECJ explained that its rulings define or interpret EC rules as they are and as they should have been applied since their introduction. Therefore, a rule of EC law should be applied by national authorities, as interpreted by ECJ, also to the relationships which emerged prior to the ECJ ruling which provided the interpretation. That is valid especially when, as in this case, a decision of an administrative body became final only because it had been upheld by a national court which misinterpreted EC law.

The ECJ took also account of the fact that under Dutch law it is possible to re-open proceedings subject to a final decision unless the interest of the parties is affected.

The ECJ held, therefore, that an administrative body is obliged, under art. 10 of the EC Treaty, to re-open proceedings in order to take account of a ECJ ruling given after an administrative decision became final if (i) national rules allow for re-opening of administrative proceedings, (ii) the administrative decision became final due to a court judgement delivered in the last instance, (iii) which has been based upon, as obvious from a subsequent ECJ ruling, misinterpretation of EC law whereas ECJ has not been asked for a preliminary ruling and (iv) the interested party submitted a relevant claim immediately after it became

aware of that ECJ ruling.

It is worth noting that the ECJ judgment in *Kühne & Heitz* may help market operators affected by incorrect interpretation of EC law by their national authorities acquire remedy for the loss suffered when it subsequently becomes evident that the ECJ interpretation of the rules underlying the legal dispute is contrary to that adopted by domestic administration.

**Judgment of the Court of Justice in Case C-340/01, *Abler and Others*, 20 November 2003**

Transfer of undertakings in labour law

The case involved an Austrian entrepreneur which rendered catering services to a hospital. The meals were prepared in the premises made available by the hospital specifically for that purpose. The service provider was also supplied by the hospital with media and necessary equipment. Eventually, the hospital rescinded the service agreement concluded with the entrepreneur who was replaced by another service provider ("the successor").

The successor refused to take over the employees of the entrepreneur. They, however, argued before an Austrian court that their employment should continue whereas the successor should also take on the entrepreneur's duties as an employer. The latter refused to apply Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ("the Directive"), claiming that the facts of the case do not qualify as a transfer of an undertaking.

The ECJ pointed out that the Directive is meant to ensure continuity of employment in a given undertaking, regardless of the change of its ownership. For that reason, the decisive criterion, when assessing whether the Directive applies, should be whether the business entity in question

retained its identity. That may be the case especially when the previous activities of the undertaking are continued or restored.

The Court took the position that the Directive should be applicable also when there are no legal relationships between the transferor and the acquirer of an undertaking. Such transfer may thus take place through a third party.

The ECJ explained that the Directive is clearly applicable also when – pursuant to contractual arrangements – there is a change of an individual or an entity in charge of certain services which, correspondingly, should step in the employer's duties towards the employees of the undertaking, regardless of the legal title to the assets upon which that undertaking is based.

The ECJ ruling provides broad interpretation of a "transfer of undertakings" under the relevant Community legislation. Therefore, it may affect these transactions were it would otherwise be vague whether the transfer of an undertaking did actually take place and whether, consequently, the succeeding service provider should be bound by the employer's duties of its predecessor.

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