

University of Miami International and Comparative Law Review

Volume 4
Issue 1 *THE UNIVERSITY OF MIAMI YEARBOOK
OF INTERNATIONAL LAW, VOLUME 4*

Article 4

1-1-1995

The Provision of Utility Services in a Unified Europe

Klaus Sommerlad

Peter Scherer

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Klaus Sommerlad and Peter Scherer, *The Provision of Utility Services in a Unified Europe*, 4 U. Miami Int'l & Comp. L. Rev. 73 (1995)

Available at: <https://repository.law.miami.edu/umiclr/vol4/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE PROVISION OF UTILITY SERVICES IN A UNIFIED EUROPE

*DR. KLAUS SOMMERLAD AND PETER SCHERER**

- I. INTRODUCTION
- II. UTILITY SERVICES UNDER THE EC TREATY
- III. ENERGY SUPPLY
 - A. *Electricity Supply*
 - B. *Gas Supply*
- IV. TRANSPORT
 - A. *Road Haulage*
 - B. *Other Transport Sectors*
- V. WASTE MANAGEMENT
- VI. OTHER UTILITY SERVICES

I. INTRODUCTION

Over the past ten years, deregulation and privatization of industries, including the service sector, have been a major issue in Europe. For a long time, the United Kingdom took the lead in this development. Now, most other European countries follow its

*Attorneys with the German law firm of Pünder, Volhard, Weber & Axster with offices in Frankfurt, Germany and Brussels, Belgium.

example, at least to a certain degree. Recently, the countries of Central and Eastern Europe have very actively followed suit, deregulating and privatizing their formerly planned economies. Some Western European countries, however, still have a notable backlog particularly with respect to various areas of utility services.

In 1957, the Treaty of Rome [hereinafter EEC Treaty]¹ brought into being the European Economic Community, now a part of the European Communities [hereinafter EC]. The Treaty of the European Union which came into force on November 1, 1993, established the European Union.² Based on the existing EC and additional provisions, such as foreign and security policy, justice and defense affairs, the Maastricht Treaty proposed to "advance European integration" by more closely coordinating social, educational, employment, immigration, economic, and security matters within and relating to the Member States.³ Confronted with such national differences, the purpose of the European Union [hereinafter EU] is to establish a common European market and to progressively approximate the economic policies of the EU Member States.⁴

1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [HEREINAFTER EEC TREATY]. The EEC Treaty also brought into being the European Atomic Energy Community [hereinafter EURATOM]. The European Coal and Steel Community [hereinafter ECSC] was already in existence. It was created in 1951 by the Treaty of Paris. EEC, EURATOM, and ECSC institutions were merged by the Merger Treaty in 1965 creating the European Communities (EC).

2. THE TREATY OF THE EUROPEAN UNION [HEREINAFTER MAASTRICHT TREATY] *reprinted in* 1992 O.J. (C 191).

3. BNA INT'L ENV'T DAILY, Dec. 29, 1993.

4. See EEC TREATY, art. III. Currently, the EU Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, the United Kingdom, Sweden, Austria, and Finland.

The most important provisions of the EC Treaty⁵ include those designed to realize the free movement of goods,⁶ persons,⁷ services,⁸ and capital;⁹ the provisions on competition¹⁰ and on harmonization of laws;¹¹ and the provisions for the realization of a common policy in various sectors, such as transport.¹²

The Single European Act of 1987 introduced the additional aim of progressively establishing an "internal market" over a period expiring on December 31, 1992.¹³ The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the EC Treaty.

Since 1986, no new Member States have joined the EC or the EU. However, some European countries, including Austria, Finland, Sweden, Norway and Switzerland, have applied for membership. The Treaty on the European Economic Area [hereinafter EEA Treaty] which came into force on January 1, 1994, established a transition stage, and created the world's largest

5. The EC TREATY is the widely accepted term for the EEC TREATY as amended by the MAASTRICHT TREATY. Interview with Mary Ellen Ynes, Information Officer of the European Commission, in San Francisco, Cal. (May 17, 1994).

