

## European Commission Turns its Attention to Company Law and Audit

BY CELIA HAMPTON

**Alignment of company laws down to the last detail is never going to be feasible in Europe. Nor is it necessary or desirable. The diversity of state company laws in the federal US system testifies to that. There are nevertheless many matters on which the national systems have to see eye to eye if what really matters - a coherent EU capital market - is to be achieved.**

The European Commission listed what needs to be done in an action plan published on May 21. This was written after public consultation in response to the report of the expert group headed by Jaap Winter, published late last year, on modernizing the regulatory framework for company law. This urged the Commission to focus only on cross-border issues and wherever possible to use

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## An Assessment of the New European Community Design Law

BY LISA M. TITTEMORE  
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**Is your product design an important business asset? Are your products being sold in Europe? Under a new law recently enacted by the European Union, enhanced protection for product designs is now available throughout the entire European Union.<sup>1</sup> The new law provides a European Union-wide mechanism for registration and enforcement of rights in product designs for the first time. Under this new law, protection for unregistered product designs took effect on March 6, 2002, and protection for registered product designs took effect on April 1, 2003.<sup>2</sup>**

In general, the new law provides owners of product designs the exclusive right to use the design and to prevent others from using it, although protection for registered designs is broader than for unregistered designs. The new law is broader than many of the national design laws already in force in the Euro-

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Under a new law recently enacted by the European Union, enhanced protection for product designs is now available throughout the entire 15 Member States. The many aspects of this new law are reviewed here.

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pean Union. It also covers a greater number of European Union countries than the international system of the Hague Agreement administered by the World Intellectual Property Organization.<sup>3</sup> The new law explicitly exists in tandem with other intellectual property laws.<sup>4</sup> Interestingly, the new law incorporates concepts drawn from patent, copyright and trademark law.

**The new law also includes a provision that allows applicants to keep the design undisclosed for up to 30 months.**

With respect to registration of product designs, the new law provides a number of additional advantages, including a single application, a single language of filing, a single administrative center, the possibility of filing a single application for multiple designs, and payment of fees to one entity rather than 15 separate countries. The new law also includes a provision that allows applicants to keep the design undisclosed for up to 30 months. Here follows more detailed information regarding the new law and its implementation.

### **Covered Product Designs**

Under the new law, the definitions of the terms "design" and "product" are quite broad. The term design generally refers to the outward appearance of a product.<sup>5</sup> The term product generally refers to

industrial or handicraft items, and is defined to include graphic symbols and typographic typefaces.<sup>6</sup> Indeed, it appears that trademarks may be protected as Community designs. Thus, for example, it is possible for a trademark that is not inherently distinctive, which would not be protected under trademark law without proof that it had acquired distinctiveness through use ("secondary meaning"), could be protected under the Community design law until it acquires secondary meaning, and thereafter under the Community Trademark Act or national trademark law.

In order to be protected under the new law, the product design must be new and have individual character.<sup>7</sup> Product designs which meet the requirements of the new law are deemed "Community designs." Features or appearance of a product that are dictated solely by its technical function are not protected as Community designs.<sup>8</sup> There is no requirement that the design have an aesthetic quality (e.g., that it be "pleasing to the eye"), however. A design that is contrary to public policy or "accepted principals of morality" will also not be protected as a Community design.<sup>9</sup>

### **Registered versus Unregistered Community Designs**

Registration of product designs under the new law is worth careful consideration, as the new law provides for different levels of protection for unregistered and registered Community designs. Registered Community designs are protected from the date of filing of the application for an initial period of five years, which may be extended in five year increments up to 25 years.<sup>10</sup> A registered Com-

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# Brussels Gazette

## Key Developments at the Heart of the European Union

### EU State Aid Continues to Decline

The European Commission reported that the overall level of State aid continues to fall. In the five-year period from 1997 through 2001, State aid fell from €102 billion to €86 billion, although the fifth year actually saw a slight increase from €85.2 billion in 2000.

The greatest contributions to the five-year decline came from Germany, which reduced aid by €6 billion, and from Italy, which reduced aid by €4 billion.

Competition Commissioner Mario Monti commented: "The system of State aid control has imposed a very healthy discipline on the fifteen Member States, each of whom pledged at the Stockholm European Council to reduce the overall amount of aid granted by 2003 and redirect aid to horizontal objectives of common interest. Most are already on the right track with levels of aid falling steadily and aid being reoriented to objectives such as the environment and research and development. Nevertheless, the cumulative effect of some €86 billion of State aid in 2001 still has a considerable distortive effect on competition in the Internal Market."

### Commission Disallows 20% of Planned Aid for BMW Austrian Plant

The Commission decided that €7.3 million, or approximately 20 percent, of a €37.2 million State aid program for a BMW Motoren GmbH engine plant in the Steyr region of Austria should not be allowed. The remaining amount of €29.9 million for regional aid, training aid, environmental aid

and R&D aid was considered compatible with the Community rules.

The BMW plant, located in Oberösterreich, produces 4- and 6-cylinder gasoline and diesel engines and develops diesel engine technology.

### Merck €78 Million Investment Granted

The Commission gave Germany authority to grant €78 million in aid to help Merck KgaA, a unit of Merck & Co., Inc., to build a new biopharmaceuticals plant for the pro-

**"The cumulative effect of €86 billion of State aid in 2001 still has a considerable distortive effect on competition in the Internal Market."**

duction of oncology products in Jena, Thüringen. The amount is below the 35 percent regional aid ceiling of aid allowable for this type of project.

