- a crystallisation of the rights of members in pension arrangements, and increased consumer protection in both personal pensions and occupational schemes

- a huge increase in the sheer volume of the quantity of law, despite the general agreement that there is too much of it already.

EUROPEAN UNION LEGISLATION
by John Young, Lovell White Durrant

I am proposing in this presentation to bring you up to date with what has been happening in Europe over the last year, and what we are expecting to see happening in the next few months. This is not an update on the implementation in the UK of EC legislation, although I shall be happy to answer specific questions about this if anyone wants.

1. European Union or European Community?

Over the last year there has been not inconsiderable confusion as to the difference between the European Community and the European Union.

Originally, there were three separate European communities, established by three separate Treaties:

(i) The European Economic Community ("EEC");

(ii) The European Coal and Steel Community ("ECSC); and

(iii) The European Atomic Energy Community ("EURATOM").

They all still exist, and the member states of each of the communities are and always were the same.

As a result of the Treaty on European Union (also known as the Maastricht Treaty), which came into force on 1st November 1993, a number of changes have occured:

(i) The member states of the three original Communities are now all members

of a new European Union ("EU");

(ii) All nationals of these member states are also citizens of the EU;

(iii) Various amendments have been made to the existing three Treaties, including a major change to the EEC Treaty by the addition of a section on common economic and monetary policy; and

(iv) The EEC Treaty was re-named the European Community ("EC") Treaty.

The EU is based on a combination of the provisions of the existing three Treaties and new provisions set out in the Maastricht Treaty which provide the basis for a common foreign and security policy and for co-operation in justice and home affairs (assylum policy, immigration and combating fraud and drug addiction) between the member states of the EU.

The result is that the phrases EU and EC are sometimes interchangeable but sometimes not.

If we are talking about the member states in the context of their new common foreign and security policy, or the new provisions relating to co-operation in justice and home affairs, they should always be referred to as the EU. However, if we are referring to the activities of the member states derived from the original EEC Treaty (now called the EC Treaty), the description EU is permissible, but it is still correct to refer to the EC.

Finally, most of the law deriving from the EU affecting businesses is based on the provisions of the EC Treaty and it is therefore still correct (and, indeed preferable) to continue to refer to EC law rather than EU law. Specifically, the Insurance Directives are still properly referred to as EC Directives as they are adopted under the EC Treaty. The official name of the Commission in Brussels remains "the Commission of the European Communities" (although as a matter of practice it has adopted the name "European Commission" in all non-legal documents). Confusingly the EC Council has decided to re-name itself the "Council of the European Union" for all purposes. This is to avoid having to call itself the EC Council for some purposes and the EU Council for others.

2. European Economic Area

The original EC Treaty sought to create a single market within which goods, services, capital and people could move freely. On 2nd May 1992 the then 12 EC member states and the seven European Free Trade Association ("EFTA") countries (Austria, Finland, Iceland, Liechenstein, Norway, Switzerland and Sweden) signed an agreement creating a European Economic Area ("EEA"). This was subject to ratification by each of the States concerned. The concept of the EEA was to extend the EC Single Market to include all the EFTA countries.
Ratification was considerably delayed as a result of the decision of Switzerland and Liechenstein not to participate. This necessitated an amendment of the original EEA Agreement and re-ratification by the five remaining countries, so that the Agreement only finally became effective on 1st January 1994.

The EEA effectively extends certain provisions of EC law so that they will apply in Austria, Finland, Iceland, Norway and Sweden. These countries will apply those elements of EC law that relate to the creation of the Single Market, including EC rules on free movement of goods and services, EC competition rules and EC public procurement rules. With effect from 1st January 1994 some 1,500 EC directives and regulations adopted prior to 31st July 1991 (including First and Second Non-Life and Life Insurance Directives) became applicable throughout the EEA. (The Agreement was implemented in the UK with minimal publicity by the European Economic Area Act 1993).

As regards EC legislation adopted between 1st August 1991 and 31st December 1993, most of this became applicable to the additional five EFTA countries with effect from 1st July 1994, by virtue of a decision of the EEA Joint Committee on 31st March 1994 which was subsequently ratified by the European Parliament and by the five EFTA countries. The Third Non-Life and Life Insurance Directives were included in the package of legislation adopted in this way, subject only to certain specific agreed exemptions and transitional arrangements. Particularly, Finland has not yet become obliged to implement the Third Non-Life Insurance Directive.

So far as insurance is concerned this means that as from 1st July 1994 the Third Insurance Directives are in force not only as between the existing 12 EU member states but also between those states and the additional five EFTA countries.

3. **Enlarged European Union**

It should be noted that the EEA Agreement does not of itself mean that the additional five EFTA countries will become members of the EU, nor will they be subject to all the provisions of the EC Treaty.