6. EC TREATY, art. 9.

7. EC TREATY, art. 48.

8. EC TREATY, art. 59.

9. EC TREATY, art. 73.

10. EC TREATY, art. 85.

11. EC TREATY, art. 100.

12. EC TREATY, art. 74.

13. Single European Act, 1987 O.J. (L 169) 1, incorporated into EC TREATY, art. 7(a).

free trade zone by comprising the EC/EU Member States and EFTA countries Austria, Finland, Iceland, Norway, and Sweden.¹⁴ The four freedoms (of goods, people, services and capital) established by the EEA Treaty are supported by "flanking" policies (e.g. on competition).

Deregulation and privatization in Europe, particularly in utility services, has resulted from the failure of European governments to harmonize national laws within the European Union and to create a single, integrated European market to deal with the increasing deficits in all public budgets within the Union.

II. UTILITY SERVICES UNDER THE EC TREATY

Pursuant to Articles 52 and 59 of the EC Treaty, restrictions on the freedom of establishment (of nationals of one Member State in the territory of another Member State) and on the freedom to provide services shall be abolished by progressive stages in the course of a transitional period. If this target is not reached by the end of the transitional period, the prohibition of such restrictions may be relied on by individuals as acts against a Member State or any other legal or natural person.

However, the provisions of the EC Treaty have direct effect only in so far as they are clear, complete, sufficiently precise and not dependent for the fulfillment of their objectives on the adoption of secondary legislation. Therefore, direct effect applies only to the essential requirements of Articles 52 and 59, namely to the prohibition of discrimination based on nationality; place of establishment; residence; or the state where a qualification has been acquired, assuming the latter to be equivalent to the qualification required in the host state.¹⁵ Restrictions which are not abolished by provisions of the EC Treaty are to be removed pursuant to

14. Treaty on the European Economic Act, January 1, 1994.

15. See David Vaughan, 2 L. OF THE EUR. COMMUNITIES ¶ 16.25 (1986).

secondary legislation, called "directives."¹⁶

According to Article 56(1) of the EC Treaty, the provisions of Articles 52 and measures taken in pursuance thereof (secondary legislation) shall not prejudice the applicability of provisions laid down by national law, regulation, or administrative action providing for special treatment of foreign nationals on grounds of public policy, security, or public health.

Furthermore, three articles have long been used to justify the continued existence of monopolies conferred on enterprises operating in the area of utility services. Article 37 of the EC Treaty requires only the adjustment and not the abolition of state monopolies.¹⁷ Article 90(1) of the EC Treaty allows Member States to confer certain privileges on public enterprises to which they grant special or exclusive rights.¹⁸ Finally, Article 222 of the EC Treaty preserves national systems of property rights.¹⁹ On the other hand, it is a well established principle under EC law that statutory monopolies can abuse their dominant market position, rightly conferred on them by virtue of these privileges, thereby infringing upon Article 86 of the EC Treaty, which prohibits the abuse of a dominant market position.²⁰ The only possible exemption to Article 86 is contained in Article 90(2) of the EC Treaty which provides that enterprises entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the competition

16. *Id.* ¶ 16.28.

17. See Leigh Hancher & Peter-Armin Trepte, *Competition and the Internal Energy Market*, 4 EUR. COMPETITION L. REV. (ECLR) 149, 150 (1992).

18. *Id.*

19. *Id.*

20. See *id.* at 151 n.6 (referring to Case 41/83, *Italian Republic v. Commission*, 1985 E.C.R. 873, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14168 (1985)).

rules of the Treaty insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. However, only the Commission, and not the European Court of Justice, has considered the application of Article 90(2) to a field of services, namely the electricity sector.²¹

Therefore, the current process of EU-wide deregulation in the area of various utility services is not only governed by EU secondary legislation dealing with the freedom of establishment and the provision of services in these areas, but is also subject to a careful consideration of EU competition law.

III. ENERGY SUPPLY

Apart from a very general directive issued in 1966, electricity, gas and water supply had not been the subject of EC secondary legislation.²² It was not until May 1988 that the EC Commission released a working document on the internal energy market dealing with both electricity and gas supply.²³

A. *Electricity Supply*

In 1990, the European Communities adopted two directives concerning electricity supply. Council Directive No. 90/547 of October 29, 1990 provides that each high voltage transmission utility shall facilitate power exchanges between other utilities through its grid, provided that transmission reliability is not

21. See Ehlermann, EG-Binnenmarkt für die Energiewirtschaft, (1992) Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 689, 692 (referring to the Commission's leading decision of Jan. 16, 1991, 1991 O.J. (L 28) 32). See also Hancher & Trepte, *supra* note 17, at 154.