### Update on State Aid Investigations

...The Commission is investigating approximately €2 billion in funds granted to publicly-owned shipyards in Spain owned by the Izar group, Europe's second-largest shipbuilding firm. Under question are funds provided by the State holding company Sociedad Estatal de Participaciones Industriales (SEPI) in 1999 and 2000. In 1997, the Commission

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approved restructuring aid to a series of public Spanish shipyards amounting to €811 million on condition that no further aid could be provided thereafter.

...The Commission is also investigating €89.4 million worth of German state aid planned for an investment by auto parts manufacturer Edscha AG in a new luxury passenger car factory. The project, with a total investment amounting to €274.11 million, would create 1100 jobs. So far, the Commission said, it has "not been able to establish whether the planned aid meets" EU regulations. The company's preferred location for the plant is Ichterhausen, with Nosovice in the Czech Republic the second choice. A decision on location has yet to be made.

## **Commission Publishes Best Practice Guidelines For Divestitures**

Best practice guidelines for divestiture commitments in merger cases have been published. They contain standard texts for divestiture commitments and trustee mandates, and are designed to help merging parties and their legal representatives in their dealings with the Commission.

**The launching of an in-depth investigation, which lasts four months, does not prejudice the final decision.**

The guidelines include a Standard Model for Divestiture Commitments and a Standard Model for Trustee Mandates under the Merger Regulation. These two standard texts are supplemented by an explanatory note which the Commission intends to serve as best practice guidelines for the negotiation and implementation of remedies under the Merger Regulation. The standard texts and the explanatory note are available on the Internet at: [http://europa.eu.int/comm/competition/mergers/legislation/divestiture\\_commitments](http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments).

## **Commission Extends Inquiry Into SEB/Moulinex Case**

The Commission is launching an in-depth investigation into the competitive impact in five

countries of the merger between SEB and Moulinex, two French manufacturers of electrical household appliances. The five countries are: Italy, Spain, Finland, Ireland and the United Kingdom.

The investigation follows a recent ruling by the Court of First Instance (CFI) annulling the Commission's decision with respect to these five countries while upholding its analysis for nine other countries, as well as its referral of the French aspects of the case to France.

The Commission re-opened the case on April 4. The launching of an in-depth investigation, which lasts four months, does not prejudice the final decision.

## **ThyssenKrupp's Acquisition Of French Automotive Supplier Approved**

The Commission cleared the acquisition of French automotive supplier Sofedit Industrie by Germany's ThyssenKrupp.

Sofedit, which makes automotive industry components and is mainly active in France, recently experienced serious financial difficulties. ThyssenKrupp's acquisition is expected to provide the financial resources for a continuation of Sofedit's business.

## **VAT Compliance Discussion Program Announced**

The Commission launched an "open consultation" on the subject of Member States' VAT compliance requirements, whether they should be harmonized and whether a single location should be established for VAT compliance purposes. A Commission study revealed serious problems in meeting compliance obligations for companies engaged in cross-border trade. A proposal based on the study and the consultation is targeted for 2004.

### **Briefly**

Members of the European Space Agency (ESA) reached an agreement on the funding contributions to Galileo, Europe's satellite navigation system, clearing the way for the official launch of the project.

The Commission approved the acquisition of RM Business Systems Ltd., the IT division of UK postal operator Royal Mail Group plc, by Computer Sciences Corp. of the US. □

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soft law, such as standards and recommendations, rather than harmonizing directives.

Why this is a prudent course is illustrated by the draft directive on takeover bids. After 14 years and eleventh hour loss of the first draft, the proposal has again reached deadlock in the Council. The meeting on May 19 closed with Germany and the UK standing firm against all compromises.

The two bones of contention are the need for the board of the target company to get shareholder approval for new defensive measures after a bid has been made, and the neutralization of defenses once a takeover bid has been successful.

Defenses commonly involve multiple voting rights for a class of shares. Once the bidder had three quarters of the shares, special provisions would cease to apply and multiple voting rights would be replaced by a single vote per share. As such shares are more valuable than other stock, to do this would violate the laws of most EU countries that protect owners from a taking of their property. A compromise text put forward by the EU Presidency at the end of April would pay compensation to these shareholders, but this was not enough to secure agreement on the directive.

The Commission takes the view that it is hardly worth having a directive without these two provisions. They entrench the aim of protecting the primacy of shareholders - the main reason for having this measure at all. A further Council meeting may be called in June if the working group can formulate a compromise that does not throw the baby out with the bath water.

### **Action on Company Law**

As usual, the narrative part of the Commission's action plan is overlaid with aspirational mantras but, happily, a timetable of measures is set out in an annex. This divides the proposed actions between the short term (2003-2005), the medium term (2006-2008) and the long term (2009 onwards).

In the next two years, legislation will be presented to confirm the collective responsibilities of board members for the company's financial statements, to increase financial and non-financial disclosures arising out of group structure, to enhance the transparency of corporate governance, to integrate the legal framework for shareholder participation (attendance at meet-

ings, electronic information, etc), to strengthen and simplify three existing directives, and to create a European cooperative and a European mutual society.

Accompanying this far from modest legislative program will be two recommendations, one to strengthen the role of non-executive directors, and the other to "foster an appropriate regime" for directors' remuneration. A feasibility study will also investigate whether there is a need to create a European private company.

