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BANKING IN EUROPE:

the harmonization process in

establishment and services

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CARLOS JAVIER MOREIRO GONZALEZ

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In Memoriam of

Salvador de Madariaga

with gratefulness to

because of their love and support

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PREFACE

This research is an interdisciplinary approach to the EEC banking harmonization process.

The methodology employed consists in focusing the subject from the legal, economic and political science perspectives. Therefore, the underlying purpose of the research is to study the legal outcomes within their context.

The research is subdivided in several parts.

The first part is a legal approach to both the first and second Banking Directives as the cornerstones of the EEC banking harmonization process. The detailed analysis of both Directives from an EEC legal perspective is a condition precedent for the understanding of how is being shaped the Community Financial Policy.

The Second Part is a political science approach to the role of interests within the EEC decision making process. More specifically, it is an attempt to show how banks can influence legislators for the achievement of their objectives. An additional study to this second part, is constituted by the analysis of the Community policies in consumer protection. This sector provides us with comparative information for an estimation of the importance of "interest" within the shaping of regulatory policies within the EEC.

A socioeconomic approach to credit institutions strategies' for the controlling of financial markets is the subject of the third part. Through the study of the United States current "de-regulatory" trends, we show the interrelationship between the world financial markets. A second stage of this part connects the European context with the other representative world financial markets. Thus, similar behaviours can be remarked, which leads the author to the conclusion that neither national governments, nor the European Institutions are currently capable to regulate financial markets without a previous "consensus" with the financial institutions.

The fourth part of the research consists in a critical approach to the institutional behaviour of the Community as regards policy-making for the achievement of an integrated financial market by 1992. This analysis shows that credit institutions, whose profits are greatly affected by public policy, have an extraordinary capacity to innovate and adapt, notably as a way of lawfully avoiding the effects of "public controls".

Each of the four parts of the research used the same methodology. First, there is an introduction to establish the guidelines of the research approach to the subject. Secondly, there is a detailed analysis of the main issues constituting the field of the study. Thirdly, we draw some conclusions from the research.

By using the above said methodology, we try to save time for the reader. Each of the parts of the thesis has a meaning by itself, but, at the same time, it also contributes to reinforce the general conclusions of the research and to give an overall view of some of the many interrelationships that we can find when analyze the shaping of Financial Policy within the EEC.

It is worth noting the conditions within which the research has been done. If it is difficult for any researcher to arrive at suitable sources for a satisfactory completion of the research, difficulties are worsening when the subject is "banking", because much of the policy process is relatively hidden and highly technical.

Therefore, despite the gathering of many reliable materials, we have to underline that much of the work is a logical process based on a mixed intellectual technic of "intuition" and "induction".

We also want to remark that, apart of the first part (which is a purely legal analysis of the subject), the whole work aims to interrelate the three scientific research fields mentioned above. This seems logical when we analyze an economic sector where the law is an instrument for the regulation of the behaviours of the market forces.

Although the thesis is about economic events, it is not, an economic analysis of those events, not could it be, given my technical competence. Economic aspects are examined only in so far as they are essential to the narrative.

The contribution of this thesis to the understanding of current trends within the European financial markets is for the reader to judge. We do not pretend to find solutions to the many complex issues. The chief aim is rather to examine some general problems of policy making and execution. We advance some critical views, sometimes contrary to those of the policy makers. We also suggest alternative legal and economic strategies. This is, in our view, the task that a young university researcher should fulfill.

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PART I

THE LEGAL ASPECTS OF THE EEC BANKING HARMONIZATION PROCESS

INTRODUCTION

The first part of the thesis consists of the next five chapters. Its aim is to give an overall view of the process of harmonization in which credit institutions are involved in the EEC.

The methodology employed consists of a systematic approach to the EEC Treaty, the first and second banking directives and the case law from the European Court of Justice. This will help us to analyse several aspects:

- (A) The historical evolution of the harmonization process.
- (B) The legal framework which has influenced the creation of the directives.
- (C) The different interests at stake which have also influenced the content of the directives (both national and bank interests).
- (D) The results that can be expected from the directives in the way towards liberalization.

The analysis of all these aspects is an essential first step of the research in order to focus clearly on the role of both international and European credit institutions influence in the decision making process in the EEC.

CHAPTER I: THE EEC TREATY AS A LEGAL FOUNDATION FOR THE DEVELOPMENT OF THE FREEDOM OF ESTABLISHMENT AND SERVICES OF CREDIT INSTITUTIONS

In spite of the fact that the EEC Treaty makes no reference to the creation of an "integrated financial system", we notice that it opens new prospects for an "international regulation" of banking activities (1). There is not much sense in promoting a "coordination of economic policies" of the EEC Member States without taking into account the coordination of banking activities.

In order to achieve this result, the EEC Treaty lays the foundations in articles 3(c) and (h). It develops them in articles 52 to 73 and 100 to 102. These provisions have two objects:

- a) To promote the freedom of banking activities for banks of Member States throughout the EEC.
- b) To promote permanent cooperation between the national authorities of Member States, and the achievement of a "common banking regulation" in the context of a Common Economic and Monetary Policy (2).

But two obstacles lay in the way of liberalization: the diversity of the banking structures and policies between "the Six", and the different aims of banks in the market, (including possible international expansion). To overcome these

difficulties, a step-by-step plan was established (3), but the accession of England, Ireland and Denmark halted its development.

Leaving aside the analysis of the role played by the liberalization of the "free movement of capital" in the creation of an "integrated financial system" in Europe, we turn to the EEC Treaty articles related to the "freedom of establishment and freedom to promote financial services". These articles are as follows: Art. 3 c) and h), Art. 52, Art. 57, Art. 58, Art. 59, Art. 60, Art. 66

Art. 3 (EEC Treaty) provides that: ... "For the purposes set out in article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out there in: c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; h) the approximation of the laws of Member States to the extent required for proper functioning of the Common Market."...

This provision constitutes a summary of the EEC Treaty. To each sub-paragraph correspond a series of provisions in parts two and three. The words "as provided in this Treaty" are significant as they indicate that the EEC Treaty has not entrusted Community institutions with general powers. Only powers specifically provided for in the successive chapters of the Treaty may be exercised by the Community when carrying out activities mentioned in Art. 3 (4). The term "approximation of laws" is used in Art. 3 (h) in a wide sense (5). Where a completely uniform Community rule is envisaged, terminology implying "approximation" etc, is not used, and a power to issue directly applicable instruments

(regulations) is generally conferred. Where, conversely, it is intended to leave to Member States liberty to legislate in a given area, but where a greater or lesser degree of adjustment is nevertheless necessary if the objectives of the Treaty are to be met, the Treaty speaks in terms of harmonization, approximation, etc. Here it generally confers a lesser power of Community action, usually by directive, i.e. laying down the ends to be achieved, but leaving the choice of means to the Member States. The scope left to national action may, however, be quite limited where the directive is very detailed (6).

Title III of the EEC Treaty regards the liberalization of both the freedom of establishment and the provision of services. But whereas the achievement of the former is going to be achieved through the "coordination" of the regulations of the Member States, the freedom of establishment will be achieved by the elimination of "obstacles".

Therefore, the secondary legislation to be enacted for the above purposes should combine directives of "coordination" (services) with those concerning the "elimination of obstacles" (establishment).

Art. 52 (EEC Treaty) provides: ... "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State

established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital"...

This article, which creates the freedom of establishment under the Treaty, applies both to individuals and companies (as defined in Art. 58, EEC Treaty). The implementation of Art. 52 is intended to take two forms: the ending of restrictions on establishment by directives (Art. 54, EEC Treaty), and the mutual recognition of diplomas, etc. (Art. 57, EEC Treaty). All restrictions were to be ended during the transitional period (ending December 31, 1969), but this was not achieved (7). The right of establishment further includes the right ... "to set up and manage undertakings, in particular companies or firms within the meaning of Art. 58/(2)"... Subject to the qualifications, relating to companies, all types of economic organizations having as their purpose the production or distribution of goods or services, irrespective of whether or not they have legal personality, are covered by the right of establishment. However, this rule must be read in connection with Article 221, concerning the right of nationals of Member States to participate financially in the capital of companies (as defined in Article 58, EEC Treaty) established in other Member States (8). The right of establishment dealt with in Articles 52 and 58 embraces all sectors of economic life: industry, commerce, finance,

agriculture, public works, crafts and the professions. The foregoing makes clear that only economic activities fall under the establishment provisions of the Treaty. The right of establishment covers not only the performance of the activities themselves, but also their collateral incidents. These include the right to set up agencies, branches or subsidiaries, to form commercial companies and to acquire shares in existing firms or companies under the same conditions as nationals. As an exception to the general rule contained in Art. 52/1 first sentence, however, the second sentence states that ... "the progressive abolition of restrictions on the freedom of establishment shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State". Since the words "established in the territory of any Member State" qualify the words "nationals of any Member State", the nationality criterion is complemented by the criterion of "actual establishment", within the Community (9). By "actual establishment" the EEC legislation means the existence of an "effective and continuous link" with the Economy of a Member State by any firm or company (10). So, any firm (or company) controlled by nationals of third countries can profit from the benefit of the freedom of establishment, because the link between the firm and the EEC is not based on the "nationality" of the persons who control its supervision.

Each Member State decides who is its national. Persons without nationality and refugees domiciled within the Community are not nationals, although the representatives of the Member

States have declared that their interest will be taken into consideration (11).

The establishment provisions apply in the "territory of the Member States". In conformity with Article 227(4) EEC Treaty, this area also includes the European territories for whose external relations a Member State is responsible. In cases Commission v Ireland (12) and Minister for Fisheries v Schonenberg (13), the Court of Justice extended this area to all other areas under the control of the Member States (except those governed by special Treaty provisions, relating e.g. to dependent territories) such as, for instance, their fisheries zones or the continental shelf of the Member States, to the extent they engage in economic activities there.

The obligations imposed by article 52 must be met in three stages. First, the General Programme referred to in Article 54 must be adopted. The Programme was adopted on December 18, 1961. Second, the General Programme is to be implemented by directives issued by the Council acting on a proposal by the Commission and after consultations with the Economic and Social Committee and the European Parliament. Third, these directives must be carried out by the national authorities (14).

In case Reyners v Belgian State (15), the Court held that Art. 52 alone was of direct effect notwithstanding the absence of a specific liberalising directive under Art. 54 (2). Even though Art. 52 does confer a direct right of establishment free

of restrictions based on nationality, it will only be a complete right when each Member State recognises the professional qualifications in the other Member States as equivalent to its own. The basis of the prohibition of discrimination based on nationality is to be found in Article 7 of the Treaty of which Article 52 is an illustration.

In case Thieffry v Conseil de l'Ordre des a avocats à la Cour de Paris (16), the Court held that since Art. 52 states one of the basic objectives of the Treaty, Member States are required both to ensure fulfilment of obligations arising from it and to abstain from any measure which could jeopardise the attainment of the objectives of this Treaty. The question arises whether an individual has legal recourse if national authorities violate his establishment rights based on Council directives and implementing national provisions which have been duly issued. For the moment, the question must be answered on the basis of national procedural law. The prohibition's direct applicability notwithstanding, a Member State will not have fulfilled its Treaty obligation as long as it will not have formally replaced the norm which infringes the Treaty by another norm of equal hierarchial value (17). The prohibition of discrimination on grounds of nationality applies first of all to measures taken by public authorities, including local authorities (18). In later cases the Court of Justice held that the prohibition of discrimination also applied to rules of any other nature aimed at collectively regulating gainful employment and services (19).

Art. 52(2) renders the right of establishment subject to the provisions of the chapter on capital (Arts. 67-73 EEC Treaty). But this is of minor importance since the movement of capital for investment purposes was freed from restrictions by Directive of May 11, 1960.

Art. 57 (EEC Treaty) provides that: 1/ In order to make it easier for person to take up and pursue activities as self-employed persons, the Council shall, on a proposal from the Commission (and in co-operation with the European Parliament) acting unanimously during the first stage, and by a qualified majority thereafter, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. 2/ For the same purpose, the Council shall, before the end of the transitional period, acting on a proposal from the Commission and after consulting the European Parliament, issue directives for the co-ordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons. (Unanimity shall be required for Directives and implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons). (In other cases, the Council shall act by qualified majority, in cooperation with the European Parliament).

The words in square brackets were substituted by the Single European Act Art.6(6). and Art. 16 (2).

The words in the second set of square brackets in para. 2 were substituted by the Single European act, art. 6 (7).

Article 57 of the EEC Treaty sets out the second element involved in the right of establishment: mutual recognition of qualifications and coordination of conditions of entry to business or the professions.

These provisions will benefit nationals as well as foreigners and are intended to provide equality of competition throughout the community (stricter entry requirements in one country could distort the free movement of persons).

The second paragraph of Art. 57 served as the basis for the enactment of the First and Second Banking Directives. It is therefore interesting to make some reflections on it.

Art. 57 (2) EEC Treaty requires the co-ordination of access qualifications to business and the professions. But not all national provisions concerning access to various occupations or professions are potential objects of the coordinating efforts of the Council. The General Programme concerning establishment (20) states **that**, when national provisions which on their face are applicable equally to foreigners and nationals have the practical effect of excluding foreigners either specifically or principally, they are subject to abrogation pursuant to article 52, not to coordination pursuant to article 57(2) (21).

Presumably, they must now be considered as completely void as a result of the Reyners case (22).

Coordination will not necessarily mean alignment of rules on the level of the most liberal country. Actual Community achievements in this field have been too limited, however, to permit prediction of the degrees of strictness or liberality of the directives to be enacted by the Council.

Coordination of the national provisions governing access to, and exercise of, the various professions and occupations is not (except in the case of the health care professions) a necessary precondition for the free exercise of the right of establishment. In case Thieffry v Council de l'Ordre des Avocats à la Cour de Paris (23), the European Court held that Art. 57 must be read as facilitating the basic right conferred by Art. 52 EEC Treaty, and not as restricting it. It is "directed towards reconciling freedom of establishment with the application of national professional rules justified by the general good".

Accordingly, the lack of a directive under Art. 57 did not prejudice the right of establishment if that could be achieved under national procedures. In this way, Title VI of the General Programme concerning establishment (24) provides that the Council examine in each case whether the lifting of restrictions on freedom of establishment should be preceded, accompanied, or followed by coordination of national provisions regarding the activities concerned. This rule however has now lost its practical significance.

Coordination is to be achieved by means of directives enacted by the Council on the proposal of the Commission after consultation of the European Parliament. Unanimity was required for all matters until the end of the first stage. Since then, unanimity has been required for matters which, in at least one Member State, are governed by legislation or which are concerned with the protection of savings (including credit and banking). Recently, article 16(2) of the S.E.A. requires only a qualified majority. The term "legislation" apparently refers to more than statutes in the strict sense of the word.

Unlike mutual recognition of diplomas, co-ordination must be achieved before the end of the transitional period. In this regard, the Treaty makers were clearly over-optimistic in their assessment of the possibilities. Though the transitional period has expired, a great deal remains to be done.

Art. 58, EEC Treaty states that: 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 shall, for the purposes of this chapter, be treated in the same way as natural persons who are nationals of Member States. "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are nonprofitmaking.

Art. 58 applies equally to companies created under "civil" and "commercial" law as to companies or firms created under public or private law (25).

The right of establishment of a company should not be confused with recognition of its corporate personality. A foreign company may wish to have its personality recognized in a State (e.g. for the purpose of bringing a suit there) without being established there. But a company seeking to establish itself in a foreign state would be extremely hampered in this endeavour without recognition of its personality (26).

Unlike the rule prevailing in the case of natural persons, article 58 does not include any explicit reference to nationality, probably because nationality was a less suitable criterion in connection with companies. We also could understand that the above reference exists, as far as companies are controlled, or have been constituted by nationals of the Member States of the Community. In this way, the nationality should be that of the "controllers" or "founders".

The first link which a company must have with the Community in order to be entitled to the right of establishment is "formation in accordance with the law of a Member State". This requirement seeks to ensure that companies benefiting from the right of establishment in the Community have a direct link to the legal system of one of the Member States. What exactly is meant by "formation" must be determined by reference to the law under

which the company which asserts the right of establishment claims to have been formed.

The second link with the Community required by Art. 58 (1), is that the company have its registered office, executive office, or principal place of business within the Community. This may be met by a company formed in accordance with the law of a Member State A, which has its registered office, executive office or principal place of business in a Member State B. Compliance with one of the requirements is sufficient to give them the benefit of the provisions on freedom of establishment in the Community. The article does not require that partnerships must have the status of a legal person (27). The registered office of a company is located at the place designated as such in the incorporation papers of the company. The executive office of a company is located where the company organs issue the decisions that are essential for the company's operation. The principal place of business is the place where the company has its principal operational facilities.

Unless a convention on the topic is adopted, the transfer of the primary establishment of a company covered by Art. 58 will remain a rarity. For this reason, the main way in which companies will exercise their right of establishment will be by creating secondary establishments. The precise legal method used will be much influenced by tax considerations. However, the actual possibilities for the establishment of branches, subsidiaries,

and the like will depend a great deal on the freedom of movement of capital.

The Daily Mail affair (28) concerned this approach. The European Court faced the question about the possibility for a company established in a Member State to change its "executive office" unto another Member State without losing its nationality, It stated that, at present, Article 58 of the EEC Treaty does not confer this right (points 24 and 25).

It is also clear that the liberalization of the right of establishment will increasingly bring third parties such as investors, customers, and creditors into contact with companies governed by the law of another Member State with which they may be unfamiliar.

The second paragraph of this article contains a definition of "companies or firms". It includes in this definition all enterprises which are profit-making; i.e. which have as their object, according to their constitution, the making of a profit, whether they actually do make a profit or not. The Commission proposal of the Directive on "Annual Accounts for Credit Institutions and other Financial Institutions" refers to "companies or firms" in the sense of Art. 58(2) EEC Treaty (29). The following are not covered by that definition: charities and social clubs, if not promoted as limited companies, trade unions and possibly friendly societies.

Art. 59, EEC Treaty states: Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period 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, acting by qualified majority on a proposal from the Commission, extend the provisions of this chapter to nationals of a third country who provide services and who are established within the Community.

The expression ..."abolished during the transitional period"... is somewhat misleading. There was no intention of authorizing any national of a Member State, no matter how little qualified, to provide throughout the Community whatever services he or she might choose to offer. The real purpose of the Treaty is to obtain equal treatment for residents and non-residents. This involves the abolition of all direct discrimination (30) (31).

It is not easy to provide a precise list of restrictions covered by Article 59. The General Programme for the abolition of restrictions on the freedom to provide services (32), provides some examples of such restrictions in Title III, including discriminatory taxation, special entry or work permits, and the like. Under subdivisions (C) and (D) of Title III of the General Programme we can find subjects relate to Financial Services.

The General Programme deals only with restrictions, formal or informal, imposed by public authority. The Court of Justice has gone further, however, and has held that restrictions imposed by private parties are also in violation of the Treaty, provided the activity involved is covered by it: see case 36/74 Walrave (33).

The expression ..."services within the Community", means within the territory of the Member States. The territory of the Member States includes the continental shelf on which the Member States exercises sovereign rights and the European territories for the external relations of which the Member States are responsible. Difficult questions may arise about Andorra, Monaco, San Marino and Gibraltar (34).

In Walrave (35), the Court of Justice has ruled that the non-discrimination rule of article 59 applies to all legal relationships which can be located in the territory of the Community, because the Community is either the place where the relationships has been entered into or where it takes effect. This seems to imply that a contract for the provision of services in a third country is subject to Article 59. This Article is in any event applicable only to the provision of services by the Community nationals.

It is worth mentioning the Commission's hesitations in Walrave, to accept that Articles 52 et s. and 59 et s. could apply to private measures. It envisaged, on the other hand, the

possibility of applying Article 7 to discriminatory measures of a private nature.

Article 59 designates, as beneficiaries, 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 nationals of the Member States need not be established in the State of which they are nationals (36).

In 1974, the Court of Justice ruled that Article 59 had direct effect as a result of the end of the transitional period (37).

The Court of Justice held the rules on the free movement of services, and thus also article 59, to be clearly relevant in the case of a transaction involving basically a service, if one of the parties to the transaction moved from one Member State to another before the transaction was completed. But article 59 did not compel a National Court to do anything except provide national treatment to all parties; see case Société Générale Alsacienne de Banque S.A. (38). In addition in this case the Court of Justice seems to have agreed with the idea of a Community - wide "Common Market", which implies that consumers, as well as producers, have a right to obtain goods and services anywhere within the Community.

In Coenen (39), the Court of Justice viewed residence requirements imposed as a means of adequate supervision over

providers of services quite restrictively. The Court said that a residence requirement by its very nature prevented nonresidents from providing services. It could thus be used only if other less restrictive measures were inadequate to ensure compliance with the rules of professional conduct in effect where the services were to be provided.

For banking activity Article 59 means that any bank which has its central administration in one of the Member States of the Community has the possibility to carry out its business in another Member State of the Community without the necessity of being established in the latter.

But we have to take in account that banks are not merely enterprises to provide services. For this reason Article. 60 (1) EEC Treaty provides that the services linked to a movement of capital must be ruled by the articles of the Treaty related to the movement of capital.

Art. 60, EEC Treaty states: ... "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in a particularly include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue its activity in the

state where the service is provided, under the same conditions as are imposed by that state on its own nationals ..."

The idea of "services" as provided by article 60 of the Treaty does not necessarily coincide with that provided by the Economic Science. The former is a wider concept, which includes all those activities do not belong to the primary and secondary sectors.

It is best to take this article and article 59, EEC Treaty together. They are closely interconnected, if not obviously consistent with each other. The notion of "services" is only capable of interpretation by reading them with each other.

The descriptive definition of "services" is incomplete and is given mainly by exclusion. Article 60 does not give a positive definition, but lists activities which the term includes in a four-fold classification.

An activity may be ancillary to some other main objective. In such cases, Treaty provisions governing that main objective also govern freedom to offer the services. Or the activity may be sufficiently linked to other objectives governed by the Treaty to require legislation for the one to be kept "in step" with that applying to the other. The instrumental definition, identifying the field of services the chapter is meant to affect, is in two parts. The limitation in Article 60, excluding from the application of the chapter matters covered under the headings of

free movement of goods, capital and persons, emphasises the residual, supplementary and complementary nature of the Chapter (40).

In case 162, 163/81, Seco (41), the Court stated that the essential point is the nationality of the provider of the services, not that of those whom he employs to do the job.

In case 286/82 and 26/83 Luisi & Carbone (42), the Court stated that it is immaterial whether the person seeking to exercises his rights under Community Law is the provider of the service or the beneficiary.

Article 60, third paragraph, preserves the right of a Member State to retain existing conditions on the provision of services in its territory, these being perceived as part of the state's machinery for protecting consumers and the public, at least pending the evolving of acceptable EEC standards. The "Insurance judgments" (43) concern a Member State's right to insist on compliance with its rules designed to safeguard against fraud or business failure. These cases show the limits of applying an automatic "Cassis de Dijon" style of mutual recognition in the field of services. In the absence of a Communitarian rule, any Member State of the Community can protect its consumers enacting its own legislative measures, whatever restrictive they would be. Therefore, the "Cassis de Dijon" judgment does not require liberalization as a "general principle". It also stated exception of mandatory requirements.

Banking services may provide a good example of capital movements intermingled with services. The restrictive rule of Article 61(2) is thus applicable to them; of course, banking services that do not involve the movement of capital (e.g., the giving of investment advice), are entirely governed by the Chapter on Services. Most of the banking services can be considered as "services" in the sense of Article 60. This was ruled by the European Court in cases Züchner (44), and Société Générale Alsacienne de Banque S.A. (45).

In order to know if a bank service can be considered as a service in the sense of Articles 59 and 60 EEC, it is necessary to know if the provider and the recipient of the service have contracted in function of a capital movement (46). Should the movement of capital be necessary for the completion of the contract, then Art. 61(2) is applicable.

In any event, the mandatory rule of Article 61, become of less importance with the progressive liberalization of capital movements up to 1988 when the last directive for the achievement of the free movement of capitals was enacted by the Council.

Art. 66, EEC Treaty provides that: ... "The provisions of articles 55 to 58 shall apply to the matters covered by this chapter ...".

It should be noted that Directives enacted on the basis of Art. 57, to the extent that they also concern the free movement of services, indicate that they are based on both Article 57 and Article 66. For the rest, the comments on the articles cited above can be applied to this article.

NOTES

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- (2) Cfr. C. Campet, "La Libération de l'activité bancaire dans la Communauté Economique Européenne", Banque, n° 327, 1974, p.255.
- (3) C. Campet: "Le Marché Commun bancaire" (Rev. MC; 1970, p.441-442)
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- (5) Transnational Economic and Monetary Law transactions and contracts; Book 4 (Chapter, 8)
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- (6) Parry & Hardy EEC Law (Sweet & Maxwell, London, 1973), p. 358-359.
- (7) Vid. Encyclopedia of European Community Law; op. cit. p. B 100050/1.
- (8) The Law of the European Economic Community volume 2; p. 2-536; by Hans Smit and Peter Herzog Matthew Bender & Company Incorporated U.S.A.; Columbia University Press (1989).
- (9) Vid. "The Law of the European Economic Community"; op. cit., p. 2-540.
- (10) Vid. "The General Programme for the abolition of restrictions to the Freedom of Establishment and Freedom to provide Services". O.J. n° 2/32 of 15/1/1962.
Vid. also cases: Segers (case 79/85) (10/7/1986) ECR 1986 Daily Mail (October 1988)
- (11) Vid. "The Law of the EEC", op. cit. p. 2-54
- (12) Case n° 61/77: February 16, 1978 ECR 417
- (13) Case n° 88/77; February 16, 1978. ECR 417
- (14) Vid. "The Law of the EEC", op. cit. p. 2-541
- (15) Case 2/74 (1974) ECR 631

- (16) Case 71/76 (1977) ECR 765
- (17) Practice or a notice in accordance with the Treaty will not do, if the infringement resulted from a Statute. See Commission V. France (ships crews) and Commission V. Italy (15/10/1986, case 186/85, ECR, 1986).
- (18) See, Steinhauser (18/6/1985, case 197/84, ECR, 1985, p. 1819).
- (19) See, Dona and Van Ameyde cases, 14/7/1976 and 9/6/1977.
- (20) Cit. not. 10 supra.
- (21) De Crayencour, "Propos sur le droit d'établissement dans Le Traité de Rome" 4, C.D.E.; 420, 22(1968)
- (22) Vid., note 12, supra.
- (23) Vid., note 16, supra.
- (24) Vid., note 10, supra.
- (25) "The law of the EEC", op. cit. supra p. 2-641-642
- (26) Vid. on this sense, Rigaux F. "Le critère de nationalité et la notion de personne morale dans l'article 58 du Traité CEE, et dans les dispositions d'application" Europees Vennootschapsrecht, 9 (Antwerp, Belgium, 1968).
- (27) Encyclopedia of "EEC Law"; op. cit. supra, p. B10054/8
- (28) The Queen and H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and Trust, case 81/87, of 27, September, 1988.
- (29) O.J.//C 130/1 of 1/6/1981
- (30) Vid. "The General Programme for the abolition of restrictions to the Freedom of establishment and freedom to provide services; op. cit. supra.
- (31) Germany was against of the inclusion of any restriction during the transitional period.
- (32) Op. cit. supra.
- (33) Walrave & Koch v Union Cycliste Internationale. Case n° 36/74; Dec 12, 1974/8290, 15 C.M.I.R. 320 (1975).
- (34) Vid. Vignes "Le droit d'établissement et les services dans la CEE; = Ann. Fr. Dr. Int. 668, 689 (1961)

- (35) Vid. *supra*; note (28)
- (36) Vid. *The Directive on Entry and Residence* (25/2/1964) O.J. 845 (1964).
- (37) Cases: *Van Binsbergen v Bestuur der Bedrijfsvereniging van de Metaalnijverheid*.
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- (38) Case: *Société Générale Alsacienne de Banque S.A. v Koestler*; case n° 15/78, October, 24, 1978 8514, 24 C.M.I.R. 89 (1979)
- (39) *Coenen v Sociaal. Economische Raad*
Case n° 39/75, Nov. 26, 1975.
8352, 17 C.M.L.R., 30 (1976)
- (40) Vid. "Encyclopedia of EEC Law". op. cit. p. B10056
- (41) Cases 62 163/81
Seco SA & Desquenne & Giral SA v. Etablissement d'Assurance contre la Veillesse et l'Invalidité, (1982) ECR, 223
- (42) *Luisi & Carbone v Ministerio del Tesoro*
Cases 286/82 & 26/83, (1984) ECR, 337
- (43) Case 206/84, *Commission v Ireland* (December 4, 1986)
Case 252/83, *Commission v Denmark* (December 4, 1986)
Case 205/84, *Commission v Germany* (December 4, 1986)
Case 220/83, *Commission v France* (December 4, 1986)
- (44) ECR, 2021 (1981)
- (45) Cit; vide *supra*.
- (46) Vid. in this sense, opinion of: General Advocate Reischl in case 15/78. *Société Générale Alsacienne de Banque SA* 81978) ECR 1978 (pp. 1984-85).

**CHAPTER II: THREE STEPS TOWARDS THE FIRST BANKING DIRECTIVE:
THE GENERAL PROGRAMMES OF 1961, THE DIRECTIVE OF
28/6/1973 AND THE PROJECTS FOR A "EUROPEAN BANKING
LAW"**

A. The General Programmes of 1961:

The preparation of the programmes was specially drafted by a group of civil servants of the Member States coordinated by the Commission of the EEC. The group was divided into nine specialized subgroups operating under Art. 54 (3.b) EEC Treaty. Banking activities were studied by subgroup number 5 (1). Freedom of establishment was specially classified in five annexes to the General Programme, on the basis of the "International Trade and Industry classification" of the United Nations Statistical Office. Banks were included in Annex I, class 62, group 620 (2).

The Programmes were much too optimistic in respect of the achievement of freedom of establishment and services for banks: the liberalization of establishment was set for the second year of the second stage.

Services were divided into two types: (a) Those linked to a capital movement; which must follow the terms fixed for capital movements. (b) Services without a connection to capital movements; which must follow the general terms for services (3).

Perhaps the most important consequence of the Programme for banking activities is the fact of its existence as the first expression of the secondary legislation in the EEC. They were therefore also a first attempt to break the strong resistance of Member States to open their markets to new competitors from other EEC countries.

B. The Directive of 28/6/1973:

The Commission proposed to the Council a project of Directive "for the elimination of the obstacles to the freedom of establishment and to provide services of the bank activities enumerated in the General Programmes", on 30 July 1965 (4).

At first, the Commission had doubts about the object of this project: non discrimination? coordination? (5) The Commission decided that priority should be given to a "non discrimination" objective (by reason of nationality) despite of the diversity of banking legislation between the Member States. But the Council gave back the project to the Commission arguing difficulties to accept the inclusion of services linked to international capital movements. The Commission then began a second project and, paradoxically, chose the "coordination" of the banking legislation as the objective to achieve for the Directive (6). But the difficulties were so great that the discussions in the Council took more than 8 years. Some Member States were against the liberalization of banking services because of its negative repercussions on monetary policy (7).

The Directive is composed of nine articles and two annexes. The first annex contains the banking services linked to the movement of capital (of list A and B of the 1960 Directive). The second one is a systematization of group 620 of the U.N., I.T.I.C. (8).

The achievements of the Directive were not those expected from its content (for example article 1). The same can be said of the recognition of "national treatment" for all EEC banks which only was a declarative measure of a right recognized by Articles 7 and 52 of the EEC Treaty. Despite the above "declarative effect", the Member States reserved their right to accept or not (under their different national regulations) the access of new banks to their markets (9).

It is worth mentioning that, during the transitional period for the application of the Directive, the European Court of Justice declared Articles 52 and 59 of the EEC Treaty to be directly applicable (10). Consequently, any restriction based on nationality was against the EEC Treaty.

The legal context in which the harmonization process began in the seventies was strongly influenced by several factors. First, the banking regulations of the different Member States were created during the period of time between the twenties and the fifties, a period of "economic autarchy". As a result, the principles which inspired the banking regulation were in the opposition to those inspiring the EEC Treaty (11).

Secondly, a common concept of Credit Institution did not exist. There were some characters common to all countries: professionalism, credit intermediation, etc.. But the differences were important in the field of "specialization" of banking activities (12).

There was a great diversity of conceptions about "bank secrecy". Any modification of this concept as a consequence of a "coordination" at a European level risked provoking a massive flow of capital from EEC countries to third countries, for example, Switzerland (13).

Fourth, the necessity of the creation of a "European Central Organism" for the prevention of risks deriving from any credit operation at a European level (14).

In such a situation any attempt by the Commission to progress towards the liberalization of banking activities would have been condemned to achieve nothing.

C. The projects for a "European Banking Law":

The first attempt to create a European banking law was presented by the services of the Commission to the group of experts under the name of "Coordination of the Banking Legislations of the Member States" in 1971 (15). The text was declared far "too optimistic" by the group of experts, due to the wide range of subjects that were considered for coordination (16). On the other hand, the Banking Federation of the EEC strongly criticized the aims of the project and advised the Commission to take into consideration two points. First, the coordination should not hamper the freedom of bankers to decide their own initiatives in the market. Secondly, the coordination should not ignore the rhythm of "convergency" of the Monetary and Economic Policies of the Member States (17).

After this criticism, the Commission services prepared a new project, based mainly on the questions related to freedom of establishment and services. The project was presented to the Commission in 1972. But, again, several problems were against the achievement of the project's aims. The professional Associations of bankers were of the opinion that the coordination (or harmonization) of the project should be only on the aspects of access and exercise of the bank profession and not on other aspects as, for example bank secrecy (18). Countries like France or Italy, with a "discretionary regulation" of banking activities, were opposed (19). It was the time of the accession of England, Ireland and Denmark to the Community, and these countries (mainly

England) were against the process of financial markets integration (20). The 1973 Oil Crisis severely affected the Financial Market. In Germany the bankruptcy of the Herstatt bank and in England the bankruptcy of the "secondary banks", made Governments reinforce controls over credit institutions' activities (21). In such a context, the Commission decided to withdraw the project.

NOTES

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- (2) Vid. L. Villaret: "Le droit d'établissement des banques et des autres établissements financiers" Rev. MC, n° 105, 1967, p. 469-470
- (3) Vid. T. Oppermann: "L'application des programmes généraux de la CEE concernant la liberté d'établissement et la libre prestation des services" Rev. MC, 1964, p. 556
- (4) OJ of the EEC, 23/9/1965, p. 2576
- (5) Vid. C. Gavalda: "L'harmonisation des législations bancaires", Journ. dr. Int; vol. 97, 1970, p. 10
- (6) OJ of the EEC 9/10-1965, p. 19
- (7) V. Briquet: "Premières mesures de libération pour les banques et les compagnies d'assurances" Rev. MC, 1973, p. 463-465
- (8) Vid. note 43
- (9) C. Campet: "Le Marché Commun bancaire", Rev. MC, 1970 p. 441-442
- (10) Case Reyners; 21/6/1974, case 21/74, Recueil 1974, p. 631
- (11) Vid. A. Grisoli: "Integrazione economica Europea ed unificazione del diritto" Riv. Dir. cmm; 1959-I, p. 472
- (12) Vid. W. Damm: "Banking in the Common Market" Journal of Institute of Bankers, vol 86, 1962, p. 361-364 Vid. A. Lefour y A. Lagumina "Banques Européennes, l'heure des rapprochements" Enterprises; number: 819; 1971, p. 61-73
- (13) Vid. B. Renda: "Credito, risparmio e banche nelle prospettive dell' Integrazione Europea" Economie e Credito; 1972; p. 25
- (14) Vid. G. Ruta: "Il sistema della legislazione bancaria" 2ª Edic; Roma ed. Bancaria, 1975, p. 676-678
- (15) Vid. FBCEE: "Cinquième Rapport" (1971-72) Brussels, 1972, p. 15-16
- (16) GCECEE: "Rapport 1971-72", p. 44-45; Brussels, 1972

- (17) FBCEE; November 1968, December 1970; Brussels, 1970
Chapter 1 st.; number 2
- (18) FBCEE: Sixième Rapport (1973-1974); Brussels, 1974;
p. 11-12
- (19) P. Clarotti: "La coordination des législations bancaires"
Rev. MC, number 254, 1982, p. 71-72
- (20) Th. W. Vogelaar: "The approximation on the laws of Member
States under the Treaty of Rome". CML Rev; 1975; pages:
220-228
- (21) Vid. D. Azqueta Oyarzum: "La integración española en la
CEE: repercusiones sobre el sistema financiero y el mercado
de valores". RIE, vol. 9; 1982, p.509 - (specially pages
519-20).

