COMPLETING THE INTERNAL MARKET OF THE EUROPEAN COMMUNITY

# 1992 HANDBOOK

Mark Brealey
and Conor Quigley

Graham & Trotman

Second Edition

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# Preface

In 1985 the European Commission produced its White Paper to the European Council setting out its programme for the completion of the internal market in the European Community by the end of 1992. This programme consisted of some 300 legislative measures needed to guarantee the free movement of goods, persons, services and capital within the Community.

In this Handbook, we set out the legislative changes which the Commission's programme entails and put them in the context of the law of the single European market as a whole. After an introduction which briefly describes the functions and effects of the community, its institutions and legislation, the rest of the Handbook follows exactly the structure of the White Paper. This is divided into three parts: the removal of physical barriers, the removal of technical barriers and the removal of fiscal barriers. Each part is divided into a number of chapters covering separate sectors. These chapters begin with a brief analysis of the developments affecting the particular sector up to the date of the publication of the White Paper and then include detailed examination of the new provisions, including both the adopted and the proposed legislation.

Depending on the nature of the subject matter, as much information as possible regarding the content and effect of the new measures has been given. In certain cases, such as technical standards or plant and animal health, the analysis given describes the framework of the new measures but refers the reader to the full text of the legislation for a complete picture. In other cases, especially in those areas relating to business law, the fullest possible explanation of all the important provisions is given.

The purpose of the Handbook is that the businessman and his professional advisers will be given a detailed understanding of the legislative measures for the completion of the internal market. No previous knowledge of Community law and procedures is required but it is hoped that a fuller picture is obtained of the framework within which commercial, industrial and business law in the internal market is affected. The new measures are described as they are produced, amended and adopted by the Commission, the Parliament and the Council. In this Handbook, we have sought merely to describe the current situation with regard to the intended and adopted legislation and no attempt is made to criticise these measures.

By its very nature, the programme is fast moving and changes from month to month if not from week to week. Every effort has been made to state the law and the proposed measures as published in the *Official Journal of the European Communities* up to June 1991. Inevitably, since completing the manuscript, some new proposals have been published and some of the proposed measures which we describe have now been adopted.

This Handbook acts as a companion guide to the encyclopaedia entitled *Completing the Internal Market of the European Community: 1992 Legislation* which we have compiled and edited and which is co-published by Graham & Trotman and the Office for Official Publications of the European Communities.

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# Introduction

## The European Community

The European Economic Community, which now has twelve Member States, was founded by the Treaty of Rome which was signed on 25 March 1957, and came into being on 1 January 1958. It was originally composed of Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined the Community in 1973 and were followed by Greece in 1981 and Portugal and Spain in 1986. Following German unification in 1990, the former territory of East Germany was absorbed into the Community. All the Member States are also signatories to two other Treaties which established a European Coal and Steel Community (ECSC) and a European Atomic Energy Community (Euratom). It is now commonplace to refer to this organisation as the European Community. European Community law derives mainly from these treaties and also from a large body of secondary legislation, such as regulations and directives, adopted under the treaties.

By 31 December 1992 it is intended that the European Community, with a population in excess of 335 million, will be a single integrated market without internal frontiers in which the free movement of goods, services, persons and capital is ensured. In order to achieve this, a legislative programme has been adopted within the Community with the aim of removing the remaining physical, technical and fiscal barriers to free movement. The completion of the internal market constitutes the most important plan since the foundation of the Community over thirty years ago.

### *The common market*

The aim of the Community is to establish a common market among its Member States and progressively to approximate their economic policies. Under the Treaty, a substantial body of legal rules were laid down to achieve this end, with the activities of the Community to include the following:

- the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all measures having equivalent effect;
- the establishment of a common customs tariff and of a common commercial policy towards third countries;
- the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
- the adoption of a common policy in the sphere of agriculture;
- the adoption of a common policy in the sphere of transport;
- the institution of a system ensuring that competition in the common market is not distorted;
- the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balance of payments remedied;
- the approximation of the laws of the Member States to the extent required for the proper functioning of the common market..

It is clear, therefore, that the Community, with its emphasis on all aspects of economic integration, is much more than a free trade area.