**It must be a safe bet that some of the measures intended for the short and medium term will still be open in 2009.**

In the medium term, the legislative pace will be maintained with proposals for disclosure by institutional investors of their investment and voting policies, choice for all 7,000 companies listed in the EU between a single and a dual board structure, enhanced board responsibilities, group policies at subsidiary level, exclusion from listing of "abusive pyramids," simplification of two existing directives, creation of the European private company if this proves to be appropriate, and basic disclosure rules for all entities benefiting from limited liability.

Subsidiary measures will include introduction a one-share/one-vote rule for all listed companies, if this is deemed to be appropriate, a feasibility study of alternatives to the present capital requirements, especially when a company moves its base from one EU country to another, and assessment of the need for yet more European corporate legal forms, such as the European foundation.

The only measure booked for the long term is reform of the Second Company Law Directive's capital requirements. However, it must be a safe bet that some of the measures intended for the short and medium term will still be open in 2009.

On the same day, the Commission issued a separate paper outlining its ten priorities for statutory audit. Reflecting EU anxieties about Enron-type situations and the desire to persuade the US that EU protection has value equivalent to the

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Sarbanes-Oxley Act, this is an urgent matter for the short term.

## Corporate Governance

It can be seen from the action plan that the Commission does not unduly favor soft law, of which corporate governance codes are among the softest. If a principle is precise enough, it probably has legal effect at one level or another, for example by making disobedience a breach of a director's fiduciary duties, or by putting a company's public listing into question.

**Also on the list for legislation rather than soft law is inclusion of new items in the directors' collective responsibilities.**

Over ten years, some 40 codes have been adopted that are relevant to the EU. A comparative study by Weil, Gotschal & Manges in 2002 concluded that the EU should not spend time writing a European one, but rather devote its energies to reducing barriers to investment and corporate evaluation across borders. The Winter report agreed.

The Commission also agrees, although it considers that each country should have its own code to be applied to companies listed locally. A measure of coordination across the EU would be desirable because, although they are closely aligned at present, some countries are planning changes and ten new members join the EU next year.

To avoid its inherent vagueness, the Commission defines corporate governance to mean the system by which companies are directed and controlled. This covers the relations between management, board, shareholders and other stakeholders, and the structure through which the company sets and achieves its objectives, and monitors its own performance. Key elements are the separation of ownership from control, and the principal-agent relationship between shareholders and directors.

Rather than legislate for all the details involved in such matters, the Commission focuses its proposals for legally binding effect on disclosure of the company's governance strategy in its annual report and accounts.

It would also like to set some EU-wide criteria for the selection and functioning of non-executive and supervisory directors, the minimum standards for nomination, remuneration and audit committees, a limit on the number of concurrent directorships a person may hold, review by non-executives of any conflicts of interest on the part of executive directors, and strong powers for the audit committee. The main provisions would be enforced nationally, at least on a comply-or-explain basis. The Commission will take any EU-level steps by recommendation in the first instance.

Directors' pay is among the hottest topics of corporate governance. Again, the Commission will address this through a recommendation in the short term, moving to legislation only if this proves insufficient. Disclosure of four items will be required: remuneration policy, remuneration of each individual director, prior shareholder approval of share and share option schemes in which directors participate, and proper recognition of what such schemes cost the company.

Requiring institutional investors to state their investment and voting policies would be limited to disclosure. There would be no legal consequences for departing from their policies in fact. Amendment of the directives affecting large investors (insurance companies, pension funds, mutuals and so forth) are planned for the medium term once problems associated with cross-border voting have been removed.

Also on the list for legislation rather than soft law is inclusion of new items in the directors' collective responsibilities. They must be treated as responsible for financial and key non-financial statements as a matter of law in the short term. In the medium term, the Commission is also contemplating three bold measures:

- a special investigation right arising when a defined percentage of shareholders asks for judicial or administrative review of the company's affairs
- development of the wrongful trading rule under which directors may be held personally accountable for the consequences of the company's failure
- imposition of disqualification as a director for some types of misconduct, such as publishing misleading statements

## Corporate Groups and Audit

Specific risks are posed by groups for both shareholders and creditors. A draft Ninth Di-

rective setting out the legal requirements for groups was abandoned. The Commission does not consider that revival would be useful, but it does consider that measures are necessary in three areas.

First, a group's structure and its internal relations must be fully disclosed. Second, a subsidiary within a group should be able to adopt or adapt a coordinated group policy. Third, pyramidal groups formed by chains of holding companies that make extensive use of minority shareholders and so confer ultimate control through a very small investment should not only be subject to disclosure duties, but should also be liable to delisting if they qualified as abusive. The Commission will do further research into what precisely this would mean.

The separate plans for statutory audit include revising the Eighth Company Law Directive, with reinforced controls through public oversight, external quality assurance, auditor independence, an ethical code, standards, disciplinary penalties, and regulation of the qualifications needed to act as auditor.

Because auditors' liability arises from the regular tort laws of the member states, it would be virtually impossible to harmonize this area. It is relevant mainly in the context of service quality. The Commission will nevertheless analyze the economic impact of existing liability regimes.

Although the aims of the US Sarbanes-Oxley Act are broadly endorsed, the Commission says that it is negotiating intensely to curb the unacceptable outreach effects of that legislation on European companies and auditors. The US must recognize the equivalence of other high quality regulatory systems.