CHAPTER III: THE FIRST COUNCIL DIRECTIVE, 77/780 ON THE COORDINATION OF LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE TAKING UP AND PURSUIT OF THE BUSINESS OF CREDIT INSTITUTIONS

A. The Objectives and Decision making Process:

The services of the Commission contacted the Member States in order to prepare a project which could achieve a good result in the process towards liberalization. Three points were the object of a special study: fixing a concrete number of problems to be overcome; deciding the hierarchy of these problems; and setting a time limit for the achievement of results. In April 1974 a document was presented to the Commission by its services. Several aspects were the object of this document: the access to banking activities; the creation of branches and subsidiaries; the financial structure of credit institutions; the relation between the EEC and third countries in this sector and the creation of a Consultative Committee in order to assure the achievement of the harmonization process (1). This document was the basis for the proposal of the Directive of 12/1/1974 (2).

It is interesting for the purposes of this paper to make a comparative study of the content of this proposal, the opinion of the Economic and Social Committee and the European Parliament, and the final text of the Directive. Step by step, we should be

able to discover the influence of the interests, both of the bank associations and the governments of Member States.

As regards the project's preamble, it is worth noting that both the European Parliament and the Economic and Social Committee criticised the delay and one narrow content of the project. The Commission's proposal stated: ... "in order to facilitate the commencement and carrying on of business by credit institutions, it is necessary to eliminate the most obstructive differences between the laws of the Member States "...

... "it is therefore necessary to proceed by successive stages..." (3).

In the text of the Economic and Social Committee however it is stated:

... "le Comité ... regrette cependant que la proposition, qui en constitue la première étape, présente un caractère insuffisamment substantiel ..." (4). Similarly the EP text stated:

..."déplore à nouveau les retards très importants qui ont toujours caractérisé et continuent de caractériser la mise au point d'une coordination des dispositions applicables dans les Etats Membres aux établissements de crédit"... ..."regrette la portée très limitée de la proposition..." (5).

We can also note that the EP and ESC's great pro-harmonization objective is in opposition to the Commission's more "static" position. In this respect the Commission's proposal states that: ..."the eventual aim is to introduce throughout the

Community a parallel authorization procedure based on uniform requirements"...

... "the above aim can be achieved only if assessment criteria which allow certain supervisory authorities particularly wide discretionary powers are progressively reduced"... (6).

The ESC text however says:... "il est regrettable que la Commission ait limité sensiblement cet objectif, en se bornant à énumérer seulement deux critères communs d'agrément et en laissant, en fait aux Etats Membres (ceci à l'encontre du principe même d'harmonisation), la liberté de fixer les conditions générales d'agrément..." "...et il s'inquiète de celles de ces conditions qui pourraient éventuellement présenter un caractère discrétionnaire, arbitraire ou discriminatoire"... (7).

The EP's text noted: ... "le but visé ci-dessus ne pourra être atteint que si les critères d'appréciation prévoyant une marge discrétionnaire particulièrement large sont progressivement réduits"... (8).

The European Parliament had a very great interest in promoting the independence and the activities of the "Contact Committee", a special committee created to give a greater flexibility to the harmonization process. For example Commission's proposal stated: ... "in order to achieve further coordination, close cooperation between the competent authorities and the Commission will be necessary within a contact committee"... (9). In the text of the Economic and Social Committee, however, can be read:

... "Ce Comité approuve sans réserve la Commission de vouloir s'entourer des avis, des opinions et des suggestions d'un comité ainsi constitué"... (10). The EP's text stated that: ... "le Comité de contact doit être en mesure de se réunir sans que les représentants de la Commission soient présents ...".

... "Toute autre application différée, chacune pour une période de deux ans, ne peut être autorisée qu'avec l'accord du Comité visé à l'article 11 ..." (in respect of article 2 of the project); ... "les autorités compétentes informent le Comité"... (in respect of article 4)... "en accord avec le Comité visé à l'article 11" ... "tout retrait d'agrément doit être motivé et notifié aux intéressés ainsi qu'au comité"... (in respect of art. 8)... "les deux représentants de la Commission ne participent pas aux réunions du Comité, lorsque celui-ci examine des sujets touchant à l'exercice même du contrôle du secteur du crédit, en particulier en ce qui concerne le cas individuels... ... "le Secrétariat est assuré par les services de la Commission, mais c'est le comité qui en détermine l'organisation"... (in respect of Art. 11) (11).

The position of the Commission may to be criticized as an attempt to "export" some of the legal achievements of the free movements of goods to the area of services. This lack of originality is regrettable as regards the harmonization of such a subtle world as financial services with respect to the Commission Proposals. For example one can be remark, as already noted, first, the mutual recognition of authorizations and, second, the creation of a contact Committee. If we look at the first Council Directive 65/65 on proprietary medicinal products (12), we find striking similarities. The Directive aimed to coordinate mutual recognition of national marketing

authorizations, on a gradual approach towards automatic mutual recognition of national licensing decisions. In this way, article 3 of Directive 65/65 EEC, provides that proprietary medicinal products may only be placed on the market if the competent authorities have issued an authorization. The spirit above was reinforced by the European Court in its case 215/87 of 7, march 1989 (13).

As regards the second similarity, Council Directive 75/319 EEC (14), established a "Committee for Proprietary Medicinal Products" (CPMP). It was designed to facilitate the adoption of a common position by the Member States regarding marketing authorizations (article 8). In addition, a Pharmaceutical Committee was created in order to advance progress towards mutual recognition, (15). The above CPMP procedure of 1975 was amended by Directive 83/570, EEC (16).

Both the structure and the competencies of the Pharmaceutical Committees found its later copy in the committees established by the articles 11 and 12 of the 1977 Directive and article 22 of the 1989 Directive regarding harmonization of banking in the EEC.

The aim of giving a real effect to the content of the Directive can be seen in EP and SEC's position on several articles. For example, in relation to the definition of a credit institution, article 1 of the Commission project stated that: "...Credit Institutions means an undertaking whose usual business is to receive, directly or indirectly, deposits or other repayable monies from the public and to grant credits for its own

account. The EP project however adds ... "ou à effectuer des placements ..." (17). Another example concerns ... "The deferment of application under paragraph 3 above shall be motivated and notified to the Commission by the Member State in question. Deferment shall be for a period of two years and may be renewed following consultation of the Committee referred to in article 11 ..." (art. 2 of the Commission project). The Economic and Social Committee opinion stated however that: ... "elle porte sur une période de deux ans au maximum," and the European Parliament opinion that: ... "Toute autre application différée chacune pour une période de deux ans, ne peut être autorisée qu'avec l'accord du comité visé à l'article 11 ..." (18).

In addition it is worth noting the content of an article, of which the consequences for the European Financial Market have not been still, clearly considered by decision makers: Art. 9 /3/ of the project provided that: ... "The Community may, through agreements concluded in accordance with the Treaty with one or more third countries, agree to apply provisions which, having regard to the principle of reciprocity, accord to branches of an institution having its head office outside the Community, identical treatment throughout the Community ...". The Economic and Social Committee considered however: ... "à tout le moins convient-il de préciser sur base du principe de réciprocité; et non en tenant compte du principe de la réciprocité, expression trop ambiguë ..." (19).

The SEC's position has to be taken in account, since it opts for the GATT principles and rejecting any position which could serve for the creation of a "protectionist market" for banking services in Europe.

As a final reflection, I would like to underline the role played by three interest groups in the Commission's project: the EEC Banking Federation (BFEC), the Union of Industries of the EEC (UNICE) and the Association of Cooperative Savings and Credit Institutions of the EEC. As stated in its respective reports: ... "with regard to the Commission, the BFEC Reports note a number of instances where the Commission either largely or partially incorporated its demands or suggestions" ... (see, for example, the BFEC Report 1975-1976, papers 19-21) (20).

... "The impact sought and exercised by the GCE has so far primarily centred on the Commission's work on the preparation of proposals for the Community legislation ..."

... "The record here bears many positive results in which the Commission adopted the suggestions of the GCE in either their original or slightly amended form. The spectrum of positive results ranges from issues in the credit sector (including such Commission proposal as the obligation of banks to supply information on security issues), to issues involving the right of establishment and freedom to provide services for Credit Institutions ..." ... "some reservations were expressed by the GCE on the form the Commission's plans have taken regarding the European Export Bank and on the lack of the Commission's progress concerning concrete forms of worker participation, the promotion of savings and the protection of savers against inflation"...

(21). It was also stated that: ... "the special interests of the co-operative and savings institutions were taken into consideration in this project." But ... "there were also, however, situations in which the Commission did not respond so favourably; for example, the Association was less successful with respect to Commission proposal in expressing reservations on the establishment of an Export Bank." (22).

B. The Directive 77/780 of 12/12/1977: (23)

In order to avoid increasing the length of this thesis the text of this Directive (and also of the Second Directive) will not be reproduced here. Instead each of the articles will be reviewed in order to clarify their content or to explain their connections with other legal provisions. Only where the exact wording of definitions or expressions are of great importance for the comprehension of the commentaries, will they be reproduced.

The Directive is very much a framework Directive which will eventually be supplemented by further Directives. It apparently has a diversity of objectives: the coordination of the legislations of Member States, the collaboration between control authorities, the search for a common position in respect of third countries, etc. But the main feature seems to be the emphasis on "control" rather than "freedom" (24). In this respect it is worthwhile mentioning the opinion of Jean le Brun (25). He stated that: ...*"Si l'ensemble de la Directive concerne le contrôle des établissements de crédit et, par conséquent, l'activité des autorités de contrôle, elle ne porte que partiellement sur la surveillance, au sens strict, de l'exercice de l'activité des établissements"*...

Article 1 defines the scope of the Directive. In the negotiations the term "credit institutions" was preferred to the term "bank", because of to the wide diversity of concepts about "bank business" throughout the EEC (26). The concept of "credit institution" was also the result of a long discussion. The

Commission preferred the idea of an institution which transforms the money received from the public into credits or investments. Some countries considered giving the definition of credit institutions a role in the financing and development of the national economies. The Commission's idea was retained, however, as it guaranteed a greater protection for savers (27).

Two conditions must be met by a credit institution in this definition: ..." to receive deposits or other repayable funds from the public and to grant credits for its own account ...". These conditions are "cumulative". In principle they have to "co-exist"; but it is sufficient to meet the conditions as a "statutory requirement". In the words of P. Clarotti (28) "... il suffit que l'entreprise ait une vocation statutaire à réaliser les deux types d'activité: il n'est pas nécessaire qu'elle les réalise forcément simultanément (elle peut se financer avec une émission d'obligations auprès du public et puis opérer pendant des années en se refinançant sur le marché monétaire)"...

With the expression ..."an undertaking whose business is"... the authors of the Directive gave a "general idea" which covered all kinds of operations permitted to a credit institution by the laws of the Member States (bonds, long and short term deposits, etc.). The reason for such a "general" definition of "credit institution" could be found in the aim of guaranteeing equality in terms of competence, without differentiating by legal form (private or public), specialization (by the kind of operations or the economic sector) or in function of the territory in which they operate (local, national or international). Such a definition excluded bodies such as local authorities whose

deposit taking and lending activities are incidental to their main business. Likewise, friendly and cooperative societies appear to fall outside the definition.

The definition of "branch" in article 1 paragraph 3, does not include "representative offices" since they do not carry on banking business.

The definition of "own funds" in article 1 paragraph 4, is actually not a definition at all but allowed Member States to continue to define them in any way they wish.

Article 2 limits the field of application of article 1. We can distinguish 3 types of exception in article 2: Those of art. 2/2: which are explicit and work automatically. Those of art. 2/4 and 2/5, which work on the basis of the hypothesis they contain. That which is in connection with article 1 first paragraph; all the financial institutions whose main business is not to receive deposits or other repayable funds from the public and to grant credits for its own account, are also excluded from the application of the Directive.

The whole number of institutions excluded by these exceptions of the application of the directive do not represent a high percentage in the credit market within the EEC. The institutions excluded by art. 2/2 are, in general terms, of "Public Interest" and have a function different from the competition to get and give money to customers. This exception

is also justified because these institutions are not regulated by the banking legislation of the Member States. It is interesting to note Jean Le Brun's remarks on the list of Credit Institutions that appear in article 2/2/: ..."Aucune ligne directive commune n'a inspiré l'ensemble des Etats Membres dans l'établissement de cette liste. Il a seulement été veillé a ce que celle-ci ne porte pas sur une part trop importance du secteur bancaire de chaque Etat déterminé et à ce qu'il n'y ait pas une disproportion trop grande entre les pays dans le jeu de cette exception (29)..."

Article 2(4) institutes a "partial exemption", in the sense that the institutions affected will be only exempted of the application of articles 3, 4 and 6 of the Directive. The "ratio legis" for this kind of exemption is explained by Clarotti as regarding the protection of financial institutions of minor importance (cooperative or local savings corporation), which would not be able to fulfil all the Directive's requirements (30).

In order to avoid any kind of abuse in the inclusion of credit institutions in the exception of article 2(4) by Member States, article 2(4) (c) states ..."the Council ... may lay down additional rules for the application of subparagraph (b) including the repeal of exemptions provided for in subparagraph (a), where it is of the opinion that the affiliation of new institutions benefiting from the arrangements laid down in subparagraph (b) might have an adverse effect on competition. The Council shall decide by a qualified majority" ... The fact of choosing "qualified majority", while "unanimity" is required to modify the Directive, shows the importance the Directive gives

to "fair play" in order in making use of this exemption. If any Member State should try to impose its own criteria in its national interest, the remaining Member States could defend the general interest of the Community by voting against it in the Council.

Article 2(5) and (6) apply to credit institutions in the sense of article 1(1), but which for technical or political reasons do not receive the same treatment as the remaining Credit Institutions. Usually they are under the supervision of an authority which is not the same as that for other the Credit Institution.

The longest period of exemption to the application of the Directive is fixed at 8 years in article 2 /6/; any prolongation to this period requires unanimity in the Council, but such a possibility is far from being put into practice.

In accordance with article 2 /5/, the Commission has published a list of credit institutions which were exempted of the application of the Directive (31).

Article 3 requiring for authorization by the Member States to the credit institutions before commencing their activities is, in the opinion of some scholars, a logical consequence of the protection of the "general interest" (32).

The requirement for authorization could appear merely as something logical and without too much importance. It has been stated in the Directive, however, because in countries such as England it was not a previous condition for the commencement of banking activities.

The conditions listed in article 3 are not exhaustive; Member States can impose other conditions if they are "general", in the sense of being required of all credit institutions regardless of nationality. We can distinguish three kinds of conditions in article 3: compulsory, supplementary and forbidden conditions.

(a) Compulsory conditions are contained in article 3(2) and in article 3(4). They include separate own funds, adequate minimum own funds, at least two persons to effectively direct the business of sufficiently good repute and with sufficient experience, and a programme of operations of the Credit Institution.

With the requirement of "separate own funds" the Directive seeks to avoid a credit institution being managed by just one "physical person". In the words of J. le Brun: ..."Cette condition, inspirée du "Vier Augen Prinzip" allemand, tend à renforcer la qualité des décisions de gestion..." (33).

The expression "adequate minimum own funds" is quite general. There is no definition as to the "minimum" quantity to

be fixed by Member States. This expression allows the different legislations of the Member States the possibility of deciding the limit. This situation obviously hinders the principle of uniformity.

With the words "sufficiently good repute" the Directive reiterates the condition stated in article 5 of the Directive of 26th June 1973 as used by legislation of the Member States each time it is necessary to prove the honorability of a person.

The requirement for "two persons" must be understood as meaning persons in the same level of hierarchy and sharing similar powers in the credit institution.

The Directive uses the word "person" due to the lack of a common definition of "manager". Each Member State is entitled to define the functions of the persons which will effectively direct the business of a credit institution.

In article 3(4) we find the requirement of a programme of operations setting out inter alia the type of business envisaged and the structural organization of the institution. This means a programme stating the business envisaged in the short and medium terms, the kind of business to be undertaken, the geographical limits in which the business will be carried out, the number of employees, etc.

Concerning the margin of discretion enjoyed by national authorities in order to decide if the programme meets the requirements necessary to receive the "agreement", it is worth noting the words of Clarotti: ..."l'autorité administrative n'a pas un pouvoir d'appréciation à son égard. Il est donc exclu qu'un agrément puisse être refusé pour le seul motif que le programme n'est pas considéré comme satisfaisant par cette autorité ..." (34).

(b) Supplementary conditions are conditions that article 3(2), first sentence, allows Member States to add to the compulsory conditions in order to grant authorization. The Directive uses the words ... "without prejudice to other conditions of general application laid down by national laws ...". The word "general" constitutes a guarantee in order to avoid discrimination between credit institutions by reason of their nationality., This guarantee is reinforced by the content of paragraph 5: ..."The Advisory Committee shall examine the content given by the competent authorities to... requirement listed in paragraph 2 ..."

(c) Forbidden conditions are all those which are required by a Member State from a credit institution under the terms of article 3(3) (a): ..."The provisions referred to in paragraph 1 and 2 may not require the application for authorization to be examined in terms of the "economic needs" of the market" ... This very important limitation to the "discretionary powers" of the Member States is justified in terms of a guarantee both to the free competence and the free access to banking activities as well as for the protection of the interest of third countries' credit institutions (35).

But this criterion of "economic needs of the market" can be applied by Member States during a period of no more than 12 years under the conditions laid down by article 3(3) (b) (c) and (d). This is a political solution in order to avoid difficulties to the economies of the Member States which adopted the criterion in the years prior to the publication of the Directive. In this respect, France, Italy, Ireland and Denmark were permitted to use the criterion up to 31st December 1989 (36). Greece was also permitted to use it (37).

In article 4(1) the Directive sets a "minimalist" position as regards the authorization given by Member States to the establishment of branches of credit institutions from other Member States in its territory. This is the conclusion we come to when reading the words "... Member States may make the commencement of business in their territory by branches of credit institutions covered by this Directive which have their head office in another Member State subject to authorization ...". This situation of discretion of Member States to decide which branches are going to carry out business in their territories is far removed from the original position which intended giving the Member State of "origin" the faculty of "authorizing" the establishment of branches of a credit institution with its head office in its territory (38).

There are two aspects of article 4, however, which point to positive evolution towards liberalization. The first is contained in article 4(2). It states that "... authorization may not be refused to a branch of a credit institution on the sole ground

that it is established in another Member State in a legal form which is not allowed in the case of a credit institution carrying out similar activities in the host country ..." This is an important evolution which clearly limits the discretionally powers of Member States (39). The second one is "implicitly" but not "explicitly" contained in article 4. In the words of P. Clarotti: ..."il s'agit de l'interdiction de l'utilisation du critère du besoin économique du marché pour l'autorisation à l'ouverture des succursales. La ratio de cette disposition à l'article 3, est comme on l'a vu, d'éviter toute possibilité de discrimination: il serait absurde qu'on permette cette possibilité lorsqu'il s'agit de succursales ..." (40).

It is also worth noting the content of article 4(4): ..."This Article shall not affect the rules applied by Member States to branches set up on their territory by credit institutions which have their head office there ...". With this statement the Directive allows Member States to apply "reverse discrimination", a position in line with the jurisprudence of the European Court in cases related to the application of article 90 of the EEC Treaty.

Article 5 allows branches of banks to use the names by which they are known in their state of origin, even though there may be limitations on the use of those names in the host country. These "limitations" in the use of names are justified in order to avoid any risk of confusion which could provoke distortions on competence. In the words of C. Gavalda: ..."deux cas peuvent se produire: d'une part que deux établissements appartenant à deux pays différents mais utilisant, au moins partiellement, la même langue aient la même raison sociale ... que deux

établissements ayant la même dénomination dans la même langue mais ayant une structure juridique différente: il s'agit par exemple des caisses d'épargne privées belges et françaises ..."

(41).

Article 6 was a first step towards the harmonization of ratios for assessing the liquidity, solvency and profitability of banks. Agreement on solvency and liquidity ratios is essential if "home country control" is to be realised. But some authors are of the opinion that this step should have been greater. For example Butsch et Vuilléez state that: ..."En attendant une plus vaste normalisation comptable, support indispensable d'une politique monétaire commune véritable, la présente directive fait un pas bien modeste ..." (42).

The three conditions established in the article are, that different calculations shall be made as an observation, that the national coefficients are not to be affected and that the Advisory Committee may make suggestions to the Commission with a view to coordinating the coefficients applicable in the Member States. They do not seem to be sufficient in order to protect the "freedom of competence" in the banking market.

Article 7 makes it clear that, despite national laws on banking secrecy, the supervisory authorities of Member States are free and indeed obliged to pass on to each other information about credit institutions.

As regards the extension of the "principle of supervision" of article 7(1) there is a controversy between various authors. J. Le Brun considers that: ... "ce principe a une portée large; les activités exercées en dehors des frontières nationales ne se limitent pas à celles qui découlent de la création de succursales mais également les prestations de services et aussi par voie de filiales ..." (43) However, Clarotti does not share this opinion: ... "certaines estiment que l'article 7 oblige également les Etats Membres à échanger des renseignements concernant les filiales; compte tenu qu'une filiale est généralement beaucoup plus importante du point de vue de l'activité qu'une succursale, si ses auteurs avaient voulu viser également les filiales, le texte de l'article 7 non seulement aurait dû les mentionner nommément mais le "notamment" qui concerne les succursales aurait dû être placé devant le mot "filiales ..." (44).

Article 7 (1) stated the obligation of the competent authorities of the Member States concerned to "collaborate closely". That implies all kind of information and assistance required by the objectives of the Directive. This is the guarantee of solvency of the credit institutions for the benefit of their customers whatever their nationality.

Article 7 is a mandatory commitment, so it has a "direct effect" on Member States. The Commission has the possibility of assuring that the degree of cooperation between the supervisory authorities of the Member States is the one required by the aims of the Directive.

Article 8 sets out the reasons for which the supervisory authorities may withdraw authorization from a credit institution.

The point of setting out such a list is somewhat unclear, since para. (1) (e) allows withdrawal for any reason permitted by national law, subject to the limited exception in para. (3). The apparent contradiction between para. 1 (c) and (d) with regard to own funds is explained by the fact that the first reference is to initial capital while the second is to operating capital. It was considered that a bank should not necessarily be penalised for losing some of its initial capital in the first years of its operation.

As regards the extension of "withdrawal of the authorization" it can consist of a revocation or just a suspension depending on the nature of the sanction (45).

It is interesting to mention the content of article 8(5). It contains a "general principle" of the administrative laws of the Member States: ... "Reasons must be given for any withdrawal of authorization and those concerned informed thereof ..."

In article 9(1) Member States are required not to apply to branches of credit institutions having their head office outside the Community a more favourable treatment than to those of the Community. This article is the result of a political compromise adopted "in liminis" before the Directive was approved and intends avoiding a situation in which the competitiveness could be distorted. (46).

Paragraphs 2 and 3 of article 9 constitute a first step towards a "hypothetical" Common Banking Policy with regard to third countries. Paragraph 2 with the obligation of competent authorities to notify the Commission and the Advisory Committee of all authorizations for branches granted to credit institutions having their head office outside the Community. Paragraph 3 allows the Community to conclude agreements with third countries, on the basis of the principle of reciprocity, for according to branches of credit institutions having its head office outside the Community identical treatment throughout the territory of the Community. This situation is related to the subjects for which the Community should be entitled to conclude the above said agreements. The answer will be provided along with the transfer of competencies (through coordination) to the Community by the Member States (47).

Article 9 is deficient in certain respects. In the words of J. Le Brun: "...ces dispositions ne règlent pas la situation des filiales créées en Europe par les sociétés étrangères, pas plus que le problème de la prestation de service effectuée dans la Communauté par des établissements de crédit extra-communautaires ..." (48). Despite Le Brun's view, as regards third country "subsidiaries", there is no necessity to make an express regulation, as they are constituted and regulated by the law of the Member State within which they develop their activities. They will, logically, be affected by the Directive.

In article 10 (1), Member States were not required to apply the directive to banks in existence at the time of implementation

of the Directive, provided that the existing institutions satisfied the requirements of separate own funds and two experienced and reputable managers, even though these requirements were subject to further exemptions. As C. Gavalda points out: ... "la directive emporte en quelque sorte une sanatio in radice et n'entend pas soumettre rétroactivement à un agrément (nouveau style) les établissements déjà existants présents sur le marché ..." (49).

Article 10(4) contains a derogation to paragraph 1: ... "credit institutions established in a Member State prior to commencing business may be required to obtain authorization from the competent authorities of the Member State concerned in accordance with the provisions implementing this Directive ...". This situation affects credit institutions of countries such as the United Kingdom, Denmark and Holland, where banks rarely received a previous authorization to the commencement of their activities. It was specially stated in order to avoid problems caused by "fringe banks" in England (50).

Finally it is worth noting that the Commission, in accordance with article 10(2) has published periodical lists of all credit institutions referred to in paragraph 1 (51).

Article 11 establishes an Advisory Committee which mainly consists of representatives from the government and the supervisory authorities in each Member State. As such, it is a fairly large body. As a result, most of the harmonization work tends to be done by the Contact Committee which is composed only of representatives of the supervisory authorities. The tasks of the Advisory Committee are set out in articles 2, 3, 6, 7 and 9. The constitution of this committee does not hinder the initiative

of the Commission in order to make propositions in the harmonization process of the banking services. In this respect the Commission can make proposals without taking into account the opinion of the Advisory Committee. But, in spite of this situation, there are some authors who demand a more independent composition of the members of the Committee. For example, C. Gavalda argues that: ... "si le principe de cette institution paraît justifié et opportun, les règles générales de fonctionnement prévues appellent une objection de principe. On regrettera une "démision" de la Commission, qui n'a plus en la matière, l'initiative des réunions et de leur ordre du jour. Il est regrettable que l'impulsion ne vienne plus de l'échelon européen, c'est à dire de la Commission ..." (52).

Article 12 states that the exchange of information between supervisory authorities which is provided for by article 7(1) is covered by the obligation of secrecy in para. /1/. However, this article prohibits the use of such information for any purpose other than the supervision of credit institutions. It cannot therefore be passed on to the tax authorities, unless criminal charges are involved. If we compare article 12(1) to article 11(6) we notice that the members of the Advisory Committee are not formally bound by the obligation of professional secrecy. This is contained in article 11(6): ... "The Advisory Committee's discussions and the outcome thereof, shall be confidential except when the Committee decides otherwise ...". The problems involved in the implementation of this article could arise from the divergence between the national legislations in the regulation of "professional secrecy". In this sense there is a lack of a "coordination measure" in article 12.

Article 13 contains the right to appeal in court the decisions (and lack of decisions) taken in respect of a credit institutions. This is merely the consolidation of the principles contained in articles 5, 6, 7, 8 and 9 of the Council Directive 25/2/1964 (53), which have a jurisprudential support in cases Rutili, Santillo, Royer, Adoui and Pecasting (54).

The general recognition of the "right to appeal in Court does not seem very convincing to some authors who prefer a more detailed regulation of this right by the Directive. In this respect C. Gavalda states: ..."L'efficacité, la fiabilité des recours organisés dans les divers Etats pourrait créer une discrimination de facto très sérieuse. Le principe du contrôle affirmé à l'article 13 risque d'être, selon nous, une garantie formelle, une coordination théorique en égard à la disparité des contrôles juridictionnels nationaux ..." (55). Similarly P. Clarotti argues that: ..."le problème s'est posé si ce recours permettait d'avoir en plus du contrôle de la légalité des différentes décisions, également un contrôle de l'opportunité. Cela dépend du droit administratif des différents Etats membres ..." (56).

In article 14 the time limit for bringing into force the content of the Directive is fixed at 24 months from its notification. In this respect the European Court condemned Italy and Belgium for not bringing into force the Directive (57). In case 301/81, *Commission v Belgium*, the Court took an interesting position in points 11 and 13. In point 11, it did not accept Belgium's claim that two years were not sufficient for bringing into force the Directive. In point 13 because it implicitly recognized the "direct effect" of articles 3 (3-a), 4 (2) and 13 of the Directive.

C. Some reflections on the consequences of the First Banking Directive:

The first banking directive could be considered as having achieved a certain progress towards facilitating the freedom of establishment of credit institutions in the Community. It was widely recognized, however, that much remained to be done to create a Common Market in banking services, even in respect of establishment (the directive does not deal with the provision of banking services within the meaning of articles 59 and 60). In particular, branches of banks still require a separate authorization to pursue their activities in a Member State other than that of its parent company. They also remain subject to the supervisory rules, including any restrictions on the activities in which they may engage in the host Member State.

Furthermore, in most Member States, bank branches are still required to maintain "endowment capital". Apart from contravening the spirit of the consolidated supervision directive (58), this requirement puts foreign branches at a competitive disadvantage compared to host country banks. In addition, a number of Member States were permitted to retain the criterion of "economic needs of the market" as a condition of authorization of a credit institution, albeit for a limited period.

In the absence of the necessary legislative measure to liberalize the provision of banking services across intra

Community frontiers, some authors have expressed surprise that the banks did not rely upon the direct effect of the relevant Treaty provisions by seeking to offer services in Member States where they are not established and seek court protection against discrimination where national law reserved the provision of those services to its nationals (59). It may be, however, that the legal opportunities were not sufficient to overcome ingrained psychological reservations and the importance of local or national social and economic relations.

The "political composition" of the EEC Council at the time the Directive was approved may also be noted. If our historical approach is correct, 7 of the 9 countries were represented by members of the Christian Democracy or conservative parties (60). It may be suggested that for such a specific sector as credit institutions, this conservative composition was not the most adequate. If we compare the Commission's proposals, the opinions of the EP and the ESC and the final text of the Directive, we realize that only a "minimum" of liberalization was permitted to be achieved. Furthermore, there is no mention of other Community policies that could also influence credit institutions, for example, social policy or consumer protection. With such a political composition, it may be suggested that it was not difficult for banking lobbies to impose their opinion in order to protect their interests.

We can also analyse the impact of the Directive in its legal context. In this respect we can distinguish between its

consequences on some national legislation and on those the harmonization process. As regards the consequences for some national legislations, in France by Law, n° 84/86 of 24/1/1984 substituted the obsolete 1941 norms taken by the Vichy Government. The new Law recognized the principle of "universality" for banking activities (61). In Germany a new law to the same effect was approved on December 20th, 1984 (62). In the United Kingdom the decision to include "Building Societies" in the Directive was adopted in 1981 (63). Under the Building Societies Act 1986, UK building societies may already lend on the security of residential property in other Member States of the Community. Nevertheless, such lending may only be conducted through subsidiaries which are themselves prohibited from operating in the UK. This restriction prevented building societies from taking advantage of the liberalizing measures of the Directive. Subsidiaries which are not empowered to operate within their home market will not, under the directive, be allowed to operate throughout the Community.

Due to the very important social benefits deriving from the activities of these last institutions, such a solution is regrettable if the aim is to spread to all the EEC citizens the benefits of such activities (mostly as regards cheap loans, low interest rates, etc). Therefore, a change of the legal nature of the building societies should be desirable, for example, the conversion of building societies from mutuals to joint stock companies which may make them prime targets for takeover by

foreign banks and insurance companies, facilitating crossborder business).

As regards the consequences to the harmonization process, the Directive was the prelude for a new stage towards coordinating the supervision of credit institutions. Two very important Directives were published in this respect: Directive 83/350, EEC on the Supervision of Credit Institutions on a Consolidated Basis (64); and Directive 86/635 EEC on the Annual Accounts of Credit Institutions (65).

Directive 83/350, EEC of 13/6/1983, was the consequence of problems created for the supervisory authorities of Germany by branches of German banks established in Luxembourg, and the scandal provoked by the "Banco Ambrosiano" affair (66). In the recital tenth it is stated that the Directive established the "minimum supervision requirements" and that Member States could impose stricter supervisory measures. The term of credit institutions is the same used in article 1 of the 1977 Directive.

Article 3 (1) states that the aim of the Directive is to ensure that where a credit institution has a participation in another credit or financial institution, it should be supervised on the basis of a consolidation of its financial situation with that of the institution in which it has the participation. The supervision on a consolidated basis is carried out by the competent authorities of the Member State where the credit

institution holding the participation has its head office. Article 3 (3) provides a number of exceptions to this rule (67).

The most paradoxical provision is article 6 (1). By this article the Directive allows Member States the power to conclude agreements on a basis of reciprocity with third Countries for the purpose of regulating the supervision of the credit institutions affected. Is this not a contradiction to the aim of article 9 (1977 Directive) which gives this competence to the Community? In principle, the contradiction does not exist. The Donckervolke jurisprudence of the European Court of Justice recognized this capacity to the Member States, as long as the transfer of competencies to the European Institutions has not been materialized by the completion of the Common Commercial Policy.

Directive 86/635, EEC of 8/12/1986 in effect applies the provisions of the Seventh Directive on Company Law (annual accounts of certain types of companies) (68) to banks and financial institutions, with the adaptations necessary to take account of the specificities of this sector. Here it would be impossible to do justice to this measure (69). Most recently, Council Directive 89/117 EEC of 13/2/1989 (70) deals with the question of obligations regarding the publication of annual accounts which the host Member State may impose on branches of banks and other financial institutions which are established in other Member States.

A passing mention should also be made of the Commission proposal for a Council Directive concerning the reorganization and winding up of credit institutions and deposit guarantee schemes. It was originally submitted to the Council in December 1985 (71) and resubmitted in an amended form in January 1988 (72) following the opinions of the European Parliament and the Economic and Social Committee. The proposed directive would lay down reorganization measures to cope with situations in which a credit institution is experiencing financial difficulties or, should such measures fail, where it is subject to a compulsory winding up procedure. A number of provisions are foreseen for the protection of deposit holders in branches of the bank in question where the branch is operating in another Member State.

As a final remark, we can state that the philosophy underlying the First Banking Directive is much more related to control rather than to the liberalization of both the provision of services and the establishment. This opinion is largely shared by a majority of the scholars (73). This strategy is broadly consistent with the socioeconomic context. We may briefly summarise the latter by referring to the fragility of the international financial markets; the fears of the majority of the governments of the EEC Member States of the treatment of their competence by the enlargement of those of the European Commission; and the influence of the BFEC and the national banking associations over the decision making process of the Directive. At that time the national markets of the EEC countries were sufficiently fulfilling the internal profitability policies of the largest credit institutions in Europe.

