

# TRANSATLANTIC QUARTERLY



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## NOTE FROM THE EDITOR

The creation of a “Transatlantic Economic Partnership” between the United States and the European Union is a particularly timely endeavor. Known in shorthand as the “TEP,” this government-led initiative will attempt to bolster trade and economic cooperation between the two sides and minimize potentially disruptive disagreements. This government “partnership” complements ongoing pairings in the business world. The mega-merger plans of Daimler Benz/Chrysler and British Petroleum/Amoco and the new joint venture between AT&T and British Telecom reveal the continuing trend to maximize global opportunities via transatlantic partnership. The success of the Transatlantic Business Dialogue (TABD)—next scheduled to meet in Charlotte in November—also attests to the important synergies and interlinkages between U.S. and European business leaders.

However, this public/private partnership will face strain over the next few months. The transatlantic business ventures still must win regulatory approval, and recent precedent shows that big-time transatlantic deals do not always meet with success. Additionally, there are a number of EU/U.S. trade tensions likely to erupt this Fall—such as those stemming from

the October 25 entry into force of the EU’s Data Protection Directive—which will challenge efforts to negotiate and realize a true Transatlantic Economic Partnership. And the recent economic and political crises in Russia cast a pall over investor confidence there and create fresh uncertainty about Russia’s economic future.

We welcome, in this Fall 1998 edition of the Transatlantic Quarterly, articles from all three of Akin Gump’s European offices. This newsletter leads with a contribution from the London office, examining a major proposal to overhaul the UK’s financial services regime. Next, we look to Moscow for a description of the hard currency regulations affecting foreign investment in Russian companies. Finally, the Brussels office provides insight into a variety of EU developments—on data privacy, antitrust cooperation with the United States, and biotechnology inventions—and into Belgian and EU initiatives with respect to the liability of statutory auditors. Please feel free to contact the authors by phone or e-mail should you have any questions.

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## UK FINANCIAL SERVICES AND MARKETS BILL

With the late-July release of the draft Financial Services and Markets Bill, the UK Government is proposing a significant overhaul of its financial services regulatory structure. The Bill provides the framework within which a single regulator for the financial services industry, the Financial Services Authority (the "FSA"), will operate. In creating a single regulator, the Government intends to foster a flexible regime effective in dealing with modern financial service providers, which increasingly work across traditional sectoral boundaries. A single regulator is also a way to eliminate the unnecessary duplication of the burdens placed on firms. The logic of a single regulatory framework indicates that a single authorization process is forming—a key aspect of both the new regime and the Bill.

The Bill makes provisions, among other things, for:

- The constitution of the FSA;
- The definition of the scope of regulated activities;
- The control of financial promotion;
- The powers of the FSA to authorize, regulate, investigate and discipline authorized persons and to intervene in their activities;
- The recognition of investment exchanges and clearing houses;
- The arrangements for approval of controllers and employees of authorized persons;
- The regulation of Lloyd's;
- Certain criminal offences; and
- Powers to impose civil fines for market abuse.

The single statutory regulator for the UK financial services industry will have clearly defined objectives and a single set of coherent functions and powers. It will take over the responsibilities of, and have powers at least equivalent to,

those of nine current regulators, including the former Securities and Investments Board, the Self Regulating Organisations (SROs), the former Supervision and Surveillance Division of the Bank of England (transferred by the Bank of England Act), the Building Society Commission, the Insurance Directorate (now part of the Treasury), the Friendly Societies Commission, and the Registrar of Friendly Societies. There will be no future equivalent of the Financial Services Act's Recognised Professional Bodies; rather, the FSA will be responsible for authorising those members of the professions carrying on financial services business.

### THE FINANCIAL SERVICES AND MARKETS BILL PROPOSES A RADICAL OVERHAUL OF THE UK'S FINANCIAL SERVICES REGULATION.

At present, EC law requires each Member State to nominate or create a Competent Authority to maintain an Official List of securities which may be traded on investment exchanges, manage the admission of new issues

to the List, and monitor adherence to listing rules. This function is carried out in the UK by the London Stock Exchange, under Part IV of the Financial Services Act 1986. Through the Bill, the Government intends to make improvements to this regime, including the introduction of fines for breaches of listing rules.

The Government sees this bill as key to its efforts to reform financial services regulation. The UK financial services industry currently accounts for 7 percent of GDP and employs more than one million people in the City of London and around the country.

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## RUSSIAN HARD CURRENCY REGULATIONS

In the past year, the Central Bank of the Russian Federation (the “CBR”) has issued detailed rules in the sphere of hard currency regulation and control. Two regulations, which impact foreign investments in Russian companies, establish new procedures for making charter contributions by foreign investors into Russian companies and providing loans to Russian companies.