Together with national representatives, the Commission has identified seven relevant concerns: registration of EU audit firms in the US, direct US access to EU audit papers, certification of financial statements and internal control systems, auditor independence, loans to management, and audit committees. Negotiations so far with the SEC and Congress have failed to gain any exemption from the Act based on the equivalence of EU regulation.

The item causing the most anxiety to the EU side is the proposal for compulsory registration of EU audit firms with the US authority, and their consequent regulation by that authority. The SEC has to decide whether or not to endorse this proposal by mid-June for entry into force by April 2004.

The Commission argues that the implications of the US oversight system are far from clear as yet, and the disclosure requirements are likely to conflict with EU laws on data protection and professional secrecy. If the US will not compromise on this, the EU will have to consider the compulsory registration of all US audit firms in Europe. Dual regulation makes a poor foundation for efficient transatlantic and global securities markets.

### Legitimate Goals for a New Europe

The Commission is not unambitious for its action plan on company law. It hopes that the solutions it proposes will "help shape international regulatory developments [...] Earning the right to be recognized as at least 'equivalent' alongside other national and international rules is a legitimate and useful end in itself."

By way of limiting its own ambition, the Commission pays tribute to the concept of subsidiarity under which the EU should only take action where a stated goal cannot be sufficiently achieved by member states acting on their own. This concept is an empty one, motivated mainly by the need to quieten internal EU tensions. There is no way that an EU-wide goal, once articulated, can be secured with any certainty unless the EU takes action. All that subsidiarity does is to point to the redundancy of EU-level action if the proposed action is too trivial, or if the member states agree on it and do what has to be done of their own accord.

**Negotiations so far with the SEC and Congress have failed to gain any exemption from the Act based on the equivalence of EU regulation.**

The founding fathers of the European Union had a clear goal - a single market in which capital, labor, goods and services could circulate freely. They reasoned that a plan rooted in economics would silence Europe's quarrelsome nation states. It would empower individuals, most of whom want to be better off, and give them directly enforceable rights to rein in the divisive behavior of their governments.

They were right, but they set a huge agenda. The United Kingdom has yet to understand what

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it means. The present government is the first since the early 1970s that professes full support for the EU, yet it puts up only a feeble resistance to the combined onslaught of opposition, press and broadcast media that are, at best, ill-informed and, at worst, malign. For six years, the government has failed to disseminate accurate information about the EU, something that was urgently needed to correct two decades of adverse propaganda.

**A glance at the actual state of the single market reveals that decades of work lie ahead in removing stubborn obstacles.**

"Europe" - as the europhobes call what they perceive to be a distant hostile dictatorship - is far from blameless in this. Euro-elites talk among themselves in a language that is so far removed from the vernacular of everyday life that they are incomprehensible to politicians and professionals, let alone to the "ordinary folk" whom they would like to persuade of the EU's merits. Naturally enough, people who have not grasped the essentials are repelled.

These elites and the member governments have also subverted the founding fathers' plan by

the revival of yearnings for grandeur on the international stage. If they cannot achieve it in their own right, the larger EU countries want to have a loud collective voice in global affairs. Recent divisions over Iraq have made this a hopeless prospect for the foreseeable future.

It is time to return to the essentials set out in the 1958 Treaty of Rome. Where EU-level government does not work well, it could usefully be adjusted and made more accountable. But a glance at the actual state of the single market reveals that decades of work lie ahead in removing stubborn obstacles, particularly to the free movement of capital and services. If anyone doubts this, they should read the Commission's action plan for company law. The paper is open for comment until August 31.

*Modernizing Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward. COM (2003) 284 final. <http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=com&SERVICE=eurlex&LANGUAGE=en&DOCID=503PC0284&FORMAT=pdf>*

*Reinforcing the statutory audit in the EU. COM (2003) 286 final. <http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=com&SERVICE=eurlex&LANGUAGE=en&DOCID=503PC0286&FORMAT=pdf>* □

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## Denmark May Keep National Provisions on Food Additive Despite Inconsistency with Harmonized Directive

BY KELLER & HECKMAN LLP

**A ruling by the European Court of Justice, upholding national measures that derogate from harmonized European Community measures, may have an impact upon the form that future harmonization measures may take.**

In its ruling, the court held that Denmark can rely on Article 95(4) of the EU Treaty to keep in place national measures that pre-dated the adoption of European Union's harmonized provisions on the use of food additives, given its assertion that the public health risk is greater than that found by the European Community legislature at the time it adopted the harmonization measure.

Accordingly, the court annulled the European Commission's decision refusing authorization for Denmark's provisions on nitrates and nitrites as food additives, which are more strict than the Community harmonization measure. The case was a matter of first impression for the court. (*Kingdom of Denmark v. Commission*, ECJ, No. C-300, 3/20/03)

"One may speculate that the Community legislature, when dealing with controversial issues, may be more inclined to opt for broader harmonization measures likely to attract general support from Member States -- and possibly may be less inclined to push for more radical measures necessary to achieve full harmonization within the EU, but which could well be opposed by "hard core" Member States -- in the knowledge of the attendant risk of a challenge under Article 95(4)," Keller and Heckman attorney John Dobinson said.

### Commission Decision Annulled

In Directive 95/2/EC, the EU set forth harmonized provisions on the use of various food additives, including sulphites, nitrates, and nitrites. Denmark voted against the directive, asserting that it did not adequately protect the public health with respect to those additives. Instead, Denmark requested authorization to maintain its existing national provisions, relying on Article 95(4) of the EU Treaty. That provision sets forth the procedure by which a Member State can maintain national provisions after the adoption of a harmonization measure.