NOTES

- (1) OJ, 17/1/1975
- (2) OJ, 17/1/1975; n° C 12/7
- (3) OJ, 17/2/1975; n° C 263/25
- (4) OJ, 9/6/75; n° C 128/25
- (5) OJ, 17/1/75; n° C 12/7
- (6) OJ, 17/11/75; n° C 263/26
- (7) OJ, 9/6/75; n° C 128/26
- (8) OJ, 17/1/75; n° C 12/8
- (9) OJ, 15/11/75; n° C 263/27
- (10) OJ, 9/6/75; n° C 128/27, 29, 30, 32, 33, 35.
- (11) Council Directive 65/65, EEC of 26/01/1965, OJ, 1965 n°369/65
- (12) Ibid.
- (13) Case 215/87, Judgement of 7/03/89
- (14) Council Directive 75/319 EEC of 20/05/1975, on proprietary medicinal products, OJ, 1975 n° L, 147/13
- (15) Directive 75/321, EEC; O.J., 1975, n° L 147/32
- (16) Council Directive 83/750, EEC of 26/10/1983; O.J., 1983, n° L, 332/1.
- (17) OJ, 17/1/75; n° C 12/8;
- (18) Vid. ib. OJ, supra.
- (19) OJ, 9/6/75, n° C 27
- (20) BFEC report; General Secretariat of the ESC Bruxelles; 1978, p.35
- (21) GCE, CEE; General Secretariat of the ESC Bruxelles; 1978; p.308
- (22) Association of Cooperative Savings and Credit Institutions of the EEC; General Secretariat of ESC. Bruxelles; 1978; p. 323

- (23) Directive 77/780; OJ L 32/30 (1977)
- (24) In a similar sense, vide: John A. Usher "Financial Services in EEC Law" ICLQ; vol. 37: January 1988; p. 148-149
- (25) Jean Le Brun: "Une Première étape vers l'harmonisation Européenne des réglementations bancaires" Revue de la Banque. 1979. vol 1 p. 34
- (26) C. Gavalda: La première Directive de coordination des législations bancaires de la CEE" Rev Trim. DR. Européenne 1979; p. 229
See also, HIRSCH, A.: "La Surveillance administrative d'un groupe multinational: L'exemple des banques multinationales" in Les groupes de Sociétés en droit européen. HOPT, Ed. 1982; vol.II. pp. 198, ss.
- (27) Vid. J. Le Brun; op. cit. supra; p. 36
- (28) P. Clarotti: "La coordination des législations bancaires" Revue du Marché Commun; n° 254; 1982, p. 75
- (29) Vid. J. Le Brun op. cit. supra; p. 36
- (30) Vid. P. Clarotti: "La coordination des législations bancaires" op. cit supra p. 77
- (31) OJ, C 244/2, (14/10/1978)
- (32) Christian Gavalda:"La première directive de coordination des législations bancaires de la CEE" Rev. Trim. Dr. Européen; 1979; p. 233
See also, HIRSCH, A., op. cit. supra p.198
- (33) J. Le Brun; op. cit. supra; page 40.
- (34) Clarotti: "La coordination des législations bancaires" op. cit. supra p. 79
- (35) J. Le Brun; op. cit. supra; p. 41
- (36) Vid. the report presented by the Commission to the Council in March, 1984 (COM (84); 118 final)
- (37) Vid. Directive 18/5/1984 (OJ, C153; 13/6/1984)
- (38) Vid. Dassel and Isaacs. "EEC Banking Law" London, 1985, Lloyds Edit., p. 75
- (39) Vid. G:B: Portales: "Le succursali di banche stero" BBTC, XLV, 1982, parte prima; p. 1012
- (40) Vid. Clarotti: "La coordination ..."; op. cit. supra p.81
- (41) Vid. C. Gavalda, op. cit. supra, p. 239
- (42) Butsch et Vuilliez, Banque, 1978; p. 208

- (43) J. Le Brun: op. cit. p. 49
- (44) P. Clarotti: "La coordination des législations bancaires" op. cit. supra; p. 84
- (45) J. Le Brun; op. cit. p. 48
- (46) Vid. Dassel e Isaacs, op. cit. page 83
- (47) P. Clarotti: "La Coordination ..."; op. cit. supra p.86
- (48) Jean Le Brun: "L'harmonisation des législations bancaires et les autorités nationales de contrôle", in "The development of financial Institutions in Europe" (1956-1976) Sijthoff, Leiden, 1977 p. 350-
- (49) C. Gavalda; op. cit. supra, p. 243
- (50) Vid. P. Clarotti: "La première directive de coordination ..." op. cit. supra; p.6
- (51) O.J., C 229/1, 8/9/1980
C 89, 21/4/1981 ... etc till nowadays
- (52) C. Gavalda; op. cit. supra, p.242
- (53) Council 64/221
- (54) Rutili (28/10/1975); case 36/75; ECR 1975, p. 1219 Santillo (22/5/1980); C. 13/79; ECR 1980; p. 1585 Royer (8/4/1976); C. 48/75; ECR 1976; p. 497
Pecastanig (5/3/1980); C. 98/79; ECR 1980; p. 1665
- (55) Vid. C. Gavalda; op. cit. p. 242
- (56) Vid. P. Clarotti, "La coordination ..."; op. cit. p.88
- (57) Commission v Italy; case 300/81; 1983 ECR 449
Commission v Belgium; case 301/81; 1983 ECR 467
- (58) Directive 83/350 EEC, 13/6/1983; OJ 1983 L 193/18
- (59) Speech by Commissioner Tugendhat to the British Bankers' Association Seminar; london; 29/1/1982
- (60) Belgium, Holland, Italy, Germany, Luxembourg, France and Ireland.
- (61) Vid. the text in BBTC, XLVII, 1984, p. 359 -; introductory note by R. Ricci
- (62) Vid. the text in BBTC, XLVIII, 1985, p. 408 - ; introductory note by A. Nuzzo
- (63) Vid. OJ, C 1/1982
- (64) OJ, 1983 L 193/18

- (65) OJ, 1986 L 372/1
- (66) Vid. M. Onado: "Regulation in International Banking" Revue de la Banque; Belgium, 1984; p. 15-19
- (67) See, Jaeger, P.G.: "I Gruppi, fra diritto interno e prospettive comunitarie", in Dir. Com. 1980. I, 916, SS. See also, Costi: "le partecipazioni delle aziende di credito", in Gins.Comm.; 1982, I, 123, ss. Provasoli: "L'area di consolidamento nella redazione dei bilanci di gruppo. La prospettiva di regolamentazione comunitaria"; in Riv. dei dott. commercialisti; 1979, 937 ss.
- (68) Council Directive 78/660, EEC; OJ 1978, L 222/1
- (69) See, Colombo: "le linee ispiratrici della proposta di direttiva comunitaria sui bilanci delle banche; in Banca, borsa, 1983, 1983, I, 187 ss.
- (70) OJ, 1989 L 44/40
- (71) OJ, 1985 C 356/55
- (72) COM (88) 4 Final (4/1/1988)
- (73) See, Costa: "La prima direttiva di coordinamento della disciplina bancaria, in Riv. dir. europeo, 1978, pp 82, ss. Giancalone: "Armonizzazione comunitaria delle legislazioni sulle imprese esercenti il credito", in Legislazione Economica; Vassalli e Visentini (ed.); Milano, 1979, II, 144, ss. Ciampi, C.A.: "Discrezionalità nell'orientamento del sistema creditizio e tutela dell' imprenditorialità bancaria", in Bancaria; 198; pp. 344 ss. Desiderio: "Liquidazione coatta delle banche e legislazione comunitaria" in Banca, borsa; 1981, I; pp.220, ss.

CHAPTER IV: SECOND COUNCIL DIRECTIVE 89/646, ON THE COORDINATION OF LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONS RELATING TO THE TAKING UP AND PURSUIT OF THE BUSINESS OF CREDIT INSTITUTIONS AND AMENDING DIRECTIVE 77/780 EEC

A. Preliminary steps to the Second Banking Directive:

In this section we shall analyze the proposal of the Commission and the different amendments of the EP and the ESC during the first reading procedure.

Most opinions agree in recognizing that the first proposal for the second banking Directive (1) contained a wider range of objectives for the achievement of a "unified banking market" in Europe, than the first banking Directive. As Lord Cockfield remarked: ... "The first banking Directive, setting out common prudential criteria for the establishment and operation of banks in Member States and its corollaries on supervision and accounting laid the foundation. The Commission's proposals for the freedom of capital movement are the walls of the internal market's financial wing. Today's proposal puts the roof on the building" ... (2). The proposal has to be seen within the legal context in which it was prepared. In this sense, I should like to mention several aspects connected to the content of the proposal.

(a) The Second Banking coordinating directive was intended to follow up and supplement the first. However, it adopts a radically different approach. In the second directive the principle of mutual recognition replaces the principle of harmonization. The legal basis for this approach is to be found in the Decision of the European Court of Justice in case 120/78 Cassis de Dijon (3). As stated there, when a product (in the present case the financial product) has been legally manufactured and marketed according to the provisions of one Member State, it may be freely offered for sale throughout the Community regardless of the specifications obtaining in the countries of destination.

(b) The mutual recognition of authorization is linked to the standardisation of conditions governing activity and monitoring, and also to the liberalisation of capital flows, on the other hand. But we can distinguish between this double parallelism. In the field of parallelism between the mutual recognition of licences for banking activities and standardisation, the parallelism should be strict. The reciprocal recognition of licences will enter into force at the same time as the various measures standardising conditions of access to banking activities, their carrying out, monitoring and controls. With regard to the parallelism between the liberalisation of banking activities and the free movement of capital: The Community must make progress in both domains, but there is no precondition. We must not wait for the realisation of banking standardisation before realising the integral free movement of capital.

(c) The position of the Community in the GATT: at the moment, the GATT rules apply to trading in goods but not services. The gradual liberalisation in this last area represented one of the fundamental aspects of the Uruguay Round. Any evolution towards liberalization within the GATT round could change the conditions of "reciprocity" called for from third countries in article 7 of the proposal.

The proposal's objectives can be divided into those with a socio-economic aim and those whose aim is to achieve higher standards of harmonization.

Socioeconomic objectives of the proposal. The Commission distinguished three objectives in the preliminary explanations to the proposal:

- ..."(1) les opérations financières à travers les frontières seront rendues plus faciles et moins coûteuses ...
- ... (2) la concurrence renforcée entre les établissements de crédit procurera un éventail de choix plus large et une réduction du coût des services bancaires ...
- ... (3) L'innovation des techniques financières ..." (4)

These objectives, which from an economic point of view are in accordance with the aims of the internal market, forget other desirable aims such as the protection of social policy or consumer protection interests. If we compare these objectives with the content of the conclusions from the Cecchini rapport (5), we note they are also directed to convincing Member States of the desirability of dismantling national barriers. Perhaps the

Commission tried a much more realistic approach than the previous years in order to gain competence from Member States in this field and set aside other aims such as the promotion of the policies mentioned above.

Objectives for the achievement of higher standards of harmonization. We can distinguish three fields in which the proposal makes very interesting innovations:

First a single Community licence: it means that the approval obtained by a bank in one Member State will be accepted by all the other Member States. A consequence for the exercise of banking activities is the "home country control" principle. This means that the supervisory authorities of the Member State granting the licence is solely responsible for the prudential control of branches established a subsidiary in another Member State. It is to be noted that if a bank so wishes, it can choose to establish a subsidiary in another Member State. It will set up a subsidiary instead of a branch. In that case, the subsidiary will have a separate legal entity, submitted to full authorization and control by the supervisory authorities of the host Member State.

The proposal adds a series of standards to the prudential rules achieved under the first banking directive (1977) and the directive on supervision on a consolidated basis (1983): minimum capital of 5 M ECUS; information on major shareholders; level of involvement in non-banking activities (not beyond 50% of the bank's own funds and not more than 10% in one undertaking).

Second a full range of banking services:

There is an extensive list in the annex to the proposal. Any activity on the list covered by the authorization granted in the home country is automatically valid in the host country even if these activities are not open to the national banks of that country. Thus advertising, for example, will be conducted in the host country under the rules of the home country, with the only possible restriction justified by grounds of public order.

Third, reciprocity requirement for third countries:

Third country banks wishing to open subsidiaries in the Community will file the relevant application for a licence with the supervisory authority of the particular Member State in which they want to establish. But the actual granting of the licence by that supervisory authority will depend on a Community procedure which will evaluate whether banking institutions from all Member States enjoy reciprocity in the state of the applicant, and what measures might be taken, if this is not the case.

These objectives were criticised by the EP, the ESC and, of course, the Banking Federation of the EEC. We shall now review their respective positions.

The position of the EP can be synthesized in three aspects: a broader field for the application of the Directive, a stronger control on the measures for the supervision of credit

institutions; and an institutional reinforcement for the competence of the Commission in this field (6).

(1) A broader field for the application of the Directive: the amendment to recital 14 (a) covers this aspect:

..."this directive should be seen in conjunction with the Council Directive ... in the field of mortgage lending"... and the amendment to article 1, first indent:

..."this definition (of "credit institution") shall include all other establishments exercising one or more of the activities referred to in Annex I as their principal activity"...

(2) A stronger control on the measures for the supervision of Credit Institutions. The European Parliament's draft contained the following:

In article 4: ..."the competent authorities shall certify the suitability of the shareholders or members in question and shall make specific reference to this certification in the text of the authorization"...

In article 7 a: ..."Member States shall require subsidiaries of credit institutions whose parent undertakings are based outside the Community to possess a licence before taking up business, in accordance with the provisions of the Directive 77/780 EEC" ...

In article 17: ..."a credit institution wishing to establish a branch in the territory of another Member State, shall give notification thereof to the competent authority of its home Member State and the relevant host Member State"...

(3) An Institutional reinforcement for the competence of the Commission in this field:

In article 7 (a) (8): ..."The Commission may, by means of agreements concluded on the basis of the EEC Treaty with one or

more third countries, agree to the application of provisions different from those provided for in this article so as to ensure, on the basis of reciprocity, adequate protection for deposits in the Member States"...

In article 20(2): ..."The Commission shall adopt measures which shall enter into effect immediately"...

In article 22 a: ..."Every three years the Commission shall submit to the Council and Parliament a report containing an analysis of the state of application of the directive and its effects on the banking sector in each Member State"...

The position of the EP is justified for several reasons:

- (a) The independence of its members, at least apparently, removed from any kind of influence from the pressure of banking lobbies and nationalistic positions.
- (b) The coherence with its position regarding the first banking directive's project in which the aim of gaining competence the harmonization process was the most important objective.
- (c) The protection of citizen's interests as customers of banking activities, which is clearly manifested in the aim of making a broader field for the application of the Directive and a stronger control on the measures for the supervision of Credit Institutions.

The opinion of the ESC (7), is an extraordinary reflection about the consequences of the proposal from the Commission. These objectives were expressed in point 1.6 of the "Preliminary observations": ..."Quant à la directive en projet, sa mise en oeuvre doit nécessairement préserver et promouvoir certains principes fondamentaux touchant notamment:

- à la protection de l'épargne
- à l'égalité des conditions de la concurrence
- à la loyauté des transactions commerciales
- à la protection des consommateurs
- au respect de la législation sociale en vigueur dans chacun des Etats membres"...

These objectives are a good complement to the lack of socioeconomic aims in the Commission's proposal.

We also find in this opinion the same three aspects as in the EP's opinion:

(1) A broader field for the application of the Directive, is clearly stated in article 1: ..."compte tenu de l'apparition de nouveaux produits financiers et de nouvelles formes de l'intermédiation financière, il conviendra de concevoir une définition plus large que celle de 1977"...

(2) A stronger control on the measures for the supervision of credit institutions is urged in the following:

Article 3: ..."les éléments constitutifs du capital ne sont pas déterminés ... il convient que les autorités de contrôle collaborent étroitement pour l'établissement des critères de détermination du capital minimum nécessaire"...

In article 4:..."la définition du critère de l'honorabilité, relève de la compétence des Etats membres ... il conviendrait que les critères choisis par les Etats membres fassent l'objet d'une coordination"...

In article 16: ..."cependant l'agrément unique et le contrôle par l'autorité compétente de l'Etat d'origine, peut être étendu à ces filiales moyennant la réalisation

des conditions suivantes: la ou les entreprises mères doivent être agrés comme établissement de crédit dans l'Etat membre du droit duquel relève la filiale .. on se demande ce qui se passe si les entreprises mère sont agrées chacune dans un Etat membre différent"...

(3) An Institutional reinforcement of the Commission's competence in this field is urged in:

In article 20: ..."La Commission se voit reconnaître le pouvoir, selon certaines modalités, d'apporter des modifications techniques à la directive en préparation:

- l'élargissement du contenu de la liste figurant en annexe
- le montant du capital initial
- la liste des catégories d'établissements visés à l'article 3 /2/
- le montant des seuils fixés à l'article 10
- les domaines dans lesquels les autorités compétentes doivent échanger des informations"...

On the other hand, four important remarks were made by the Banking Federation on points on which the European Commission's proposal lacks coherence (8):

(1) The possibility for Member States to edict more severe norms than those contained in the draft directive: the banks of countries which are to adopt "stricter standards" will be in an unfavourable position vis-à-vis their competitors.

- (2) The overly restrictive definition of establishments to which the directive shall be applied, which excludes financial bodies which exercise either only an activity of fund collection, or exclusively an activity involving the granting of funds. The same rules should apply to all financial bodies which call on the public.
- (3) Level of participation in non-banking activities: the limits of 50% (own resources) and 10% (individual enterprise) are too low and do not take account of the realities existing in some Member States.
- (4) Special dispositions for activities concerning the securities business (shares, bonds, etc.). The Banking Federation is against the disposition according to which, for these activities, the national authorities of one Member State may demand that the bank which undertakes them have sufficient provisions in that Member State. This is a breach in the general principle of control of the country of origin and implies a separation (which is artificial and arbitrary) between the various activities of a bank (from the point of view of surveillance of its solvency).

It is worth noting the evolution of the Banking Federation in respect to their influence in the process of drafting the first banking directive. In this respect, two aspects can be remarked upon: (a) Those who criticise the Commission's proposals are seeking a wider margin for the activities of all European

banks throughout the EEC. The banking federation has moved from its "protectionist and nationalistic" position of 15 years before to a more European position. Therefore it is not strange that they only make remarks in questions related to business, forgetting the social function of banking activities. Have they also moved from their original positions by for the results of the Cecchini rapport? (Mostly as regards retail banking benefits).

(b) There is no mention of the position of article 7 which claims reciprocity in the relations with third countries. Is the Banking Federation thinking of creating a European Market in which the biggest banks in the world (from the United States and Japan) would not have a real chance of selling their financial products?

The underlying to this evolution, can be found on two aspects. The first, is economic growth, reflecting on both macroeconomic parameters and the financial markets' microeconomic field. The second is, the interrelationship of the European markets, mostly through the issue of new financial instruments and the participation of the largest credit institutions in Europe within the different stock exchanges in Europe (9).

B. The second proposal for a second Banking Directive:

From the three aspects that synthesized, the position of the EP and the SEC in their opinions on the Commission's first proposal, only one (a stronger control on measures for the supervision of Credit Institutions) was retained in the second proposal. In the "explanatory memorandum" of the proposal we read the following: ... "The Commission was able to accept most of the amendments proposed by the European Parliament which clarify and strengthen the provisions regarding "prudential supervision" (10).

The content of this amendment has influenced several articles. Their main features are:

Recital 14: ... "the mutual recognition of financial techniques in the field of mortgage credit"...

Article 4: ... "the supervision of major shareholders"...

It ensures that the banking supervisory authorities are bound to refuse the granting of a banking license if they consider that shareholders or members are not suitable persons.

Article 7: ... "the reciprocity provisions governing the establishments in the Community of subsidiaries of banks from non-Community countries"...

The new article makes clear that "national treatment" must really work in practice, ensuring effective market access in the third country. There may be situations where on the face of it the Community institution is given the same rights of establishment as a domestic bank, but is excluded from the market by other means. In these circumstances the Commission would be

able to act. But any country providing genuine national treatment to Community banks would be under no threat.

Article 16(1) second paragraph: This provision is considered necessary in order to accommodate the problems encountered by a number of regional savings banks in Germany which are confined under the terms of their licences to operating within a limited geographical area. The derogation provided by a new amendment to the general rules of article 16(1) (the right of credit institutions to provide services on the whole territory of the Community), is proposed subject to the provisions that (a) the local banks in question remain subject to all the prudential requirements imposed by Community legislation and (b) there are no barriers to competition from banks having their head office in other Member States.

Article 19(3): This amendment makes it clear that any duly authorised credit institution must be allowed full access to all the normal means of mass-advertising of its services and products. It would remain open to Member States to regulate the form and content of advertisements and also to control such practices as "doorstep-selling" or "cold calling", where such regulations are justified by the general good.

List of banking activities: the amendments regarding some items of the list were considered necessary in order to clarify the text and to bring it more closely in line with the list of services annexed to the proposal for an Investment Services Directive which are also performed more and more frequently by banks in most of the Member States. The investment activities

(trading for own account or on account of customers) are:
brokerage, dealing as principal, market making portfolio
management, arranging or offering underwriting services,
professional investment advice, safekeeping and administration.

C. The Second Council Directive 89/646, of 15/12/1989:

The Directive (11), on which the Council reached a common position on 24/7/1989 (12), illustrates the new approach to supervisory legislation in the field of financial services (13). This feature is recognized by the main authors: In the words of P. Clarotti: ... "mais ce qui est fondamental dans ce document, c'est la nouvelle approche qu'il définit pour aboutir à l'objectif programmé: abandon de l'approche de l'harmonisation préalable et généralisée de tous les réglementations existantes et son remplacement par une harmonisation des seuls aspects essentiels de celles-ci, accompagnée par deux principes fondamentaux: la reconnaissance mutuelle et le "home country control"... (14). Similarly, Zavvos wrote that: ... "This legal instrument should be seen in the wider context of Community measures (adopted or proposed) which safeguard the financial stability of banks. In fact, this directive will only come into force at the same time as the adoption of specific legislation regarding harmonisation of technical matters"... (15). Rosello also stated that: ... "no se pretende una Ley General Bancaria; si aspiramos a una liberalización bancaria; en el Mercado Unico, es necesario realizar una armonización mínima previa de las condiciones de estabilidad de un banco (capital mínimo, socios honorables, participación limitada en empresas, liquidez, coeficientes de solvencia, etc.)..." (16).

The four substantive titles of the Directive contain both provisions to supplement the First Directive (as regards common authorization requirements (Title II), the treatment of branches of institutions established in a third country (Title III), and further provisions on the pursuit of credit activities (Title

IV), and new provisions primarily designed to facilitate the free provision of banking services (Title V).

We now consider some of the recitals of the preamble to the Directive, which, in our view, add new legal contents with respect to the first Directive.

In recital 4 the spirit of the Directive and its evolution with respect to the first Directive is synthesized in the statement that: ... "to achieve only the essential harmonization necessary and sufficient to secure the mutual recognition of authorization and of prudential supervision systems making possible the granting of a single licence recognized throughout the Community and the application of the principle of home Member State prudential supervision"...

Recital 8 can be divided into two parts. The first is intended to avoid the "fraud of law": ... "the principles of mutual recognition and of home Member State control require the competent authorities of each Member State not to grant authorization or to withdraw it where factors make it quite clear that a credit institution has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State in which it intends to carry on or carries on the greater part of its activities"... The second part was the consequence of long discussions and was added to the Directive only during the Council discussions which preceded the Common Position of 24/7/1989 (17). The content reiterates the decisions of the European Court each time it has had to decide on the legality of decisions from the Commission addressed to legal persons: ... "a credit institution shall be deemed to be situated in the Member State in which it has its registered

office; Member States must require that the head office be situated in the same Member State as the registered office"...

In recital 10 we clearly see a political compromise in order to avoid distortions on the national economies of the Member States ... "the host Member States's competent authorities will retain responsibility for the supervision of liquidity and monetary policy"...

Recital 15 allows the host Member State to require compliance with specific provisions of its own national laws ... compatible with Community law and intended to protect the general good... etc. This solution has been stated before by the European Court of Justice in several cases, as for example: Dassonville (1974), Debauve (1980), Sandoz (1983), Cinéthèque (1985), Gullung (1988), etc. (18).

In recital 16 the Directive leaves aside any possibility of establishing a solution for the problems created by each specific contract for the provisions of financial services. This is a matter of private international law and any solution must be in coherence with the process developed by the Community for the unification of norms of private International law relating to contracts. The solution to these problems must be found under the Rome Convention of 19/6/1980 (19).

It is worth noting the meaning of the expression ... "a carrying on activities receiving mutual recognition in the same manner as in the home Member State"... This expression was

preferred by the Council to the expression "financial techniques" (20). Two consequences from its content can be considered:

- (a) The expression does not hinder the right of the contracting parts to choose the law that they should like to apply to the contract. So there is no compulsory requirement for the application of the law of the home Member State.
- (b) What the expression means is that Credit Institutions have the right (but not the obligation) to choose the home Member State law each time they are going to carry out activities receiving mutual recognition.

In recital 18 there is an innovation in respect of the first banking Directive. Thanks to this new recital, Member States are no longer allowed to use the "criterion of economic needs of the market". On the other hand, the content of the recital provides a useful link to the liberalization of capital movements. These are the national barriers for the achievement of a "unified financial market". In the words of the recital: ... "in any case the measures regarding the liberalization of banking services must be in harmony with the measures liberalizing capital movements"... ... "Member States may invoke safeguard clauses in respect of capital movements, they may suspend the provision of banking services to the extent necessary for the implementation of the above mentioned safeguard clauses"...

Recital 20 is the consequence of a political compromise reached by the Council in one of its last meetings (21). Two

important consequences derive from it. First, with the words ... "a flexible procedure is therefore needed to make it possible to assess reciprocity on a Community basis"..., the Directive is confirming and delimitating the spirit of the First Banking Directive, as far as the creation of a "European Banking Policy" is concerned. Secondly, with the words ... "the aim of this procedure is not to close the Community's financial markets but rather, as the Community intends to keep its financial markets open to the rest of the world, to improve the liberalization of the global financial markets in other third countries"..., the Directive is opening a road to the possible inclusion of financial services in the GATT Round negotiations.

The concept of "credit institution" in article 1(1) (taken from article 1 of the Directive 77/780 EEC) was the object of confrontations between two schools of thought reflecting to a great extent national philosophies on banking supervision and regulation. One advocates the so called "narrow" or "traditional" approach. The adherents of this approach (the United Kingdom and the Netherlands) consider that the primary objective of prudential supervision is the protection of the savings of the public. They allege that any broadening of the current Community definition would incur technical problems with regard to supervisory standards which should be set for specific institutions. On the contrary, a "broader" view (Federal Republic of Germany and France) advocates that nowadays the purpose of prudential supervision is not only to protect savings but also to safeguard the stability of the banking system and to ensure equivalent regulatory treatment. This stability, it is argued,

could be endangered by the failure of an institution which is engaged exclusively in lending activities but which finances such lending from the interbank market (22). The Federal Republic of Germany made a reservation in order to include investment societies within the concept of credit institutions (23). The solution for such a confrontation between national philosophies on banking supervision could come in future by way of the Commission's proposal concerning Investment Services on the securities market (24).

Perhaps the crux of the argument for regulatory differences as regards specialized financial institutions lies in the belief that the free market will not serve certain segments of the populace to a degree consistent with the social welfare. Thus specialized financial institutions are necessary to allocate credit and resources into certain sectors of the economy, like housing (25).

It may be suggested, however, that financial transactions are governed by a complex network of processes which are not always clearly understood by the public. It would therefore be advisable to extend the definition of credit institution to include undertakings which grant loans without directly drawing on public deposits or other redeemable capital.

In article 1(5) the Directive uses the definition of "competent authorities" from article 1 of Directive 83 /350/EEC. This concept was also fully negotiated within the Council, however, and a useful explanation finally prepared. The latter

was that: ... "pour aller à la rencontre de la délégation du Royaume-Uni qui a émis une réserve liée au sort des articles 14 et 17, le Groupe s'est orienté vers la solution qui consiste à insérer au procès-verbal du Conseil la déclaration suivante..."

And in article 1, point 5:

Le Conseil et la Commission conviennent que la définition d'autorité compétente couvre, pour les besoins de la directive, les autorités nationales habilitées en vertu de dispositions légales ou réglementaires à exercer la surveillance prudentielle des établissements de crédit en ce qui concerne les activités citées sur la liste en annexe"... (26).

In article 1(6) there is a definition by exclusion of "financial institution":

- (a) an undertaking other than a "credit institution"
- (b) which cannot carry on these activities: acceptance of deposits and other repayable funds from the public, credit reference service and safe custody service.

This definition constitutes an innovation with respect to the first banking directive. Its legal consequences are linked to the content of article 18(2) of the second Directive. In the words of P. Clarotti: ... "cette définition est importante pour la mise en oeuvre de la reconnaissance mutuelle en faveur de certaines entreprises qui ne répondent pas à la définition d'établissement de crédit, qui est prévue à l'article 18 /2/. En effet, la Commission avait estimé, et le Conseil l'a admis, qui le système de reconnaissance mutuelle à travers le simple recours à la liste, aurait avantagé les banques universelles des pays ayant la réglementation la plus laxiste par rapport aux banques

des pays qui interdisent ou découragent l'exercice direct par celles-ci de certaines des activités figurant dans la liste. Pour pouvoir exercer ces activités, les banques en question sont obligées de créer des filiales spécialisées"... (27).

In article 2(3) there is an exemption to the application of an article of the Directive to credit institutions which are affiliated to a central body. This means the abrogation of the "time limit" contained in article 4 (a) of the first banking directive (77/780; EEC).

Article 3 is a mandatory requirement for Member States, in order to prohibit persons or undertakings that are not credit institutions from carrying on the business of taking deposits or other repayable funds from the public. The use of the expression "carrying on the business" is not equally understood by the different national legislations. If, for example, we read the French or the Spanish text this expression is understood as a "professional activity" ("à titre professionnel" or "a título profesional"). Such a concept does not have a common feature within EEC Law and for this reason the European Court of Justice in cases Unger and Levin (28) stated that it was necessary to give a common definition to this concept. It may be suggested, however, that the expression "activities with an economic aim" used by the European Court in cases Van Roosmalen and Dona (29) would be more adequate for the purposes of the article. The lack of a common definition of the concept could imply differences when Member States prohibit persons or undertakings from carrying on the activities cited in the article.

Article 4(1) established an initial capital of 5 million ECU for credit Institutions as a "minimum" necessary for receiving the authorization from the competent authorities of Member States. This requirement is a "complement" to article 3 of the first banking Directive. During the discussions within the Council Denmark was in favour of the requirement of a higher quantity of "initial capital" for certain credit institutions (as, for example "mortgage credit institutions") with a strong risk involved in their activities (30).

Article 4(2) is the result of pressure from Italy and Germany within the Council for the protection of their "Regional banks". But the situation created by article 4(2) could provoke distortions of competition in future and should therefore need a complementary measure in the Directive to be applied. In our view, if at the same time a system were set up under which credit institutions could claim exemption from the field of application of the Second Banking Directive by providing notification (on a voluntary or compulsory basis) of their decision to waive their right to extend their operations beyond the previously established territorial borders and, notably their right to undertake cross border operations, the problems facing public regional law or local credit institutions, notably in Germany, would be solved.

The initial capital required by both art. 4(1) and 4(2) is, in our view, less important, perhaps, than other factors. There is no doubt that many small credit institutions, often, but not

always, cooperatives, have been operating smoothly and successfully for many years and providing a reliable service for their customers, even though their initial capital was substantially less than the limits provided by the present directive.

Article 5(1) obliges the shareholders or members of a credit institution to inform the competent authorities about their identities and holding amounts before taking up business. The ownership and control of a credit institution by important shareholders is an issue of supervisory concern, particularly in a period when highly complex group structures are a widespread phenomenon. Financial markets rely primarily on the confidence of the public. The particular feature of financial services is that their value is highly dependent on the public's perception of stability of the specific financial institution and that of the financial system taken as a whole. It is not always a given fact that the purpose of stability are best served by the free play of market forces. Unlimited competition can sometimes produce instability. Thus, the risk of cross-financing and conflicts of interest are particularly evident in an environment of vast changes in the structure of financial systems. Article 5(1) enables the competent authorities to obtain the necessary information regarding the identity and the interests of shareholders directly or indirectly holding a qualified participation in the credit institution applying for a licence. With this legal requirement the Directive employs a practice of the Commission of the EEC, each time it addressed decisions to

undertakings in order to decide the compatibility of their agreements with the EEC Treaty. A good example is the series of decisions Transocean Marine Paint Association (31).

Article 5(2) states that competent authorities shall refuse authorization if they are not satisfied as to the suitability of the shareholders or members of credit institution. This statement, was added in the second project of the Directive (June 1989). In our view, it is another example of an arbitrary figure within the Directive. With this article Member States have the possibility of acting in function of their interests. What do we mean by "suitability"? What legal instruments can be used in order to attack a refusal of authorization based on the need to ensure the sound and prudent management of a credit institution? Once more political compromise solved situations needing a previous coordination process and involving divergences caused by differing national legislations. This has affected the uniform application of the Directive within the EEC.

On the other hand, these sort of requirements also found a critical view by well known scholars of the United States. Scott (32) and Rockoff (33), as well as Posner (34), consider that all regulatory impediments to entry based on the "convenience and needs" requirement should be abolished. Peltzman (35) and Lash (36) take the opposite view.

In article 7 there is another innovation with respect to the first banking directive. The aim of "prior consultation" required by the article is to avoid the fraud of law. In the words of P. Clarotti: ... "le but de cette nouvelle disposition est d'éviter que certains établissements de crédit essaient de profiter de la reconnaissance mutuelle, dont la raison d'être est de permettre à tout établissement de crédit de pouvoir opérer, s'il le souhaite, sans être soumis à des contraintes additionnels, sur l'ensemble du territoire communautaire, pour se soustraire à la réglementation, par hypothèse plus restrictive, de leur pays d'origine"... (37).

Articles 8 and 9 constitute Title III of the Directive (relations with third countries). Due to their complexity and importance for the application of the Directive, we shall study them together.

The council decided, on a proposal from the French delegation (38), to modify the original proposal from the Commission (39) into a new one with two articles. In this way the Council wished to distinguish between the obligations of the Member States in respect to the Commission and the essential questions which could affect the Community as a whole.

With the adoption of the reciprocity clause the Community acquires a provision which already exists in the legislation of the most liberal states (for instance, the United Kingdom and Switzerland). It gives a legal content to something that is an undeniable fact: that the European Community is one of the most liberal and open financial markets in the world. For several decades, large numbers of non-Community banks, insurance companies and investment companies have been established in

almost all the countries of the European Community and offer a broad range of financial services. In many cases the non-Community institutions are entitled to offer a broader range of services on Community territory than in their home country.

Several questions, however, have to be solved after the coming into force of articles 8 and 9:

(a) The Community must adopt a strong negotiating position in the GATT negotiations on the liberalization of financial services, given that it is one of the most open financial markets in the world, with 320 million depositors and investors. There are still many developed and developing countries which, while they benefit from the Community's open banking market, do not themselves offer Community banks and other financial institutions equal access and operating conditions. The problem could only be solved by way of "exemptions". The Commission has indicated its willingness of acting through "exemptions" (40), but what developing countries are going to be exempted? What criteria are going to be used for the selection of these countries?

(b) If articles 8 and 9 come into force with the other articles of the second banking directive at the end of 1992, the banks of countries which apply protectionist measures and hinder the access, or operations, of Community banks will rush to become established in the Community within the transitional period.

(c) While today it is possible in theory for any non-Community bank to set up branches throughout the Member States (provided they allow it), there is no Community provision obliging these branches to respect certain minimum rules which Community banks are obliged to respect, for instance banking licences, initial capital, sufficient funds, etc.

As regards subsidiaries, despite special authorization which is currently required by most EEC Member States, problems will arise regarding other issues. For instance, in a recent parliamentary question (41), Mr. De Vries MEP stressed that European Banks Subsidiaries, under the American Bank Holding Company Act, are not authorized to acquire Insurance Companies in the U.S., nor to merger with them, while the U.S. banks are not under this restriction.

(d) Among other preconditions, the authorities of the Member States should require the parent companies of these branches to provide every guarantee that if the branch or the whole banking group is affected by a crisis, Community depositors will not be at risk.

(e) If the Commission has the power to decide whether or not reciprocity is given by third countries to Community credit institutions, are the Member States going to accept peacefully the decisions of the Commission?

(f) Why are branches not covered by the articles 8 and 9?

Finally, it is worth noting some observations by Scott on the question of reciprocity: ..."Trois questions doivent être posées: cette exigence de réciprocité de traitement s'appliquerat-elle aux banques étrangères existantes, déjà établies dans la CEE? comment déterminer l'Etat d'origine d'une banque entrant dans la CEE? (in order to avoid the "leapfrogging") que signifie réciprocité de traitement?" ...(42).

Article 10(1) stated that a credit institution's own funds may not fall below the amount of initial capital. In order to reinforce the content of this principle, article 10(3) stated that when a credit institution is taken by a person other than that who controlled the institution previously, the "own funds" must attain the level of initial capital. The aim of this provision is to avoid that the promoters of a new bank would prefer to take control of an existing bank without the fulfilment of the requirement of the condition of initial capital.

In article 10(4) there is an exemption to article 10(1), where there is a merger of two or more credit institutions, the own funds of the institution resulting from the merger may not fall below the total own funds of the merged institutions at the time of the merger. This is clearly a measure in order to facilitate the acquisition of a bank in crisis by healthy banks. This is a kind of bounty in favour of the healthy bank because this provision does not require the fulfilment of the condition of initial capital.

Article 11 is a new provision. The first banking directive has a similar provision for bank managers (requiring them to be experienced and honourable). But there is no mention of the shareholders which acquire (or have the intention of acquiring), directly or indirectly a qualifying holding in a credit institution. This article reinforces the feature of "prudential supervision" in the Directive. The aim is to avoid that the most important shareholders should have a bad influence over the sound and prudent management of the credit institution.

The content of article 11(3) which requires any person who proposes to dispose of a qualifying holding first to inform the competent authorities, was criticized by the German delegation within the discussions of the Council (43). With the position of the German government a more liberal procedure should be achieved through the limitation of the arbitrary power of national authorities. In the words of the text proposed: ..."les Etats membres ne doivent pas prévoir un contrôle général préalable des personnes visées à l'article 11(1) dans le cas où celles-ci ne peuvent pas selon la situation du droit existant ou les clauses contractuelles exercer une influence négative sur la gestion saine et prudente de l'établissement de crédit"... (44).

Article 12 is one of the main provisions of the Directive. It incorporates rules requiring banks to fulfil certain objective criteria if they wish to acquire or maintain participation in non-credit or non-financial institutions. With these criteria the Directive aims to achieve adequate supervision in the interest of financial stability for two main reasons: firstly, because

participation in a subsidiary may affect the soundness of a credit institution, if the former runs into financial difficulties (contagion risk); and secondly, since equity participation constitutes a long-term freezing of the assets of credit institutions.