The first, **Regulation 482**, sets forth new rules for non-residents wishing to make charter capital contributions in cash in Russian companies other than credit institutions. This rule provides that such cash contributions must be made in Rubles, and must be preliminarily registered with the relevant Regional Division of the CBR. To register, the foreign investor and the Russian company must file an application and required documents with a “Russian authorized bank” (licensed by the CBR). After review and verification of the submitted documents, the Russian authorized bank opens both a foreign currency account and a special “investment” Ruble denominated account (the so-called “I” Account) in the name of the foreign investor. The Russian authorized bank is subject to a number of additional notification requirements and then must file the application to the Regional Division of the CBR, which within 10 days, will determine whether to register the charter contribution. One problem with these new detailed procedures is that they do not explicitly replace the pre-existing regulation applicable to such investments. Accordingly, until the CBR resolves the ambiguity, it is possible for investments to be made under either regime.

The second, **Regulation 527**, sets out rules for CBR approval of loans made to Russian companies other than banks for a period greater than 180 days (loans for a period of less than 180 days may be made without CBR approval). Under Regulation 527, loans qualify for a simplified

registration procedure if they meet certain criteria (with respect to the amount of the loan, its interest rate and costs, and its relationship to other currency operations requiring CBR approval) or if they fall into certain categories (such as loans guaranteed by the Russian Government). Of course, any loans for more than 180 days which do not meet the specified criteria are subject to the more rigorous preliminary approval process. And Regulation 527 contains certain additional qualifications which significantly restrict the loans that may qualify for the simplified registration procedure.

The procedure for “registering” a loan is generally similar to those set forth in Regulation 482 for cash contributions to Russian companies. The borrower must apply to a Russian authorized bank, which in turn will forward copies of the application certified by the Russian authorized

bank and the supporting documents to the Regional Division of the CBR. The Regional Division must take action on the application within 10 days from the date on which the complete application is filed. If the Regional Division finds it needs more time to review the documents it can extend the review period up to 30 days.

CERTAIN RUSSIAN HARD CURRENCY REGULATIONS DIRECTLY IMPACT FOREIGN INVESTMENTS IN OR LOANS TO RUSSIAN COMPANIES.

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## APPLICATION OF THE EU DATA PROTECTION DIRECTIVE

Is your company ready for October 25, 1998?

- Does your company store or manipulate personal data about employees, customers, or other individuals in the course of its business?
- Does your company have operations located in at least one EU Member State?

- If so, has your company developed procedures to comply with relevant Member State legislation that implements the EU Data Protection Directive?
- If not, read on.

In the past year, much transatlantic attention has been focused on the EU Data Protection Directive and its requirement that personal data not be transferred from EU Member States to third countries that do not provide “adequate protection” to such sensitive data. Yet in the race to achieve “adequate protection” in third countries by the October 25, 1998 (entry into force of the Directive), businesses should not lose sight of significant data protection requirements within the EU itself.

The Directive places obligations on EU “data controllers” which are entities engaged in obtaining, manipulating, storing or otherwise processing data about individual persons. The Directive sets parameters for permissible processing, but also imposes on data controllers obligations to ensure the accuracy and quality of the data, provide certain information to the individual subject to the data processing, and report processing activities to a central authority. Within this framework, however, Member States have wide discretion to impose even stricter requirements. But no matter how loose or strict the Member State law, the baseline protections provided to individuals by the Directive effectively impose *significant* new responsibilities on most businesses and other entities. As a result, companies with any operations or data processing in the EU should develop a plan to ensure compliance of their data processing activities, in and between EU Member States, with the Directive.

In third countries, achieving adequate protection is challenging because most businesses do not wish to undertake a wholesale importation of the obligations imposed on them in

the EU where not otherwise required by law. However, understanding and complying with the Directive’s requirements to provide adequate protection in the EU will not only protect a multinational’s activities in Europe, but may also serve as a blueprint for developing a satisfactory means of achieving adequate protection in third countries.

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## U.S. AND EU REINFORCE THEIR ANTITRUST COOPERATION

On June 4, 1998, the U.S. and EU signed an agreement to strengthen mutual enforcement of competition rules. This “positive comity” agreement, supplementing a 1991 EU/U.S. accord on antitrust cooperation, will allow the competition regulator of one party (the Requesting Party) to request that the other (the Requested Party) take action against alleged anticompetitive activities under its own laws.

Under the agreement, the Requesting Party may agree to defer or suspend enforcement activities pending the

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THE EU AND U.S. HAVE  
SIGNED AN IMPORTANT  
AGREEMENT TO STEP-UP  
THEIR COOPERATION ON  
ANTITRUST  
ENFORCEMENT.

enforcement activities of the other when certain conditions set out in the agreement are satisfied. For example, one such condition is that the anticompetitive conduct either does not have a direct impact on consumers in the Requesting Party’s territory, or if it does, that it occurs principally in and is directed towards the Requested Party’s territory. Another of these conditions is that the competition authorities of the Requested Party will use their best efforts to complete their investigation and obtain a remedy within six months of the deferral by the competition authorities of the Requesting Party. This is a tall order, particularly for the European Commission with its limited staff.