The Commission refused to authorize the national provisions, finding them to be dispropor-

tionate to the objective of protecting public health. Denmark then sought annulment of the Commission's decision in the Court of Justice.

Sulphites are used as preservatives in a variety of foods, and can cause digestive tract lesions if ingested in large amounts. They are also known to provoke severe allergic reactions in some people. The EU's Scientific Committee on Food (SCF) examined the health risks of sulphites and, in 1994, established an acceptable daily intake. It also recommended, in light of the incidence of allergic reactions, that the use of sulphites be limited as much as possible and that their presence in food should be indicated on labels.

**The court pointed out that the EC Treaty distinguishes between pre-existing national provisions and new national provisions.**

Nitrites and nitrates are also used as preservatives, primarily in meats where they can be transformed into nitrosamines, which are recognized carcinogens. The SCF examined nitrites and nitrates in two opinions: the first, issued in 1990, stated that it would be prudent to reduce the levels of pre-formed nitroso compounds as far as possible; the second, issued in 1995, pointed out that nitrosamines are carcinogens and stated that it is impossible to determine a level below which they pose no carcinogenic risk. Accordingly, the SCF reiterated its conclusion that exposure to nitrosamines in food should be minimized.

In its opinion, the court pointed out that the EC Treaty distinguishes between pre-existing national provisions and new national provisions. The former, which may be justified on grounds of "major needs" or the protection of the environment, are known to the Community legislature at the time harmonization takes place. With the latter, the Member State must provide new scientific evidence and demonstrate the existence of a problem

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## European Court

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### *Half-Full Harmonization from page 9*

specific to the Member State that arose after the adoption of the measure.

The court observed that Denmark's request to maintain differing national provisions was not justified by a major need specific to Denmark, and was not based on new scientific evidence. Nonetheless, the court noted that there is uncertainty inherent in assessing public health risks, and that a Member State may put forward a different assessment that is not necessarily based on new or

**The court observed that Denmark's request to maintain differing national provisions was not justified by a major need specific to Denmark.**

different scientific evidence. If a Member State argues that its assessment differs from that accepted by the Community legislature at the time it adopted the harmonization measure, the Member State must prove that its national provisions ensure a higher level of health protection than does the harmonization measure -- and that they do not go beyond what is necessary to attain that objective.

The court examined the Community harmonization measures for sulphites, and concluded that they were sufficient in light of the SCF's 1994 opinion. Thus, it ruled, the Commission's decision

not to authorize Denmark's stricter national provisions was not in error.

However, with regard to the harmonization measures for nitrites and nitrates, the court found that the Commission's decision "did not take sufficient account" of the SCF's 1995 opinion, in that it failed to mention that the opinion called into question the maximum amounts of nitrites set in Directive 95/2. In the opinion, the SCF criticized the conditions of use for nitrites under the directive -- observations that "are relevant in assessing whether the contested provisions are justified." Accordingly, the court concluded, "to the extent that the Commission failed duly to take into account the 1995 opinion in assessing the justification for the contested provisions concerning the use of nitrites and nitrates, its decision is vitiated by a defect which renders it unlawful. It follows that the contested decision must be annulled in so far as it rejects those provisions."

Thus, the court found that Denmark's pre-existing provision provided a higher level of protection than the harmonized measure and did not go beyond what was reasonably necessary to attain that objective as evidenced by the SCF opinion. □

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## Intellectual Property

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### *Design Law from page 2*

Community design gives its owner the exclusive right to make, offer, put on the market, import, export, stock, or use a product in which the design is incorporated or to which it is applied, and to prevent any third party not having the owner's consent from doing so ("Infringing Acts").<sup>11</sup> Not included in Infringing Acts are acts done privately and for non-commercial purposes; acts done for experimental purposes; and, acts of reproduction for citation or teaching, subject to certain limitations.<sup>12</sup>

Unregistered Community designs are protected for a period of three (3) years from the date on which the design was first made available to the public within the European Union.<sup>13</sup> The unregistered Community design gives the owner the

right to prevent Infringing Acts, but only if the Infringing Acts result from copying the protected design. Thus, independent design will not be a defense in the case of registered Community designs, but, in light of this copying requirement, would be a defense in the case of unregistered Community designs.<sup>14</sup>

Another important defense against a claim with respect to infringement of a registered Community design is the "right of prior use." This right entitles third parties to exploit a design for purposes for which it had been used or for which serious and effective preparations had been made to use it before the priority date of the registered Community design. The right of prior use cannot be licensed and cannot be

transferred apart from a transfer of the relevant part of the business, however.<sup>15</sup>

## The Application Process

Applications for registration of Community designs may be filed with the Office of Harmonization in the Internal Market ("OHIM"), the same agency that handles registration of trademarks under the Community Trademark Act, or at the central industrial property office of a participating country.<sup>16</sup> A registration fee of €230 per design must be made at the time of filing the application, along with a publication fee of €120 per design if publication is not deferred or €40 if deferment of publication is requested (with an additional €120 fee at the time publication is requested). Applications may be filed for multiple designs, and additional fees per design are charged on a reduced basis, depending on the number of additional designs.<sup>17</sup>