The positions of the Commission, the Council and the European Parliament varied in respect of the percentages they allowed to the "qualified participation" of the credit institutions in non financial undertakings. The European Parliament, bearing in mind the role played by the banking system in the industrial and financial sector, recommends an amount of 25% (own funds) and 75% (qualified participation). The Commission opted in the first proposal for 10% and 50% respectively, but after the EP's recommendation raised the limit to 15% and 60% respectively. The Council accepted this position but introduced some exceptions (article 12(3) and (8)) in order to respect the position of countries with a "universal banking system" (Germany, Spain, Greece, Holland). On the other hand, some countries (Belgium, Italy and France) where there is a general ban on this participation, were against the introduction of these exceptions. (45). One more time we are facing a provision with a high political content that could create insoluble structural problems for the weakest countries of the Community.

Articles 13, 14 and 15 contain the means of prudential supervision of a credit institution authorized in the EEC.

Article 13(1) is very important. By giving the competence of prudential supervision to the authorities of the home Member State, the article modifies changes the First Banking Directive's provisions on this issue (46).

Article 14 states some exceptions to the rule set by article 13(1). Owing to the inadequate harmonization of the provisions regarding liquidity and, more generally, the lack of monetary cooperation, article 14(2) introduces an important derogation to the principle of supervision by the home Member State. The host country retains primary responsibility for the supervision of the liquidity of credit institutions and complete responsibility for the implementation of monetary policy. These provisions show that before the Single Market can be attained, the following are necessary: a more substantial convergence of the monetary policy of the Member States; and a precise description of its contents and the continuation of effects to harmonize national legislations in key sectors, such as the rules for calculating and supervising the liquidity of credit institutions. The smooth functioning of the internal banking market will require close and regular cooperation between the competent authorities of the Member States.

In Article 14(3) the Directive provides for cooperation between the relevant authorities of the host countries and those of the home country to avert market risks resulting from operations by established credit institutions on the "security markets". Article 14(3) has become imperative, particularly in the light of events of the crash of the international stock

markets on 19th October 1987. These events showed the fragility of the security markets as well as the lack in many Member States of adequate measures. But article 14(3) fails to specify the nature of these "necessary measures", the procedures for and the extent of cooperation among the competent authorities both in this and in other instances covered by the Directive.

Perhaps it would be too ambitious to require the banking Advisory Committee, under the ultimate supervision of the Commission, to assume a further essential and active role as a coordinator of cooperation among the relevant authorities of the Member States in respect of all cases of cooperation, although this is urgently necessary. It could thus develop into a "Community Banking Authority". This would undoubtedly be a positive contribution to efforts to set up a European Central Bank.

Article 15 provides for the possibility for home authorities, after first informing the host authorities, to undertake on-the-spot verification in the branches of their credit institutions which are established in other Member States. The right to make on the spot verifications is recognized to the EEC Commission for the protection of competition law. In this sense, it is interesting to compare the content of article 15(1) of the second banking Directive, and article 7 (1) of the first banking Directive, with article 7 (a) (b) of the "antidumping regulation" (47). Several questions then arise. Can the authorities of the host Member State deny permission for the

investigation? How much time must pass between the information and the undertaking of the verification? How are the verifications going to be undertaken? What are the legal remedies that the workers of the branch which is going to be investigated can use for the protection of their professional rights? (48) (49).

Article 16 deals with the question of "professional secrecy". Historically this question has been only "superficially" regulated by the Community legislation as, for example, in Directives 77/799 (EEC), 79/1070 (EEC), 76/308 (EEC) and 79/107 (EEC) (harmonization of tax and VAT), and the first banking Directive (50). But the second banking directive significantly reinforces the existing Community provisions. The new obligation envisaged extend to: Art. 16(1): Persons who now or in the past were employed by the competent authorities; Art. 16(2): The exchange of information between the competent authorities of the Member States regarding matters of prudential supervision; and Art. 16(3): The exchange of information provided in the context of a cooperation agreement between the competent authorities of a Member State and an authority of a third country.

Art. 16(1) filled the gap in the definition of "professional secrecy" and its consequences: "...that no confidential information which they may receive in the course of their duties may be divulged to any person or authority what so ever, such that individual institutions cannot be identified, without prejudice to case covered by criminal law"... This is an

important innovation with respect to article 12 of Directive 77/780 EEC, and article 50 of Directive 85/611 EEC (UCITS). It is a direct consequence of the decision of the European Court in case 110/84 "Hillegom v Hillenius" (51), which implicitly stated the necessity for such a definition.

Article 16(5) and 16(7) stated two exemptions to the general rules of paragraphs 1 and 4. Article 16(5) uses the term "authorities"... This includes, according to Clarotti: "...", dans les pays où ils existent comme par exemple la Grande Bretagne des organismes professionnels d'auto-contrôle"... Article 16(7) uses the expression ..."authorize the disclosure of certain information to other departments"... In the words of Clarotti: "..." cette faculté s'étend aux communications aux commissions parlementaires d'enquête"... (52).

But the "professional secrecy" regulated by article 16 ignores the most important aspect: the relations between the bank and the customers. As long as these relations are not regulated by the Community, breaches of the principle of equal competition could appear within the EEC in function of the different regulations on "professional secrecy" by Member States.

Article 18(1) constitutes the most important instrument in order to achieve the principle of "mutual recognition" of banking activities. This is complemented by the content of article 18(2) in which the subsidiaries of credit institutions are allowed to provide the activities listed in the Annex of the Directive throughout the territory of the Community if they fulfil several

conditions provided for in paragraph 2. The reason for article 18(2) lies in the fact that, in some Member States, credit institutions are not allowed to carry out some of the activities listed in the Directive's Annex (as, for example, leasing, factoring, mortgage credit, safekeeping and administration of securities); only subsidiaries are allowed to do that. But subsidiaries are regulated by Directive 83/350, so they are not considered "credit institutions" in the sense of Directive 77/780; therefore the activities that they could do would not benefit from "mutual recognition".

Article 18 could cause in future some legal and socioeconomic problems of no easier solution. Clarotti exposed the legal consequence of the principle of the "mutual recognition" with these words ... "il donnait à tous les établissements de credit le droit de sortie, ce qui étant contesté notamment pour les caisses d'épargne le régional prinzip, d'après lequel les caisses d'épargne ne pouvaient opérer en dehors de l'aire géographique qui leur était attribuée par l'agrément ... comme tous les droits, il peut être soumis à certaines modalités et éventuellement à certaines exceptions dûment justifiées. Le Conseil et la Commission ont estimé qu'il fallait laisser à la Cour le soin de déterminer, le cas échéant les caractéristiques de ces modalités et l'étendue de ces exceptions, sans les préjuger par des listes d'exceptions"... (53).

Socioeconomic problems could arise as a consequence of the different capabilities of national financial markets to absorb the new financial products recognized in the list. There is no doubt that the need for an efficient and dynamic banking system is greater in the underdeveloped countries and regions of the

Community, but it is not the case that the banking institutions of such countries and regions will fall victim to a "creaming off" process to the advantage of the large transnational banks.

Article 19 contains the forms of exerting the right of establishment. It is interesting to note the content of paragraph 4. The first part reads: ... "before the branch of a credit institutions begins its activities, the competent authorities of the host Member State, shall, within two months of receiving the information mentioned in paragraph 3, prepare for the supervision of the credit institution"... The "supervision" is understood as being over the fields in which the host Member State conserves both principal and residual competence: The second part of paragraph 4 reads: ... "and if necessary indicate the conditions under which, in the interest of the general good. those activities must be carried on in the host Member State". ... what is meant by "general good"?

There is no common definition in the Directive of the meaning of "general good". In this sense, Roselló tries to justify the absence of a "list" to delimit the concept in the Directive, and gives some ideas of what we must understand by "general good": ... "(a) the concept could be assimilated to the concept of mandatory rules in Private International Law. (b) It is necessary to make a restrictive interpretation of the concept, ignoring any form of administrative law or "ius cogens" in it. (c) The delimitation of the concept is up to the European Court of Justice. Such a delimitation could be similar to that of the concept of "general interest" enounced by the Court in case 205/84 (insurance), Commission v Germany: (54).

(c.1) "Il faut qu'une disposition analogue n'existe pas déjà dans le pays d'origine.

- (c.2) Il faut que la mesure ne soit pas disproportionnée par rapport à l'intérêt à protéger.
- (c.3) Il faut que la matière visée par la règle concernée n'ait pas fait l'objet d'une harmonisation sur le plan communautaire, ou bien d'une harmonisation insuffisante (in this sense we can ask ourselves if the 4 Directives on "consumer credit, misleading advertisement, and contracts concluded outside commercial offices, can be considered as rules protecting the "general interest").
- (c.4) Il faut que la réglementation en cause ne se traduise pas, dans les faits, par une discrimination au détriment de la banque étrangère"... (55).

What article 19 clearly states is that, in any case, the host Member State cannot refuse the establishment in its territory of a branch of a credit institutions duly agreed in its home Member State.

Article 20 established a very simple procedure for the provision of services by a credit institution of one Member State within the territory of another Member State: the notification to the competent authorities of the home Member State of the activities on the list in the Annex which it intends to carry on. There are several questions to be made in respect to this article. Why the procedure is much simpler than it is for the establishment of a branch? Would it not be better to give the home Member State the possibility of refusing the authorization

for the same reasons as in article 19? Must we understand that the home Member State implicitly approves the provision of services in another Member State with the only condition of the notification by the credit institution? If this should be the sense of the article the only limits to the provision of services could arise from the application by Member States of the "safeguard clauses", provided for by Directive 88/361 EEC of June 1988 for the implementation of article 61(2) and 67 of the EEC Treaty (56).

Article 21 is another example of a political compromise between Member States, in order to respect the principle that it is the host Member State which takes note of any irregular situation on the part of a credit institution and it is the home Member State which takes the appropriate measures to ensure that the institution concerned puts an end to that irregular situation.

Article 21(1) refers to credit institutions having branches within the territories of Member States, so there is no mention of the provision of services as such. This could mean that when a credit institution exercises the free provision of services (crossborder activities), there is no obligation to report on its activities to the competent authorities of the Member State where the activities are provided. This would also affect the content of article 21(2).

In paragraphs 4 and 8 host Member States are authorized to take appropriate measures when a credit institution persists in violating the legal rules referred to in paragraph 2. But these paragraphs are technically incomplete: there is no reference to the content and procedure of the measures that host Member States could take. Consequently, the content of these two paragraphs could provoke breaches to the "principle of legal security" for the activities of credit institutions.

In paragraph 5 the concept of "general good" is employed; the comments cited above also apply here. Profesor Usher thinks that, in any way, a restrictive approach is required (57).

Finally we should like to mention the content of paragraph 11 where credit institutions are allowed to advertise their services through all available means of communication in the host Member State: Is this statement on the Directive not rather "superflous" when it has been duly recognized by the play of the Treaties and the Jurisprudence of the European Court? (58).

Title V of the Directive must be read taking into account the content of article 8c (EEC Treaty) and the "accession acts" of Greece, Portugal and Spain. These provisions state several stages before freedom of establishment can be achieved by 1th January 1993.

Article 22 gives "executory powers" to the Commission in order to make technical adaptations to the content of the

Directive. Executory powers have been recognized by the S.E.A. to the Commission and has been delimited by the Council in its Decision 87/373 of 13/7/1987 (59). This decision stated that the Commission on exercising its executory powers has to act through three types of committees; one of them is the committee cited in paragraph 2 of article 22. This paragraph states that ... "the Commission shall be assisted by a committee composed of representatives of the Member States"... As there is no specification of who can be appointed for this committee, Member States could appoint the same persons as for the Banking Advisory Committee, a situation which could render the existence of one of the Committees a little unreal.

In article 22(1) subparagraphs 4, 5 and 6 the Commission is given executory powers which were the competence of the Council under the "own funds" Directive of 19 /4/ 1989.

Article 23 preserved the rights acquired by credit institutions providing services before the entry into force of the Directive, and also for branches which have commenced their activities in accordance with the provisions in force in their host Member States. It is worth noting that there is no reference to branches of credit institutions established outside the Community. In this sense, it may be suggested that a paragraph should be included in this article (as the Council did in its common position of the Directive in Solvency ratio) (60) in order to regulate the situation of those branches. This was also the position of the French delegation during the discussion within the Council: ... "Cette directive ne s'adresse pas aux sucursales

d'établissement de crédit ayant leur siège en dehors de la Communauté. Leur traitement est laissé à l'appréciation des autorités nationales qui veilleront à ne pas les traiter de façon plus favorable que les établissements soumis à la directive ... La Commission ferait, si besoin, une proposition visant à définir un régime commun dans tous les Etats membres pour les dites succursales"... (61). With such a solution the Council would take another step on the way towards a "Common Banking Policy", on giving a communitarian regulation to a field which is still under the competence of the different Member States.

Article 24 constitutes an "unusual" form of fixing the date for the bringing into force by Member States of the provisions of the Directive. Article 24(1) reads: ... "to comply with the Directive by the later of the two dates laid down for the adoption of measures to comply with Directives 89/299 EEC and 89/647 EEC, and at the latest by 1th January 1993"... The only justification for the employment of such a "formule de renvoi" is that the implementation of these two Directives constitutes a fundamental "first step" for bringing into force the provisions of the second banking Directive.

D. Supplementary Directives to the Second Banking Directive:

Two further measures of vital importance for the achievement of Second Directive in essential aspects, should be mentioned. They concern the definition of own funds and the solvency margin of credit institutions.

The first Directive expressly left the definition of own funds (62) (all those items which together constitute the capital of the bank) to the Member States' legislation, though the concept has been described as a "cornerstone of banking supervision" (63) and the use of such a concept is practically essential for measuring and comparing capital adequacy.

Directive 89/299 EEC of 17/4/1989 (64) now sets out common standards for the definition of own funds which Member States are obliged to use in all their legislation implementing Community measures on the prudential supervision of credit institutions.

The Directive distinguishes between original and additional own funds and limits the proportion the latter may represent in the total (65). It provides a maximum of items which can comprise own funds, along with a list of all those items which must be deducted from own funds. Member States may, however, allow the deduction of the other items. The net result is a Community minimum standard for the calculation of a bank's capital. The directive also notes that ... "the Member States... shall be obliged to consider increased convergence with a view to a common

definition of own funds" ... within five years of its implementation (66).

Directive 89/647 EEC of 18/12/1989 (67) sets out to provide a Community measure of the capital adequacy of credit institutions, to replace existing national regulations in this regard and to introduce a greater degree of comparability of supervisory standards. It should also strengthen the average solvency of Community banks, having depositors and investors better protected from unforeseen difficulties.

Though the utility of ratios between assets and liabilities as an aid to monitoring solvency and liquidity of credit institutions was recognized in the First Directive (68), the Commission's 1985 White Paper on completing the internal market does not mention a directive on solvency ratios. It may be assumed that the timing of this Directive owes something to the "Proposals for the international convergence of capital measurement and capital standards" put forward in December 1987 by the Basle Committee of banking supervisors of the group of ten, which includes seven Community Member States (69).

The Directive will apply to all credit institutions which fall within the ambit of the First Directive definition. The solvency ratio itself, a mathematical concept, is defined as a credit institution's "own funds ... (expressed) ... as a proportion of total risk-adjusted assets and off balance-sheet items". From 1st January 1993 credit institutions will be obliged to maintain

a solvency ratio, to be calculated at least twice a year, at a minimum of 8%, and to act as quickly as possible to restore the ratio to 8% should it fall below this figure.

A large proportion of the text is devoted to classifying asset items according to their degree of risk expressed as a percentage, though Member State are permitted to prescribe higher weighting for asset items. Off-balance-sheet items are classified according to the directive's three annexes. The total of the values of the assets and off-balance-sheet items thus adjusted for risk constitutes the denominator of the solvency ratio which must be maintained.

Recent developments in the theory of finance suggest that balance sheet controls are likely to impose small costs on society (70).

Two administrative issues may, however, arise. First, some banks could not afford a high premium system. Therefore, the risk-classification scheme should be as objective as possible. The system will remain viable as long as there are no systematic errors in the setting of premiums (71).

Second, there is the question of whether the premium rates levied on individual banks should be publicly disclosed. There will obviously be opposition to public disclosure from high-risk banks, and from banks that may be threaten with being placed in a high-risk classification.

Finally, it should be said that a 100 percent insurance scheme solution, as a broader insurance coverage, would further reduce the likelihood of bank runs. In particular, the possibility of a run by large depositors would be eliminated (72).

NOTES

- (1) COM (87) 715 final, 16 /2/ 1988
- (2) Vid. EUROPE magazine. Thursday, 14 January, 1988;p.5 See also, CLAROTTI, P.: "Progress and Future Development of Establishment and Services in the EC relation to banking" J.C.M.S.; vol.XXII, nº 3, March, 1984 pp. 225-226
- (3) Case 120/78; 20/2/1979
- (4) COM (87) 715 final page 4
- (5) Commission of the EEC : "Research on the cost of non Europe"; vol. 9: Financial Services. p. 27 Luxembourg 1988
- (6) Vid. PE Text, 3/89
- (7) Vid. OJ, nº C 318/42 (12/2/88)
- (8) Vid. Europe; nº 4699; p.7; (14/1/88)
- (9) See chapter related to the European Financial Environment and its influence on the EEC banking harmonization process.
- (10) COM (89) 190 final (29/5/1989)
- (11) Directive of 15/12//89; OJ, nº L 386/1, (30/12/89)
- (12) Council document 7835/89, published as EP DOL C3-16/89
- (13) The Commission has adopted a similar approach in its proposal for a directive, submitted in January 1985, mortgage credit (O.J. 1985 C 42/4)
- (14) Vid. P. Clarotti: "Un pas décisif vers le marché commun des banques". (Revue du Marché Commun, p.454 nº 330; September-October, 1989)
- (15) Vid. G. Zavvos: "Towards a European Banking Act" 25, Common Market Law Review, 263, p.271; (1988)
- (16) Interview with Mr. J.L. Roselló (Main Administrator in GD 15 of the Commission CEE); March, 11, 1990
- (17) Vid. p. 5 of "restricted document", nº 7239/89 EF 54 (13/6/1989) Council of the EEC
- (18) Vid. Debaue: case 52/79 (1980); ECR 833
- (19) OJ, nº L 266, (9/10/80)
- (20) Page 7 of "restricted document" cited supra.

- (21) Page 9 of "restricted document" n° SN/2331/89 (EF) (26/6/1989) Council of the EEC.
- (22) Vid. "Recent Innovations in International Banking". Bank for International Settlements. April 1986, p.240-241
- (23) Page 10 of "restricted document", n° 7239/89, cited supra
- (24) COM (88), 718 final; O.J., n° C 43 (22/2/1989) presented to the Council by the Commission (3/1/1989)
- (25) See, White: "Price Regulation and Quality Rivalry in a Profit-Maximizing Model: The case of Branch Banking" J. Money, Credit & Banking 107-118, February, 1976
See also, CARRON, A.S.: "Reforming the bank Regulatory Structure" , Washington; 1984, p.28
- (26) Page 11 "restricted document" n° 7239/89, cited supra
- (27) Vid. P. Clarotti: "Un pas décisif vers le marché commun des banques", cited supra; p. 456
- (28) Unger, Case 75/63; (19/3/1964). ECR, 1964
Levin, case 53/81; (23/2/1982). ECR, 1982
- (29) Van Roosmalen, case 300/84 (23/10/1986). ECR, 1986
Dona, case 13/76 (14/7/1976). ECR 1976
- (30) Vid. page 14 of "restricted document", n° 7239/89, cited supra.
- (31) Decisions: 27/6/1967; O.J. 1967/163
21/12/1973; O.J. 1974/ L 191/18
23/10/1975; O.J. 1975 L 286/24
11/12/1979; O.J. 1980 L 39/73
- (32) See Scott, H.: "In Quest of Reason: The licensing Decisions of the Federal Banking Agencies"; 42, U. Chi. L. Rev., 235; 1975
- (33) Reckoff: "The Free Banking ERA: A Reexamination". J. Money, Credit & Banking; 141-168; May, 1974
- (34) Posner, A.: "The Social Costs of Monopoly and Regulation"; 83, J. Political Economy; n° 4, pp. 807-829; August, 1975.
- (35) Peltzman, S.: "Bank Entry Regulation: Its Impact and Purpose"; The National Banking Review. December, 1965; pp. 163-167
- (36) Lash, N.A.: "Banking Laws and Regulations: an economic perspective" Prentice-Hall; 1987; pp. 36-39
- (37) Vid. P. Clarotti; "Un pas décisif vers le marché commun des banques"; cited supra; p. 457

- (38) Vid. "restricted document" n° 7239/89, cited supra
- (39) COM (87) 75 final p. 7-8
- (40) Vid. European Community News (20/10/1988) p. 4
- (41) PQ n° 134/9 answered by Sir Leon Britain, in OJ, EC, C, n° 233 of 17, September 1990; p.16
- (42) Vid. Hal S. Scott: "La Notion de Réciprocité dans la proposition de deuxième directive de coordination bancaire". Revue du Marché Commun, n° 323, January 1989, p.47
- (43) Vid. p. 25 of "restricted document", n° 7239/89, cited supra
- (44) Ibidem;
- (45) Ibidem;
- (46) Giving Member States the faculty to establish an "authorization procedure" for the branches of credit institutions whose head office were in other country of the EEC.
- (47) Council Regulation n° 2423/88 (11/7/1988) OJ, n° L 209/1
- (48) Vid, in this sense "EEC Competition Law", Ivo V. Bael and J.F. Bellis, pages 289-294 (Paragraph 1003: Discovery: "on the spot investigation CCH-Editors; 1989
- (49) It is worth noting the position against the content of article 15/11 by the Luxembourg delegation within the Council. Page 29 of restricted document 7239/89, cited supra
- (50) Article 12 of Directive 77/780
- (51) Case 110/84, 11/12/1985 Recueil 1985, p. 3947-3966
- (52) Vid. P. Clarotti: "La deuxième directive de coordination en matière d'établissements de crédit"; p. 461 op. cit. supra
- (53) ibid; p.462
- (54) Recueil de la Jurisprudence de la Cour 1986, p. 3755
- (55) Vid. Rosselló, op. cited supra, p. 107, 108
- (56) OJ, n° L 178 (8/7/1988) p.5
- (57) Interview with professor J.A. Usher at Exeter University; May, 1991

- (58) See also recent U.C.I.T.S. Directive, were marketing rules are stating as competence of the Member States.
- (59) Decision 87/373, EEC; OJ n° L 197 (18/7/1987)
- (60) Common position on 24/7/1989; EP Doc C3-17/89
- (61) Page 44 of "restricted document" 7239/89, cited supra
- (62) It has been suggested that this expression is a mistranslation of the French term "Fond propres", and that "banking capital" is to be preferred in English.
- (63) Explanatory statement to the Commission's proposal: COM (86) 169, final 2; page 1
- (64) OJ 1989 L 124/16
- (65) Article 6 of Directive 89/299 EEC
- (66) Article 2 (2) of Directive 89/299 EEC
- (67) OJ, n° L 386/14 (30/12/89)
- (68) Article 6 of Directive 77/780 EEC
- (69) It should be remembered that the Basle recommendations only apply to banks of a certain stature, and are not in any case binding on the participant states.
- (70) In particular, in a world of perfect capital markets, without taxes and without bankruptcy costs, the allocation of resources will be independent of the balance sheets adopted by firms for mandated by regulation.
See MODIGLIANI and MILLER: "The Cost of Capital, Corporation Finance, and the Theory of Investment"; 48, Am.Econ. Rev.; n° 3; June, 1958; pp. 261-297
For a similar view, see MAYER: "Should Large Banks Be Allowed to Fail?"; J. Financial & Quantitative Analysis; November, 1975; pp. 603-610
- (71) See, SCOTT and MAYER: "Risk and Regulation in Banking: some Proposals for Federal Insurance Reform"; 23, Stanford L. Rev.; May, 1971; pp. 857-902
- (72) See, BARNETT, HORVITZ and SILVERBERG: "Deposit Insurance: The Present System and some alternatives"; 94, Banking L. J.; April, 1977; pp. 304-332

CHAPTER V: CONCLUSIONS TO PART I

Several remarks can be made following this critical approach to the harmonization process of banking activities in Europe:

(a) The "harmonization process" has enabled the Community to remove some of the backlog measures long outstanding, rather than proceed to adopt those which are required by present conditions or will be required in the near future. Not only can it be maintained that in the area of financial services, which be it recalled represented some 7% of the Community's GDP (1), the Community has achieved too little. It may also be the case that this little is in many cases rather late. The change in the nature of the activities of banks, for example, is a constant theme in discussion of financial services (2). The importance of a banks's credit risk, on which the traditional approach to prudential supervision was based, has diminished compared with exchange rate risks, interest rates risks and securities market risks. Yet there is no sign of a Community measure to deal with this modification in the financial ground rules.

(b) Concern has also been expressed that, though it has proved a useful lubricant for the legislative process, the technique of mutual recognition, a "second best" compared to coordination of national provisions, gives rise to the danger that the interest of consumer/investor protection "may be subordinated to the policy of speedy completion of the internal

market" and encourage the Member States to accept the lowest common denominator in fixing the Community standard (3). The approach based on the principle of equivalence, as proposed in the Commission's White Paper on completing the Internal Market of 1985 also raises concern. Both freedom of services and consumer protection at a high level would be served by imposing the standards of the country of origin in all countries where the services are marketed. All services would thereby be able to circulate freely within the internal market and be supervised by the authorities of the country of origin under certain standard conditions applicable Community-wide but not necessarily harmonized. Prudential controls established on banking institutions in every Member States and supervised by the home country authorities will not be sufficient to protect efficiently the consumer funds deposited in a credit institution against fraud and bankruptcy. Positive integration is required to provide for such assistance as a Community-wide obligatory guarantee-fund system (4), obligatory deposit insurance schemes etc. (5). As Revell stated (6), the approach to prudential regulations relying on balance sheet ratios, particularly if they are uniform across whole groups of institutions of different size and specialization, is a dead end. In a fast changing financial system the essential feature of an effective system of prudential regulation is that it should concentrate on the risk exposure of individual institutions. This cannot be done by detailed regulation. It demands a high degree of competence among the supervisors, whose attention should be concentrated on the doubtful cases.

(c) Cross-border transaction put the individual consumer in a more vulnerable position towards its partner, namely in terms of access to information and dispute settlement procedures. Private international Law rules, when applicable, are far from giving consumers an adequate solution to the settlement of disputes arising in the context of cross border transactions. The latter concern, for example, the conclusion of the contract (availability and presentation of the terms and conditions governing the transaction, marketing practises), the change of contract terms, allocation of risks and liability rules in cases of system failure and payment to an unauthorized third party, documentary evidence and assigning of the burden of proof, revocability of orders of payment, error and dispute settlements procedures.

Banking services are subject to the Convention of Jurisdiction of 1968 (7), and the Convention on contractual obligations of 1980 (8), but exemptions are made possible which would have the effect that the consumer would not be granted the most favourable provisions of the laws which would be declared applicable to his transaction.

(d) New technological developments in financial services in the EEC countries are taking place in a legal vacuum. Citizens have usually voiced their concern on the use of computer systems by involving personal privacy, by holding information on private individuals without their knowledge or consent, by disseminating this information to other institutions or persons, or by using

computer systems to monitor individual behaviour. EFTPOS offers specific and additional risks in terms of protection of privacy of individuals using the system: data make it possible to trace the consumer in all his travels and places where purchases are made and to draw a clear profile of his consuming habits. Reference should be made to the provisions of the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (9).

(●) The effect on the market of the international liberation of financial services is far from clear. While removal of barriers to international trade in financial services and to the international capital movement should lead to more competition, the related restructuring of the financial services industry may lead to higher concentration and anticompetitive arrangements. Competition at the international level will indeed require the constitution of "financial conglomerates" through takeovers, mergers and agreements to use or exchange common network services. Forms of cooperation may include detailed agreements on technical standards, security measures, operating procedures, tariffication rules, etc. They will also imply restrictive agreements between the financial institutions and retailers accepting the common payment system. Such a restriction of competition, while inevitable, should be contained within reasonable limits and not lead to market structures and practices which would be directly detrimental to the consumer namely by imposing excessive prices and other unfair conditions, or by restricting the choice of payment methods available. Another

anticompetitive effect would result from attempts made at the European Community level to achieve a common market for financial services and at the same time to create barriers against the rest of the world. The recent "European Agreement for bank cards usage" which has been drafted by the European Council for Payment Systems and notified to the Commission for a possible exemption from the application of the Treaty rules on competition is a good illustration of such a protectionist behaviour as it excludes from participation non-European banks and financial institutions.

f) Social policy is also forgotten by the financial services harmonization process. Employee participation and company structure are questions of no easy solution which affect credit institutions. Some reflections from Pipkorn could be of interest here: "...a much broader attempt to realize the goal of an increasing participation of the employees in the life of their undertaking, laid down in the Community's social action programme of 1974, has been made with the Commission's proposal for a directive on procedures for informing and consulting employees of undertakings with complex structures in particular transnational undertakings" (10). The Commission has justified the need for a directive on this subject on the grounds that the decision-making process of large enterprises has become so complex that the existing procedures for informing and consulting employees do not any more correspond to the level where decisions with serious repercussions for employees are taken. Such procedures are generally confined to affairs of the local business entity and do not reach the level of the real decision-making centre in cases where this entity is legally an autonomous company, but economically a part of a group of companies under

uniform management. If the dominant undertaking of such a group is situated in Germany would be informed on the decisions taken at group level in accordance with legislation on group works council existing in Germany. But the workers of the subsidiary in Belgium or in France need not be informed and consulted under this law which has its territorial scope limited to Germany. The unequal treatment of employees affected by the decisions of one and the same undertaking stemming from this territorial limitation of existing information and consultation procedures impedes the realization of the social goals set forth in article 117, and is inconsistent with the creation of conditions in the Common Market similar to those of a domestic market, as aimed at by the whole EEC Treaty and specifically by articles 2, 7, 48 and 52 (11). ... "The directives and draft directives dealt with so far aim at protecting the interests of the employees through procedures ensuring that they are properly informed prior to decisions affecting them and granting procedural arrangements for a dialogue between the decision-maker which determines de facto the employment conditions and the employees' representatives with respect to "monitoring" the social consequences of such decision"... ... "The most controversial issue is the participation of employees in the election of the members of the governing bodies of companies"... (12).

g) Fiscal issues are also at stake. As regards corporate taxation, a uniform taxation system should be necessary for avoiding the problems of finding an incontrolled market price for transfers between affiliated companies (13). The above fiscal achievement will avoid situations such as that created by Daily Mail as regards capital gains taxation in the U.K.; both the

opinion of the European Court and the General Advocate, did not justify the transfer of the residence for tax reasons (14), stressing the opinion maintained in several cases before. This solution, though legally admissible, does not cope with the factual problem, inherent to every business-profit making mentality, that money looks for niches where can be maximilised its value. Thus credit institutions will develop strategies in order to place their financial products in countries where fiscal issues could be easily overcome.

As regards financial conglomerates another issue to face is the criteria for defining business income. Apart from the question of rates, the criteria that regulate the classification of taxable income, the exceptions to the accrual principle, payment advances or deferrals, tax suspensions or payment instalments, cost allocation criteria, etc, may weigh considerably on the overall entity of the tax levied.

h) As far as the political composition of the Council is concerned, the majority of its members were representatives of the Christian Democratic or liberal parties (15). With such a composition, it may be suggested that it is not very difficult to understand why the directive ignores any consideration for the protection of the objectives of other policies of the Community and puts so much emphasis on supervision, control and every kind of limitation to the completion of a European financial area in accordance with the spirit of the Treaty.

On the other hand, it is worth noting that the credit institutions may also have close relations with these politicians. Most of the latter, as we shall see in next chapters, are involved in activities closely linked to banking. The study of the strategies for the achievement of their objectives shall also be analyzed on next chapters. The legal outcome of this situation is a not very convincing set of rules included in the Commission's White Paper for the achievement of the Internal Market.

If the second banking Directive is to be the "corner stone" for the creation of a single market for banking activities in Europe, it seems that many gaps have to be filled in order to avoid the house collapsing.

NOTES

- (1) Fitchew, CDE symposium "Vers un marché unique des services financiers", Brussels, 27-28/4/1989; p.1
- (2) Delmas-Marzalet and Jozzo; 1986 symposium on "Europe and the future of financial services" proceedings; p. 3 and 133, restrictively
- (3) Remarks of Professor Gower to the Commission's 1988 Conference on Financial Conglomerates; p. 5-12
- (4) Such a system is proposed by the Commission in its draft directive of 21/3/1988 concerning "package holiday tours"; COM (88) 41 final (OJ, of 12/4/1988)
- (5) Such schemes have been introduced, but as an invitation only, in the text of the Commission Recommendation of December, 22th, 1986 concerning "credit institutions" (OJ, n° L 33/1987)
- (6) See, Revell, J.: "Solvency and Regulation of Banks". Bangor Occasional Paper in Economics; n° 5, U. of Wales Press. 1975
- (7) Convention of 27th September 1968 on Jurisdiction and the enforcement of judgements in civil and commercial matters; OJ, n° C 97/1983.
- (8) Convention of 19th June 1980 on the law application to contractual obligations; OJ, n° L 266/1980
This Convention has not yet been implemented in Belgium, the Netherlands, Portugal and Italy.
- (9) OJ, n° C 297/1980, p.3 published with an explanatory memorandum in EC Bulletin 3/1980 supplement.
- (10) Jörn Pipkorn: "Employee participation in the European Community: progress and pitfalls" in B. Wilpert and A. Sorge (eds.)
- (11) Jörn Pipkorn: op. cit. supra p.60-61
- (12) ib. cit. supra, p.68
- (13) See, Nielsen, T.: "The Arms's Length Test: A Rule of Law or an excuse for Arbitrary Taxation?" Interfax, 296; 1979.
See also, Burge, M.: "The 1975 U.K. Treaty as a Concrete Example of How Some Problems can be Handled", in N.Y.U. International Institute on Tax and Business Planning 1977. Tax Treaties and Competent Authority. New York. 1978

- (14) See cases: 270183, Commission V. France, ECR 1986, 273; 115/78; Knoors ECR 1979, 399 and 33/74, Van Bisbergen, ECR, 1974, 1299.
- (15) The political composition of the Council on 15th December 1989 (date of the approval of the second banking Directive) was: Denmark, Germany, Portugal and the United Kingdom (right wing governments), Belgium, Greece, Ireland, Italy, Luxembourg and the Netherlands (coalition governments composed of socialist, liberals, christian democrats, etc); Spain and France (socialist).

PART II

INTERESTS AS SEEN FROM A POLICY MAKING PERSPECTIVE

INTRODUCTION

The majority of the rules governing the present social context of the Western Societies are normally the subtle processes of negotiation between different sociopolitical representatives. These processes "involve diverse, often conflicting perspectives based upon different objective or subjective interests" (1). Thus, the structural issues and the substantive policy issues are closely inter-related. In particular the complicated relationship between policy intentions and policy outcomes cannot be explained in terms of some deficit in the process of the latter through the organisational system, but in terms of conflicts of interests and values with an inter-related impact upon both ends and means.

The following discussion tends to criticise interest groups and organisations as being concerned only with their narrow viewpoints ("subjective interests"), in order to make an overall assessment of their importance within the decision making processes of the western societies.

As we have seen before, the EEC banking harmonization process involves a complex conjunction of law, economics and politics. Thus, the aim of this part is to make a stage by stage reflection in order to identify what interests are at stake in the banking harmonization process. First, attempts will be made in order to show both the existence and the role of interests in

the decision making processes of the Western Societies. Secondly, assuming this statement, the analysis of the importance of interests within the EEC decision making process will open the path to the third stage: the role of banks as a pressure group in face of the EEC banking harmonization process.

CHAPTER I: REFLECTIONS ON THE EXISTENCE AND ROLE OF INTERESTS WITHIN THE DECISION-MAKING PROCESSES OF WESTERN SOCIETIES

The existence of interests within the structures which configure the decision making processes of the western societies have been a focus of attention for scholars. Caporaso, for example, defines interests as the "gatekeepers of the political arena since they control in an important way the content of the issues allowed to enter" (2). Nonet and Selznick describe interests in a similar way, as "an effect of legal pluralism which multiplies opportunities within the legal process for participation in the making of law" (3). Thus, interests are in a position to affect and regulate the character of the flows between society and polity. But, once the existence of interests has been discussed, questions arise about both their nature and place within the decision making processes of the western societies: "what produces interests? How are interests represented?" (4).

Scholars as Caporaso, identify interests as the "demands which are placed on the political system by associational interest groups, like trade unions, employers' associations, farmers' unions, etc..." (5). Similarly, Esty and Caves: "...The independent role of expenditures invites us to assume that the industry is an unitary actor making rational investments in political benefits" (6).

Definitions and descriptions of the group component of society has been made by many authors. Groups are perhaps one of

the most outstanding features of our societies, as well as the international society, and the role they play is crucial. Already in 1936 Bearel pointed out that: ... "this great fact stands out clearly, that through the centuries -down until our own day- group interests were recognized as forming the very essence of politics both in theory and in practice" (7).