22. Council Directive 66/162, 1966 O.J. (L 66) 584 *et seq.*; see also Vaughan, *supra* note 15, at para. 16.67.

23. COM(88)238 final.

affected.²⁴ Council Directive No. 90/377 of June 29, 1990, concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users, provides that electric and gas utilities shall supply to the statistical office the rates they charged to all categories of customers on the understanding that public aggregate figures will respect confidentiality.²⁵

The Federal Republic of Germany recently expressed concerns that the provisions of these two directives will operate as a lever for the export of cheap French atomic energy electricity.²⁶ These arguments were rejected by experts in Brussels, as energy suppliers are not automatically forced to conduct electricity through his network. This is instead subject to negotiation. Furthermore, cross-border deliveries already existed within the framework of the European Energy Association.²⁷ However, these two already existing directives are only the first step of the Commission's three-stage approach to complete the internal market for electricity.

The second stage involves three elements. First, it is necessary to create a transparent and non-discriminatory system for granting licenses for the production of electricity and building of electricity lines (grids). The purpose is to open up investment in production and transport to independent operators, particularly to large industrial users. Second, the concept of unbundling (i.e., separation of the management and accounting of production, transmission and distribution operations) must be put into practice in vertically-integrated enterprises in order to ensure transparency of operations. Finally, the introduction of a limited basis of Third Party Access [hereinafter TPA] is desired whereby the transmission

24. Council Directive 90/377, 1990 O.J. (L 313) 30.

25. Council Directive 90/377, 1990 O.J. (L 185) 16.

26. See *Council of Ministers Intends to Open Energy Market*, Eur. L. Press, July 2, 1990, at 4.

27. *Id.*

and distribution companies are obliged to offer access to their networks to certain eligible entities at reasonable rates within the limits of available transmission and distribution capacity. The Commission issued a draft directive concerning common rules for the internal market for electricity in 1992.²⁸

With respect to eligibility criteria for TPA, this proposal benefits very large scale consumers of energy, while excluding small and medium-scale consumers. The proposal established several criteria for eligibility. To qualify, a consumer company's annual consumption must exceed 100 GWh of electricity. Distributors' annual supply must exceed 3% of electricity consumed in their Member State.

The whole concept is very controversial and several EC Member States expressed major reservations regarding this concept.²⁹ One of the major objections to the concept was that the Commission's proposal would constitute a violation of the principle of subsidiary, as expressly recognized in the Maastricht Treaty by the insertion of Article 3(b) in the EEC Treaty.³⁰ Furthermore, the effected industry rejected both the EC's concept, particularly an increased TPA, arguing that unbundling as well as

28. Council Directive, 1992 O.J. (C 65) 4.

29. For the entire concept of the Commission, see EC COMMISSION, *European Commission Proposals for the Progressive Achievement of Internal Market in the Electricity and Gas Sectors*, (Agence International d'Information Pour la Presse) Documents of Jan. 29, 1992. For the rejecting front, see *EC/Energy: Major European Energy Distributors and Trade Unions in the Sector Condemn the European Commissions Energy Policy*, Europe No. 5658 of Jan. 31, 1992.

30. The Community may take action in fields not falling in its exclusive competence only, in accordance with the principle of subsidiary, if and insofar as the objective of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Von Burchard, *Third Party Access and European Law*, (1992) EuZW 639 et seq., 693, 694. *Contra*, see Hancher and Trepte, *supra* note 17, at 149, 160.

the breaking up of regional monopolies would effectively result in an expropriation.³¹

Meanwhile, the Commission has issued an amended proposal which reflects many of the important amendments proposed by the European Parliament.³² With respect to the controversial issue of TPA, the proposed directive establishes the right of certain industrial consumers to negotiate access to the network. In an important change, the amended proposal allows Member States to impose public service obligations on energy companies concerning security of supply and consumer protection, which can be relied on as a basis to deny TPA. In any event, in light of experience acquired during the proposed second stage, the Commission wants to define a third stage in detail later. Details have not yet been decided, but it is expected that this third stage for liberalization of the energy market will enter into force on January 1, 1996.³³

B. Gas Supply

The European Commission's approach towards the gas sector is an analogous three-stage approach. The Council of Ministers adopted a Directive on the transit of natural gas through grids on May 31, 1991, as well as the Directive concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users.³⁴

31. See *Deutsche Stromwirtschaft lehnt EG-Pläne für mehr Wettbewerb ab*, FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), May 19, 1992, and *CDU-Wirtschaftsrat sieht Superbürokratie in Brüssel*, HANDELSBLATT, Dec. 5, 1991.