Having said this, on 4th May 1994 the European Parliament approved Treaties to admit Norway, Sweden, Austria and Finland (but not Iceland) to the EU. Their accession must now be approved by referenda in each of the four countries this autumn. Subject to such approval, each of these countries will become full Member States of the EU (including the EC!) with effect from 1st January 1995. If this occurs (which is not necessarily a foregone conclusion) Iceland will thereafter be the only remaining member of the EEA that is not also a member of the EU.

4. Switzerland

The departure of Switzerland from the negotiations for the formation of the EEA resulted in the resurrection of an Agreement signed between the EC and Switzerland in October 1989, which was intended to make reciprocal between the EC and Switzerland all the benefits of the then EC Insurance Directives.

For a long time it was hoped that this Agreement would be made redundant by the establishment of the EEA, but this proved not to be the case.

The result is that the First and Second Non-Life Insurance Directives (but not the Life Directives and not the Third Non-Life Directive) now apply as between the member countries of the EU and Switzerland, so that companies with their head office in Switzerland have the same rights to establish branches or agencies to carry out cross-border insurance within the EU as were formerly available within the EU under the FIrst and Second Non-Life Directives. Conversely, Switzerland makes similar benefits available to EU insurers, including those with their head office in the UK.

5. Third Insurance Directives

I mention these Directives in passing, if for no other reason than that everyone will expect me to do so. However, in reality, nothing has happened at EU level over the last year other than the gradual implementation of the Directives (including their extension to the EEA, as discussed above).

The Directives were supposed to have been implemented in most of the 17 EEA

countries by 1st July this year. I attach for interest a brief note outlining the actual current position on implementation in the countries now concerned.

6. Proposed prudential supervision directive

On 28th July 1993 the EC Commision issued a proposed Directive to amend the First and Third Non-Life and Life Insurance Directives (among others) in order to strengthen the powers of supervisors in the wake of recent cases of fraud in the financial services sector. The Directive is known colloquially as the "post-BCCI Directive".

The draft Directive contains four major provisions aimed to cover gaps in the supervision of investment and insurance companies and banks revealed by the BCCI collapse.

Firstly, the group structure of (among others) an insurance company must be sufficiently transparent to enable the insurer to be supervised effectively. If the relevant supervisory authority comes to the conclusion that the group lacks transparency it will withdraw its licence.

Secondly, as insurer's head office will have to be in the same member state as its registered office. This is to avoid the BCCI situation where BCCI had its head office in Luxembourg and its administrative offices in London. This tended to mean that the relevant supervising authorities in Luxembourg limited their supervision to the activities of the bank in Luxembourg (which were modest). By contrast, supervisors of local branches tended to limit their supervision to local operations on the assumption that Luxembourg was supervising the worldwide activites of the bank.

Thirdly, free exchange of confidential information is to be automatically permitted between the regulatory authorities, statutory auditors and bodies involved in the liquidation of insurers, as well as with the authorities supervising the liquidators and auditors respectively. (This is a dramatic proposal in some member states where there are strict laws preventing one regulator talking to another – the matter is uncontroversial in the UK where such dialogues regularly occur).

Finally, auditors engaged in the preparation of an insurer's statutory accounts are to be required to communicate to the competent regulatory authorities irregular

circumstances which come to their notice. This obligation has been extended by subsequent amendment so as to cover not only the regulated company but also undertakings linked to that company.

Some of these developments are not new so far as the UK is concerned – indeed, the UK has taken its own steps in the aftermath of the BCCI collapse to introduce a duty on an auditor of an insurance company to communicate to the DTI whenever the auditor thinks that circumstances have arisen in relation to the insurance company that might be taken into account by the DTI in considering whether to impose a Notice of Requirements (the Auditors Insurance Companies Act 1982) Regulations 1994).

The matter that may cause some concern for established companies is the requirement that the head office of an insurance company must be in the same member state as its registered office. There is no doubt that as companies expand their activities their principal activities and, thus, their commerical centre of operations may well end up in a different member state from their registered office – which may then retain a purely historical significance.

The draft Directive does not define "head office" and it remains to see how it will, in practice, be implemented.

7. **Proposed Directive on Financial Conglomerates**

The EC Commission has prepared a summary document on the supervision of financial conglomerates. This could lead to a proposal for an EC Directive or Regulation before the end of 1994, designed to avoid "double gearing".

The likely contents of any Directive are as yet unclear, but they would address the situation where, for example, an insurance company owns a bank and the same assets are used to support the solvency margin of both bodies.

It is unlikely that any legislation will have a severe financial impact on most operations. So far as the UK is concerned, the Bank of England already takes informal steps to ensure that where a bank owns an insurance company (or vice versa) the same assets are not used to support the bank's solvency ratio and the insurance company's solvency margin. (Having said this, it is by no means uncommon for insurance companies to benefit from "pyramiding"companies above

each other so as to obtain double benefit from the same assets).