Separate Community institutions were established under the Treaty with the aim of adopting and enforcing legislation and ensuring the proper functioning of the common market. The main legislative body, the EC Council, is composed of representatives of the national Governments. The EC Commission, which has a broadly executive role, is appointed by agreement of the Member States, but is wholly independent of any national authority. Finally, the European Parliament is a body directly elected by the nationals of the Community. Legislative power is shared between these three bodies: the Commission proposes legislation which the Parliament and Council then examine, although the final decision lies with the Council. European Community law, which derives from the Treaty and also from legislation adopted in accordance with it, such as regulations, directives and decisions, constitutes a major force which affects not only the Member States but also the rights and obligations of individuals and companies. In order to interpret and enforce this, the Community also has its own Court of Justice.

By the mid-1980s much progress had been made in establishing the common market and many of the policies of economic integration which the Treaty envisaged were adopted. The common customs tariff was fully

established in 1968. A common agricultural policy was established. Structural funds concerned with social, regional and industrial affairs had been established at Community level. However, not all the developments which might have taken place did happen. The 1970s was a time of economic recession, during which ideas of economic integration were not given as much support as might have been expected. Many national measures of short-term interest were taken, often having effects not only as against third countries but also in relation to the other Member States. These measures were often aimed at protecting the national markets and industries through, for example, the use of public funds to aid and maintain non-viable companies. Quite apart from recession, a further reason why economic integration was not given such primary importance was that so much effort was concentrated on the enlargement of the Community. Once the accession of Portugal and Spain was fully agreed, the mood in the Community changed and economic integration became once again a matter of prime importance. Attention was switched to the internal market of the Community and the measures which needed to be taken to remove the remaining barriers to the free movement of goods, services, persons and capital within the Community.

## The Single European Act

The Heads of State and of Government of the European Community, meeting as the European Council in Copenhagen in 1982, pledged themselves to the completion of the internal market as a high priority. At subsequent meetings in Fontainebleau and Dublin in 1984 and in Brussels the following year, this pledge was repeated. It was then that the Commission seized the opportunity in a White Paper of June 1985 addressed to the European Council entitled 'Completing the Internal Market' in which a programme of legislative measures which were needed to be adopted was put forward.

The Commission stressed that the White Paper was not intended to cover every possible issue which might affect the integration of the economies of the Member States. Of primary importance was the internal market and the measures which were directly necessary to achieve a single integrated market. Many other matters which bear upon economic integration and indirectly affect the achievement of the internal market, while being of substantial importance, nevertheless do not form part of the programme to complete the internal market. These are contained in other Community policies, such as the competition, environment and social policies, industrial research and development and the European Monetary System. The White Paper, however, listed a host of measures which the Commission had been urging the Council to adopt for many years as well as new proposals which were deemed necessary.

It was recognised that the legislative powers which the Treaty had given to the Council had resulted in many of the measures which the Commission had proposed over the years remaining unadopted. One reason for this was that unanimity in the Council was required for much of the legislation. Accordingly, at the same time as the White Paper was produced, the Member States agreed to alter parts of the Treaty so as to enable the legislative programme to be more easily implemented. This resulted in the Single European Act (SEA) which came into force on 1 July 1987. As well as making certain alterations to the institutional structure of the Community, the SEA gave a proper legal basis to some of the economic activities, such as those relating to the environment and research and technological development, which the Community had in fact pursued over the years but which had not been specifically provided for in the original Treaty. A new development in European Union was made with the introduction of provisions on European cooperation in the sphere of foreign policy. But, as far as the programme for the completion of the internal market is concerned, the important provisions were those which declared the need to complete the internal market and which altered the voting procedure in certain cases. According to the new provisions, legislative measures were to be adopted with the aim of establishing throughout the Community by 31 December 1992, an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured. This is the internal market.

## The internal market and freedom of movement

Separate provisions of the Treaty govern the free movement of goods, services, persons and capital. Some of these rules are wholly self-sufficient and impose an outright prohibition on certain restrictions to free movement. In other cases, the rules allow for further legislation to be adopted by the Council. Where there are no specific provisions in the Treaty dealing with further legislative measures, the Council may issue directives for the approximation of national laws which directly affect the operation of the common market. In general, the Council, in issuing such directives, must act unanimously, on a proposal from the Commission. However, in many cases involving the completion of the internal market, the Council is to act by a qualified majority.

### *Goods*

Fundamental to the common market is the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all measures having equivalent effect. In addition, internal taxation of a Member State may not be used in a discriminatory manner so as to discourage trade within the Community.