A 12 month "grace period" is provided for registered Community designs. This means that a disclosure of the design made by the designer or successor in title made during the 12 months prior to the date of filing, or if priority is claimed, prior to the date of priority, will not be considered to affect the new and/or individual character of the design.<sup>18</sup> In other words, registration may still be sought even if the design has already been disclosed, provided that the disclosure falls within this 12-month period. Thus, a Community design may be protected as an unregistered design for the first 12 months after it has been disclosed and thereafter may be protected as a registered design as long as timely application is made. This provision was provided in order to allow owners of product designs time to "test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable."<sup>19</sup>

OHIM review of the Community design applications is limited to determining whether the application meets the formal requirements and whether requirements relating to priority claims are satisfied. OHIM will also refuse registration if the design does not conform to the statutory definition or is contrary to public policy.<sup>20</sup> OHIM will not examine whether the design conflicts with prior designs. There is no opposition period provided prior to registration.

Publication may be deferred for a period of 30 months from the date of filing, or if priority is claimed, from the date of priority. Upon registra-

tion, the design will be published in the Community Design Bulletin, unless the applicant requests deferment of publication.<sup>21</sup> OHIM is required to maintain a register of Community designs, which is open for public inspection (except that, in the case of a request for deferred publication, only limited information will be provided during the deferment period).<sup>22</sup>

## Invalidity and Infringement Proceedings

Challenges to Community designs, including claims of conflict with prior designs are addressed by means of an application for a declaration of invalidity, which is an inter-partes procedure.<sup>23</sup> Applications for invalidity in connection with registered Community designs may be filed with OHIM or one of the Community Design Courts, which are to be identified by each member state pursuant to the new law.<sup>24</sup> In the case of an unregistered mark, the application of invalidity may only be filed in one of the Community Design Courts.

The Community Design Courts also have exclusive jurisdiction over infringement actions, and, if permitted under national law, actions relating to threatened infringement and actions for declaration of non-infringement. Although the Community design law provides significant uniformity, it is worth noting that matters not covered by EC 6/2002 will be subject to the national law of the Community Design Court where the action takes place.<sup>25</sup>

**OHIM will also refuse registration if the design does not conform to the statutory definition or is contrary to public policy.**

Possible sanctions for infringement include European Union-wide injunctive relief, seizure of infringing products, notably, seizure of equipment used to manufacture the infringing goods, "if their owner knew the effect for which such use was intended or if such effect would have been obvious in the circumstances." Other possible sanctions include "sanctions appropriate under the circumstances which are provided by the law of the Member State in which the acts of infringement or threatened infringement are committed, including its private international law."<sup>26</sup> Thus, sanctions

continued on page 12

## Effect of EU Enlargement on Community Trademark Law

Ten new countries will join the European Union on May 1, 2004 ("date of accession"). Rights arising under a Community Trademark ("CTM") application filed prior to the date of accession will automatically be extended to the new countries joining the European Union (this is also true for CTM applications filed after the date of accession that claim priority prior to the date of accession).

Enlargement of the European Union will also result in additional possible obstacles to registration for CTM applications, including new issues relating to descriptiveness, non-distinctiveness, and genericness, and a larger pool of potential opposers claiming prior use. It is also likely that official filing fees will increase, perhaps as much as US\$1,000-2,000 with the addition of new countries.

**Owners of prior national trademark rights in a new member country will be able to file oppositions based on those national rights.**

For example, a CTM application filed after the date of accession may be refused registration as being descriptive, non-distinctive or generic in one of the new member countries, but if it had been filed prior to the date of accession, would be automatically extended to provide the owner with rights in the new member countries without being subject to refusals because of problems in the

new countries. In other words, after the date of accession, the trademark RYBA for fish would be refused registration as being generic (ryba is the Polish word for fish), but if the application had been filed prior to the date of accession, this issue would not have precluded the owner from obtaining a CTM registration (although third parties in Poland would still be able to make fair use of the term RYBA under CTM rules).<sup>1</sup>

Thus, there are a number of advantages to getting a CTM application on file prior to May 1, 2004.

There is further additional benefit to filing new CTM applications before November 1, 2003, as owners of prior national trademark rights in a new member country will be able to file oppositions based on those national rights against new trademark applications filed after the date of accession *and* against CTM applications filed up to six months before the accession of the new member country, namely, applications filed after November 1, 2003.<sup>2</sup> Accordingly, "filing often and early" has special meaning for trademark owners in light of the upcoming European Union enlargement. (*Lisa M. Tittmore, Bromberg & Sunstein LLP*)

### **Endnotes**

<sup>1</sup> *If the trademark is considered to be against public policy or accepted principals of morality in the new member country, then use may be prohibited in that country even if the application was filed prior to the date of accession.*

<sup>2</sup> *The owner of earlier rights (e.g., rights arising from national applications or registrations, International Registrations under the Madrid Agreement or Protocol, and unregistered trademark rights such as common law rights, acquired prior to the date of accession) in a new member country will have the right to exclude the use of an automatically-extended CTM application in that country unless the earlier rights are invalid or were obtained in bad faith. The owner of earlier rights in a new member country will not be able to use those rights to oppose or revoke an automatically-extended CTM application or registration; it can only prevent use of the trademark in that country.*

could vary depending on where the alleged infringing conduct occurs.