32. See European Proposal No. 6124, Dec. 9, 1993, 13 *et seq.*

33. See Council Directive, *supra* note 25.

34. See Council Directive 90/296, 1990 O.J. (L 147) 37; See also Council Directive 90/377, *supra*, note 24.

In 1992, the Commission also issued a proposal for a Council Directive concerning common rules for the internal market in natural gas.³⁵ The Commission proposed, *inter alia*, eligibility criteria for TPA. For consumer companies, annual consumption must exceed 25 million M3 of gas. For distributors, annual supply must exceed 1% of gas consumed in their Member State. Not surprisingly, the gas industries' arguments against the EC concept, and particularly against an increased TPA, are broadly similar to those raised by the electricity industry.³⁶

The third phase of the Commission's activities, planned for January 1, 1996, should, however, result in an enlargement of the TPA scheme to other consumers of a smaller scale.

IV. TRANSPORT

Article 74 of the EC Treaty requires Member States to set up a common transport policy. Nevertheless, significant progress in this respect was not made for decades and transport industries of the Community have remained as national markets, some of which were and still are, highly regulated. This situation began to change as a result of a decision by the European Court of Justice, which held that discrimination against carriers on the basis of nationality or place of residence, which at the time existed in the form of restrictions on access to all national and international transport markets (particularly in the form of cabotage regulations, bilateral quotas and restrictions on transport to and from non-EC countries), was incompatible with the Articles of the EC Treaty

35. Council Directive, 1990 O.J. (C 65) 14.

36. See *Die Vorschläge der EG-Kommissionen verhindern den freien Wettbewerb*, HANDELSBLATT, Nov. 3, 1992 and *Gasbranche kritisiert heftig die Zwangsdurchleitung*, HANDELSBLATT, Oct. 1, 1992. Similarly, the Commission has issued an amended proposal in this regard. See COM(93)643 final.

providing for the free movement of services.³⁷

The EC has since issued, and continues to issue, numerous regulations and directives which gradually introduce the principle of free movement of services for transport businesses in the single European market.³⁸

A. Road Haulage

National markets used to be closed to transport businesses from other EC Member States, preventing the free movement of services regarding road haulage. Traditionally, national transport regulations were used to cut off national markets from foreign businesses by means of so-called quota restrictions. Cross-border transport of goods occurred via bilateral transport permits, which were not always available in sufficient numbers and were subject to compulsory tariff regulations. However, Community-wide quotas providing for cross-border transportation rights throughout the EC were only limited.

The granting of access to the domestic market of any Member State is known as "cabotage." Regular cabotage is when foreign transport businesses may be allowed to transport goods within a foreign country without this restriction. Foreign transport businesses may be allowed to transport goods within another country only following a cross border journey undertaken to carry goods to that country; this is known as follow-up cabotage.

Regulation No. 4059/89 of December 21, 1991, provides for a limited cabotage quota of special permits for the entire

37. European Parliament v. EC Council, May 22, 1985, case 13/83, (1985) ECR 1513 *et seq.*

38. Regulations are directly applicable in all Member States. Directives oblige Member States to incorporate the stipulation of the directives into their national laws.

Community as of July 1, 1990.³⁹ These permits allowed businesses engaged in cross-border road haulage in one Member State the right to transport goods within another Member State without having a business established there.⁴⁰ Such permits were valued for periods of two months, but could be issued for only one month, in which case their number/quota had to be doubled. In either case, the legal and administrative provisions of the host Member State had to be observed. The Council of Ministers agreed to increase cabotage quotas by at least 10% each year, but this transitional arrangement expired on December 31, 1992. After January 1, 1993, the Council introduced a final provision which led to the introduction of regular cabotage.⁴¹

The Community has also implemented the decision of the Council of EC Transport Ministers of June 20/21, 1988, which removed all restrictions between Member States concerning market access in the area of road haulage.⁴² At the same time, all national tariff regulations became inapplicable with respect to international transport within the EC; instead, only price recommendations may be issued.