Lasswell and Kaplan emphasize that the group concept is not to be taken as logically fundamental but rather as interpersonal relations that show various degrees of organization. Concerning the question of how and why a group gets organized they say that: ... "the tendency for a specific group to emerge varies with 1/ the intensity of perspectives for solidarity and their integration with predispositions, and 2/ expectations of the difficulty in attaining values by private operations..." (8). The first factor refers to things such as shared faiths, loyalties, and interests, which make it more likely that there will be an organization to defend these. The second factor refers to the environment and points out that it is more likely for a group to emerge if not expected to reach the desirable goals individually.

An interest group is said to be "an interest aggregate organized for the satisfaction of the interest" (9). With this definition almost all groups can be regarded as interest groups when they include demands and expectations. Lasswell and Kaplan further elaborate the concept by distinguishing between special interest groups and general interest groups. By the first is meant a group which has expectations of satisfying their interest somewhat at the cost of outsiders, whereas the latter has other than special interests. The more special the interest, the more

intense is the activity of the group and membership is not frequently shifted (10).

Interest groups can be of different types according to their focus, e.g. economic, social, professional or philanthropic. What they all have in common is that they desire to influence public policy and often direct their actions towards the administrative agencies which have much discretion in their activity. The administrative agencies are in fact themselves pressure groups (11).

Gortner (1977) defines the main channels of influence open to the interest groups as to be lobbying with the legislative or public agency, appealing to the court and educating the public to create public opinion (12).

Policy-making is affected by the political structure of the society and will therefore react to demands and support, so-called inputs, from the environment. The interest groups are a part of the socio-political environment of the administrative agency. Therefore, the political system will produce transactions between norms, internal constituencies, and external constituencies that will influence the policy-making in the administrative agency. In this sense it is worth mentioning the studies from Kindleberger (13), Pincus (14), Baack and Ray (15) as well as Webb (16), which show the influence of lobbies' strategies within the shaping of the Political Economy of several western countries as the United States, Australia,

Germany or the United Kingdom along the current century. This interaction between the administration and the formal and informal actors of the interest groups obviously has an impact on the behaviour of administrators and their decisions. Peters, defines four categories of interaction patterns: legitimate interaction, clientela relationships, parentela relationships and illegitimate group processes (17). This categorization concerns the kind of legitimation or status the groups enjoy in different systems, the extent to which they can exert influence, and the policy results yielded of interaction.

Legitimate interaction can for instance be corporatism or some kind of required consultation. Corporatism is a rather extreme version which tends to limit the number of pressure groups that may take part in the policy process. Legitimate interaction normally results in redistribution (the decision taken is likely to take from one group and give to another) or self-regulation which occurs when the elite is not strong enough to implement a redistributive decision.

The clientela relationship occurs when the administration perceives one group as legitimate rather than all groups. Between the administration and the interest group selected there will appear a situation that is characterized as symbiotic. The policy consequences will be selfregulation (see above) or distribution (when a group is granted continuing benefits).

The parentela relationship wants to describe a situation that was prevailing in preindustrial societies but which can still be found today. It is a situation where fraternal ties are emphasized between the pressure group and the government or a dominant party. Policy-results here will be distributive programs among the faithful and regulations, as the party seeks to regulate the entire society through the use of intermediary groups.

Sometimes the situation is so unfavorable to interest groups that their existence is seen as illegitimate. The result of this system is frustration and alienation of the individuals in the groups. Examples of action that can be taken by individuals, who still want to try to influence, are protest, demonstration and violence, but these undertakings rarely yield any influence.

The first three patterns grant a certain stability and institutionalization to the interest group influence. But only in the first, legitimate situation, there is no or little "politics" of access to the policy process. This in fact makes it easier to find the "public interest" because interests are forced to cooperate, or bargain, to reach results.

There is also a slight, but far from waterproof, correlation between type of political system and type of interaction. The Northern European countries are e.g. inclined to produce legitimate interaction, whereas parentela relationships often occur in systems that have or are dominated by a hegemonic

political party. Certain issue areas also tend to give certain relations, e.g. agriculture, medicine and banking have created clientela relationships within many different political systems (18).

Unfortunately, the citizens, in spite of being destinataries of social welfare legislation, are not rightly placed for defending their interests; scholars are concerned on this issue; Joerges, thinking about citizens as consumers and so affected by "quality standardization", does not find an alternative to their lack of involvement within the decision making processes affecting their interests (19); Cranston, stresses the lack of citizens' participation within the decision making processes stating that "collectively they have little meaningful impact except through a few pressure groups, perhaps the labour movement, and possibly sympathetic officials in some governments departments" (20). Thus, their overall influence compares unfavourably with that of commercial interests, the media, and pressure-groups espousing free-market ideology.

Therefore, concerns arise about the consequences deriving from the role of "interests" within the decision making structures of the western societies; mostly because the representatives of those "interests" seem to aim at subjective profits. The resulting legal "outcome" is criticized by the scholars. Unger states that no standards of right are to be found beyond the arbitrary preferences of individuals or groups, therefore every consensus turns out to mask a personal control

of some by others (21). Similarly, Nonet and Selznick remark that "it is a way of vindicating individual claims" (22).

Thus, the question arises: how do interests interact within structures and how are they influenced by the structures in producing the outcome?

There seems to be a "grey zone" of interaction between both "structures" and "interests". In the words of Snyder:..."structures represent outcomes of processes that have previously occurred; they are configurations of interests, congealed at least temporarily in the form of institutionalised sets of social relations..."; but, at the same time "...structures define, delimit and shape objective interests" (23). Similarly Barrett and Hill maintain that the structures despite constitute the "rules of the game", are themselves an outcome of the policy bargaining process and make bargaining parties unequal (24).

Thus, if the legal order is to be responsive and not merely opportunistic, its structures need effective tutelage in the accommodation of pressure from the different interests on stake. Nonet and Selznick offer a similar solution: "Governments must proceed, as a legal actor, to establish the agencies and mechanisms by which ends will be furthered...to bring maximum objectivity to the elaboration of public policy" (25). In that legal capacity government transcends power politics. It looks beyond the demands made on it to the needs it must meet, reaches out to powerless interests, elicits participation, takes

initiative to discover emerging problems and inchoate aspirations".

Finally, we should like to underline that the above reflections do not aim to give the impression that all policies are the result of the clash of "subjective" interest. The state structure plays an important role in many decision making processes. This is an obvious fact. But in several sectors, banking among others, it is impossible to understand the nature of the Policy making without taking into account the assessment of the influence of subjective interests on the final outcomes.

NOTES

- (1) Snyder, F.: "Introduction and Hypotheses" of the seminar on European Community Law in Context. E.U.I.; Florence (Italy); 11, January, 1991.
- (2) Caporaso, J.A.: "The Structure and Function of European Integration". Goodyear Publishing Company. California, 1974.
page 23.
- (3) Nonet, Ph. and Selznick, Ph.: "Law and Society in Transition" (Toward Responsive Law). Harper Colophon Books. New York. page 96.
- (4) Snyder, F.: "Interests', and the legislation process", in "New directions in European Community Law"; London, 2 (1990). page 40 ss.
- (5) Caporaso, J.A.: Op. citt. in (2); page 24.
- (6) Esty, D. and Caves, E.: "Market Structure and political influence"; Economic Inquiry; Vol. XXI. January, 1983. page 26.
- (7) Lasswell and Kaplan: "Power and Society" 1950; p. 32.
- (8) Ibid; 1950; pag. 32-33.
- (9) Ibid; 1950; page 35.
- (10) Ibid; 1950; p. 42-43-44.
- (11) Nigro, in Lindberg and Scheinghold, citted in (42) of the corollary; 1970, p. 46.
- (12) Gortner: "The Public Agency and its environment"; 1977; p. 46.
- (13) See, Kindleberger, Ch.: "Group Behaviour and International Trade". The Journal of Political Economy; LIX, Feb.; 1951, n.1, p. 30.
"The Rise of Free Trade in Western Europe: 1820. 1875". The Journal of Economic History; XXXV, March; 1975, n.1, p. 51.
- (14) See, Pincus, J.: "Pressure Groups and the Pattern of Tariffs". The Journal of Political Economy; LXXXIII, 1975, n.4, pp. 757-758.
- (15) See, Baack, B. and Ray, E.J.: "The Political Economy of Tariff Policy: A Case Study of the United States"; Explorations in Economic History; XX, 1983, pp. 73-93.

- (16) See, Webb, S.B.: "Tariffs, Cartels, Technology and Growth in the German Steel Industry". *The Journal of Economic History*; XL, June, 1980, n.2, pp. 309-329.
- (17) Peters: "Types of interaction between pressure groups and bureaucracy", 1984; p. 150.
- (18) This entire section is based on Peters, 1984, chapter 5; citted in (17).
- (19) Joerges, Ch.: "Quality Regulation in consumer goods market: Theoretical concepts and practical examples", in "Contract and Organisation: legal analysis in the light of economic and social theory". 1986; Walter de Gruyter. Berlin/New York. page 154.
- (20) Cranston, R.: "Legal Foundations of the Welfare State" Weidenfield and Nicholson. London. 1985; page 334.
- (21) Unger, R.M.: cit. supra.
- (22) Nonet and Selznick; page 96; op. citted in (3).
- (23) Snyder, F.: Op. Citted in (4), page 454.
- (24) Barret and Hill; opp. citt. supra page 22.
- (25) Nonet and Selznick.: pags. 112-113.

CHAPTER II: INTEREST WITHIN THE ECC DECISION-MAKING PROCESSES

A. General Considerations:

As we have seen before, organized interests play an important role in the policy-making in all modern democracies and it is obvious that the willingness to influence at the European arena is equally prominent.

An analysis of both the institutional system of the EEC and its decision making processes reveals that there is a subtle mixture of interests within them. Due to the supranational structure of the Community, the analysis must develop on at least two different levels: the national and the Community ones. This seems to be the way most scholars do. For example, Snyder remarks that: "...two forms of state structure played a role in the legislative process: the "supranational state" or European Community, on the one hand, and the Nation States, on the other" (1). Similarly, Harrop states that while influence is best brought to bear at the European level, it should not be neglected at national level (2).

As far as the national level is concerned, a distinction must be made between the Public-Policy interest and the interest of specific individuals or organisations ... ("which do not embody or represent the "public" or "national" interest") (3).

Concerns arise on the activity of specific individuals or organisations. In terms of political activity, "economic interest groups" (representing subjective interests) rely on traditionally developed channels of access to national policy-making centers. As Lindberg states: "...the volume of their contacts with administrators and parliamentarians has greatly increased in direct relation to the extent to which their vital interests have been affected by provisions of the Treaty, (or the secondary legislation)" (4). Such activities concentrate not on the reasons why the overall advantages of proposals far outweigh any risks or sectional costs for the national welfare, but negatively on the protection of their own interest. Thus, we can and do complain that the processes of national policy-making do not accentuate the positive in the vital public debate, but underline the negative and make sure that the case for sectional interests swamps the much more powerful arguments for the general good. Such activities also occur often outside the public arena, thus seeming to be against the whole democratic principle.

As far as the Community level is concerned, the decisions which are taken represent the articulation of many different views in a very slow process of decision-making. Thus, there are considerable opportunities to influence policy-making by both the Member States and the Economic Interest Groups. "...Of special significance are the wide range of interests involved in law-making...the sharply contrasting conceptions of the legislative process and the issues at stake which are held by different actors and the ways in which these conceptions shaped the various proposals for legislation and the eventual outcome..." (5).

Concerns arise as to the negative role played by the Member States for the achievement of more cohesive and responsive economic policies so plainly needed for the Community: "...The Council's constitutional job is not to make proposals for the Community interest, but to react to proposals made to it... the Council is, in practice, a process of private inter-governmental negotiation on the narrow issues of national interest in each proposal before it" (6). The decision-making process is not paralleled by the public debate about the benefits and risks to the Community of the proposals. Whatever public debate there is, it concentrates on their negative impact on national and sectional interests. Thus, unless governments can distance themselves sufficiently from Community decision-making, it is hard to see how Council with its present working methods is ever going to make the major political decisions which the Community needs if it is to be more than a simple free-trade area.

Such a critical analysis of the role of the Member States within the Council also found its basis on the Opinion of the Advocate General Capotorti in the *Bela-Mühle*, Case 114/76 (7): "...The Council must be acknowledged to have the power to reconcile the various interests involved and, if necessary, to make a choice in each individual case, giving priority to one interest over another...". A warning against the discretion of the Council each time it has to decide between one interest or another. The A.G. stated: "...It is clear that, in exercising these economic policy options, the Council has a wide margin of discretion. Accordingly, it is not enough to establish that one objective or the other is subordinated or sacrificed to the claims of another..." (8). Thus, it does not seem that the role of the Member States within the decision-making process of the European

Communities preserves the aims for the achievement of the most important interests: those necessary for the creation of a strong Community.

B. Interest Groups and the European Economic Community:

The political spill-over brought about by European interest groups has not kept pace with the economic spill-over of integration: "...the interest of large firms, despite occasional, issue-specific lobbying through trade associations or individually, remain largely invisible but are none the less important ... this interest in effect exercise a determining influence on the agenda and contents of policy-making and law-making" (9).

The presence of these groups within the European legal arena, despite being a consequence of the establishment of the EEC and its central institutional system, finds precedents in both Europe and the United States. International interest groups existed before 1958. The development of interest groups evolved in four successive waves, the first of which appeared with the launching of the O.E.E.C. and the Marshall Plan. In addition, the E.C.S.C. which came into existence in 1952, led to the emergence of a group of unions; the third wave followed the establishment of the EEC. The final wave came with the arrival of the E.F.T.A. (10). Accordingly, Coopers remarks the parallelism between both the role and the structure of the U.S. lobbies and the European Interest Groups: "...there have been several traditional pillars of resistance to proposals for a restrictive approach to the importation of U.S. feed material (within the EEC)...these pillars of resistance could be mobilized on occasion as an internal EC "American lobby"...furthermore, as in the case of the EC, the US agricultural lobby has deep divisions within it..." (11). This similarity between the EEC and the Western Countries

interest groups has been also remarked by Berger, (12), who goes further than simply remarking the similarity of subjective interests in US and EEC, by stating that labour and capital are distinctive types of interests, ie objective interests, and consequently they should not be put on the same plane as another interests which are subjective interests only.

Nowadays, some novel forms of behaviour are displayed by the European interest groups. The emergence and development on a large scale of interest groups at the Community level mirrors their development in Western industrial Society as a whole. Functional specialization and the growth of large-scale political and economic units have increased the physical and social space separating the "elites" from the "masses".

C. The Structure and Tactics of Interest Group Representation Within the EEC:

The existence of an interest group at the European level is, at least partially, dependent on the existence of a Community policy in the same field. By late 1961, there were 222 organized economic interest groups; the number rises to 350 by 1967. Nowadays the number surpasses 500 (13). The development of the Common Agricultural Policy and the establishment of the Customs Union, 1958-1968, were crucial to the appearance and growth of the General Committee of Agriculture in the E.C. (COCEGA), the Committee of Professional Agricultural Organization in the E.E. (COPA), and the Union of Industries in the E.C. (UNICE). The Community policy can also have a strong impact in other sectors which are directly affected by the policy and therefore will develop regional interest groups; i.e.: trade unions affected by the Customs Union (14).

Lindberg, remarked another important reason to explain this growth: the recognition by the Commission of its allies each time it decides to take any legislative initiative. "...Vulnerable to the charge that they were an irresponsible undemocratic body, the Commission was anxious to cultivate any contacts possible with them. Thus, from the start the Commission actively promoted the formation of interest groups..." (15).

It is not my intention here to analyze all these groups in detail. But, their growth requires a brief reflection on how they influence on the making of Community Policies. We are dealing the construction of an independent system in which groups directly coalesce at the European level and exert an influence directly on Community institutions. Accordingly, national interest groups have sought to organize at the level of the EEC, to develop regularized contacts with their opposite number in the other Member States, and to seek access to the EEC decision making centers.

European interest groups vary in character from groups meeting for sporadic round-the-table discussions, or exchanges of view, to legally constituted associations with formal statutes and permanent secretariats. Among them, associations representing national confederations of industry (U.N.I.C.E), of trade (C.O.C.C.E.E.), of farmers, the most extensively organized, (C.O.P.A.), and the bankers (The Banking Federation of the European Community), of which the influence and structure are going to be analyzed in the next chapter. This diversity no doubt reflects the structural complexity and functional specificity of Western Society. Even from the standpoint of their formal structure, European groups are very decentralized. The groups have proved to be tough negotiators for national positions and do not show much evidence of having a "Communitarian spirit". Their stated purposes or goals are similar: to establish a "liaison" between groups representing a given sector in the several countries of the EEC, to promote the interests of their

particular sector before the institutions of the EEC (Commission, Council, Assembly, Permanent Representatives, ESC).

Scholars agree on noting that, as a general rule, national considerations continue to shape the character of participation in these regional interest groups. Caporaso notes that what is passed on to the Commission may be a diluted, weakened version of the desired policy or a few series of irreconcilable national positions which the Commission may find difficult to forge into an overall policy (16). Thus, common positions are reached when interests coincide, but otherwise decision-making is of the lowest -common- denominator type, with final agreement rarely exceeding what the least cooperative participant is willing to grant.

The degree to which they can expect to exercise influence on the Community level will depend on factors such as the permanent secretariat and its personal assets, as well as competence and authority vis-à-vis its affiliates. The scope of action varies considerably but it is clear that European interest groups are limited by the fact that decisions are still, in great extent, taken at the national affiliates (17).

The two primary targets for interest group activity are the Commission and the Council of Ministers. The European Parliament, like the Economic and Social Committee, is not very effective as a conveyor of group interests. No official ties exist between the European Council and the European interest groups and thus far

only representatives of business and trade union interests have been heard on a regular basis.

The Council of Ministers, is not the object of "strong" influence by pressure groups, probably due to the fact that, since Council members are rather closely instructed representatives of their respective states, it could be redundant to try to influence them at the Community level. On the other hand, the Council offers little scope of lobbying and the meetings are more like an international conference. The institutionalized concertation between the ministers of the Council and the European interest groups take place in the tripartite conferences and the standing Committee of Employment.

But the Commission is by far the Community channel most often used by interest groups. Institutionalized lobbying is mainly performed by the many advisory committees for which provision has been made in the Treaties (18).

The role of interest groups in face of the Commission have been remarked by the scholars. Caporaso maintains that proposals emerging out of a subtle interaction between the aims of Commission Members, the options and constraints provided by the Treaty, the position of national "elites", and the influence of interest groups, and that immediately after the proposals emerge, and before them go to the Council, the interest groups enter into another phase of collaboration. Finally, he thinks that the

latter phase of intensive Council-Commission bargaining is simply too rapid and too secret for groups to play a role" (19).

Thus after considering this process, it does not seem that the influence on European institutions can be so effective as the outcomes show it to be. Therefore there is a "grey zone" where interests at stake play their very important and decisive role. Perhaps Snyder's reflections on the issue could provide the answer: "...these interests in effect exercise a determining influence on the agenda and contents of policy-making and law-making. They do so in three distinct ways. The first, by far the least important, is through political participation by individuals, groupings and groups in the making of decisions on key issues. The second is by non-decision making: the practice of limiting the scope of actual decision-making to "safe" issues by manipulating the dominant Community values, myths, and political institutions and procedures. The third does not require the existence of grievances or disputes, nor does it necessarily occur through decisions. It is by institutional control over the political and legal agenda" (20).

We have seen how the EEC decision-making processes evolved in response to organizational and contextual needs, and we have briefly sketched out the role from trade associations and group of firms. Organized groups tend to be strongest in industry and agriculture, weaker in labor, and weakest in consumer organizations. Thus, the European interest groups have interests that are too narrow to engage most people and as such are often unopposed. Therefore, the warnings from the scholars against their influence on the European decision making processes are still relevant: "...few will perceive the group as threat to

their interests...since they are functionally specific, they present the possibility of not leading to higher degrees of integration" (21). And McGee and Weatherhill: "...vested interest of trade and professional organizations seek to delay the creation of the Single Market" (22). While it is true that, many times, interest groups and organisations act also in the Community interest, it has to be underlined that the EEC structures do not allow too much room for the representation of all interests at stake, in particular as regards those of the weakest parts of society.

NOTES

- (1) Snyder, F.: Op, citted in (4), Page 45.
- (2) Harrop, J.: "The political Economy of Integration in the European Community"; E. Elgar Publ.; England, 1989; page 22.
- (3) see Snyder, F.: op. citted in (4), page 60.
- (4) Lindberg, L.N.: "The political Dynamics of European Economic Integration", Standford University Press; California, 1963; page 97.
- (5) Snyder, F.: "New Directions in European Community Law" (Fragments of a Baseline. Some themes in EEC law); Journal of Law and Society. Vol. 14; number 1; 1987. page 172.
- (6) Reports; P.E. Doc A 2- 39/88 ; (7/4/88) 01/ pages 19-20.
- (7) Judgment of the European Court, 5/7/1977; case 114/76; ECR, 1977 I.
- (8) Opinion of MR. Advocate General CAPOTORTI, delivered on the 7th of June, 1977. ECR, 1977 I; page 1228.
- (9) Snyder, F.: Op. citted in (4), page 60.
- (10) Caporaso, J.: op. citted in (2), pages 24, 25.
- (11) Cooper, A.E.: "The protein link: complexity in the US-EC agricultural trading relationship" . Journal of European Integration, 11 (1987), 29; pages 38 ss.
- (12) Berger: "Introductions to Organising Interest in Western Europe: Pluralism, Corporatism and the Transformation of Politics"; in S.D. Berger , ed. (1981).
- (13) See report of the UNICE. Part B - I/2 (1990) Brussels.
- (14) Kirchner and Schwaiger: "European Interest Group Organizations"; 1981: p.38-40.
- (15) Lindberg, L.N.: Op. citted in (16); pages 28, 29.
- (16) Caporaso, I.: op. citted in (2) pages 29-30.
- (17) Kirchenr and Schwaiger; 1981; op. citted in (34); p.48.
- (18) It seems that the Commission does not have a consistent idea of how to organize the advisory committees into its policy-making process and there is a lack of overall approach to the appointmetn of members. Ibid; 1981; p. 123-124).

(19) *idem*; pages 44-45.

(20) Snyder, F.: *op. citted in (4)*; pages 61-62.

(21) Caporaso, I.: *op. citted in (2)* page 50.

(22) A. MCGee and S. Weatherhill: *op. citted supra*; page 578.

CHAPTER III: THE ROLE OF BANKS WITHIN THE DECISION MAKING STRUCTURES OF THE WESTERN SOCIETIES

A. General Considerations:

"...L'Europe des banquiers est elle souhaitable, possible, depuis longtemps réalisée ou utopique?... La réponse est affirmative, sous réserve de ne point y voir l'organisation d'une internationale à tendance cryptogamique, mais la suite indispensable de l'aménagement de l'espace économique et commercial dégagé par le traité de Rome..." (1).

The words above from Gavalda set the issue, always controversial, of the rôle of banks, both in its positive (their contribution to the creation of welfare economic conditions), and its negative feature (their aim of being for ever the creators of the "rules of the financial market"), within the western societies.

But it is the former feature the one which raises concerns within the scholars. For example, Cohen asks: "...Perché la Comunità Europea è incapace di raggiungere una formale integrazione finanziaria? In tempi di rapida innovazione, di derogolamentazione, e di mutamento strutturale in mercati funanziari globali..." (2). Two reasons seem to be in the basis of the answer: first, the position of governments facing the increasing development of the financial international markets integration; secondly the rôle which is being played by both the political and economic interest groups within the decision making processes on the issue (3). In order to analyze the former one,

scholars agree on both the main feature of banks' behaviour and its consequences.

If understanding policy demands not only a description of the visible arguments which bring it about but also an examination of the submerged mass of customary assumptions on which it rests, understanding the politics of banking thus requires a sketch of the way historical experience produced a unique pattern of politics.

How do credit institutions behave within the western decision making structures on the issue? Porzio defines one of this features of banking behaviour as an "endogenous" tendency to organize the financial market in terms of concentration; "...nel senso che in tutte le attivita economiche inserite in un'economia di mercato vi è una tendenza alla concentrazione e/o all'intese fra produttori e che probabilmente quest'esigenza si manifesta soltanto prima e con maggiore intensità nel mercato del credito data la funzione centrale che assumono le attività creditizie..." (4). This feature is stressed by Belli who expresses his conviction on the natural tendency of banks not to accept the rules of free competition (5). This behaviour derives from oligopolistic structures which guarantee an "homogenous" and "centralized" way of control over the financial market (6). This situation finds support in the political intervention through legislative channels (7). Much more, the legislation enacted by the State in order to regulate the most important features of the financial market, is simply a consequence of the internal necessities of credit institutions in order to safeguard their

own interests. As Arcucci states: "... la costante tutela della liquidità, intesa quale valore essenziale della gestione bancaria, travalica non solo gli interessi della singola impresa, ma anche quelli dell'intero sistema bancario" (8). This view is shared, among other, by Saraceno (9). Thus it seems that the external rules governing financial market are only the consequence of the internal necessities of the credit institutions (10). Puccini describes the consequences of this behaviour within the political structures of the western societies with these terms: the Ministry of Finance (or Treasury) plays the political rôle within a very tiny room; technical decisions are enacted by the governor of the Central bank; thus, credit institutions exercise lobbying on both instances in order to implement their aims despite the necessities of the whole social context (11). Therefore, the regulations of both the financial market and the monetary activities become a complex dynamic in which economic rules, political and interest groups form a unitary issue (12).

Similarly, Goodman writes: "...la politica monetaria può essere un utile strumento per quei politici in carica che desiderino influire sulle condizioni economiche in tempo di elezioni" (13). But also the rôle of the Central Banks can be questioned in terms of its independency: "... Quali sono le cause di questa caratteristica conservatrice che pervade le banche centrali?.. Questo problema può essere meglio compreso mettendo in reslato i consolidati legami tra banca centrale e comunità finanziaria (14). Woolley has also stressed this lack of independence of the central banks, stating that in the western countries, the creation of the Central Banks do not aim to preserve of macroeconomic instability but mainly to serve to the interest of credit institutions..." (15).

One of the consequences derived from this lack of independence is the policy against inflation currently shaped by the Central Banks of western societies (16). Similarly, Bingham (17).

Other consequences to be remarked are stressed by some authors; f. ins., Moran, who argues that "Prudential regulation" is an example of how the Bank of England connections with bankers were shaped by the informality and social cohesion of the City (18). Or, Grant, who shows how different were the politics of banking from the politics of economic policy in general, and mostly as regards the role of the state in "industrial rescues" in the 1960s. and in the 1970s. in the United Kingdom (19). Similarly, Artis, as regards the shaping of monetary policy (20).

We can thus conclude that the rôle of banks within the decision making structures of the western societies must be weighed in the same balance as the political interest. Much more, it seems that banks play the main rôle in the background while both civil servants and politicians do not develop a very important rôle on the issues despite being the real executors of the monetary and financial measures. This seems to be also the opinion of scholars as Moran, who says that the feature which have marked the policies of the banking community are three: "Informality, privacy and freedom from partisan political argument" (21).

Thus, this situation seen from a European perspective necessarily influences the dynamic of the financial harmonization process. A double axis action can be found in the behaviour of credit institutions within western societies. The first relates to national behaviour; the second to the European Economic Community: both are correlatives and interpenetrating. A clear example of this interpenetration can be found in the words of the governor of the Italian Central Bank, which express, from the national perspective, the main features of the basis supporting the European Financial Integration process: "...bisogna condurre l'intermediazione bancaria al punto di combinazione ottimale fra efficienza e stabilità...solo un'azione coordinata di vigilanza prudenziale e strutturale è in grado di realizzare questo risultato..." (22). We shall analyze this issue in the next section.

B. The way banks exercise influence within the EEC decision making process. A historical approach:

"...car, et nous insisterons tout particulièrement sur ce point, l'Europe que nous fabriquent les disciples de MM. Schumann et Monnet est, d'abord, celle des financiers et des hommes d'affaires" (23). The statement above is an introductory reflection to the study of the historical evolution of the influence of banks in the legal system of the Community. As already noted at the beginning of this work, the EEC Treaty does not contain specific provisions for the creation of an integrated financial system. Much more, as it has been explained before, it was not but until 1973 that, with the enactment of the Directive of the 28th of June, the first steps towards the integration have been taken.

Several reasons were also given before in order to explain such a situation. Another one can be added. The EEC Treaty was born within a context of "Pax Bancaria" (from the early thirties to 1973), in which the main features were the high profitability of banking activities, the light control on the part of the supervisory authorities, financial crisis without international consequences, etc.

Therefore, scholars seem to agree in giving to credit institutions the key which opened the door of the integration process. Coston explains the period of sixteen years between the enactment of the EEC Treaty and the 1973 Directive, as a period

of time in which no other new measures were taken because of the necessities of the internal politics of credit institutions (24). It was only after the consolidation of the first stage (related to the basic conditions for the creation of the Common Market), that new objectives, both socioeconomic and financial, become the issue: "...la première étape intéressait surtout les mesures douanières et de contingentement, dont les effets ne se feront sentir qu'à la longue. En raison d'une conjoncture économique particulièrement favorable, cette première étape est franchie ...le passage à la seconde étape va accentuer le phénomène de la concentration..." (25). Lefour and Lagumina share the same view as regards the importance of market strategies based on "concentration" (26). Thus, it has been argued, the 1973 Directive was the consequence of several factors not necessarily linked to political or social aims: "...la concurrence des banques américaines et, les besoins de financement des sociétés multinationales..." (27).

Two kind of reasons, both technical and political, were the basis of this movement towards concentration. The technical ones can be summarized as follows:

a) "...faire face à des besoins de capitaux et de services sans commune mesure avec ceus auxquels ils devaient faire face auparavant..."

b) "...fournir à des sociétés multinationales trois types de services: gestion de trésorerie, appui financier, assistance financière..." (28).

The political reasons are related to the importance of the historical links other than for technical reasons, between the most important credit institutions of Europe: "...A de très rares exceptions presque toutes ces banques sont liées entre elles par des intérêts communs, par des objectifs très voisins et, dans de nombreux cas, par des unions personnelles et des participations..." (29). Similarly Guerrieri and Padoan (30).

The consequences of this pressure were reflected in both the quality and the quantity of the harmonization measures enacted by the Community. First, the only measure enacted by the Council, the 1973 Directive, clearly served the financial strategies aimed by the credit institutions. In fact the main objective of this Directive was the recognition of national treatment, which facilitated the above process of "concentration" between the biggest banks of the Community.

Secondly, as has already been said, the 1971 and 1972 drafts of a European Banking Law (31) did not reach their final stage. Despite their highly technical content and due to the wide range of objectives which they intended to regulate, the Banking Federation of the Community, (and the national banking organisations), pressed, together with the majority of the governments of the Member States, against the enactment of the projects.

The 1977 Directive, was only a "framework directive" (32), in which control was preferred to freedom. Thus the Directive summarized and unified measures in order to guarantee the

financial soundness of the credit institutions after the 1973-1975 economic crisis. Porzio set both the reason for its enactment and its content within such a difficult economic context: "...Ma è proprio nel 1973-74 che comincia la prima serie di crisi bancarie: Banca privata in Italia, Herstattbank in Germania, la Franklin Bank negli Stati Uniti d'America..." "...dovviamo collocare la direttiva in questo contesto..." (33). It is now generally agreed that the credit expansion of the early 1970s. stimulated imprudent lending by banks which contributed to both the financial crisis of 1974 and the 1975-1976 great inflation (34). Therefore, the 1977 Directive was the solution to problems which despite being economic in origin were also failures of supervision and regulation. The 83/350 and 86/635 EEC Directives, (35) were merely corollaries to this aim.

Roth remarks the influence of credit institutions strategies on the evolution of the harmonization process stating that business circles concerned with the provision of interstate services (i.e., banking, insurance, the professions), have shown only a relatively limited interest in an expansion of the domestic markets to form a unified internal market, "and that where such an interest in expansion exists, it is considered more advantageous to take the course of establishing branches and / or acquiring subsidiaries in the markets of the Member states concerned..." (36).

It can be assumed that not only complexity of the subject but also this lack of interest on the part of credit institutions is one reason why it has not been possible to reach more satisfactory results up to date.

Therefore, we can summarize the banking harmonization process prior to the eighties with these words from Mezzacapo:

"...le direttivi concernenti gli enti creditori non hanno inteso regolare l'attività bancaria sotto un profilo operativo, essendosi occupate piuttosto delle condizioni per l'accesso a tale attività, della eliminazione delle discriminazioni fondate sulla nazionalità, del consolidamento della situazione finanziaria de un ente creditizio con quella degli enti ai quali esso partecipa..." (37). A view which is shared by Roth when states that, to date, the thrust of efforts to achieve co-ordination has been directed no so much at the approximation of conditions for the exercise of an activity as at the development of mechanisms for crossfrontier administrative co-operation, with a strong shift to the principle of home country control, accompanied by the mandatory recognition of certificates issued by the competent authorities in the country of origin (38).

Against this historical framework of the relations between the banks and the ECC financial integration process, the question remains as to how do banks influence this process, mainly as regards measures related to the completion of the internal market.

NOTES

- (1) Gavalda, CH.: "L'harmonisation des législations bancaires"; (Communication faite à la branche française de L'International Law Association, de 31 mai 1969).
- (2) Cohen, B.J.: "L'Integrazione Finanziaria Europea e gli Interessi Bancari Nazionali", in "L'Economia Politica dell'integrazione Europea: Stati, Mercati e Istituzioni". Sor. Ed. IL MULINO. Bologna. 1988. p. 233.
- (3) See, on this way, Goodman, J.B.: "La Politica della gestione monetaria in Francia, Italia e Germania: 1973-1985" in, "L'Economia Politica...", op. citedx supra. p. 299-300.
- (4) Porzio: "Il Governo del Credito"; Napoli; 1976; p. 17.
- (5) Belli, F.: "Funzione del Credito", in "Credito e Moneta"; Milano; Giuffrè Editore; 1982 p. 16-17.
- (6) Belli, F.: op. cit. in (5); p. 17.
- (7) Belli, F.: "Banca e industria fra le due guerre", in A.A.V.V; Vol. II; p. 203 ss; Roma, dicembre 1980.
- (8) Arcucci: "La liquidità"; MILANO; 1970; P. 244.
- (9) Saraceno: "La banca di credito ordinario"; MILANO; 1949; P. 88.
- (10) Belli, F.: "Funzione...", op. cit. supra. p. 36.
- (11) Puccini, G.: "Partiti e Riforma bancaria"; in Credito e Moneta: op. cit. supra; p. 73.
- (12) Hodgman, D.R.: "The Political Economy of Monetary Policy: National and International Aspects". Boston; Federal Reserve/ Bank of Boston; 1983; p. 79
- (13) Goodman, J.B.: "La Politica della Gestione Monetaria in Francia, Italia e Germania: 1973-1985"; p. 313.
- (14) Goodman, J.B.: "La Politica..."; op. cit. supra.pp.337-338
- (15) Woolley, J.: (1984); 319, as citted by GOODMAN. op. cit. supra; p. 338.
- (16) Lombra e Witte: "External Pressures and the Operations of the Fed"; 1982; p. 211-232.
- (17) Bingham: 1985; 48-49.
- (18) Moran, M.: "The Politics of banking". McMillan Press LTD. London; 1984; p. 19

- (19) Grant, W.: "The Political Economy of Industrial Policy". London. Butterworths; 1982.
- (20) Artis, M.: "Foundations of British Monetary Policy". Oxford. Blackwell; Edits. in 1965 and 1981.
- (21) Moran, M.: Op. cit. supra; p. 22.
- (22) Speech to the International Conference for the Supervision of Credit Institutions. September, 1984.
- (23) "Revue d'Economie Politique", numéro spécial de janvier-février 1958, consacré au Marché Commun présenté par M. Jacques et édité par MM. René Courtin, Puierre Ori, Francois Perroux, etc...
- (24) Coston, H.: "L'Europe des Banquiers" Paris; 1965. pp. 24-25.
- (25) Coston, H.: ibd. supra. p. 25-26.
- (26) Lefour, A. and La Gumina, A.: "Banques Europeennes: l'heure des rapprochements"; ENTREPRISE: 819, 22 mai, 1971
- (27) Lefour, A. and La Gumina, A.: ibd. op. cit. supra. p. 61.
- (28) (idem); ibd. p. 69.
- (29) Coston, H: ibd; supra; p. 106.
- (30) Guerrieri, P. and Padoan, C.: "Introduzione to L'Economia Politica..." Op. cit. supra
- (31) FB, CEE: "Cinquième Rapport (1971-72), Brussels. 1972, pp. 15-16.
GC, CEE: Rapport (1971-1972). Brussels. 1972, pp. 44-45.
- (32) Vide, Usher, J.A.: "Financial Services in EEC Law", ICLQ; January, 1988. vol. 37. pp. 148-149.
- (33) Porzio, M.: "Libera circolazione dei capitali e disciplina Comunitaria delle banche"; MILANO; 1987; pp. 5 y ss.
- (34) See Laidler, D.: "U.K. inflation and its background: a monetarist perspective", in Inflation in the U.K. Manchester U. Press; 1978, pp. 52-74.
- (35) OJ, 1983, L 193/18
OJ, 1986, L 372/1
- (36) Roth, W.H.: "The European Economic Community's Law on Services: Harmonization"; CML Rev.; 25:35-94; 1988; p. 38.
- (37) Mezzacapo, V.: "Presentazione" to the "Libera circolazione...", cit. supra; pag. IV.
- (38) Roth, W.H.: Op. cit. supra; p. 48.