## Conclusion

Despite some variation depending on where allegedly infringement conduct occurs and where enforcement actions are initiated, the new Community design law provides significant uniformity and expanded protection for product designs in the European Union. In light of the new law, owners seeking to protect rights in product designs should consider whether to seek registration under the new law. □

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## Endnotes

<sup>1</sup> As of May 1, 2004, the European Union will include ten additional countries. See Sidebar, page 12.

<sup>2</sup> The new law is set forth in Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community Designs ("EC 6/2002"). Commission Regulation (EC) No 2245/2002 of 21 October 2002 is the implementing regulation for EC 6/2002. Both are available at <http://oami.eu.int/en/design/legalaspects.htm>.

<sup>3</sup> The international system of the Hague Agreement is applicable in Germany, Belgium, Spain with limited effect, France, Greece, Italy, Luxembourg, Netherlands, and certain other non-European Union countries.

<sup>4</sup> EC 6/2002 Article 96.

<sup>5</sup> The term "design" is defined as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture, and/or materials of the product itself or its ornamentation." EC 6/2002 Article 3.

<sup>6</sup> The term "product" is defined as "any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs." EC 6/2002 Article 3. Computer programs are protected under other intellectual property laws in the European Union, such as copyright law.

<sup>7</sup> A design is considered to be "new" if no identical design has been made available to the public prior to, for unregistered designs, the date on which the design has first been made available to the public, and, for registered designs, the date of filing of the application for registration or, if priority is claimed, the date of the claimed priority. Designs are deemed identical if their features differ only in immaterial respects. EC 6/2002 Article 5. A design is considered to have "individual character" "if the overall commercial impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public" prior to, for

unregistered designs, the date on which the design has first been made available to the public, and, for registered designs, the date of filing of the application for registration or, if priority is claimed, the date of the claimed priority. EC 6/2002 Article 6.

<sup>8</sup> EC 6/2002 Article 8.

<sup>9</sup> EC 6/2002 Article 9.

<sup>10</sup> EC 6/2002 Article 12.

<sup>11</sup> EC 6/2002 Article 19.

<sup>12</sup> Also not subject to Community design law are equipment on ships and aircraft registered outside of the European Union when they temporarily enter the European Union. EC 6/2002 Article 20.

<sup>13</sup> Under the new law, an unregistered Community design is "deemed to have been made available to the public within the Community" if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialized in the sector concerned, operating within the Community." Proof of this disclosure is required for enforcement of an unregistered Community design. EC 6/2002 Article 11.

<sup>14</sup> EC 6/2002 Article 19.

<sup>15</sup> EC 6/2002 Article 22.

<sup>16</sup> EC 6/2002 Article 35.

<sup>17</sup> EC 6/2002 Article 37.

<sup>18</sup> Priority of six months from the date of filing of the first application may be claimed pursuant to the Paris Convention by a person who has filed an application for a design right or for a utility model, including a design patent, in or for "Any State party to the Paris Convention for the Protection of Industrial Property, or to the Agreement establishing the World Trade Organization, or his successors in title." Priority of six months from the date of exhibition at an officially recognized international exhibition may also be claimed. EC 6/2002 Articles 41 and 44.

<sup>19</sup> EC 6/2002 Introductory 20.

<sup>20</sup> EC 6/2002 Articles 45-47.

<sup>21</sup> EC 6/2002 Article 50.

<sup>22</sup> EC 6/2002 Article 72.

<sup>23</sup> EC 6/2002 Articles 25, 26 and 52-54.

<sup>24</sup> EC 6/2002 Articles 80 and 81.

<sup>25</sup> EC 6/2002 Article 88.

<sup>26</sup> EC 6/2002 Article 89.

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## *Trans-Atlantic Challenges*

### **Deutsche Post Facing Probes on Both Sides of the Atlantic**

BRUSSELS -- Just as Deutsche Post AG faces regulatory headaches in the US, the German mail giant confronts a new challenge in Europe that could hamper its acquisition strategy.

US competitor United Parcel Service Inc. is joining with German consumer and express mail groups to complain that Deutsche Post uses high stamp prices within its letters monopoly to help fund acquisitions such as its recent \$1.1 billion takeover of Seattle-based Airborne Inc. They want EU Competition Commissioner Mario Monti to rein-vigorate a dormant probe into Deutsche Post and threaten a fine that would force stamp prices lower.

**UPS says the study shows that stamp-buyers pay eight euro cents more for a domestic stamp than they should.**

Across the Atlantic, the US government is already investigating Deutsche Post's purchase of Airborne - the third-biggest US delivery company and owner of its own air-cargo fleet - for violating federal laws limiting foreign control of US airlines. If a judge agrees in August that Airborne's ultimate parent is German, that could set back Deutsche Post's expansion and derail US regulatory approval.

In Europe, antitrust czar Monti won't be reviewing the Airborne deal but could still deal a blow to Deutsche Post's strategy through his campaign against state-controlled companies that use public money to grow their businesses. Deutsche Post is nearly 70 percent state-owned.

Armed with nearly €40 billion of annual sales, Bonn-based Deutsche Post is much more than a dull national post office. It has become a global logistics giant. Since 1997, it has made about 40 major acquisitions, buying up local and international delivery services including Brussels-based DHL International Ltd., Switzerland's Danzas, UK-based Securicor plc's distribution business - and most recently Airborne.

The expansion has put Deutsche Post on a collision course with Atlanta-based UPS, which complains that its German competitor unfairly received government subsidies. In the past two years, UPS has notched up a number of important victories. In 2001, EU regulators fined Deutsche Post €24 million for granting parcels discounts on condition that customers sent most of their business via Deutsche Post. This action prevented private companies from competing fairly, the regulators ruled.