With the adoption of the common customs tariff in trade with third countries, the customs union of the Community guarantees that all goods originating in the Community, or in respect of which import formalities into the Community have been complied with, may not be subject to any customs duties by reason of crossing an internal Community frontier. Measures of equivalent effect which are also prohibited cover any charge which is imposed unilaterally on goods by reason of the fact that they cross an internal frontier. Charges levied, for example, in respect of health inspections on imported goods will be contrary to these rules unless they are part of a general system applied to domestic and imported products alike or are payment for a service which is actually rendered to the importer.

It would clearly be contrary to the operation of the common market if imported goods could be taxed at a higher level than similar domestic goods. Accordingly, no Member State may impose directly or indirectly on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Nor may it impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Restrictions on imports and exports of goods between Member States are prohibited: (Articles 30-34 EEC). All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to such restrictions and are also prohibited.

However, while the prohibition on customs duties on imports or exports in intra-Community trade is absolute, there are exceptions to the prohibition on quantitative restrictions. The Treaty provides that the prohibition does not apply if the restriction is on grounds of:

- public morality, public policy or public security;
- the protection of health and life of humans, animals or plants;
- the protection of national treasures possessing artistic, historic or archaeological value;
- the protection of intellectual property rights.

Such a restriction will not be permitted, however, if it constitutes a means of arbitrary discrimination against imported goods or is a disguised restriction on trade between Member States. These derogations from the basic prohibition, which are largely non-economic in nature, are construed very strictly and any measures taken pursuant to them must be proportionate to their purpose.

The European Court of Justice, in the Cassis de Dijon case, stated that in general a product, once lawfully manufactured in one Member State, must be allowed to be marketed throughout the Community. However,

the Court also recognised that some other restrictions on trade might be permitted pending the harmonisation of national laws which seek to protect certain interests or values. This included restrictions justified on grounds of consumer protection, prevention of unfair commercial practices, protection of public health, protection of the environment, improvement of working conditions and the effectiveness of fiscal supervision.

### *Services*

Restrictions on freedom to provide services within the Community are prohibited (Article 59 EEC) in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may extend this right to nationals of third countries who are established within the Community. While a distinction is drawn between the freedom to provide services and freedom of establishment, a person providing a service is entitled temporarily to pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals. Some exceptions apply in the special cases of transport services and financial services. Thus, freedom to provide services in the field of transport are governed by the special rules relating to the common transport policy and the liberalisation of banking and insurance services connected with movements of capital are to be effected in step with the progressive liberalisation of the movement of capital.

A practical restriction on the exercise of the right of freedom to provide services arises where the Member State insists on certain mandatory requirements, such as professional qualifications. Accordingly, the Council is empowered to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

### *Persons*

Provisions in the Treaty relating to the free movement of persons include rules on the rights of Community nationals to move from one Member State to another in order to exercise their vocation or profession or in order to look for and obtain work. Different rules apply depending on whether the person seeking to exercise his rights is employed (Article 48 EEC) or self-employed (Article 52 EEC). In certain cases, the person is entitled to remain in the host country after he has ceased working. Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are, for these purposes, to be treated in the same way as natural persons who are nationals of Member States. This includes companies or firms which are constituted under civil or

commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit making.

### Employed persons

Employed persons are entitled to freedom of movement within the Community, a right which entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. This also entails the right, subject to limitations justified on grounds of public policy, public security or public health:

- to accept offers of employment actually made;
- to move freely within the territory of Member States for this purpose;
- to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- to remain in the territory of a Member State after having been employed in that State.

These rights do not apply to employment in the public service.

Community legislation has been adopted in order to strengthen the application of these rules. Any national of a Member State, irrespective of his place of residence, has the right to take up an activity as an employed person, and to pursue such activity, within another Member State in accordance with the laws governing the employment of nationals of that State. He has, in particular, the right to take up available employment in another Member State with the same priority as nationals of that State. National rules may not be applied where they limit application for, and offers of, employment, or the right of Community nationals to take up and pursue employment, or where they subject these to conditions not applicable in respect of their own nationals. Nor may they apply where, even though they apply irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered. An exception to this is where the conditions relate to linguistic knowledge required by reason of the nature of the job to be filled.

A Community worker may not be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, reinstatement or re-employment. He should enjoy the same social and tax advantages as national workers and have access to training in vocational schools and retraining centres. Any clause of a collective or individual agreement or of any other collective regulation concerning employment, eligibility for employment, remuneration and other conditions of work and dismissal is null and void in so far as it lays down or authorises

discriminatory conditions in respect of workers who are nationals of the other Member States. Certain rights of residence attach also to members of the worker's family.