The scope of these two agreements should not be overstated. First, they do not contain clauses found in mutual legal assistance treaties (MLATs) between the U.S. and a number of countries on which the U.S. relies to obtain documents, physical evidence and testimony in foreign countries for use in U.S. prosecutions. In other words, the exchange of the sort of confidential information critical for antitrust analysis remains out of bounds except where the enterprises concerned waive their right to confidential treatment.

Second, the agreements do not alter, or require change in, existing laws of the U.S., the EU, or of their respective States or Member States. This is apparently the reason why merger control falls outside of the scope of the agreements. This is regrettable given that conflicting decisions in merger controls are especially problematic: clearance of a merger one jurisdiction which is nevertheless prohibited in another may well be the end of the merger. However, in some recent cases there has been progress. EU and U.S. authorities seem to be consulting each other more successfully than in the past in order to avoid conflicting decisions.

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## PROTECTION OF BIOTECHNOLOGICAL INVENTIONS

Ten years of debate on the protection of biotechnological inventions came to an end with the recent adoption of Council Directive 98/44/EC on the legal protection of biotechnological inventions. The Directive sets forth conditions for patenting biotechnological inventions, including those involving elements of human origin. The initial Commission proposal for the Directive dates back to 1988; however, it was rejected by the European Parliament in 1995 on the grounds that it was too vague with respect to the ethical conditions for patenting parts of the human body. This concern has been addressed in the newly adopted Directive.

Under the Directive, biotechnological inventions are generally patentable if they are new, involve an inventive step, and are conducive to industrial application. Excluded from protection are plant and animal varieties and essentially biological processes for the production of plants or animals. In addition, the human body at its various stages of formation and development or the simple discovery of one of its elements is not patentable. However, an element isolated from the human body or otherwise produced through a technical process, including the sequence or partial sequence of a gene, may be patentable. Other unpatentable inventions include those whose commercial exploitation would be contrary to

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EC MEMBER STATES  
HAVE UNTIL JULY 30,  
2000, TO PROVIDE FOR  
PATENT PROTECTION OF  
BIOTECHNOLOGICAL  
INVENTIONS.

*ordre public* or morality  
(such as processes for  
cloning human beings or  
for modifying the germ  
line genetic identity of

human beings) and uses of human embryos for industrial or commercial purpose. The Directive also provides for compulsory licensing on a non-exclusive basis, in return for appropriate royalty and entitlement to a cross-license, where a patent cannot be exploited without infringing on a prior plant variety right and where a plant variety right cannot be exploited without infringing on a prior patent.

Member States now have until July 30, 2000, to amend their national patent laws to comply with the Directive. This requirement is without prejudice to the obligations of Member States under international agreements, particularly the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement and the Convention on Biological Diversity. European pharmaceutical and biotechnology groups hope this Directive will encourage investment in biotechnology-related research and development in Europe and safeguard European competitiveness.

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## LIABILITY OF STATUTORY AUDITORS IN BELGIUM

Statutory auditors in Belgium increasingly find themselves subject to liability suits for their activities. Statutory auditors are charged with the audit of the financial condition, the annual accounts and the regularity of the transactions reflected in the annual accounts. Statutory auditors are liable to the company for any shortcomings in the performance of their duties and are jointly and severally liable for any loss resulting from a breach of the provisions of the Belgian Companies Act. Certain violations also carry criminal sanctions. The Companies Act determines that an auditor's report is required to make reference to:

- How the accounts were audited (generally accepted auditing standards);
- Whether the auditor has obtained from the management all requested information and answers;
- Whether the accounts give a true and fair view of the financial situation; and
- Whether the annual management report includes all information required by law and whether it accords with the accounts.

In the absence of any precedents, Belgian statutory auditors have long considered themselves immune from liability suits. That situation is now changing as victims of corporate fraud increasingly turn against the statutory auditor as well as against the management. At present, law suits are pending against audit firms such as KPMG and Ernst & Young. These and

similar actions focus mainly on whether the accounts give a "true and fair view" of the financial situation of the company. Of the few available precedents, a 1996 decision by the Court of Appeal of Liège marked an important change in the perception of auditors' responsibilities in Belgium. The Court condemned a statutory auditor for failing to report a black money circuit worth 0.0012% of the annual turnover. Previously, auditors had only been considered liable to the

extent that unreported transactions could, if reported, have seriously affected the true and fair view of the financial accounts. The condemnation of a statutory auditor to a criminal sentence for failing to report a minor

irregularity in the accounts sent shock-waves through the Belgian audit environment.

At the EU level, the Commission is currently studying national rules on the liability of statutory auditors to determine whether harmonization of such rules would be necessary. Although the Commission released in May 1998 a new Communication on the Statutory Audit in the EU, it skirted around the issue of professional liability and instead set forth a future work program in the area of auditing standards, audit quality control systems, and auditor independence. It is possible that the Commission could propose some action if it determines that disparate Member State rules in this area create a barrier to exercising auditing services throughout the EU.

BELGIAN AUTHORITIES  
ARE TAKING A STRICT  
VIEW OF THE  
RESPONSIBILITIES OF  
STATUTORY AUDITORS.

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