Previous legislation provided that all quantity restrictions on cross-border road haulage within the Community ceased to apply as of January 1, 1993.⁴³ The Council adopted Regulation No. 3118/93 in order to implement free movement of services in the

39. See 1990 O.J. (L 390) 3; see also Basedow/Held, *Die EG-Kabotage-Verordnung*, (1990) EuZW 305 *et seq.*

40. *Id.*

41. COM(91)377 final.

42. See *Deutscher Industrie-und Handelstag* (DIHT), *EG-BINNENMARKT GÜTERKRAFTVERKEHR*, (1989), at 5.

43. Council Regulation 1841/88 of 30 June 1988, art. 4(a)(1), 1988 O.J. (L163) 1.

field of road haulages between EC Member States.⁴⁴ Pursuant to this Regulation, conditions under which non-resident carriers may operate national road haulage services within a Member State were enumerated. According to Article 2(1) of the Regulation, cabotage operations shall be carried out from January 1, 1994, to June 30, 1998, within the framework of Community cabotage quotas. From that date onwards, any non-resident carrier meeting specified conditions shall be entitled to operate national road haulage services in another Member State, on a temporary basis and without quantitative restrictions, without a need for a registered office or other establishment in that State.⁴⁵

Moreover, the professional licensing requirements for parties wishing to engage in road haulage were harmonized throughout the EC as of January 1, 1993. As noted *infra*, Regulation No. 4059/89 provided that any road hauler established in an EC Member State, in accordance with the local regulations and authorized to engage in international road haulage is to be allowed to temporarily engage in road haulage in any other EC Member State (host state), without having to maintain a business establishment or branch there.

It should be mentioned that compulsory tariffs (margins) existed under bilateral arrangements between EC Member States for cross-border transport. Since January 1, 1989, only reference rates have still been admissible, which are not binding on transport firms. Since January 1, 1990, tariffs for the cross-border transport of goods may be freely negotiated by virtue of Regulation No. 4058/89 which concerns the fixing of prices for the transport of goods between Member States.⁴⁶ Purely national tariff regulations are only subject to the Community's competition rules, particularly

44. Council Regulation 3118/93 of 12 November 1993, 1993 O.J. (L279) 1.

45. Commission Regulation 3118/93, art. 12(3).

46. 1989 O.J. (L. 390) 1.

to the ban on cartels under Article 85(1) of the EC Treaty.⁴⁷

Pursuant to Article 2(a) of Regulation No. 1017/68 of July 19, 1968, applying rules of competition to transport by rail, road and inland waterway, the contents of Article 85 of the EC Treaty fully apply in the transport sector.⁴⁸

Finally, it may be said that as of January 1, 1993, every operator established in a Member State who meets specified quality criteria is entitled to offer to carry goods between two other Member States. Following the same principle, cabotage rights enabling haulers to provide their services freely within another Member State were established in 1990. Permits issued have gradually been increased over the last years, so that in the foreseeable future, there will be complete freedom.

B. *Other Transport Sectors*

In order to create an EC-wide single integrated market, the Community is also endeavoring to liberalize services in the following methods of transport: inland waterway,⁴⁹ railway,⁵⁰

47. See Cases 209-213/84, *Ministere Public v. Asjes, Nouvelles Frontieres*, 1986 E.C.R. 1425.

48. 1968 O.J. (L 175) 1.

49. See Council Directive 87/540, 1987 O.J. (L 322) 20; Commission Regulation 1017/68, 1968 O.J. (L 175) 1; Commission Regulation 1101/89, 1989 O.J. (L 116) 25; Commission Regulation 2919/85, 1985 O.J. (L 280) 4; Draft Regulation on the Abolition of Cabotage Restrictions on Inland Waterway Shipping, 1985 O.J. (C 331) 2.

50. Commission Regulation 1017/68, *supra* note 49; Statement by the EC Commission on a Uniform Community Railway Policy, 1990 O.J. (C 34) 8.

combined carriage,⁵¹ bus,⁵² maritime,⁵³ and air.⁵⁴ These sectors of the industry are subject to an extensive body of EC legislation.

V. WASTE MANAGEMENT

Rising public awareness of environmental problems has resulted in an increasing number of EC provisions and legislative measures in the area of waste and waste management during the last fifteen years.