Member States must grant Community nationals, on production of a valid identity card or passport, the right to enter and leave their territory in order to take up activities as employed persons and to pursue such activities in another Member State. As proof of the right of residence, a document entitled 'Residence Permit for a National of a Member State of the EEC' must be issued. For the issue of such a permit, the authorities in the Member State may only require that the worker produce the document with which he entered the country and a confirmation of engagement from the employer or a certificate of employment. The residence permit must be valid throughout the Member State for at least five years and be automatically renewable. It may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed.

#### Self-employed persons and companies

Restrictions on the freedom of establishment of Community nationals in another Member State are prohibited. This also applies to restrictions on the setting up of agencies, branches or subsidiaries in another Member State. Freedom of establishment includes the right to pursue activities as self-employed persons and to set up and manage companies and firms. While in the case of freedom to provide services, the supplier of the service is present in the Member State only temporarily, establishment implies a more substantial connection with the State in which the activity is carried on, although the dividing line between the two is not clear. A person will be established in a Member State where he has a permanent or long-term presence there or where he has a permanent place from which an economic activity is carried on. However, establishment may also be assumed where the presence is not permanent. Often, it is a matter to be decided on the facts of the particular case.

Generally, the right of establishment applies to all economic activities, with the exception of activities which involve the exercise of official authority. Certain restrictions on the right of establishment may be allowed on grounds of public policy, public security or public health. As with services, the directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications also make easier the exercise of the freedom of establishment.

### *Capital*

Article 67 EEC states that, to the extent necessary to ensure the proper functioning of the common market, Member States are to abolish

between themselves all restrictions on the movement of capital belonging to residents in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Current payments connected with the movement of capital between Member States must be free from all restrictions. Unlike the provisions on the free movement of goods, services and persons, the rules in the Treaty on free movement of capital, while being independent in themselves, must be developed in the light of other Treaty provisions, including those relating to balance of payments and economic policy. Each Member State must pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency. In order to facilitate this, the Member States must coordinate their economic policies and provide for cooperation between their appropriate administrative departments and between their central banks.

There is an obvious connection between the free movement of capital and the free movement of goods, services and persons. Accordingly, each Member State must authorise, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the movement of goods, services or capital and any transfers of capital and earnings, to the extent that the movement of goods, services, persons and capital have been liberalised.

In 1960, Community legislation, based on the OECD Code of Liberalisation of Capital Movements, provided for the liberalisation of exchange control restrictions on capital movements. Four categories of capital movements were established. For three of these categories, to varying degrees, the Member States were required to liberalise foreign exchange authorisations for the conclusion or performance of the transactions in question. Member States were not obliged to abolish the restrictions which applied in respect of the fourth category. Other provisions required the adoption of rules governing investment on the money market and payment of interest on deposits by non-residents and the regulation of loans and credits which were not related to commercial transactions or to the provision of services by non-residents to residents. In order to neutralise those effects produced by international capital flow on domestic liquidity which are considered undesirable, certain rules govern the regulation of the net external position of credit institutions and the fixing of minimum reserve ratios in particular for the holdings of non-residents.

In order to promote the coordination of monetary policy in the Community, a Monetary Committee was established with the task of keeping under review the monetary and financial situation of the Member States and of the Community and the general payments system of the

Member States. If movements of capital lead to disturbances in the functioning of the capital market in any Member State, the Commission must, after consulting the Monetary Committee, authorise that State to take protective measures in the field of capital movements. A Member State which is in difficulties may, on grounds of secrecy or urgency, take these measures on its own initiative, although, if it does so, it must inform the Commission which might order that the measures be amended or abolished.

## The White Paper: completing the internal market

By the time of the publication of the White Paper in 1985, substantial progress had been made by the Community in giving effect to these legal rules on freedom of movement. However, the Commission insisted that much needed to be done to complete the internal market. It listed some three hundred measures which were required to be adopted by the Council. The proposals were divided into three parts: the removal of physical barriers; the removal of technical barriers; and the removal of fiscal barriers.