CHAPTER IV: THE PRESENT SITUATION

We are going to focus on the increasing activity of banks in order to apt the measures envisaged for the completion of the internal market to their particular situation.

We try to analyse both national and Community levels of pressure and to assess the impact of both on the legislative action of the EC regarding 1992.

In order to analyse more precisely the way through which pressure is brought, we have limited the research. First, we only discuss measures directly linked with the completion of the internal market. Secondly, we will only deal with the Banking Federation of the European Communities at the Community level, which include both private and state banks, and with the Asociación Española de Banca Privada (AEB, Spanish banking association) at the national level.

Because of the difficulties of dealing with the twelve national organisations, we have chosen the Spanish association as an illustration example.

Through the analysis of these two organizations and their activities we will try to answer the question as to why there is a duplication of efforts: concerning Community legislation both levels are maintained, even though they have close links between

them. We have advanced four hypothesis trying to explain why these two levels coexist.

Those hypothesis are:

1. There is a greater openness on the part of the Community institutions towards national pressure groups.
2. AEB does not have confidence in Federation's ability to represent its members' views.
3. AEB finds the compromise solutions put forth by the Federation too weak.
4. AEB's views are not reflected in the Federation's decisions.

We have begun with the analysis of the legislation envisaged by the White Paper programe, with the methods of interest groups concerning community legislation and with the characteristics of BFEC and AEB organisations. This analysis was done through documents and through interviews with the main actors involved. This background has allowed us to investigate how those banking organisations press Community institutions using the same instruments, and to asses the impact they have on legislation. At the end of our research we will make an assessment of the reasons for the maintenance of both levels of pressure.

A. Aims of European banks in face of the internal market.

Special case of Spanish banks:

The starting point of the new banking legislation is the White Paper, which identifies six directives and two recommendations needed to complete the free movement of services in the banking sector. Afterwards, several directives and recommendations have been added.

The approach of the Commission in order to achieve the liberalisation of banking services is based upon three principles:

- "introduction of a single licensing system for financial institutions permitting both the establishment of branches and the provision of services throughout the community;
- common rules on the supervision and regulation of financial institutions;
- the principle of home country control" (1).

These are the basis of the understanding between the Commission and the banks, since these are the main support of Commission's aims.

Nevertheless, the most important issue is to establish the exact degree of harmonization the rules of supervision and regulation of financial institutions require. Here, everything

depends on particular legislative traditions, but also on the material conditions of banks. The cleavage between those partisans of a low approach may be explained by a double axis: the first would oppose banks coming from a culture of high degree of economic freedom - U.K. is the clearest example - and banks coming from a mercantilist culture, characterized by a high degree of regulation and governmental intervention, like the French ones. The second axis would oppose the most obsolete banks, which now survive thanks to national restrictions, with excessively high prices of services. Roughly, we could say that in the first group would be British, Luxembourg and German banks, while Italians, French and specially, Greek and Portuguese banks would be in the second one.

The result of the 1992 challenge will be a drop of prices of at least 10 percent; (in some countries, such as Italy and Spain, almost fifty percent), and an increase of competence (2). Now it seems clear that these conditions will lead inevitably to a turmoil in the banking sector, which will mean more bank failures and hostile takeover bids. Because of this new situation, several governments that coincide on their will for a more dynamic banking and financial services sector, now do not want the greater turmoil and risk which will accompany it. And they are pressing for more regulation and more protection against non-Ec banks. Perhaps, in a near future, banks that feel themselves not prepared for the new challenge, could demand more regulation. For the moment, banks are still engaged with the Commission plans. Their demands are addressed to their

governments in order to avoid the excess of regulation and intervention which could place them in an adverse position with other european banks.

In the financial services sector, a great advance is already done. The decision of free capital movements has been taken, and it will constitute the main support of the free movement of financial services. Also, every directive foreseen in the White Paper has been presented by the Commission to the Council.

Consequently the work of banking lobbies concerning the single market is near to finish, and now it only deals with punctual questions. The interest of banks concerning the single market is now placed on the activities to get a good position before 1992 (3), and this affect mainly private activities and national reglamentation. Therefore, the banking lobby's interests at the EEC level are being displaced to new areas susch as consumers proteccion and payment systems.

The second banking directive

There were many objections and difficulties of interpretation set down by banks. These concerned mainly the definition of credit institution, the list of business which is integral to banking and shall be included within the scope of

mutual recognition, third country institutions and participation in non-banking sectors.

The directive takes the definition of financial institution of the first directive (77/780/CEE). Banks demanded an extended definition, based on a functional criteria. Their arguments were that the existent narrow definition provokes discrimination among banks and other institutions making the same kind of operations. According to the banks (4), in the preliminary project of the Commission those demands were duly taken into account. However, the final version of the Commission proposal returned to the definition of the first directive.

Banks have also asked for an extended list of activities which are submitted to the principle of mutual recognition. They wanted services of investment banks, assurances brokerage, etc. to be included. This demand has not retaken neither by the Ecosoc, nor by the Commission.

One of the main points of the debate was the problem of reciprocity concerning third countries' institutions.

Banks asked for a more clear reciprocity clause. The aim was to get the same conditions for the community institutions in third countries, by delaying the license till the verification of reciprocal treatment in the home country of the third institution. This demand was retaken by the Ecosoc (5), who articulated it restricting the access of non-EEC institutions to

the single market of financial services. This coincidence of points of view was due to the fact that the "rapporteur" of the "avis" concerning the Second directive was Mr. J. Pardon, director of the Belgian banking association and representative of the banks in the Ecosoc (6).

Also, there was a great controversy concerning the proposal's intention to limit bank's participation in the non-banking sector. The text's provisions would impose a limit on bank's participations in a particular commercial or industrial undertaking to 10% of their own funds. The reason behind this was that the banking authorities responsible for the supervision of the bank's activities would not be in a position to assess the risks of such ventures.

However, the positions of banks were different according to the home countries. German banks are very heavily involved in such participations, while bank participation in non-banking sectors is prohibited in Italy and Belgium. It was impossible to find a compromise solution in the Federation. This allowed national institutions to express openly their positions.

The Spanish banking association had the faculty to push towards a greater limit and has done it. The results of its pressure, added to other national associations'one, have been positive. Thanks to this pressure, an amendment was approved by the Parliament increasing the limits laid down in the directive, which reached 20% and 60% respectively.

The approved directive has finally established the limits to credit institutions' participation in non-credit and non financial institutions at 15% and 60% (for an undertaking of, and for the total value of non-banking participations, respectively) although member countries can choose whether or not applying such limits to insurance companies.

Pressure developed by German and Spanish Banking associations has been very tough. The Spanish banking association points out the importance of pressure over the European Parliament to obtain such an increase of limits. However the strong position of the German government in favour of such increase has been maintained until the approval of the directive, even threatening that it would not approve the proposal of the Commission.

The own funds of banks must not fall below the initial capital required, although national authorities may allow a bank to restore its level of own funds in a certain delay. The condition which required all banks of the Commission's proposals to arrive at the level of initial capital of 5 million Ecus before December 31, 1996, has been substituted by a "standstill" clause in the approved Directive.

The core of the directive is in title IV (articles 18 to 21) devoted to "provisions relating to freedom of establishment and freedom to provide services". Those articles establish the scope of mutual recognition, organise the cooperation between the

competent authorities of the Member States, and set up the procedure for establishment and provision of services in the host country.

Therefore, the Internal Market (including "home country control") principles are included in the said articles. No banking association has made any demand concerning such principles, therefore articles 18 to 21 have passed unchanged through all of the decision-making procedure.

This is a demonstration of the strong consensus among the Commission, the Member States and banks to implement the Internal Market for financial services, existing discrepancies restricted in defining the characteristics of such an Internal Market.

Bank accounts

This directive claims for a harmonization on the form and contents of the annual accounts of banks and other financial institutions.

By the date of the White Paper, two proposals of the Commission had been presented already. The directive (86/635/EEC) was adopted on 8 december 1986. Agreement of banks and authorities and awareness of its necessity to complete the internal market allowed its adaption before the time expected.

Bank's branches accounts

The White Paper foresaw a directive on the accounts of foreign branches of banks. According to it, Member States are no longer able to oblige branches of banks whose headquarters are in another Community country to publish separate accounts branches will only have to supply the supervisory authorities with copies of the annual report and accounts drawn by their head office in accordance with the Directive on the annual accounts of banks.

Since this directive has been an important and old demand of European banks, its adoption has been welcomed by them.

This directive has been formally adopted, after the cooperation procedure, by the Council on February 13, 1988. The outcome does not differ in substantial aspects from the initial proposal of the Commission of 1986, reviewed on 1988 (7).

Mortgage credits

The White Paper foresaw a directive on the freedom of establishment and the freedom to supply services in the field of mortgage credit to be taken by 1988. The Commission proposal was modified in May 1987 in order to take into account the amendments proposed by the EP.

The aim of the proposal is to abolish "all institutional and technical provisions preventing or obstructing a credit institution from undertaking mortgage business throughout the Community (8). The approach of the Commission was that an approximation of the existing regulation would be a cumbersome exercise and it would serve no purpose. Because of this, it proposes the solution of initial recognition. Each country must allow credit institutions from other members states to apply their own domestic techniques in its market, even if such techniques do not comply with the rules of the host country.

Banks rejected this approach, and demanded a harmonization concerning the measures of protection of consumers and concerning certain monetary measures and special banking system particularities.

The opposition of banks was mainly against the articles 4 and 5, the key provisions of the directive. The results of this opposition have not been very successful since the amendments considered by the Commission have only a limited scope, and most of them are only improvements in presentation and in drafting.

More specifically, the Commission has maintained the provision obliging Member States to authorize the credit institution who have had the condition of competition distorted by the introduction (importation) of new financial techniques or to take equivalent measures. Banks argue that this provision means in fact a harmonization on the basis of provisions less

restrictive and it is contrary to the Single European Act which require a high level of protection for the consumers. Perhaps, national representatives in the Council will be more sensitive to these demands concerning the protection of consumers (9).

Reorganization and winding-up of credit institutions

This directive falls within the scope of the Council's work on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. But the Commission had proposed that a directive coordinating the role of bank supervisory authorities in these proceedings was necessary to apply it to the credit institutions. The Council working group responsible for finalizing the text of the Convention has recognized this was justified (10).

The proposal was based on the principles of unity and universality. The principle of unity corresponds to the principle of home country supervision. The principle of universality is on line with that recognized by the Second Banking Directive, as regards the free provision of services contained in its annex.

In the amended proposal (11) the Commission has taken into account several demands of the EP concerning the strengthening of schemes to protect depositors. In this way, the proposal now includes also a part of the recommendation on the establishment

of a guarantee system of deposit within the Community, envisaged in the White Paper.

This recommendation was adopted by the Commission in 22nd december 1986. (Recommendation of the Commission 87/63/EEC).

The proposal is now awaiting the Council's common position following Parliament's first reading.

The harmonization of the concept of own funds

The Commission presented in September 1986 the proposal of a directive on the harmonization of the concept of own funds. This directive was envisaged as a recommendation in the White Paper. The Banking Advisory Committee, when consulted, suggested that a recommendation would be the appropriate instrument. In spite of this suggestion, the Commission thought that the definition of own funds is "a cornerstone for much of the further work in the banking sector" (12), and consequently decided to propose a directive.

The Commission revised this proposal in order to take into account the amendments proposed by the European Parliament and the opinion of the Economic and Social Committee. The result was the amended proposal of 15.1.1988 (COM (88) 15 final).

Beside the lobbying done before the first proposal, the pressure by the banks after it in order to achieve a greater similarity with the orientation of the Bale Committee has not achieved important changes, in particular concerning the securities of indeterminate duration which banks wanted to be regarded as primary capital. After its second reading, the European Parliament rejected the "common position" reached by the Council at the December Finance Council meeting, because of a problem of "comitologie". Due to the fact that this common position was reached by unanimity, the directive was unanimously approved by the Council the 17th April 1989 without any substantial change.

Solvency ratios

The solvency ratios directive, closely linked to the own funds directive, has a great importance in the light of the desire to permitting credit institutions to provide services in Member States other than those where they have their headquarters, under home country supervision.

The directive wants to strengthen average solvency standards among Community credit institutions in order to protect both depositors and the stability of the banking system.

The proposal of the Commission, presented in April 1988 (COM (88) 149 final), was lobbied by the banks.

The main objective of the banks, according to the Federation was to avoid the possibility given to the national authorities of prescribing ratios over those fixed in the directive. This possibility envisaged in the first documents of the Commission effectively disappeared in the proposal. On the other hand, the banking lobby was not able to convince the Community authorities to reduce the weighting of 50 percent to the loans to individuals for the purchase of residential property, which, according to it, was excessive.

Banks which, according to national standards, maintain a high solvency ratio will not bear the drop of profitability that banks which have to increase their solvency ratio will have to afford. Third country banks, mainly off-shore banks, could benefit from lower solvency ratios which would reduce their necessity of capital.

The solvency ratios directive has been approved on December 18, 1989 by the Council of Finance Ministers (Ecofin) after some "comitologie" disputes and some technical changes.

Control of large exposures by credit institutions

This recommendation has merited few attention of banks and national authorities, because of its non-obligatory character and because of the big margins left to the credit institutions concerning large exposure.

The recommendation of the Commission 87/62/CEE was adopted in December 1986.

Other measures

Out of the directives and recommendations envisaged in the White Paper, there are many other measures which are objectives of banks' pressure. We can divide them into two groups: measures concerning non-banking sectors, but having large implications for banks, and measures derived from the White Paper programme.

Among the different measures, the following are specially important:

- 1) Legislative proposals for the final stage of the liberalisation of capital movements which include: the proposal for a directive for the full liberalisation of capital movements, the proposal for the amendment of the 1972 directive on the regulation of international capital flows and the proposal for a regulation amending and combining the existing two Community instruments which are available to provide medium-term balance of payments assistance (13). This programme means the achievement of one of the aims which inspired the creation of the BFEC. Because of this, the support of banks to the Commission has been very strong in this area.

2) **Fiscality.** This is an area in which the Federation is making a big effort, including a detailed study about the incidence of VAT of financial activities. The Federation's demand is to give them the authorisation to charge the VAT on their financial products by an amendment of article 13 of the sixth VAT directive, which let national legislation decide over this faculty. The Commission has not considered this demand, but just the opposite, proposing the suppression of this right of option of national legislation, concerning its programme of suppression of fiscal barriers.

However the AEB is strongly opposed to the demand of the Federation and several national associations (neither any document of the Federation, nor any people interviewed in the Federation mentioned this discrepancy).

Concerning the fiscality of capital it has been impossible arriving at a united answer of the BFEC to the demand of a single position in light of the proposal of the Commission ("Creation of a European financial area"; 4/11/1987, COM (87) 550 final). This shows again the difficulties for obtaining a common decision of the BFEC when banks position rely on nationality, and everyone tries to maintain its existing national regulation.

3) **The proposal concerning the definition of common technical features of the machines used to produce the new**

payment cards, envisaged in the White Paper in the chapter of new technologies and services, has been largely contested by banks. Their arguments were based on the constraints that an excess of regulation would suppose for new advances in such a changing field. The Commission has been sensitive to these arguments and, as a result of that, has made the decision of transforming the envisaged directive on a recommendation (14).

4) The proposal for a directive on insider trading (15), which has been recently adopted as Council Directive (89/592) (16) was supported by banks, but also it is seen as a possible constraint for operating in the financial market if the result will be an excess of regulation.

5) But one of the most important actions in which we can appreciate the negative attitude of banks towards higher degrees of protection of the consumer rights, has been the opposition to the Commission Proposal of the Electronic Funds transfer Directive (17). Banks argued that the proposal endangers future technological developments on the subject. But both the Commission and the BEUC (Bureau Européenne des Unions des Consommateurs) rejected such an argument. What the proposal intends is to avoid responsibilities to the owner of an electronic payment card who uses it regularly and could be subject of illicit transactions. This proposal will fix a unitary regulation on the subject. In fact, Denmark is the only member state

of the Community which has enacted a regulation protecting the consumer interests.

The interest of banks is considerably larger than shown here, extending to other measures. But the main effort is done in the areas which we have dealt with.

B. Objectives of banks pressure:

The main Community objective on which European banks want to have influence in order to achieve their aims is the legislative process. This means pressure on the four Community bodies involved in that process: The Council which adopts the decisions, the Commission which has wide powers to submit proposals; and two consultative institutions, the European Parliament, a political body representing the citizens of Europe, and the Economic and Social Committee, a socioeconomic body representing social and economic interest groups within the Community.

The Council

As I said before, the Council of Ministers is the most powerful single institution in the Community's structure but it is, at the same time, the most difficult to permeate. Direct representations to the Council are not easy to arrange and may not be the most appropriate way of gaining the attention of Community Ministers and diplomats. A more indirect approach, by lobbying government departments in the national capitals may produce better results.

The Council of Ministers has the final word in most decisions. Its deliberations are extensive and crucial to most of the proposals that are placed before it. But all Council

meetings are held in secret, the agendas are rarely made public in advance and access to the Council as a body is almost impossible for those who wish to press their claims and concerns. Few times, does the BFEC ever get the chance to meet the Council of Ministers even informally.

The objective that the BFEC can hope to achieve at the Council of Ministers stage in the Community's decision-making process is to find out what is happening behind the closed doors of the Council. The contacts that they have been able to build up over time in Brussels are with diplomats in the Permanent Representations, officials of the Commission that participate in the Council of Minister's discussions and journalists reporting Community business. Through them the BFEC obtain information about the negotiating stances adopted by each member, the main points of difficulty, and the possible compromises and trade-offs that are being floated. The BFEC must ensure also that their officials are on hand, in the corridors outside the meeting rooms, for any government official to consult if he so desires.

However, what the BFEC discovers about the secret discussions in the Council can prove to be vital leads to the nationally based pressure groups which together make up the membership of the BFEC. The most effective lobbying almost invariably takes place in the national capitals, where national pressure groups have to lobby. These officials will themselves be glad to obtain the reactions of the main parties at national level to be affected by a particular community proposal. The more

technical the nature of the proposal the more government officials once the Council of Ministers' negotiation begin.

Most of the work at the Council of Ministers stage is done in the working groups convened specifically to look at individual proposals within the Coreper. Each Member State is intitled to send a delegation of between three and five people to each working group meeting. Such a delegation would typically comprise one person from the ministry of External Affairs, and one person from each of the functional ministries or government agencies with an important interest in the subject matter. The External Affairs representative will commonly be draw from the ranks ot those it has posted in Brussels at its Permanent Representation. The working groups will begin a cycle of meetings, in so far as the availability of rooms and interpreting facilities allow, on a monthly or bi-monthly basis. These experts on many occasions find it difficult to resolve their conflicts. Where deadlock is reached, the matter will be referred to the Coreper for a political solution thrashed out by the diplomats. If detailed technicalities have to be understood before a workable compromise can be put forward, then Coreper will pass the problem to and ad hoc committee of attachés from the Permanent Representations. A particular draft piece of legislation may pass backwards and forwards between Coreper, the working groups and the ad hoc committees several times before an outline agreement is reached. At this stage, the BFEC are very much on the outside of the decision-making process and only those with very close relations

with the officials involved can expect to have information about it.

When the working groups come up with a text which they can recommend to Coreper for approval, the job of the latter is to narrow the areas of disagreement down to the political level of government ministers. When the full Council of Ministers meets, Ministers will find many measures for decision on their agendas, and only matters starred "B" will be discussed in detail at this level.

We will see later how banks do exert pressure in such an important Community institution. We will consider what we have just said: There is little scope for direct lobbying because the Council meetings are still held in the manner of an international conference with decisions being taken in many areas behind doors and out of the public view. However, the national interest groups have chances to exert influence via national ministers or other national representatives all along the Council's negotiation process.

The Commission

As said before, there are big opportunities for lobbying the Commission. Over the past fifteen years, the Commission has looked for the support of interest groups in order to strengthen its position within the Community. Also, the Commission and

European pressure groups need and use one another as an information source. The BFEC, and often national pressure groups too, need to obtain information from the Commission about its policies and operations and about its future plans. Through access and the opening of bilateral relations the BFEC hope to influence the attitude and behaviour of Commission officials whose work touches on their own field of concern. The Commission for its part needs information about the variety of positions and aspirations of the BFEC and national pressure groups, as well as factual information which may be slow in arriving from national government sources.

There are also wider reasons for this Commission's friendly stance towards pressure groups. The Commission wants to extend the Community's influence below the level of national governments, which are its principal interlocutors in the EC decision-making process. In addition, the Commission and pressure groups may find it is mutually beneficial at times to by-pass the national government level on issues on which national governments are not prepared to give ground. In any case, the Commission will as a matter of policy always prefer to talk to the BFEC with an agreed viewpoint than have to discuss the same topics separately with national pressure groups.

These closed relations between the BFEC and the Commission are explained in that power of initiative we have mentioned. The EEC Treaty in particular not only calls upon the Commission to flesh out specific common policies, but also to develop other

policies which give effect to the principles laid down in the Treaty. So in practice the duties of the Commission extend far beyond the role that is traditionally assigned to the civil service in each Member State: it has not only an administrative role but a political one as well. But policy initiation is not in any case the only task the Commission has to undertake. The Commission also has substantial powers in the field of the management and enforcement of existing policies, areas which can be of equal interest to the BFEC. The Commission can take independent action to enforce Community laws and obligations without needing the approval of the Council. And in some areas the Commission has been given delegated powers by the Council, for example in the application of the competition policy.

The Commission makes particular use of these so-called experts in many aspects of its work. The BFEC may well be able to advise a Commission official in his search for outside expertise. This is an excellent way of contacting the Commission. However, the main problem for the BFEC is to know where to go to see the relevant officials. Overlapping interests are present among the directorates-general of the Commission. Incoherent and inconsistent policy stances can easily emerge from the Commission because directorates-general make policy decisions separately rather than jointly. Responsibilities often do not fall clearly into the lap of just one directorate-general. Battles then won by the BFEC in one directorate-general can all too easily be blocked by another directorate general.

In the case of European bank's interests, they are mainly dealt within the following directorates-general: DG1 (external relations), DG2 (economic and financial affairs), DG3 (internal market and industrial affairs), DG4 (competition), DG11 (consumer protection), and DG15 (financial institutions and taxation). The European banks must have occasional contact with these six departments. Obviously, their main contacts at a technical level are with DG15. However, the extra community interests of banks must be reflected in contacts with DG1; when the dominant issue is freedom of establishment for banking institutions there must be contacts with DG4; and the increasingly important subject of the vigilance of the quality of banking services explains the contacts with DG11.

The European Parliament

In a first and rough approach to the question of the role of lobbies in EP, two ideas apparently contradictory are frequently repeated: members of EP are not a relevant target of pressure, and EP policy-making is strongly dependent on European and national lobbies. This feeling, specially perceivable among the Commission's officials, must be analysed.

Concerning the first idea, there are two reasons which can explain the lack of interest of lobbies on the EP: its lack of power and, specifically, its inability to identify specific strategic political objectives commanding a consensus throughout

the Parliament. However its growing political influence and the importance the Parliament has in the Community budget are making it more and more a focal point of the BFEC. After the direct elections and, moreover, after the procedure modifications introduced by the Single European Act, the BFEC is turning to the EP.

The BFEC is mainly on lobbying the EP because of its budgetary power and its ability to influence the Commission, specially when cooperation procedure is followed. Also, important are the ability of EP to mobilize support and the ability to make the Commission pay attention to a certain point. But, EP is interested on getting in touch with the BFEC. According to Kirchner (18) there are several reasons because of which the EP needs the support of the BFEC: a) to obtain specialised information from the BFEC and to draw on the expertise of the BFEC, and b) to secure satisfactory consultation with the BFEC, specially on budgetary questions, in order to draw on the BFEC as a source of support or to win it as an allied vis-à-vis the for the Council.

So we assist to a growing role of the EP as a target for the BFEC activities. This trend will continue if, as it looks feasible, the EP continues increasing its powers.

In the field of community action we deal with in our research, the importance attached by the BFEC to the EP should

be great, because the cooperation procedure is followed in all measures envisaged in the White Paper, thanks to the art. 100 A.

The second idea is the dependency of the EP on the interest groups in general and the BFEC in particular. There is a general trend in all Western Europe Parliaments to be seen as the main way of expression of interest groups. The loss of importance of Parliament in modern policy-making is transforming them into fora of discussion, in which interest groups have to intervene.

However, in national Parliament the outcomes of policy decisions continue being controlled by political parties, which have increased their strength while in European Parliament the weakness of political groups makes its political outcomes to be seen as determined by the will and ability of strongest lobbies.

The excessive dependency of the EP vis-à-vis on the main interest groups is remarked by many bureaucrats of the Commission. Recently, in a private conversation, a former general director of the Commission expressed this idea, based, according to him, in the lack of enough information by the members of the EP and their inability to collect it (19).

This argument is rejected by euro-parliamentarians. According to a Spanish parliamentarian, head of his political group in the EP, the European Parliament is the most powerful parliament in order to get information, thanks to its ability to

obtain it from the Commission and the Council and thanks to the high level of parliamentarian's background (20).

Concerning the activities of national lobbies vis-à-vis Spanish europarlamentarians, it is important to notice that the Spanish electoral system does not permit a closer relation between parliamentarians have no interest on listening to national or trans-national lobbies, but they prefer to rely on their capacity, less dangerous than following advises of not well known groups.

The ways used by the BFEC to penetrate the EP may be divided in two groups. According to Sidjanski (21) there are 2 ways: the first is to penetrate inside the EP, helping certain representatives of the interest groups to be elected; the second consists in a group of actions, trying to influence EP outcomes.

The first way is very often used in the EP, specially inside several political groups, like the gaullist one. The financial and banking sector is specially well represented, and mainly among British, Benelux and Italian parliamentarians.

The action developed by the BFEC are: studies or surveys, letters or direct contacts and institutional declarations. A remarkable way of access is through the mass media, even though banks do not often use this way.

In this field of actions, banking lobbies have an added obstacle, due to the bad image usually associated to the influence of big banks. Many parliamentarians avoid carefully to show their relations with the representatives of banks, in order not to be seen as spokesmen of capitalists.

Concerning EP, the pressure objectives of interest groups are individual parliamentarians, groups and committees. The work of the banking lobbies is based on selective relations, because they are only concerned with certain decisions of a limited field. These lobbies, as well as others of the same size, tend to have contacts mainly with certain political groups, EP committees or "rapporteurs" rather than with most of them.

Banking interest groups have mainly contacts with individual members of the EP. The special structure of the EP, in which there is not a strict party discipline, makes the MEPs to be the most important target of pressure. It is clear that the easiest contacts are with MEPs with a banking background and belonging to the liberal or the democrat groups.

The banking lobbies are specially interested in the works of Economic and Monetary Affairs committee, which intervenes in the debates of all the directives proposed on the White Paper, submitted to the cooperation procedure.

Direct contacts between banking lobbies and parliamentarians rely almost exclusively on the activities of national interest

groups. The Banking Federation has, however, contacts with them as we will see.

The Economic and Social Committee

The main function fulfilled by the Ecosoc is not in the treaties. It is to create relationships between the EC institutions and the economic groups of the member countries. The Ecosoc favours consensus among different economic interests and gives a more practical approach to the measures envisaged by the Commission. It serves too to help the BFEC to reformulate their demands from an european perspective.

We could say that the Ecosoc is the "natural" way for the BFEC to express their demands. Because of this, they attach great importance to it.

The members of the Ecosoc are personally named and cannot receive any imperative mandate. However, and because of the little importance given by the other institutions to the opinions of the Ecosoc, many chiefs of credit institutions have been replaced by managers and high level employees, which implies a lost of independency (22).

Other Community institutions

The European Court of Justice.- The legal work of the Court of Justice, which interprets the law in full independence often creating new laws or developing existing ones, is closely watched over by representatives of the BFEC. There are no representations of European or national groups at the European Court of Justice, but several chairmen of the Ecosoc have visited the Court of Justice in Luxembourg.

Representatives of the BFEC deny any attempt to lobby judges of the European Court, whose independence is guaranteed in the treaties.

However some kind of indirect pressure is made concerning certain causes. This is through the intervention which Commission and Member States can do in every case. The BFEC can lobby those Member States or the Commission in order to present before the Court the intervention they want.

The European Council.- The lobbying of this body shows how the major European interest groups make their presence felt whenever they have even a slight possibility of exerting influence at the European level.

The influence is mainly exerted by the BFEC through the relatively regular meetings by the President before the meeting of the European Council.

The European Investment Bank.- Since the EIB is an instrument of European structural policy and has a significant influence on the grant of funds, banks in particular may have certain interests in having contacts with it. However, these contacts are never made through the banking associations.

C. Ways of pressuring. A case study: AEB:

Through BFEC

The BFEC organization.- The Banking Federation of the European Community was founded in June 1960. Its Secretariat is located in Brussels (rue Montoyer, 10). The Federation is comprised of twelve national banking federations from the Community countries as members - Association Belge des Banques (Belgium), Den Danske Bankforening (Danmark), Bundesverband deutscher Banken (Germany), Association des banques Helléniques (Grece), Asociación Española de banca (Spain), Association Française des Banques (France), The Irish Bankers' Federation (Ireland), Asosiasi Bancaria Italiana (Italy), Association des Banques et Banquiers (Luxemburg), Nederlandse Bankiersvereniging (Holland), Associação Portuguesa de Bancos (Portugal) and the British Bankers' Association (United Kingdom)- and the banking federations of five EFTA countries -Verband Osterreichischer Banken und Bankiers (Austria), Suomen Pankkiyhdistys (Finland), Den Norske Bankforening (Norway), Svenska Bankföreningar (Sweden) and Association Suisse des Banquiers (Switzerland)- as associate members. The total number of commercial banks represented by the Federation is 2.040.

Concerning the aims and objectives of the Federation, article 3 of its Statute states that:

"The Federation is an instrument of common action of the professional Banking Associations to assist in attaining, within the sphere of banking activity, the European aims laid down by the Treaty of Rome, without prejudicing the maintenance and development of relations of member associations with the banking establishments of third party countries".

The administrative structure of the Federation is composed of four main bodies: The Council, the Central Committee, the General Secretariat and the Consultative Committees. In addition, Temporary ad-hoc Committees may be set up. The scheme is the following:

Council	President
	2 Vice-Presidents
Central Committee	President
	General Secretariat
Temporary ad-hoc Committees	
President (one each)	Consultative Committee (10)
	President (one each)
	1. Financial Markets
	2. Juridical
	3. Competence
	4. Fiscal
	5. Banking Control
	6. Bank Accounts
	7. Consumer
	8. Mortgage Credits
	9. Payment systems
	10. Public relations

The Council defines the general principles of policy and action of the Central Committee. It is the ultimate decision-making body. The Council has a president and two vice-presidents. The president represents the Federation in legal matters and in all actions of civil life. He can only act in the name of the Federation with the consent and by delegation of the Council. The President convenes the Council and controls the actions of the Central Committee. The President is appointed by the Council from within for a period of two years. The two vice-presidents assist him and are not of the same nationality of the president. The actual president is Mr. Conrad J. Oort, from Holland, and the two vice-presidents are Mr. Jeremy Morse, from United Kingdom, and Mr. José Luis Leal, from Spain.

The members of the Council are usually Chairmen or Vice-chairmen of the national affiliates. The Council meets when summoned by the President and at least twice a year. With the exception of budgetary matters and the annual report, which is decided by a majority of two thirds. Decisions of the Council are taken unanimously. Each delegation is entitled to one vote.

The Central committee ensures the management and administration of the Federation. It supervises and is in close contact with the General secretariat. Its representatives are the managers of the national affiliates. It has a president who is currently the Italian Felice Gianni.

The General Secretariat is the permanent body of the Federation. It has a Secretary who is appointed by the President on the decision of the Council. The current secretary is the Italian Umberto Burani. The total personnel of the General Secretariat is thirteen people and is composed of assistants, consultants and secretaries/typists.

There are ten different Consultative Committees. Article 6 of the Internal Regulation of the Federation specifies that the Council may, after advice from the Central Committee, establish permanent specialised Committees. Each organization appoints one or two representatives. These Committees organise their own activities and appoint from within themselves, if they wish to do so, a Chairman, and a secretary and "rapporteurs". The Consultative Committees met between three to five times a year in the sixties and have met twice a year so far since the seventies, but may meet more times depending on activities in the Commission. They act as filters of the members' proposals and they base this function on the general interest of the associates and the strategy of the Federation. Three committees have existed since 1960. These are: the Judicial Committee, the Fiscal Committee and the financial Markets Committee, the Fiscal Committee and the financial Markets Committee. Today, there are also seven other Committees: Competence Committee, Banking Control committee, Bank Accounts Committee, Consumer Committee, Mortgage Credits Committee, Payment Systems Committee and Public Relations Committee.

The Central Committee may, subject to ratification by the Council, set up temporary ad-hoc Committees. The Central Committee defines their duties and duration and determines their method of functioning.

The Federation remains in permanent contact with the official departments of the European Economic Community while examining the problems which will occur for the banks within the framework of the Community. This is performed by the day to day work of the secretary and the staff of the Secretariat as well as by the activities of the Consultative Committees and the Central Committee. These two last bodies also coordinate as much as possible the positions to be taken and the proceeding of the member associations which bear upon European integration. They will favour a communal position of representatives of banks vis-à-vis international organizations by a study of the problems and exchange of views.

Considering the number of opinions annually produced by the Federation in which common points of view are presented, the Federation demonstrates, in spite of competition among banks, organizational cohesion. Solutions on which all twelve member affiliates of the Federation agree are easy to find. In general, it can be said that no fundamental difficulties have to be overcome in reaching decisions on policies (23). There are two clear different positions in face of the internal market: a group of countries- basically, United Kingdom, Holland and Germany -wants to go as fast as possible towards the complete

liberalisation of financial services, while another group - mainly, Italy and France - is, in general, much more reluctant to a very quick advance. In any case, the cohesiveness of the Federation as an organization is helped by the fact that only twelve organizations exist, and that these organizations are based in the twelve countries of the European Community (24).

There are no formal stipulations in the Statute of the Federation for some kind of "supranational competencies" vis-à-vis its member associations. Moreover, while Article 7 of the Statute specifies that the Council decisions bind the member associations, it also states that such decisions cannot amend the powers of the member associations. Further to this Article, each delegation is entitled to vote under reserve of being able to consider, within a period of fifteen days, whether the decision of the Council is consistent with the statutes of its own association. Similarly, Article 6 of the Internal Regulations of the Federation requires that the results of the Consultative Committee's work, whether permanent or ad-hoc, are communicated to the Central Committee which only publishes them with the consent of the Council.

BFEC influence on the legislation of the Community. The Federation's pressure focuses mainly on three community bodies: the Commission, the Council of Ministers and the Economic and Social Committee. Opinions and Memoranda are usually submitted to the Commission and the Ecosoc and, when discussions take place, to the Council of Ministers.

When the Federation tries to intervene in the drafting stage of Community legislation, it makes contacts with the cocktails to phone calls -between the Secretary or the consultants of the Secretariat of the Federation and officials (mainly, A4 and A5) of Directorates-General in the Commission, specially DG1, DG2, DG3, DG4, DG11, DG15. Also, every year a meeting takes place between the representatives of the Federation and officials of the Commission, including Commissioners responsible for Transport, Energy or the Budget. At a formal level, there are representatives of the Federation in the Credit organization Committee of DG15. Finally, there exist communication channels with the Banking Advisory Committee, set up by the First Banking Coordination Directive of 1977 (77/780). The result of all these kinds of contacts is a permanent use of one another -the Commission and the Federation- as an information source for their respective interests. The Federation's pretensions to go further and influence the Commission's initiatives are, of course, conditioned by the fact that the Commission is the one that decides up to what point the consideration of the Federation's point of view are beneficial for the Community interests it defends.

The Federation, while not maintaining institutionalised relations with the Committee of Permanent Representatives of participating directly in either the so called Tripartite Conferences or the Standing Committee on Employment, has very occasional contacts with individual members of the Council of

Ministers. In general, pressure over this body is reserved to national associations.