8. Proposed Directive on Intermediaries

On 18th December 1991 the EC Commission adopted a Recommendation that EC member states should ensure that insurance intermediaries are subject to certain minimum requirements, as well as compulsory national registration. Recommendations of this nature have persuasive effect only – but may be replaced by a Directive if they are not followed.

The minimum requirements suggested included a level of commercial and professional knowledge (to be determined by the member states), the carrying of professional indemnity insurance and having sufficient financial capacity. National registers were to distinguish between independent and dependent intermediaries.

In November 1992 the DTI published a Consultative Document on the implementation of the Recommendation in the United Kingdom. Not surprisingly the document, and subsequent Government statements, concluded that no significant new legislation was required in the United Kingdom, although the ABI announced in July a number of "improvements" in its non-statutory General Business Cose of Practice.

Equally unsurprisingly, the EC Commission has announced that as a result of complaints about the manner in which the 1991 Recommendation has (not) been implemented, in particular in Spain, it is now planning to draft a binding Directive on the subject. It is understood that the Competition Directorate-General is also examining the concept of independent commercial agents. No detailed information about the likely content of any Directive is yet available, but it seems likely that the easy days of the regulation of non-life insurance intermediaries in the UK are numbered.

9. Proposed Directive on Export Credit Guarantees

In July this year the Commission proposed a Directive to harmonise export credit guarantees, which has caused considerable controversy in the FT and Lloyd's List.

The aim is to prevent distortions of competition arising from differences in the export credit facilities available from the governments of different member states.

The Directive has, according to the press release, three main elements:

(i) common principles are to be established for the conditions available in export credit insurance contracts, including guidelines for the type of risk to be covered, the percentage of the loss to be covered and the other rules that "together constitute the quality of the guarantee"'

(ii) the calculation of premiums is to be controlled; and

(iii) the availability of cover for different countries is to be addressed.

The details of the draft Directive are as yet still unpublished, and most people are still guessing at its likely terms on the basis of the press release and some "bootleg" copies of the draft in circulation. In theory, the Directive is supposed to cover only medium and long term credit insurance. The feature that has attracted most attention is that guarantees of 100% (such as those offered by the ECGD) would be outlawed. Instead, buyers' credits would be limited to 95% of a total risk and sellers' credits limited to 90%.

Short-term export credit providers are concerned that the draft Directive covers manufacturing periods of 12 months or more "for the account of or with the support of the state". There is concern that short term credit insurance can in certain cases fall within these time periods. As the UK government provides insurance of last resort in this field, covering about 4% of the market, the entirety of the UK's short-term export credit market could potentially be regulated by the Directive.

Apart from this, the biggest problem of all seems to be divergence between member states on the principles to establish in assessing premium rates to be charged for credit insurance. Given that controversy has commenced even before the draft Directive has been published it seems this one is likely to run and run.

10. Miscellaneous

Discussions are still proceeding on the Commission's Green Paper of March 1993 on Remedying Environmental Damage. No progress towards proposals for legislation is now likely to be made this year.

Draft Directives and Regulations are still under discussion designed to create three

new types of European entity: A European association, a European co-operative society and a European mutual society. The aim of the proposals is to enable, amongst others, mutual societies to take advantage of the Single Market without having to forego their special character. Views differ on the extent to which these proposals are likely to have the slightest impact on the insurance market. It has also been suggested by the German government (which currently holds the presidency of the Council) that the proposals on a European association and a European mutual society should be withdrawn on the grounds of "subsidiarity" (remember that word?).

Finally, it is worth a reminder that the insurance Group Extemption, Regulation 3932/92, exempting certain categories of agreements, decisions and concerted practices in the insurance sector from the application of Article 85 of the EC Treaty (which prohibits anti-competitive agreements and practices) came into effect on 1st April 1993. It clarifies the type of arrangements that the EC Commission considers do not have a material anti-co-operative effect. Certain people in the insurance industry still seem to be blissfully unaware that EC or UK competition law affects them at all, and the occasional reminder has its purpose!

ANNEX
Progress report as at 31st August 1994 on implementation of the EC Third Life and Non-Life Insurance Directives

Implementation completed

1. *Denmark:* The principal implementing legislation was adopted in April 1994 but some secondary legislation still needs to be enacted.

2. *France:* The principle legislation was adopted in January 1994 but certain administrative executive orders remain to be enacted.

3. *Germany:* The principal implementing legislation was adopted on 28th July 1994.

4. *Iceland:* The principal implementing legislation was adopted in May 1994.

5. *The Netherlands:* The principal legislation was adopted in April 1994 but