### *Physical barriers*

The most obvious example of physical barriers are customs posts at frontiers which continue to exist largely because of the technical and fiscal divisions between Member States. However, they also serve as useful points at which other State controls can be exercised, such as immigration and drugs controls. It would not, therefore, be sufficient merely to abolish the technical and fiscal barriers without also providing for alternative methods whereby these other controls may continue without the need for customs barriers. To this end, the White Paper envisages measures covering arms legislation, drugs control, immigration, right of asylum and the status of refugees, national visa policies and extradition.

### *Technical barriers*

Technical barriers to free movement provide the greatest number of problems facing the Community. These barriers present themselves in a variety of different ways. The most obvious examples are those technical requirements which goods must satisfy under national rules relating to health and safety or for environmental or consumer protection. Government procurement policies which favour national suppliers are a serious impediment to inter-State trade in goods and services. It was proposed to strengthen and extend the current Community laws in these area. Other proposed measures tackle the remaining obstacles to the free movement of persons, services and capital. National company laws, intellectual property rights and taxation rules contain many provisions

which operate as a disincentive in inter-State business. The White Paper makes a number of proposals in these areas which are designed to create suitable conditions for industrial cooperation between companies in different Member States and to open up the market to companies wishing to expand throughout the Community.

### *Fiscal barriers*

The measures relating to the removal of fiscal barriers are concerned with further harmonisation of the structures of indirect taxation within the common market and deal with value added tax and excise duties. A uniform system of VAT was established in 1977, but some derogations were permitted to the Member States. Furthermore, the Member States retained the right to set tax rates within their territory and a system of taxation on importation and remission of tax on exportation was continued, even in intra-Community trade. With the removal of fiscal barriers, the intention is that VAT rates should be within set bands and that tax would no longer be charged on importation from another Member State so that in general goods and services would be subject to taxation in the country where supply takes place. As regards excise duties, the plan is that these would be applied to alcoholic products, tobacco and mineral oils with a harmonised structure and rate for each of these throughout the Community.

## European Community policies and the internal market

As has been stated above, the European Community pursues a number of activities, not all of which are solely economic. However, many of the policies have a direct bearing on the internal market and it is appropriate to have a knowledge of their main characteristics. These include agriculture, competition, social policy, environment and international trade.

### *Common agricultural policy*

The common market extends to agriculture and trade in agricultural products and the rules laid down for the establishment of the common market apply also to agricultural products. This is, however, subject to certain qualifications and a special agricultural policy is also established in the Treaty. The objectives of this policy are increased agricultural productivity, a fair standard of living for the agricultural community, stabilised markets, the availability of supplies and reasonable prices for consumers. These objectives were to be attained by the establishment of a common organisation of agricultural markets which would include measures such as regulation of prices, aids for the production and marketing of various products, storage and carryover arrangements and

common machinery for stabilising imports or exports. As part of this organisation, a major part of the Community's budget is allocated to an agricultural guidance and guarantee fund which supplements prices for agricultural products and seeks to encourage developments in productivity and use of the land.

Common organisations have been set up to cover cereals, milk, beef and veal, sheepmeat, pigmeat, poultry and eggs and sugar. In addition, a special regime applies to fisheries.

### *Competition policy in the internal market*

The Treaty provides for the institution of a system ensuring that competition policy in the common market is not distorted. European Community competition law deals with restrictive practices, abuse of a dominant position, mergers and acquisitions and state aids.

#### Anti-competitive agreements, decisions and concerted practices

All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited. Any agreements or decisions which are prohibited under these rules are automatically void, at least to the extent that the anti-competitive provisions are not severable from the rest of the agreement or decision. However, an agreement, decision or concerted practice may be exempted from this prohibition if it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. This exemption may apply as long as the anti-competitive provisions are strictly necessary and do not eliminate competition in respect of a substantial part of the products in question.

Only the Commission may declare the prohibition to be inapplicable. With certain minor exceptions, all agreements, decisions and concerted practices which are to be exempted must be notified to the Commission. However, the Commission has granted block exemptions, without the need for individual notification, to a number of classes of agreements. As long as the agreements are in accordance with the rules set out in these block exemptions, they should generally comply with the anti-trust rules of the Treaty. To date, block exemptions have been adopted dealing with, inter alia, exclusive distribution, exclusive purchasing, research and development, patent licensing, know-how licensing and franchise agreements. In each of these cases, the Commission has established a list of restrictions which will be allowed together with a list of those restrictions which will not be allowed and which deprive the agreement of the benefit of the block exemption.