The Federation's contacts with Economic and Social Committee are mainly of a formal nature, in other words, participation of its member affiliates in the Study Groups, Section Meeting and Plenary Sessions of the Ecosoc. The member affiliates of the Federation have actually two representatives in Group I (Employers): Mr. José Luis Leal (President of the Spanish Banking Association) and Mr. Jean Pardon (Director of the Juridical and Fiscal department of the Belgian Banking Association). In addition, Mr. Pardon has been the "rapporteur" of the Ecosoc report on the Second Banking Directive in which several technical demands of banks were retaken (the report received the support of most of the members of Ecosoc thanks to the inclusion of a social chapter that pleased the Trade Unions). With this such a direct participation in the Ecosoc, banks can bring their requests to the Community institutions.

Finally, on special cases such as, the creation of a European Export Bank, there have been formal contacts with the European Parliament. In that case, representatives of the Federation were consulted by the sub-committee of External relations of the European Parliament on that issue. However, at an informal level, contacts with particular parliamentarians, who are members of certain committees, like the Economic and Monetary Affairs Committee, exist. Furthermore, as a member of the Federation told us, when the Second Banking Directive was

recently being discussed in that Committee, those informal contacts took place. But surprisingly, a Spanish parliamentarian, member of the Economic and Monetary Affairs Committee, insisted, in an interview, on the absolute absence of that kind of contacts. In any case, we have the attestation from a very faithful source proves that a greek parliamentarian, member of the Committee and formerly linked to banks, contacted the Federation.

Relationship between objectives and practical policies. Policy priorities: general and specific: As with many other European Interest organisations the relationship between objectives and practical policies of the BFEC is subject to developments in EC integration in general, i.e. the degree of success in the achievement, operation, execution or preparation of the policies. Setbacks or lack of progress in the sector of economic and monetary integration may affect the practical policies of the BFEC in achieving its aims.

The BFEC pressed for general measures to maintain incomes within limits compatible with economic imperatives, to reduce the rate of inflation (25), (in the long term, inflation has adverse effects on: deposit growth and balance sheet structure; quality of banking assets; interest margins, and operating costs), and to exercise moderation in public expenditures.

As far as specific priorities is concerned, the BFEC pressed for harmonisation of banking legislation, establishment of

conditions for the free movement of capital within the Community, harmonisation of the presentation of annual accounts of credit establishments, removal of any special taxes still in operation in the banking sector such as indirect taxation of transactions in securities or on bond interests, (in addition, institute rational and fair rules as to the position of banks in a general European VAT system), minimum conditions for admission to stock exchange quotating harmonisation of the rules governing the activities of stock exchange intermediaries, harmonization of company taxation within the Community by a system of imputation, and, finally, harmonisation of regulations governing collective investment undertakings.

Management of AEB interests in the BFEC.- Considering the individual situation of AEB within the Federation, we have to take into account that the latter has- as one of its main characteristics -a great degree of cohesiveness among its members. First, this is helped by the fact that only twelve organizations exist, and that these organizations are all based in the twelve countries of the European Community. Also, there is a strictly balanced distribution of power between the member associations within the Federation: each association has a representative in all the inter-association bodies of the Federation, and the presidencies of the Central Committee and Consultative or ad-hoc Committees rotate between the member associations within a periods of two bi-annual exercises. The AEB has actually one of the vice-presidencies of the Council which is occupied by the president of the association, José Luis Leal.

Finally, decisions of the Council are taken unanimously with the exception of budgetary matters and the annual report which are decided by a majority of two thirds. Then, each delegations has one vote. The disagreements with the final decisions are manifested publicly.

In this institutional framework the AEB feels quite comfortable and has no risk of being discriminated against. Furthermore, the AEB's position in face of the internal market is in the middle of the group which wants to go as fast as possible towards the complete liberalisation of financial services- United Kingdom, Holland and Germany -and the group which is more reluctant to a quick advance. Hence, it can easily fit in both positions or even play a double game if necessary.

However, there are AEB interests that are not assumed by the Federation because they are founded on particular characteristics of the Spanish banking structure or are opposed to another association's purposes. In these cases the Federation does not reach a consensus and the AEB acts by its own. This has happened with an article of the Second Banking Directive concerning bank's participations in the non-banking sector. The AEB was in favour of a less restrictive limits to the participations due to the great industrial interests of Spanish banks. As it was impossible to find a compromise solution, AEB, by its own, exerted pressure successfully to the European Parliament.

But in a general perspective and according to AEB and Federation officials, the evaluation of the management of AEB interest in the Federation is extremely positive. Four reasons to add to those already given were specially mentioned in the interviews:

- The great similitude between the objectives of the twelve associations with very few exceptions.
- The special proximity of Federation and AEB due to a permanent daily telephone and telex communication. Proximity increased by the europeistic enthusiasm of the still recent membership of the AEB.
- Bilateral relationship with other member associations besides the relations in the frame of the Federation.
- The practical advantage for the AEB of delegating management responsibilities to the Federation on Community issues, instead of assuming them all by itself.

Through itself

The A.E.B. organization.- The Asociación Española de Banca Privada (Spanish Association of Private Banks) was created on 22

June 1977. It was created when the new democratic system was instituted and after the creation of the main trade unions.

All private banking institutions included in the Register of the Banks of Spain can be full members if they participated in the foundation of the Association or are accepted as members.

Credit and saving organizations and the other financial institutions which are not included in the Register of Banks and Bankers of the Central Bank of Spain can be associate members.

Currently as of 28 May 1991, there are 137 full members. There are four decision-making bodies: the General Assembly, the General Council, the Executive Committee and the Office of the Chairman.

The General Assembly is made up of all the full and associate members, even though those only take part in debates in consultative capacity, without voting rights.

The Assembly meets ordinarily at least once a year, but it can have extraordinary meeting by all of the Chairman or by written request of at least 20% of the full members.

The Assembly has to elect the Chairman, with a majority of 75% of votes, to approve the budget and to approve or censure the general running of the Association.

The full members of the General Assembly are divided into four groups, according to their contributions of all financial assets, including their own. Concerning voting, there is a system of proportional representation which basically amounts to giving extra votes to those which each bank is entitled to in its capacity as full member, according to the proportion of each bank's funds to the total of the national Private Bank's funds, including their own. In practice, the Assembly votes by unanimity the issues presented during the annual meeting.

The General Council which represents the four groups of banks making up the AEB is made up of the Chairman and has as many members as are laid down in the rules contained in the Social Statutes. On 31 May 1991, the General Council was composed of 23 members, divided in four groups. In the first group are represented the six biggest banks, which have more than 70% of the global banking business in Spain.

Usually General Council meets once a month. It met extraordinarily once during 1988.

It decides on the appointment of the General Secretary of the Association on the recommendation of the Chairman and the nomination of the members of the Executive Committee. Also it has to ensure that the activities of the Associations comply with the rules laid down by the General Assembly; to be acquainted with the expenditure and to ensure that it is within the approved

budget. The General Council prepare and approve all matters which have to be submitted to the General Assembly.

The executive Committee is composed of the Chairman and seven members, two for each of the three groups for banks and one for the fourth.

It meets on the Chairman's initiative, or at the request of at least three members, as often as necessary. Its responsibilities are the same as the General Council's ones, and any others that the Council may specifically delegate to it.

In practice it meets twice a month (first and third Mondays of the month), and its greater knowledge of the different subjects involved allow it to become the governing body of the Association. During 1991 no extraordinary meeting was held.

The office of the Chairman is the highest representative post in the Association. He is elected by the General Assembly, in his personal capacity, whether or not he is attached to a member bank, by secret ballot of the full members. His term of office is four years and he may be re-elected. The Chairman is Mr. José Luis Leal. His principal responsibilities are: to represent the Association legally, to preside the governing bodies, to submit to the General Assembly the a budget for the following financial year and the balance sheets of the previous year, and to represent the AEB before every administration or legal authority.

The staff of the Chairman is extremely small. On May 28 of 1991 only 18 people worked in the AEB headquarters in Madrid, including auxiliary employees. Nevertheless, this staff has an important power of coordination and brokerage. In fact all the issues are discussed and usually agreed on working committees, in which representatives of the main banks are present. The discussion is presented and directed by the experts of the AEB, who do not have voting rights.

Indirects contacts.- Even if most contacts between AEB and the decision-making system in Brussels are established through the Federation, this is not the only way of access to european institutions in Brussels. There are two other channels of access: 1) through other euro-organisation of interest groups settled in Brussels and 2) through national banks with a permanent office in Brussels.

The AEB belong to the COEE, the Spanish Confederation of Employers' organisations, and has 10 representatives on its general Assembly. The AEB participates also on the Board of Directors, on the Executive Committee and in all working groups related to economic or financial issues. The CEOE belongs to UNICE. The latter has developed a complex network of relationships with the Commission and bureaucrats of Brussels. Both organizations are important ways of pressure concerning Community legislation on economic or social subjects, not directly financial ones. But concerning the legislation analysed on this study, CEOE and UNICE play a very secondary role.

Bank's representation offices at Brussels fulfil mainly an informative role in both ways: from the Commission to AEB and from the AEB to the Commission. The growing divergences of Spanish banks among themselves is reducing the ability of the AEB to use them. The biggest Spanish banks have important offices on Brussels, like the Bilbao-Vizcaya Bank. These offices can play a higher role if there are discrepancies between AEB and the Federation. Today they serve mainly the aims of their commercial policy, and their lobby acts are few and with reduced scope.

Direct contacts.- Besides the actions developed through the Federation, the AEB has many ways of direct action vis-à-vis Community institutions. The objective of the AEB of upholding the professional interest of the member private banks sometimes needs to be preserved by some actions developed directly with Community institutions.

The AEB hardly has direct contacts with the Commission, neither with commissioners nor with bureaucrats. Sometimes some relationships are established, based upon special personal relationships between those commissioners and bureaucrats and the officials of the AEB. Many Spanish civil servants of the Commission who are dealing with financial subjects have a banking background. Sometimes they have worked in Spanish banks and their knowledge of community law and administration has got them in touch with officials of the AEB. This former relationship allows some occasional contacts between the AEB and those bureaucrats

of the Commission. However the scope of these contacts is always reduced.

An example of this kind of contacts is the conference given by Mr. Abel Matutes, about financial innovation, in Madrid in 1988 invited by the AEB. Mr. Abel Matutes, commissioner of the EC, was a former member of the AEB, because of his status of banker before becoming a member of the Commission.

As said before, Council of Ministers meeting are still held in the manner of an international conference with decisions being taken in many areas behind closed doors and out of the public view. In this situation national lobbies are place in better position to exert influence via national ministers than community lobbies.

AEB develops an special effort to watch over the activities of the Council. Contacts in order to lobby the Council are held with Spanish administration, government and Central Bank (Banco de España). The ways are mainly letters and surveys, but also personal contacts.

Contacts with Administration and government are held at a very high level: General Directors, State Secretaries (Viceministers) and, occasionally, Ministers. All of them belong to the Economy and Public Treasury Ministry. Sometimes the contacts are held with bureaucrats of the Central Bank, also at a very high level. On the part of the AEB, usually the General

Secretary intervenes but, sometimes, the Chairman does it as well. Both are accompanied by experts of the AEB.

The election of the General Director, State Secretary of Central Bank is only based on efficiency criteria. AEB choose the person or departament directly involve in the measure it is being dealing with.

In its contacts with national authorities, AEB only defends its national points o view. However, usually, AEB's positions do not differ from those of the Federation. Also, when positions over a Community measure has been agreed on the Federation, pressure exerted by AEB will not go against the agreed position. Nevertheless, AEB only stresses its pressure over demands it is particularly concerned with.

Most of times, pressure over national authorities begin before the measure has been discussed on the Federation. Therefore, AEB demands are only national (even though usually those national demands coincide with demands of banks of other countries). Moreover, national administrations are only sensitive to national demands.

In any case, AEB communicates to the Federation that actions have been developed vis-à-vis national authorities, which allows a certain control by the Federation. Also, another element of integration is the network of bilateral relationships among national associations. Those contacts are favoured by frequent

meeting on the Federation, which allows a better knowledge among participants. Contacts among associations reach a high frequency (twice or three times a day between some associations, mainly by telefax or phone).

As conclusion, we can say that, since pressure on national authorities concerns national demands, there are some mechanisms which favour a certain degree of coordination, but they are never compulsory and sometimes could be not respected.

Both Federation and AEB exert pressure on parliamentarians. While the scope of the Federation is all the members, AEB only have contacts with Spanish parliamentarians.

The AEB has contacts with main political groups in the EP, mainly through letters and studies sent to Spanish europarlamentarians. Direct contacts are often set up with some of them. Usually AEB gets in touch with a parliamentarian of each group chosen for his personal characteristics and accessibility rather than for his belonging to the Economic and Monetary Committee or his dedication to banking subjects.

Another form of action used by AEB to press europarlamentarians is through the Spanish government. If the latter finds reasonable the demands of AEB, it may press the parliamentarians of the political party which support it through the party authorities. According to a Spanish europarlamentarian, belonging to a political party of the

opposition, this is the most usual way to lobby euro-parliamentarians, and out of this indirect way -he added- there is no contact between the AEB and the political groups with representatives in Strasbourg.

Recently, in the debate over the Second Banking Directive, the main demand of Spanish banks concerning the participation of banks in non-banking sector has been accepted by Spanish europarlamentarians. This shows that even if activity of lobbies over europarlamentarians is not very active, it is usually efficient enough. All along the contacts with Spanish europarlamentarians there was a certain lack of cooperation with the pressure exerted at the same time by the Federation, even though the latter was informed by the AEB about its contacts.

Finally, the relationship between AEB and Ecosoc is exceptionally closed, since Mr. José Luis Leal, chairman of the AEB, is also member of the Ecosoc. Although members of the Ecosoc are chosen because of their personal qualities and they do not receive binding mandates, it is even more important that they are chosen because of the network of expertise which is at their disposal through the organisation they represent (26). In this situation, it is certain that AEB's points of view are duly taken into account in the Ecosoc. Furthermore, AEB influence in the Ecosoc is not only exerted through Mr. José Luis Leal (even if he is the most important way), but also through the other four representatives of the CEOE (the Spanish Confederation of Employers' Organisations) to which AEB belongs.

Some features of the Spanish banking sector and the rôle of the AEB

The Spanish banking sector situation is characterised by the very important legislation preserving the Spanish financial markets from foreign banks, the excessive interventionism of the government (which reach the 45,5% of the resources) and the high level of prices.

In fact, scholars are concerning about the background reasons of this "protectionism". Andreu says that there is a "mutual interest" between both the State and the credit institutions in order to preserve the market under the control of Spanish banks (27). The aim of this relationship is to maintain a situation in which the financial and monetary policy, as well as several fiscal issues are under the control of national authorities. Thus, a good relation between both the government and the bankers helps to above preservation.

Also, the adaptation to the new requirements of the single market is complicated because of the overlapping of the conditions of the Adhesion Act and the conditions of the White Paper.

The results of the application of the Commission programme in Spain will be an important drop of prices (20% of assumed potential price fall according to the Cecchini rapport. "The cost of non-Europe" (28)), the greatest in the EC, and a strong

competence of non-Spanish bank to offer their products in Spain. Anyway, we can place Spanish banks in our double axis as coming from a very protectionist banking culture, but becoming quickly very aggressive. Although the financial margin is still bigger than the one in the rest of Community Countries, their great advantage is high profitability, which let them a considerable capacity of action. Hence, it is important to prepare themselves economically for 1992 by intranational mergers and agreements with non-Spanish European banks. The government and Central Bank (Banco de España) are supporting strongly this process of modernisation, mainly by protecting their high level of benefits.

Spanish banks were strongly in favour of Spain's entry into the European Community. Now they support the plans for an internal market, which will give them the faculty to operate throughout Europe with a single license. Concerning the legislative action, they agree on the principles and only have objections over punctual questions, as we will see. Finally, Spanish bankers are pressing the government to limit its intervention in the financial market in order to avoid being discriminatorily treated vis-à-vis other European banks.

D. Why duplicate efforts?:

The previous discussion provokes this question and, at the same time, helps to obtain the answer. The double way of pressuring of the AEB- through BFEC and through itself -is an apparently redundant effort. Why does not AEB delegate to its European-level association the management of all its Community affairs?

As possible answers here are four hypothesis we have contrasted with facts exposed before and which have been formulated to all of the people we have interviewed:

- a) There is a greater openness on the part of some of the Community institutions towards national pressure groups.
- b) AEB does not have confidence in Federation's ability to represent its members' views.
- c) AEB finds the compromise solutions put forth by the Federation too weak.
- d) AEB's views are not reflected in the Federation's decisions.

The first hypothesis is maybe the most obvious one. As said before, because the Council is still more an international body rather than a supranational institution, the influence exerted on it is almost totally reserved to national groups that do their pressure via national governments. In the case of Spanish government, the Central Bank (Banco de España) and other national

administrative bodies in order to lobby the Council while the Federation does nearly nothing.

Concerning the Commission, the situation is just the opposite. Even if sometimes AEB has certain contacts with the Commission through personal relationships between Commission bureaucrats and AEB officials, the pressure on the Commission is mainly exerted by the Federation because the Commission- as stated by an official of DGXV in an interview -is much more interested in being, if possible, legitimated by European groups representing the whole European sector through taking into account their points of view, rather than on considering the opinions of a national association.

In respect to the other Community institutions and, especially, the Ecosoc, it is much more difficult to see such an evident difference of openness between the one showed to AEB and that showed to the Federation: The President of the AEB is a member of the Ecosoc but he is at the same time vice-president of the Federation. Even if the Ecosoc membership is based on personal rather than on representative criteria, it can be said that the voice of both organizations is, in this case, simultaneously defended by the same person. Concerning the European Parliament, there exist also a clear double pressure: both Federation and AEB exert influence on European Parliamentarians. However, while the scope of the Federation is all the members of the Parliament, AEB only have contacts with

Spanish parliamentarians, which are, obviously, more opened to AEB influence.

Therefore, at first, the hypothesis of greater openness on the part of some of the Community institutions towards the national organizations is valid to explain the double way of pressuring of the AEB: when the institution is more opened towards the national institutions- Council, national parliamentarians -the influence goes through AEB; when this openness does not exist -Commission, non-national parliamentarians- the pressure is exerted through the Federation. But this argument is not enough: it does not explain the autonomy from the Federation that the AEB actions have and the frequent lack of cooperations between both organizations when there are simultaneous influences. The first hypothesis would be totally appropriate for a perfect system with a totally coordinated distribution of pressure objectives, but, since this is not the case -as we have seen, there is only a certain degree coordination which consists, mainly, on information channels-, it is only partially valid.

The second hypothesis -AEB does not have confidence in the Federation's ability to represent its member's view- was unanimously rejected by both consultants of the Federation and of ABE in the interviews we held with them. In fact, if the hypothesis would be real there was no sense on being a member of the Federation. On the contrary, in a general perspective and according to the interviewed representatives of AEB and the

Federation, the evaluation of the management of AEB interests in the Federation is seen, for the moment, extremely positive.

But the third and fourth hypothesis do serve together as a second answer to the title of the section. The third one- AEB finds the compromise solutions put forth by the Federation too weak -was rejected by the Federation consultant while admitted as "possible" by the AEB representative. Indeed, the necessity to reach consensus within the Federation Council to take any decision could debilitate them and force the AEB to defend by itself its interests. The fourth hypothesis -AEB's views are not reflected in the Federation consultant but accepted by the ABE official with the addition of "sometimes". In the already mentioned case of the problematic article of the Second Banking directive on the participation of banks in the non-banking sector, the Federation could not find a compromise solution. The AEB defended its positions by itself exerting pressure to Spanish europarlamentarians and achieved an amendment of the Parliament to the directive which was favourable to its interests.

Hence, there is not a redundant effort: the AEB delegates to the Federation the management of the majority of its Community interests, but intervenes also itself because the Federation's compromise solutions are too weak or, sometimes, cannot reflect AEB's views.

The general schemes of the pressure exerted by the A.E.B. on the Community institutions in which the limit between national

and Community levels is trespassed by A.E.B. in two ways: through the Federation and through itself, wether directly or indirectly.

However, this double pressure is not a redundant effort. Because of the convenience of participating in the defence of common European banks- interests and the political profitability of defending the A.E.B.'s own Community claims through an European level organization, the A.E.B. has been a member of the Federation since Spain entered the Community. It can be considered the official representative of the whole Community banking sector, legitimated by the membership of all european official banking associations and by its permanent institutional contacts since the year of its foundation, 1960. But, since some institutions show great openness towards national pressure groups and as long as there could be a lack of enough solidity in the Federation's compromise solutions or, even sometimes, they cannot reflect ABE's views, the latter also exerts pressure itself, whether directly- the Council, via Spanish government, the European Parliament, via national parliamentarians, and the Ecosoc, through its representative- or indirectly -through the Spanish Confederation of Employers' Organization, or the Spanish banks.

Hence, each way of lobbying has its own objective and motivation and there is no overlapping between them.

This two ways of lobbying could be seen, at first, as a kind of cooperative federalism where certain subjects are solved in a federal level and other are better managed in a local level.

But, because the Federation has no supranational competencies vis-à-vis its member associations and, moreover, there is sometimes neither cooperation nor clear coordination between both levels of pressuring, we cannot say that the structure of banking pressure in the Community corresponds to a cooperative federalism scheme.

In any case, this banking pressure structure that exists today in the European banking sector and that, in some characteristics- the national level pressure to the council and the national parliamentarians -can be also applied to other sectors' Community pressure, will change in the near future. Not only because of possible institutional changes in the Community, but also because in 1993, the 2.040 banks that are now together in the Federation but most of them separated by borders in the market scenario, will be then fully competitors.

This structure shows a clear imbalance: AEB is an instrumental entity of banks in exerting pressure on legislation in a broad sense, including the European level. BFEC is an instrumental entity of national associations achieving what they cannot alone, at least not profitably.

In this sense BFEC accomplishes two main functions: collecting information from Brussels and representing banks directly with the Commission. In addition, it serves as a general framework of cooperation among national associations, collecting information from Brussels, through a permanent representation

that could not be afforded by AEB alone. It would imply almost doubling its functioning costs. The BFEC can fulfil such a function better and cheaper.

Representative and lobby functions vis-à-vis the Commission are also better performed through the Federation. The Commission encourages the setting up and action of transnational groups because of the afore mentioned reasons. Therefore, the best way to gain access to the Commission is through the BFEC, which will receive greater attention from Commission officials. In the same sense the Commission encourages the coordinated positions of pressure groups by providing them with a privileged access, and BFEC serves as a suitable framework for getting the necessary consensus to present a unitary proposal to the Commission.

When COM documents are released, discussions among representatives of national administrations (in the working groups, COREPER and the Council), will begin, with the Commission defending its proposal. Opinions of Ecosoc and amendments of the European Parliament have a relevant importance (the increasing resources which lobbies devote to the latter are a proof of this), but they have to be retaken by the Council or/and the Commission to be included in the directive. Commission and Council are not in an equal position. In fact the Council is the legislator for the entire European Community.

When discussions are held in the Council, BFEC cannot intervene. Pressure is then channelled through national

associations. However, national associations do not defend sectorial banks' demands, but the Spanish banks' demands; even if often both are going to coincide. This is not explained by a dishonest or free-rider behaviour of national associations, but by the privileged status that national Administrations are going to grant to national demands of "their" banks.

We have explained above the factors to be taken into account when setting up a banking legislation. The Commission, in accordance with principles retained in the White Paper and the Single European Act chooses among them what it deems most valuable.

The aims of putting up border barriers, having more flexible and efficient financial markets and preserving financial instability are shared by the Commission and all Member States.

The trend towards des-regulation affects also to all Member States, even where governments are held by socialist parties, like Spain. However, legislation proposed by the Commission cannot be neutral in respect to existing national financial markets and, subsequently, national administrations have their own views about measures required by the Internal Market.

As we have mentioned, proposed legislation answers shared principles. National Administrations do not contest such principles (also, because national administrations are not able to change the proposal (principles and structure) of the

Commission, except if only a minority of the Member States support such a proposal). Usually, they only demand changes on critical points of the concerned proposals. Thus, concerning the measures envisaged by the White Paper in the field of banking legislation, most of the subjects had a very technical character (in the sense of a matter which does not affect the general interest of the citizens). Therefore, most of the demands of national administration deal with very technical issues.

National administrations function in terms of constituency interest (also, in terms of self interest as F. Scharpf has pointed out (29)). Therefore, the outcome of the Council must reflect the Community interest (mainly defended by the Commission) plus national interests. Discerning the national interest when dealing with a technical subject is explained in terms of national actors' interest. The main aim of each national administration becomes to help "its" banks to grasp at the opportunity of the single market (very often even the demands concerning previously referred aims are considered hidden national demands to protect less developed banking systems).

The result of such a process is that national administrations turn to banks for them to define the national interest. Banks have good reasons to get national representatives listen to them: banks know better how envisaged measures of the Commission will affect national banking markets, and banks share the main aim of their national administration: take advantage of the envisaged measures, and increase (or at least, maintain)

their share in the financial markets. In addition, banks have other arguments to be heard by national administrations: other national administrations will listen to "their" banks, and will aid them, therefore if a national administration does not help "its" banks, these banks will suffer such a discriminatory treatment.

The result is that when dealing with regulatory matters (most of these included in the referred proposals except the political principles which were agreed to in the White Paper) positions of the national administrations positions inside the Council rely on national interests as defined by concerned national groups (AEB, in our case study).

The consequence is the strength of banks' demands when all or, at least, most of national associations coincide. However, even if bank demands coincide the existing situation of markets and legislation in each country reduce the possibilities of any large scale agreement of national administrations.

In accordance with this hypothesis every time that national associations obtain an agreement inside the BFEC and if they are interested on having such outcome from the Council, they should get it. However, as we have seen, not receive all of the demands of the BFEC concerning the Commission's proposals are retaken by the Council.

At the Council, we have found a special relationship with the banking national groups. In fact, representatives of national bureaucracies in the Council become "prisoners" of banking interest groups at home. This does not signify that there is a power relationship which is imposed over national representatives, but that decision-making procedure at the European Community allow national representatives to accept any demand of national banks (in the sense of a demand that is not shared by all banks, but only by national ones).

When dealing with the regulation of technical issues (as banking legislation), national representatives are pushed to defend the national interest as defined by national interest groups, the ABE in our case study.

The traditional aims of protecting consumers and preserving financial stability are transferred to the Community (whose main expression is the Commission), while the aim of each constituency of defending and increasing the strength of national financial institutions remains still in the hands of national bureaucracies. Thus, national representatives at the Council are specially committed to defend the national financial comparative advantages and permit national banks maintain their traditional way of doing business. In this sense, we have seen how most of the modifications of the second banking directive have had as an objective to reduce or smoothen requirements, or introduce exceptions (as conceding share capital or non-banking participations) permitting national banks to continue their

existing way of doing business or allowing banks more time to adapt to the new requirements.

Therefore the national representatives at the Council have as a priority aim to defend the aims of national banks, as expressed by the AEB. Since most of the issues covered by banking legislation remain apart from public opinion, an ideological position takes a secondary importance: instead of fighting principles laid down by the Commission (which were agreed on the White Paper), they fight now to adapt such principles in favour of their clienteles, the national banks.

The result is a general smoothing of agreed principles. Community banking legislation becomes distorted by the effect of exceptions and they try to counter-balance competitive advantages of each country's banks. Even though new Community banking legislation poses a challenge for all European banks, it is a challenge which most active banks and banks which rapidly adapt to the new rules will benefit.

Finally, we do not think a transfer of power from the AEB towards BFEC is envisageable if policy-making of the European Community continues in its present form. Therefore, a vicious circle exists, since the existing policy-making of the EC favours the mentioned double level structure within the banking group, thus granting a privileged status to AEB.

NOTES

- (1) Commission of the ECs: "Completing the internal market: an area without internal frontiers. The progress report required by article 8B of the treaty." 17 November 1988. COM (88) 650, final.
- (2) Research on the "Cost of Europe". Basic Findings: Volume 9. "The Cost of non-Europe" in Financial Services. Commission of the European Communities; March, 1988.
- (3) Ibid.
- (4) Rapport annuel FBCE (Novembre 1986 - December 1987)
- (5) Avis du Comité Economique et social sur la Proposition de deuxième directive.
- (6) See also: "Briefing"; Brussels; 1990. Norton Rose.
- (7) Proposals COM (86) 396 final and COM (88) 118 final.
- (8) Proposal for a council directive on the freedom of establishment and the free supply of services in the field mortgage credit, 24.1.1985, COM (84) 730 final.
- (9) Spanish banks give great importance to these demands of the Federation since a fast opening of national mortgage credit market would imply the disparition of Spanish banks from this market, due to their underdevelopped techniques. So they are pressing, next to the Federation, in order to avoid the total and fast liberalisation envisaged by the Commission.
- (10) Text adopted during the second reading on 5 August 1983. (Council document N° 8659/83 DSR 38).
- (11) COM (88) 4 final.
- (12) Proposal for a council directive on the own funds of credit institutions, COM (86) 169/2 final, 15.9.1986, Explanatory memorandum, page 3.
- (13) See Communication from the Commission. Creation of a European financial area, 4.11.1987. COM (87) 550 final.
- (14) Interview with a medium-top level official of D.G. XV.
- (15) Amended proposal presented by the Commission: COM (87) 1165 final.
- (16) EURONOT- 138 , September, 7 - 1988.
- (17) Kirchner, E.J.: "The European Parliament and interest groups"; in: R. HRBEK et alii eds. The EP on the eve of

the second direct election: balance sheet and prospects. Brugges, Tempelhof, 1984. Kirchner adds a fourth reason (learning from them) which looks obsolete, due to the new developments in the EP powers.

- (18) Interview with Mr. Rosello. DG XV.
- (19) Punset, E.: Spanish member of the Economic and Monetary affairs Committee of the European Parliament.
- (20) Sidjanski, D.: "Le Parlement Euopéen et les groupes d'intérêt", in: R. HRBEK et alii, eds. op. cit.
- (21) Interview with Mr. Jean Pardon, member of the Ecosoc and "rapporteur" of the Ecosoc report on the Second Banking Directive.
- (22) Although there were cases where the BFEC was unable to reach a common stand and had to submit both a majority view and a minority view, (value added tax, the currency exchange alignment in the EC known as "The Snake, Suretyship, European Expert Bank), it appears from the records examined and interviews conducted that "normally" solutions can be found on which all twelve member affiliates of the BFEC agree and that no fundamental difficulties have to be overcome in reaching decisions on policies.
- (23) Interviews with Mr. Jean pardon...
- (24) In its Report of 1975-76, p. 13, the BFEC. "Experience shows that while initially, and in the short term, some of the effects of inflation may appear favourable in money terms and perhaps even in real terms, in the long term, banks almost inevitably suffer".
- (25) McLaughlin, D.: "The Economic and Social Committee", in Jamar, J. and Wessels, W. eds. : Community Bureaucracy at the Crossroads, De Tempel, Bruges, 1985.
- (26) Research on the "Cost of Europe". Basic Findings. Volume 9. "The cost of "non-Europe" in financial Services. Commission of the European Communities, March 1988.
- (27) Andreu, J.M.: "Sobre la Relaciones entre la Banca y el Estado"; I.C.E. MADRID, 3/9 December, 1990. pp. 4418-4419.
- (28) Schapf, F.: "The joint decision trap: Lessons form German Federalism and European Integration". Berlin 1.985.
- (29) Ibid.

CHAPTER V: CONSUMER PROTECTION AND THE BANKING HARMONIZATION PROCESS.

Introduction

This chapter is devoted to the study of some of the consumer protection issues which seems to have been neglected in the banking harmonization process, such as consumer credit, EFTPOS, standard terms, bank charges, or data protection.

The first section consists of an overall analysis of the consumer protection policy within the EEC legal framework.

The second part is focused on the more specific subject of consumer protection related to the banking activities within the EEC.

A. Consumer policy at community level:

Despite the fact that the Treaty of Rome did not perceive the need for the creation of a Community Consumer Protection Policy, the declaration of the heads of state of October 20, 1972, meant a change of direction towards consumer protection issues within the EEC legal framework.

Thereafter, programmes of action of the European Community for consumer protection have been approved by the Council of Ministers in 1975 (1), 1981 (2) and 1986 (3). The fundamental rights of the European consumer have been defined as follows: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; the right to adequate representation. Several directives have been also adopted by the Council on Consumer protection issues (4). Thus it is useful to analyze some of the reasons for this change towards policy making on consumer issues within the EEC legal framework.

- a) Consumption receives attention, within the EEC Treaty, only in so far as it relates to production (5). The Treaty of Rome contains no machinery for the identification of consumers' real needs. Articles 39, 40, 85/3/ and 86 /2-b/, the only provisions of the Treaty that explicitly refer to the consumer, illustrate this "productivist" perception of the consumer interest in the common market. Thus, the question arises why the European Institutions, without an

express command of the EEC Treaty, decided to create an European consumer policy which would serve the 1970's willingness of the Community to go further than unification of Europe's economies and markets.

The question above may be solved by taking into account the interpenetrating double axis action of both the international and some of the EEC member States legal framework on consumer protection.

As far as the international framework is concerned, it is worth noting that several international organizations to which all of the Member States of the EEC belonged, had already enacted some consumer protection measures. In 1961, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) of the United Nations created a "Codex Alimentarius", an standard program which had some influence on the evolution of national laws related to food, labelling, safety and quality controls on food (6). In addition, on May 17, 1973 the Consultative Assembly of the Council of Europe, adopted a 28-article "Consumer Protection Charter" (7), covering general consumer rights. Some of the principles enumerated by the Council in the 1973 "Consumer Protection Charter" were exactly the same as those lately recognized by the 1st and 2nd EEC Consumer Protection Programs.

On the other hand, and as far as the national axis is concerned, the association of Denmark and the United Kingdom to the EEC, both with the highest standards of consumer protection legislation at that time, had a decisive impact on the above mentioned change.

b) The 1970's was the decade when the development of a consumer movement infrastructure began to bear fruit (8). Although they were not specifically represented in the consultative and advisory bodies of the EEC, consumers began to be "softly" heard in the media.

c) Industrial interests. As Bourgoignie clearly states: "Since all European countries regulated product standards and many had substantial legal control of product labelling, uniformity in this areas would reduce barriers to intra-Community trade and favour those industries that could sell in the wider market..." "Industry did not support Community involvement to benefit consumers as such, but rather to facilitate its intra community Marketing of Goods and Services" (9).

In general terms, we might see what Trubek defines as the "classical approach" beneath the above cited changing of attitude of the European Institutions towards consumer protection issues (10). Whatever role the European Institution should play in this area was limited to defining the rules of the game and to impeding violations of predetermined rules.

Thus, it seems that the economic power of producer/sellers was translated into political power in order to achieve other but the consumer protection objectives (11), despite the content of the paragraph 3 of the Preliminary Program to the 1975 one: "The consumer is no longer seen as a purchaser and a user of goods and services... but also as a person concerned with the various facets of society that may affect him".

The most important lack undermining the principle of participation within the EEC decision making was that consumer groups, legal theorists and the regular courts were not heard from in any significant way on the European stage in the 1970's (12).

Therefore, it was not the spirit of the process above to define legal standards, rules and instruments which would help to establish a fairer balance between the mutual rights and obligations of parties in a consumer supplier relationship. Such a standpoint aroused concerns between the scholars: "greater formalism in contracts, increased responsibilities for suppliers to provide consumers with positive information, compulsory definition of certain clauses in contracts, etc..." (13) did not find the room within the EEC consumer protection legal action.

Perhaps the lack of an specific legal basis for the creation of the Consumer Protection Policy also had a negative influence over the process above. The legitimacy intended by the Heads of State or Government to the formulation of a Community consumer protection policy rested on a double basis: the expansion of the principles expressed in the preamble of the Treaty and the

outlining of a Policy within the Community Social programme. Thus, the formulation of common rules or approximation of national laws safeguarding consumers' interests is justified as a "measure adopted in pursuance of the objectives of the Treaty with the aim of merging the economies of the Member States into an economic entity functioning under conditions similar to those prevailing on a domestic market" (14).

Close stressed this point: "It is symptomatic of the slow progress which the Consumer Protection Programme of the European Economic Community has made that there should still exist so much doubt over the preliminary question, as to whether there exist a sufficient legal basis in the Treaty establishing the EEC for the programme..." (15). Thus, the Commission, and indeed the Member States, embraced a consumer protection policy on the basis of a liberal approach, not only to Article 100 (in particular where national measures of consumer protection produce distortions of competition) but on the possibilities of article 235 of the EEC Treaty.