In 1975, the EC enacted Directive No. 75/442 on waste.⁵⁵

51. Council Directive 75/130, 1975 O.J. (L 48) 31; COM(88) 665 final; Proposal for a Directive Amending Directive 75/130 on the Establishment of Common Rules for Certain Types of Combined Carriage of Goods Between Member States, 1992 O.J. (C 282) 8.

52. Commission Regulation 117/66, 1966 O.J. 147 p. 2688; Commission Regulation 516/72, 1972 O.J. (L 67) 13; Commission Regulation 517/72, 1972 O.J. (L 67) 19; Commission Regulation 3820/85, 1985 O.J. (L 370) 1; Council Directive 88/599, 1988 O.J. (L 325) 55; proposed legislation published in 1987 O.J. (C 77) 13, and 1987 O.J. (C 120) 9.

53. Commission Regulation 4055/86, 1986 O.J. (L 378) 1; Commission Regulation 4056/86, 1986 O.J. (L 378) 4; Commission Regulation 4057/86, 1986 O.J. (L 378) 14; Commission Regulation 4058/86, 1986 O.J. (L 378) 21; Commission Regulation 3577/92, 1992 O.J. (L 364) 7. Further proposals are published in 1989 O.J. (C 263) 11.

54. Commission Regulation 2299/89, 1989 O.J. (L 220) 1; Commission Regulation 2343/90, 1990 O.J. (L 217) 8; Commission Regulation 1344/90, 1990 O.J. (L 217) 15; Commission Regulation 84/91, 1990 O.J. (L 10) 14; Commission Regulation 83/91, 1990 O.J. (L 10) 9; Commission Regulation 294/91, 1991 O.J. (L 36) 1; Commission Regulation 295/91, 1991 O.J. (L 36) 5; Commission Regulation 2410/92, 1992 O.J. (L 240) 18; *see* additional proposals published in 1991 O.J. (C 258) 15; COM(92)257 final; COM(92)274 final; 1992 O.J. (C 206) 41 and 57; 1992 O.J. (C 253) 6 and 11.

55. Council Directive No. 75/442, 15 July 1975, 1975 O.J. (L 194) 39.

Pursuant to Article 3(1) of this Directive, all Member States shall take appropriate steps to encourage the prevention, recycling and processing of waste, the extraction of raw materials and possibly of energy therefrom and any other process for the re-use of waste.⁵⁶ Article 3(2) provides that the Member States shall inform the Commission in good time of any draft rules to such effect.⁵⁷ According to Article 6, the Member States' competent authorities shall be required to draw up one or several plans relating to the type and quantity of waste to be disposed of, general technical requirements, suitable disposal sites, and special arrangements for particular waste.⁵⁸ Such plans may, for example, cover the natural or legal persons empowered to carry out the disposal of waste, the estimated costs of disposal operations and appropriate measures to encourage rationalization of the collection, sorting and treatment of waste.

Subsequently, several more specific EC provisions followed, which include, in part:

- Council Directive No. 76/403 of April 6, 1976, on the disposal of polychlorinated biphenyls and polychlorinated terphenyls;⁵⁹

- Commission Decision No. 76/431 of April 21, 1976, setting up a committee on waste management;⁶⁰

- Council Directive No. 78/319 of March 20, 1978,

56. *Id.*

57. *Id.*

58. *Id.*

59. 1976 O.J. (L 108) 41.

60. 1976 O.J. (L 115) 73.

on toxic and dangerous waste;⁶¹

- Council Recommendation No. 81/972 of December 3, 1981, concerning the re-use of waste paper and the use of recycled paper;⁶²

- Council Directive No. 84/631 of December 6, 1984, on the supervision and control within the European Community of the transfrontier shipment of hazardous waste;⁶³

- Council Resolution No. 89/C 9-01 of December 21, 1988, concerning transfrontier movement of hazardous waste to third countries;⁶⁴ and

- Council Regulation No. 259/93 of February 1, 1993, on the supervision and control of shipments of waste within, into, and out of the EC.⁶⁵

This last regulation entered into force on May 1, 1994. The Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, as adopted on March 22, 1989, was approved on behalf of the EEC by Council Decision 93/98 on the same day.⁶⁶

Furthermore, the Council of Ministers enacted on June 27,

61. 1978 O.J. (L 84) 43.

62. 1981 O.J. (355) 56.