Then, last year, the EU forced Deutsche Post to pay back money to the German state that it used to fund its generous discounts - even while Deutsche Post ran a loss in its parcels business. With accumulated interest, Deutsche Post had to pay €906 million back to the state. Deutsche Post, however, is appealing Monti's decision at the European Court of Justice in Luxembourg and at a court in Germany.

The latest tussle is different because it mostly focuses on Deutsche Post's basic letters business rather than the parcel division. Two years ago, German consumers complained to Brussels about high stamp prices. Deutsche Post successfully rebutted the claims with a study by Arthur D. Little showing that Germany's stamps are priced at roughly the European average. UPS was never convinced about the Little study. It hired economists NERA, whose just-finished study accuses Deutsche Post of overcharging by as much as 40 percent, or €1 billion, a year. UPS says the study shows that stamp-buyers pay eight euro cents more for a domestic stamp than they should.

EU officials said it was too early to say whether the new evidence on stamp prices would lead to fines for Deutsche Post. "We've just received the NERA study a few weeks ago," said EU spokeswoman Amelia Torres. "We're still examining it and don't have a view at the current stage."

Successful acquisition of Airborne would give Deutsche Post its first major foothold in the US market, an important step in the German company's plans to build a global delivery giant that can rival UPS and FedEx Corp. anywhere. To block the move, the two US carriers are trying to drag Airborne into a battle over Deutsche Post's ties to DHL Airways Inc., the Miami-based airline

that flies DHL shipments inside the US. UPS and Memphis-based FedEx claim DHL Airways is controlled by Deutsche Post, which generates about 90 percent of the airline's revenue through DHL International. Deutsche Post and DHL Airways deny the accusation, saying the two US carriers just want to keep Deutsche Post from expanding on their home turf.

Competitors are pushing Monti to crack down on Deutsche Post's revenue streams. "The Commission needs to reopen the stamp prices case," says UPS vice president Anton van der Lande. "The data show Deutsche Post making a rate of return allowing it to cross-subsidize other commercial activities, including making acquisitions that have nothing to do with why the monopoly was granted in the first place."

Competing German mail groups are equally incensed. Deutsche Post is "able to finance acqui-

sitions in part because they are making a 25 percent profit from stamp sales," says Ralf Wojtek of German Express Organization, BIEK. Deutsche Post denies those charges. It lowered prices last year under pressure from Germany's own regulator, RegTP and chief executive Klaus Zumwinkel said prices will remain unchanged for the next three years. There is "absolutely no space" for further cuts, says Deutsche Post spokesman Dirk Klasen. "It's not the case that we save up money from the monopoly business and then use it for acquisitions."

But competitors are adamant Brussels should take action. They point to last month's decision by EU officials to slap a €12.6 million on Deutsche Telekom AG for squeezing competitors - even though the German regulatory authority had already reduced wholesale telephone access charges. (Copyright © Dow Jones Newswires) □

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## Drug Agency

# Health Ministers Compromise on Drug Approval Centralization

European Union health ministers have approved sweeping new rules for drug approvals, giving a London-based agency powers similar to those of the US Food and Drug Administration. The package of laws now returns to the European Parliament for a second reading, with the aim of winning final approval before the end of the year.

**The EU's new centralized approval process covers drugs to fight AIDS, cancer, diabetes and Parkinson's disease.**

Under the rules, the drug industry is required to follow a centralized procedure to register certain drugs at the European Agency for the Evaluation of Medicinal Products, or EMEA.

"With today's agreement, we have taken an important step towards ensuring that Europe gets a more robust, modern, effective and competitive regulatory framework for pharmaceuticals," said Erkki Liikanen, EU enterprise commissioner.

The EU's new centralized approval process covers drugs to fight AIDS, cancer, diabetes and neurodegenerative diseases, such as Parkinson's disease. For other drugs, companies could choose whether to use the EMEA or national authorities. Currently, drug companies have a choice between national and centralized registration procedures.

The new procedure gives Europe's pharmaceutical industry a shot in the arm, EU officials say. In recent years, drug companies have shifted research activities across the Atlantic as the US regulatory system is considered more business friendly and less bureaucratic than Europe's. The agreement waters down proposals made in late 2001 by the Commission. That plan called for all new substances to be approved via the EMEA, though generics could still be vetted by national governments. Liikanen said the health ministers' decision is a "well-balanced compromise."

The EU drug industry opposes the mandatory centralized system. About 40 percent of new products use the national authorities. A drug approval in one EU country is then recognized by other European governments. "Retaining the current industry choice over the registration route will ensure a healthy balance between centralized and national regulatory systems," said the European Federation of Pharmaceutical Industries and Associations in a statement.

The new rules also set an EU-wide time frame for how long drug companies can have exclusive intellectual property rights over data generated on new medicines. The compromise calls for a 10-year period during which data would be protected from rivals. Drug companies get an extra year if they can show the drug has an alternative use. At the moment, protection periods vary across the EU.

To balance the rules, generic drug companies can test copies of medicines two years before the protection expires. That will allow them to sell generics as soon as the 10- or 11-year protection period is over. The drug industry supports the plans. The data protection rules "will be an essential driving force for research in Europe," the federation said. (Copyright © Dow Jones Newswires) □

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