63. 1984 O.J. (L 326) 31.

64. 1989 O.J. (C 9) 1.

65. 1993 O.J. (L 30) 1.

66. 1993 O.J. (39) 1.

1985 its Directive No. 85/339 on containers of liquids for human consumption.⁶⁷ Pursuant to Article 3, Member States shall draw up programs for reducing the tonnage and/or volume of containers for liquids for human consumption in household waste for final disposal. Moreover, according to Article 5, Member States shall take steps to ensure that a clear indication is given on new refillable containers offered for sale, either on the container itself or on the label, that the containers concerned are refillable. However, this obligation shall not apply for a period of ten years on the date of notification of this Directive.

Finally, it should be mentioned that Article 7 provides that the Member States shall notify the Commission of all voluntary agreements and all laws, regulations and administrative provisions enacted, whether national or sectoral in scope. Member States shall also notify of prospective draft texts, without prejudice to Council Directive 83/889 enumerating the procedure for the provision of information in the field of technical standards and regulations.⁶⁸

On March 18, 1991, Directive 75/442 on waste was amended by Directive 91/156.⁶⁹ According to Article 3, Member States shall take appropriate measures to encourage the prevention or reduction of waste production and its harmfulness, the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or the use of waste as a source of energy. Furthermore, the Member States are obliged to secure a sufficient infrastructure by making technologically advanced installations available. For this purpose, detailed waste management plans are required, and comprehensive systems of authorization and supervision (e.g., for transportation)

67. 1985 O.J. (L 176) 18.

68. Council Directive 83/189, 28 Mar. 1983, laying down a procedure for the provision of information in the field of technical standards and regulations, 1983 O.J. (L 109) 8, amended by Council Directive 88/182, 22 Mar. 1988, 1988 O.J. (L 81) 75.

69. 1992 O.J. (L 78) 32.

are to be introduced. The operation of waste disposal and recycling plants must receive official approval specifying the type and amount of waste treated, security measures, location and process. Notification must be given of services provided in connection with waste disposal. According to the principle of causal responsibility, the person in possession of the waste who transfers it for recycling and/or the previous owner and producer of products which caused the waste must bear the costs of its disposal. Article 2 of Directive 91/156 provides that Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Finally, the European Commission issued several proposals in the area of waste management, most prominently a proposal for a Council Directive on the landfill of waste⁷⁰ and for a Council Directive on the incineration of hazardous waste.⁷¹

On August 24, 1992, the Commission issued a proposal for a Council Directive on packaging and packaging waste dealing with all kinds of packaging.⁷² Because the proposal acknowledged the possible trade barrier effect of national packaging laws and intended to protect the "free movement of goods," including packaging material, it was heavily criticized by environmental protection hardliners for not declaring stricter national provisions to be permissible.⁷³ The proposal, as amended by the European Parliament, set concrete targets for the next few years.⁷⁴

70. 1991 O.J. (C 190) 1.

71. 1992 O.J. (C 130) 1.

72. 1992 O.J. (C 263) 1.

73. *See Community Packaging-Waste Elimination Proposals*, BUS. L. EUR., Aug. 10, 1992, at 3.

74. *See* 1993 O.J. (C 194) 154.

Furthermore, according to the proposal, all packaging must carry a harmonized indication of the extent to which it is re-usable or recoverable; consumers must be advised on how they are to deal with used packaging. It is also noteworthy that Member States shall take necessary measures to ensure that, within five years, national systems are set up to provide for the return of all used packaging and/or all packaging waste from the consumer or waste stream or other final user in order to channel it to the most appropriate waste management alternatives, and to ensure that the used packaging and/or packaging waste collected is effectively re-used, recycled or recovered. These systems shall ensure the coverage of import products under non-discriminatory procedures and conditions and shall be designed in such a way that there are no barriers to trade or distortions of competition. ·

Recently, the Council of Environmental Ministers adopted the Directive but was immediately criticized by Germany for restraining the free movement of recyclable waste.⁷⁵

VI. OTHER UTILITY SERVICES

Finally, it should not be left unmentioned that other utility services, such as radio and television services, postal services and telecommunication services, are subject to extensive EC legislation. Substantive national deregulation within the Community has already been the result of such legislation, and there is more to come.

75. The Directive is not yet published. Denmark, Germany and the Netherlands voted against the Directive.