Although the concept of the "Common Market" varies somewhat in the Treaty (16), the sense in which it is used in Articles 100 and 235 seems to be the basic principles and policies laid down by the Treaties establishing the Community. Therefore, the tendency of the Commission has been to concentrate on the justification of particular measures by relating their content specifically to the requirements of the legal bases chosen, (for the achievement of the above concept of "Common Market"), rather than developing any general theory of the role of the consumer in the market (17).

Both the European Institutions and scholars agree on the legal instruments chosen for the formulation of a Community Policy in Consumer Protection. As far as the formulation of the common rules is concerned, the Heads of State or Government, following their conference held in October 1972 in Paris, stated that: "it was desirable to make the widest possible use of all the dispositions of the Treaties, including article 235(EEC) in future" (18). This intention was confirmed by the Commission in 1975, in reply to a parliamentary question (19). The European Parliament's Committee on the Environment, Public Health and Consumer Protection also reiterated the position in its report on Community consumer policy (1977), (20). On the other hand, scholars as Isaac (21) and Schwartz (22), consider article 235 as a legitimate basis for adoption of measures implementing consumer protection policy.

As regards approximation of laws, the approach based on the idea which limits the scope of article 100 to the opening up of markets (23), the rationalization of production (24) and the elimination of technical obstacles to trade (25), constitute the common core of the scholars' theories on the subject for the areas not expressly provided by the Treaty as Community consumer protection policy.

Thus, the development of the EEC Consumer Protection Policy on the basis above, does not seem convincing either in its nature and in its results, to the defendants of a more progressist Consumer protection Policy within the EEC: "Community action on behalf of consumers concentrates largely on areas in which

consumers' interests converge with a wider aim of the European Economic Community, such as enlargement of the Market or promotion of its competition policy" (26). Therefore, in those areas where there is a clearer duality between the aims involved or where the measures envisaged extend beyond the scope of the strict economic objectives of the process of European integration, practical proposals are either no more than embryonic or the subject of sharp criticism". Similarly, Joerges: "The Europeanization of product safety law is not in fact, determined by genuine safety motivations. The assumption of regulatory tasks by the Community is instead taking place in the context of internal market policy, which is determined economically in the main, and under the institutional conditions specific to Community action" (27).

As regards the results achieved by the Consumer Protection Policy, a negative balance has been recognized by the European Commission: "les résultats obtenus sont très en deçà des intentions énoncées dans les programmes d'action à l'égard des consommateurs" (28).

Thus, the question arises on why the achievements do not accomplish the objectives set forth by the programs. Several reasons could provide us for an answer to this question:

First, Economic factors (conflicts of interest), secondly Political factors (fear of loss of national sovereignty, protection of home industries), thirdly Legal factors.

Economic factors:

The economic context during the 1970's was important. Economic problems of the late 1970's and early 1980's have imposed financial limits beyond which integration could not be allowed to proceed... "les gouvernements et les milieux industriels ont manifesté une certaine réserve vis-à-vis des deux programmes arguant que le coût d'une réglementation état pour eux une charge financière supplémentaire alors qu'ils subssaient déjà les effets de la récession" (29). The effects of new budgetary policies on Member States' contributions have become the most common source of conflict between those Member States reluctant to accept any increase in the Community budget.

There was a change of industrial interests. Industry, which in the early 1970's did not see consumer protection measures as a significant threat, strongly opposes national and community initiatives at increasing the level of consumer protection: "...new institutions have been established alongside of the Commission's status, which significantly reinforce the influence of national experts and industry in the Community decision-making process, without providing adequate counterbalancing representation from the consumer side" (30). Such an undesirable institutional situation is due to the fact that specific issues of harmonisation of consumer protection imply marginal changes for business interest. Thus, if adjustment problems can be resolved by negotiation with governments or EC Committees, they can be avoided (31).

Consumer were not closely involved in the Community decision-making process. At the level at which decisions are actually taken, there are neither administrative nor consultative structures for general matters with consumer protection implications. As far as the consultative stage within the decision-making process of the community is concerned, neither the Commission nor the Council seems to consider it desirable to have fuller representation of consumers on the Economic and Social Committee (32), whose opinion is required before the Council adopts regulations or directives on the basis of either article 100 or article 235 of the Treaty.

Political factors:

National governments did not accept consumer protection reforms imposed by a supranational entity that would exceed the level of protection actually granted to consumers on their national markets. The Commission document noted: "le raisonnement selon lequel bon nombre des sujets en cause dans ce domaine sont l'affaire des gouvernements nationaux et non pas de la Communauté. Cet argument a été utilisé tout particulièrement contre les propositions de la Commission visant à protéger les intérêts économiques des consommateurs" (33).

Legal factors:

First, the rule of unanimity imposed for both articles 100 and 235 of the Treaty had a negative influence in so far as a quicker approval of the harmonization measures on consumer protection was concerned.

Secondly, most directives relating to the composition or labelling of consumer foods contain "safeguard clauses" which usually allow the state to take temporary emergency measures, which may consist of modifying the provisions of the directive (Krämer, 1978: 203-09).

Third, barriers, like Treaty provisions, lack of legal services and costs, make access to the European Court of Justice by consumer (or their representatives) extremely difficult (34) (35).

Therefore, consumer participation in the enforcement of Community legislation depends on effective consumer access-to-justice at the national level of each Member State. Codes for resolution of disputes had a special significance as a supplementary means of achieving access to justice for consumers (36).

It does not seem that the situation will change in the next future. In 1978 the Commission decided to revise its harmonization policy. The result of the Commission's new

orientation may well be a dramatic change in the Community's institutional and programmatic attitude towards a positive consumer protection policy system: "Backstopping policy choices are now likely to prevail over active Community interventionism (Bourgoignie. 1987)".

On the other hand, the priority given to the completion of the internal market by 1992 has increased the risk of seeing consumer policy restricted to those measures which are directly linked to the attainment of the economic objectives of the Community. Conflicts between internal market policy and consumer policy, could provide an undesirable result for the former.

Joerges stresses on this acute need for action at European level: "...There are two arguments in favour of European initiatives to anticipate national developments: firstly, the Community must be aware that it will be regarded as having responsibility for hazards to the extent that it is successful in imposing its policy on opening up national markets; secondly, it must expect that the freedoms of action at present open to national authorities will lead to new (subsequent) market segmentation because the competent authorities in Member States will interpret the general safety clauses in the new type directives differently, and will respond with different action" (37).

Reich and Micklitz give a warning on the effects of some of the above conflicts on the weakest part of the Society: " The freedom of contract meant denial of bargaining power to the consumer and unilateral imposition of contract conditions, dramatically underlined by the existence of unfair contract terms in standard form conditions...The freedom of competition could

lead to price fixing, misleading and suggestive advertising, and hard-pressure salesmanship" (38).

Such a pessimist view about the consequences of the completion of the internal market based on free trade mechanisms is shared by Bourgoignie (39).

Taking into account that consumer problems are closely associated to social problems especially in underdeveloped regions, the "human face" of the Internal Market seems to have been forgotten also for consumer protection issues.

Several remarks can be made in order to establish a relationship between some of the features stressed above and the Consumer Protection Policy.

First, the initial aim for protecting the consumer was not the consequence of an internal intra Communitarian spirit in order to create a Community with a "human face" but the necessary consequence of the pressure exercised on the EEC legal framework by both the international context and the economic interest of the governments/industries of the majority of the EEC Member States.

Secondly, the lack of programming concerned both the objectives to be achieved and the ways through which they are going to be achieved. Priority is not given to consumer protection achievements but to the economic developments. Thus,

consumer protection is regarded as a complementary policy of the rest of the EEC Policies. Therefore the idea of the Council Resolution of 15 December 1968 (40), in the sense that consumer protection must be taken into consideration when implementing the other common policies, is far from being actually accomplished. Consumer protection is not regarded as an objective in itself but as a "subproduct" of other community policies.

Thirdly, the negative influence of industrial interest within the EEC decision making process (continuously remarked along this thesis, as regards the achievement of both pluralism in participation and wider welfare standards for the European citizens) sharpens every possibility for the achievement of a strong European Policy on consumer protection.

Those remarks seem to be very helpful in order to understand the concerns already expressed before as regards the lack of higher consumer protection standards within the EEC banking harmonization process.

B. The banking harmonization process and the consumer:

The EEC approach on opening up the common market for financial services is almost exclusively based on increased market openness and aims at "universal banking" throughout the EEC.

As regards to that situation the BEUC overall assessment of EEC policy on the subject is that the supply side is, therefore, in the forefront of the community concerns, while the demand side has not been sufficiently focused on (41).

In this kind of banking policy environment the European consumer will have to face the evolution of the personal financial services, mostly the impact of "payment systems": automatic teller machines, electronic fund transfer at the Point of sale and home banking. They raise several issues requiring legal solutions: protection of consumer privacy, the conclusion of the contract, dispute settlement procedures, etc.

On the other hand, as regards the consequences deriving from the enactment of the second banking directive, consumer interests could be damaged if prudential controls established in every Member State are the only way to protect consumer funds deposited in a service institution against fraud and bankruptcy (42). Therefore, the "new approach" being established for financial services which is based on harmonization of the rules concerning

the presentation, marketing and contracts of financial services products, raised concerns of consumer organisations (43).

Before analyzing the consumer protection problems which remained unsolved within the EEC and, as a preliminary remark, it is useful to give a definition of what we mean by a "consumer" of a financial service. One of the biggest "legal vacuums" of the banking harmonization is the lack of a unitary definition of "consumer". "De lege foeranda", it is worth referring to the decisions of the courts in order to discover the principles which determine whether or not a person is a "consumer" or has a more specific status of "customer" (44). The relationship of banker and customer does not come into existence unless both parties intend to enter into it (45).

Therefore, if for example, a person has no account with a bank and is not about to open one, the fact that a bank renders some casual service for him will not make him a customer. Assuming the principle above (the opening of a "bank account"), the same could apply for any contractual relationship (debtor/creditor or viceversa, mandatory orders for the management of personal financial interest, security deposits, etc...) between the credit institutions and any person. The qualification of "customer" begins with the contractual operation. In this sense it is worth noting that a person becomes a customer immediately after the contractual operation is created; he does not need to have habitual dealings with a banker in order to rank as a customer (46). Thus, the status of

customer, which implicitly contains the status of consumer (47), seems to provide a stronger legal argument arising from the concept of the "intuito personae" relationship between the credit institution and the person (48). In so far as the customers have to keep pace with the obligation of "fidelity" to their banks, mostly as regards the "transparence" of their contractual behaviours, it should be regrettable that banks will behave the same attitude.

The "intuito personae" concept, firmly rooted within the private law (both civil and commercial) of the EEC Member States, provides us with another argument, (leaving aside EEC Public Law), in order to stress the necessity for the creation of European Consumer protection legal rules in the field of "financial services". From this standpoint, it does not seem fair to maintain a legal framework within which the supply side ("the credit institutions") benefits from the advantage for the imposition of the "contract rules". The principle of equality in the "contractual relationship" is clearly damaged.

We now turn to some of issues of importance for consumers which are not successfully regulated by the EEC legislation. First, consumer credit. Owing to its commercial importance in an increasing number of sectors, the authorities have concerned themselves with consumer credit, primarily from standpoint of its macro-economic implications and, in particular, its impact on inflation (because when the overall demand for consumer credit exceeds supply, this may impede the accumulation of sufficient

savings to meet the needs of public and private investment) (49). That seems to be the reason why the 1986 Consumer Credit Directive (50) was the first measure enacted by the EEC as regards consumer protection in the field of financial services. The making process of the Directive took more than a decade. Despite of this long period, it does not seem that the final outcome should be the most desirable: "The Directive does not apply to credit agreements at large but is confined to agreements under which the creditor is a person carrying on the business of granting credit and the debtor takes the credit otherwise than for business purposes" (51). On the other hand, not all consumer credit agreements are within the scope of the Directive. (For instance, exclusions within article 2 (1) (a-f)).

The interest of the governments of the EEC Member States, for obvious reasons, once prevailed over the aim to regulate a field just for the sake of consumers. Much more, on analyzing the decision making process of this directive one has to stress the influence of "banking interests" within. The proposal for the Council Directive on consumer credit (52) was not confined to provisions aimed at giving credit buyers mere information and protection (53), but also included a number of stipulations as to the actual content of credit agreements offered to consumers (54). The Economic and Social Committee (55), and the European Parliament's Committee on the Environment, Public Health and Consumer Protection (56), gave favourable opinions on the proposal. However, the Parliament's Legal Affairs Committee firmly opposed it, taking the view that the measures proposed did not meet the requirements of Article 100 of the Treaty, since it

had not been established that Community rules in this field would promote trade within the Community (57).

The risks arising from the lack of a sufficient legal basis (see above "consumer Policy at Community level), for the enactment of the EEC Consumer Protection Policy found in this situation one of its consequences: the legal uncertainty any time a measure is intended to be enacted by the Commission (58). How can we relate the E.P.'s legal argument with the opinion of the best known expert on the subject, Mr. R.M. Goode? The following quotation arises some perplexity: ..."It is therefore a particularly opportune moment to consider credit law in Europe; ...and to speculate on the form and content that such unified or harmonised laws might take... There is little doubt that the making of Directives in this field is well within the juridical competence of the organs of the Community" (59).

The risk of legal uncertainty has been expanded, within the field of consumer credit legislation, by the enactment of the Second Banking Directive: how do the EEC institutions managed to implement both the freedom of consumer credit offers, supplied from other Member States of the Community, with the article 12 of the 1986 Consumer Credit Directive? Many dangers could arise in future if there exists an overlap between the scope of both directives: the potential for inducing consumers to overextend themselves through misleading advertising, the collection of information about the personal situation and credit worthiness of the consumer by credit reporting agencies across Europe, the lack of transparency specially with regard to the real cost of

credit (due to the different monetary context from which the supplier offers the credit to a citizen of another Member State), etc...

The "Soft Policy Approach" of the Community to the consumer credit problems has left unsolved the majority of those problems above. First, certain problems may arise before a credit contract is concluded:

-access to consumer credit: avoiding abuses as using a person's sex and marital status as criteria for determining whether to grant credit or not.

-mandatory specifications in advertisements: consumers should be informed in an easily understandable way about the real cost of credit and about their legal position vis-à-vis the creditor.

-credit reporting systems: reporting agencies which hitherto have been set up for securing information concerning the indebtedness and the creditworthiness of buyers and borrowers, (to serve the interest of the lender and the vendor), raise major problems from the point of view of consumer protection and even from the more general standpoint of respect for individual privacy.

Secondly, at the time of concluding the contract:

-the bill of exchange and the promissory note: they offer a twofold advantage to the creditor: a security function and a credit function. The security function derives from the fact that the instrument is an "unconditional" order or promise to pay a certain sum and thus creates a debt which is completely independent of the underlying commodity transaction and possible breaches of contract. In addition, the instrument can have a credit function if the bearer gets it discounted.

-unfair clauses: after the contract has been concluded: the introduction of special means of redress for consumers which could be both, cheap and rapid.

EFTPOS (Electronic Funds Transfer at the Point of Sale):

E.F.T.P.O.S. regulatory approach by the European Institutions, constitutes a very good example of the lack of development of the consumer protection in financial services within the EEC.

Additionally, it illustrates the negative influence of credit institutions within the European decision making process. Scholars do not accept such a situation and do not hesitate to denounce it: "consumers are most concerned and irritated by the recent development in the sector of EFTPOS at EEC level, where indeed a draft directive (60), which had been prepared for months and had reached a final stage, has been suddenly changed into a

Recommendation (61). One does not find any real justification for this modification which is the result of intensive lobbying by the banking sector on Commission decision-makers" (62). It is worth noting the similar attitude that in the United States took the lobbies with respect to the content of a recommendation from the National Commission on Consumer Finance on the subject. Successfully lobbying was achieved as regards the recommendation as has been remarked by Cargill: "...The Commission on EFT covered a wide range of issues and concerns about the rapidly growing application of the computer to financial transactions. Even though many problems may emerge to promote and require structural change in the financial system, the commission recommended only minimal legislation" (63). Apart from the principle of fair competition and fair and transparent charging, there is little in the Recommendation to benefit consumers.

The most important gaps of the Recommendation above can be summarized as follows. First, risks of damage linked to the use of the system in cases of failure of the system, fraud, loss, theft or unauthorised use of the card are borne by the user through liability exclusion clauses for the providers. Thus, the principle of "equity" in the contractual relation which binds the consumer to a provider is not respected. Risks should be distributed in a "rational manner" (64). Second, unacceptable change pricing policy costs per EFTPOS transaction. "Consumers are charged a certain amount per EFTPOS transaction in addition to the cost of the card; new tariffs are imposed or at least suggested for other methods of payment which were offered free of charge before; (e.g. cheques)" (65). Third, the problems arising from the increasing internationalisation of electronic payments within the EEC have not been taken into account (66).

Fourth, there is no provision within the Recommendation above, for monitoring compliance with the "Code" and no sanctions are available if it is breached. Fifth, access to EFTPOS raises issues of concern: service accessibility ("the information seekers") (67); the unsolicited supply to the consumer of payment cards (68); etc. Sixth, risks in terms of protection of privacy of individuals using the system. Seventh, there is a lack of consumer redress in order to overcome problems arising from eventual errors, failures or unauthorized transactions (69).

ATMs (Automated Teller Machines), and Home banking:

ATMs are a widespread feature of retail banking services within the Community. ATMs make it easier for consumers to get at their own money, especially out of banking hours. Despite of this advantage, we can remark some disadvantages:

- I) Service failure (card eating, running out of cash).
- II) The necessity to improve the ability of ATMs to handle consumer deposits.
- III) The necessity to install more ATMs at public sites.
- IV) Documentary evidence: ATMs transactions do not necessarily generate printed records, or printed records that are automatically available to consumers (70).

As regards Home banking, there are two obstacles to be overcome from the consumer view point; the first is security; consumers need to be reassured that home banking systems are proof against both deliberate fraud and random catastrophes. The second is the delivery mode for the service: home banking systems are usually carried by videotex, but videotex is proving to be expensive and of limited appeal.

These new technological developments in financial services are taking place in a legal vacuum. Being aware of this situation, the Commission of the European Communities has published the "Draft of Green Paper. Developing Europe's payment systems" (71), in which expresses concerns about both the imposition of the electronic systems in near future and the lack of development on consumer protection on the subject. Perhaps, the most relevant legal feature of the document can be found on the importance given by the Commission to the works within the UNCITRAL as regards international credit transaction (72). Once again it seems that any European development for the protection of consumers must wait until an international legal instrument on the subject, has been previously enacted.

Standard terms

Concerns about the use of standard terms in a contractual relationship has been largely expressed by the scholars. For instance, Pocar (73), Gillardin, (74), and, Von Hippel, who

states that: "Standard terms diminish the consumers' rights and the other party's duties, and in general comprise many terms which are prejudicial to consumers" (75).

Neither the concept and the content of the standard terms have been the object of any regulatory approach by the European Institutions. Currently is being discussed within the Council the Commission Proposal on standard terms as regards contracts being concluded by consumers (76), where some general principles are stated which embrace wider margins of protection for consumers than those achieved by former Community legislation (77). But as long as this Proposal would not become a Directive, and in order to study disadvantages for the consumer within the financial services contractual relationship, it is useful to establish a definition of "standard term". Although there is no uniform definition of them within the EEC Member States (78), the German AGB-Gesetz of 1976 (79), provides a substantive criterion: "Standard contract terms are those terms drafted in advance for a number of contracts, which one of the contracting parties proposes to the other upon the conclusion of a contract (80).

As regards the EEC legislation on financial services, the most important concern for consumers is focused in the anti-competitive practices that through cooperation agreements can be developed by the European credit institutions. Uniform conditions avoid any incentive for improvement of standards and should therefore not be allowed unless expressly exempted (81). The recognition of the use of standard form clauses by the Commission Recommendation of 17 November 1988 concerning payment systems

(82), do not have to be understood as a "general exemption" for credit institutions in order to introduce within the contract terms, exemption clauses, clauses imposing joint liability on the consumer and the retailer, etc. As said above the Council of the EC has adopted the Commission proposal for a Directive "on standard terms" (83), in which a common definition of "standard term" is given by enumerating different kinds of them (article 2 (4)). But up to date, no other remarkable feature can be noticed which could contribute to an improvement of the situation. Therefore, a kind of control should be introduced by the Community legislation. But scholars seem to be pessimistic on the subject: "when legislatures are considering the introduction of new legislation dealing with standard terms, business interests often challenge them to supply data which support the legislature's claim that freedom of contract is abused" (84). The creation of a new financial product or a new system or insuring its quality can not be accepted as arguments which exempt the credit institution of the compliance of article 85(1) of the EEC Treaty (85).

Recently "La Asociación Española de Jueces para la Democracia", has denounced the risks for consumers arising from such practices: "En teoría, las entidades crediticias actúan según las reglas de la libre competencia. pero en la práctica existe una fuerte interconexión, (a través, por ejemplo, del Consejo Superior Bancario), que provoca la existencia de prácticas homogéneas abusivas; entre las cláusulas abusivas

destaca el llamado "pacto de liquidez", que consiste en que el banco fija unilateralmente el saldo a pagar (86).

Bank charges:

Even if there has been no expressed agreement concerning commission and no agreement can be implied from a previous course of dealing, the bank will still usually have a right to charge a sum for its services (87) (88). Giving consumers comprehensive and accurate information about charges is only one aspect of market transparency, but it is a significant one in a period of rapidly increasing competition between different types of financial institution.

There is no doubt consumers can benefit from the increasingly direct competition between different types of financial service. However, the cost of providing each service should be transparent and there should be no concealed cross-subsidiation which distorts competition.

The disclosure of mechanisms for the calculation of the sum that the consumer has to pay for a banking service have not been the subject of any EEC regulation. Much more, attempts made by the Commission in both consumer credit and payment cards to include objective criteria for the calculation of the sum to pay for the consumer using these services has been sharpened within the decision making process.

In a written question by Mr. Sisó Cruellas to the European Commission (89), the lack of consumer protection on the subject was put on to evidence: ..."el Instituto Nacional del Consumo (Spanish), considera que la transparencia no es ni "medianamente satisfactoria"...", ¿Considera la Comisión que el consumidor comunitario está suficientemente amparado en relación con la transparencia que le deben las entidades financieras?". The answer of Mr. Leon Brittan, was a confirmation of the lack of capability of the European Institutions in order to protect consumers (90).

As regards consumer credit, the disclosure of financial terms has the objective of helping the consumer to compare the credit charges of one financier with those of another and thus to shop around for the most favourable terms. The proposed EEC Directive on Consumer Credit contained provisions for rate disclosure (91): article 3, indication in advertising of the total cost of credit; article 5, display of interest rates and other costs or credit (92). None of the two key questions to be resolved by rules requiring rate disclosure were solved by the Directive. The European consumers do not yet have an uniform regulation about what items are to be included in computing the amount of the credit charge, and what is the method of computing and expressing the rate. As said before, this situation can seriously endanger consumer interests with the enactment of the content of the article 12 of the Second Banking Directive, because the methods for computing those costs vary considerably from one country to another according to local conditions and practices (93). Mme. Mader stressed the problem of the lack of

transparence within the current banking practices: "Que la quasi totalité du service bancaire soit rendue sur les taux me parait précaire: c'est le symbole de la non-transparence"... l'attitude des banques vis-à-vis du crédit est pratiquè à des taux exorbitants... la multiplication par deux du taux de base bancaire" (94).

Transparent charging on the issue of payment cards was one of the principles contained in the draft directive that the Commission prepared on 1988 (95). However, the Commission was persuaded to transform the draft Directive into a Recommendation. The efficient "lobbyng" by credit institutions seems to be at the background of this decision.

Therefore, due to the lack of any EEC regulation on the subject, scholars are concerned as regards the protection of consumer interests in next future. Mitchell thinks that the impact that the single market will have on national deregulation of banking will reinforce market pressures on the banks to increase the revenue they get from charges (96). Therefore the "transparency of charging" will become an increasingly important issue on consumers protection (97).

Other issues of importance for consumers:

Several questions of importance for consumers remained unsolved despite the enactment of the Second Banking Directive.

First, as regards the Bank's duty of secrecy: To what information does the obligation of secrecy extend? To the knowledge which the bank acquired before the relation of banker and customer was in contemplation, or after it ceased?; To the knowledge derived from other sources during the continuance of the relation?. Is the duty of secrecy "absolute" or are there any occasions when a bank is justified in making disclosure concerning its customers' affairs?. Who is responsible for keep the secrecy within the staff of a credit institution?.

Secondly, several aspects on the protection of privacy of the consumer transaction raise concerns: the flow of personal data across frontiers in the context of an EEC wide and interoperable electronic banking network; disclosure of personal data or consumers' financial records to third parties for marketing purposes; the creation of black lists of names which are held secret or not officially organized by law, etc... This issue shall be discussed in next section.

Thirdly, there is no mechanism of redress for consumers which could provide the actual enforcement of their claims.

Up to now none of the European recommendations on the subject has been implemented within the Member States: those from the Council of Europe of the 23 of January (98), and the 14 of May of 1980 (99), and those contained in the first and second programmes for consumer protection within the EEC (100). This situation deserves serious attention. Mostly if we have in mind

that a government of and EEC Member State, (Great Britain), is considering the enactment of both the White Paper on "Banking Services: Law & Practice", and the "Draft Code of Banking Practice" (101), ensuring a fair deal for the consumer (102).

C. The protection of privacy of the consumer transaction:

Alongside the technical developments of informatics during late sixties and early seventies, the first voices raising concerns on the subject of the protection of privacy of the consumer transaction were heard: "Un autre danger de l'utilisation de l'informatique tient au fait qu'elle accroît le risque technocratique... l'atteinte à la vie privée n'est certes pas directe. Mais la technocratie disposant des ordinateurs peut accéder à une puissance telle que la vie privée sera restreinte à un domaine étroit" (103). Meanwhile the use of informatics on financial services began to be questioned: "les questionnaires que doit remplir le candidat à un prêt vont très souvent au-delà des seuls éléments destinés à garantir la solvabilité de l'emprunteur" (104).

In November, 1974, the French Commission on "Informatique et libertés" expressed its concerns on the subject: "d'une part, les différents fichiers (relatifs aux divers "produits" servis aux clients) sont reliés les uns aux autres par des systèmes de connexion informatique... d'autre part, cette base de données peut être consultée dans chaque agence ou guichet au moyen de terminaux... ces systèmes étaient ceux qui soulevaient le plus de difficultés sur le plan de la sécurité..." (105).

It is of great importance to take into account here some of the problems that could be created by an improper use of this technological development. We can notice three of them on which the French Commission relied:

- a) The instalment of screens outside the bank offices within the buildings of their customers can provide the formers with the possibility of entering the files of their competitors, as long as the lateres should also be customers of the same bank.
- b) It can be easy for "distributors" to access to the files of bank's customers with problems of solvency.
- c) Sellers of goods to be paid through credits can profit of access to the file for preparation of market studies or sell campaigns (106).

Some years later, aiming to cope with the task of protecting the use of personal data, the Council of Europe approved its "Convention for the protection of individuals with regard to automatic processing of personal data" (107) articles 6, 7, 8, 9 and 12, lay down general principles in order to safeguard the process of personal data revealing racial origin, political options, religions, beliefs, health, sexual life and criminal convictions; as well as the right of any person to obtain to guarantees as regards a proper use of its personal data. Unfortunately not all the member states of the Council of Europe have ratified the Convention.

Thus, financial services legislation within the western countries does not embody the protection of the principles above, although they have been consacrated more than ten years ago

(January, 1981). Moreover, as Alvin Toffler has repeatedly stressed, information related to personal data is quite unlike other resources in that it is not consumed when used. On the contrary, the use of information is almost always a "generative" process (108). Many scholars have largely demanded a solution to this situation; Millard: "to the many problems arising from the increasingly international nature of the data processing industry, the situation is complicated still further by the fact that some nations perceive unregulated data flows as a serious threat to their economic interests and even to their national sovereignty" (109).

Chorafas and Steinmann have stressed the necessity of regulation in banking activities: "Electronic banking permits direct access to the bank's text and data available through thousands of terminals and people. Hence, on line information systems increase the possibilities of fraud... Banks are particularly vulnerable to computer fraud because their inventory is money: "money inventories" are homogenous and immediately negotiable" (110).

The many systems also create problems for the banks' customers if employees are to be transferred from one data centre to another: "Employees had to learn a new security system each time they were transferred which can be potentially dangerous as regards security standards (sometimes contradictory)" (111).

On July, 27th 1990, the Commission of the European Communities presented its Proposal of Directive for the protection of persons with regard to the processing of personal data" (112). Recitals 2, 5 and 6 of the preamble, in which the

necessity to harmonize the protection of the use of personal data is stated, are examples of the legislative approach in which consumer protection is understood as a "second best" (subsidiary) to the completion of the economic objectives of the internal market. By example: Recital 2: "... que el establecimiento y el funcionamiento del mercado interior...hacen necesaria no solo la circulación de los datos personales"; Recital 5: "...la diferencia entre los niveles de protección de la intimidad... puede constituir un obstáculo al ejercicio de una serie de actividades económicas a escala comunitaria". Recital 8 leaves the door open for the protection of data flows in any special environment; whatever measure enacted within the financial services sector should take in mind this words: "...que los principios de la proteccion de la intimidad...podrán completarse o precisarse, especialmente en determinados sectores, mediante normas específicas conformes a dichos principios". It seems that many time will go by before the European Institutions will enact any measure for the implementation of these principles within the financial services sector.

Recitals 11, 13, 14, 15 and 17 as well as articles 12, 13 and 14 are a copy of articles 9 ss. of the 1981 convention.

The most relevant feature of the proposal is the imposition of responsibilities to the manager of files. Recital 20 is very interesting from the point of view of the way in which Community legislation is normally worded; two features can be remarked: first, the delimitation of responsibilities: "...la responsabilidad debe recaer, en caso de interponerse una acción por daños y perjuicios, en el responsable del fichero..."; secondly, the recommendation of the European legislator to the

national legislator of the kind of measure to take in order to guarantee the protection of personal data: "...que deben aplicarse sanciones disuasorias a fin de garantizar una protección efectiva". What we have to understand by "sanciones disuasivas", is far from clear; it could mean both, administrative or criminal ones.

In the former case, the Community will make another step in the way towards the creation of a European Criminal Law. In this sense it is worth mentioning some of the recent developments within the EEC legal framework. First, as regards the Rapport from the legal service of the Council of the European Communities of 11 June, 1990 (11), in which a positive opinion was stated as regards the capability of the European Institutions to oblige Member States to create a criminal procedure for the prosecution of financial transactions related to money profits from drugs-dealing. Secondly, as regards the enactment of Regulations of 4, February, 1991 (reinforcing the monitoring of certain expenditure chargeable to the Guarantee Section of the European Agricultural Guidance and Guarantee Fund), and 4 March, 1991 (concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Common Agricultural policy) (113), in which the Member States were encouraged to take measures to step up controls for avoiding irregularities as regards the execution of the financial transactions by the E.A.G.G.F.

Last, but not least it has to be underlined that article 17 is a copy of articles 6, 7 and 8 of the 1981 convention.

As a final remark we can say that the Proposal slightly differs from the content of the 1981 Convention. Taking into account that it is now in the first stage of the decision making process, it seems probable that some years will pass without an European common denominator on the subject being established. Once again, the Community arrives late to the protection of the citizens' rights in the face of both financial and technological developments. If we compare that in the United States we can see that their citizens have enjoyed material protection on the subject for more than ten years (113).

CHAPTER VI: CONCLUSIONS

The concluding remarks found some similarities within the area of financial services. Both the lack of a programme containing the measures for the protection of consumers, and the important role of credit institutions within the decision-making process, have to be stressed in this area.

It does not seem fair to create the legal framework for the achievement of an European financial area in 1992, in the absence of enactment of consumer protection measures. If the liberalization of capital movements and the uniformization of criteria on the soundness of credit institutions (accounting, own funds, etc...), have been conditions "sine qua non" for the enactment of the second banking Directive, why has the protection of consumers facing developments on the creation of a new financial area, not been put on the same level? Nothing but a strong influence of credit institutions over the decision-making process, seems to justify this situation. The measures enacted by the European institutions for the completion of the internal market in financial services only fulfil the necessities of the credit institutions. Both the approximation of prudential rules and the soft liberalization of the sector are measures largely demanded for the credit institutions. We shall examine this statement in the following chapters.

There is a risk that 1992 will be born without two of the basic conditions for a democratic society: the participation of consumers within the decision-making processes and the creation of rules for their protection.

NOTES

- (1) Council Resolution of April 14, 1975; OJ, n° C91/1
- (2) Council Resolution of May 19, 1981; OJ, n° C133/1
- (3) Council Resolution of 15 December 1986, concerning the integration of consumer policy in the other common policies; OJ, n°C 3 of 7 January, 1987.
- (4) Mostly with regard to consumer information and protection of consumer health and safety; and consumer's economic interest (misleading advertising, product liability; contracts negotiated away from business premises and consumer credit). See, the Commission rapport to "the 1992 Challenge at National Level"; Second annual conference, 29th November to 1 December, 1990. Badia Fiesolana. Florence (Italy).
- (5) See, Meynaud J.: "les consommateurs et le pouvoir"; Etudes de science politique 8; Lausanne, 1964; p. 446 and p. 455.
- (6) See, BEUC rapport, 1982 (a:3).
- (7) Resolution 543 (1973) on a Consumer Protection Charter (25th Ordinary Session of the Consultative Assembly; 14-18 May , 1973).
- (8) See, von Hippel: "Der Schutz des Schwächeren" 1982, reviewed by Fleming, Am. J. Comp. L. 31, (1983) 572.
- (9) Bourgoignie, Th.: "Consumer Law and the European Community: Issues and Prospect"; part III of the volume 3 of "Integration Through Law"; 1987. Walter de Gruyter. Berlin-New York.
- (10) Trubek, D.M.: "Consumer Law, Common Markets and Federalism: Introduction and General Concepts", in "Integration through Law"; op. cit. supra. vol. I.
- (11) Trubek, D.M.: op. cit. p. 10-11.
- (12) Bourgoignie, Th.: "Consumer Law..." .Op. cit. surpa; p. 121.
- (13) See, Fontaine, M.: "La protection du consommateur en droit civil et en droit commercial belges", in la protection du consommateur, Travaux. H. Capitant, Dalloz, Paris, 1975. pp. 215 et seq.
- (14) Pipkorn, J.: "Les méthodes de rapprochement de législations à l'intérieur de la CEE", in L'influence des Communautés européennes sur le droit international privé des Etats membres; LARNIER; Brussels; 1981, p. 19.

- (15) Close, G.: "The legal Basis for the Consumer Protection Programme of the EEC and Priorities for Action", in *Consumer Law in the EEC*, Sweet & Maxwell; London. 1984.
- (16) See, Close, G.: "Harmonisation of Laws: Use or Abuse of Powers"; (1987) 3 E.L. Rev. 473-476.
- (17) *ibid.* p. 7.
- (18) Sixth General Report on the Activity of the Community; 1972; p.17.
- (19) Commission answer to a question put by mr. Maigaard; OJ of 13/12/1975, n° C 285/27 and 28.
- (20) European Parliament Committee on the Environment, Public Health and Consumer Policy (rapporteur: M. Brégère), doc. 114/77 , 2 June 1977. pp. 48-49.
- (21) Isaac, G.: "L'action de la C.E. pour la protection des intérêts économiques et juridiques des consommateurs", A.U.S.S. de Toulouse; 1979 p. 177.
- (22) Swartz, I.: "Article 235 and Law-making powers in the European Communities"; 27 I.C.Q.L., 1978; pp. 614-628.
- (23) Marx, F.: "Funktion und Grenzen der Rechtsang. leichung nach art. 100 EWG", Cologne, 1976, p.160.
- (24) Leleux: "Le rapprochement des législations dans la CEE"; Cahiers de dr. euro. ; 1968; p. 142.
- (25) Slot, P.: "Technical and Administrative obstacles to trade in the EEC"; Sijthof; Leyden 1975.
- (26) "European Consumer Law"; Proceedings of the seminar held in Louvain-la-neuve on May 14 and 15, 1981; CABAY-BRUYCANT; 1982, pp. 71-72.
- (27) Joerges, Chr.: "Paradoxes of deregulatory strategies at Community level: The example of Product Safety Policy", 1990. EUI, p. 4.
- (28) COM (85) 314 final. Nouvelle impulsion pour la politique de protection des consommateurs (Communication de la Commission au Conseil); 23/7/1985. p. 2.
- (29) *ibd:* p.3.
- (30) "Limits of EC Integration in Consumer Law & Policy"; *op. cit. supra*; P. 214.
- (31) Von Hippel, E.: "Verbrauchersschutz in Europa"; *Rabels Zeitschrift*; 1981. p. 358-359.

- (32) See, answers to parliamentary questions, OJ of 14, 7, 1977, n°C 186/2 and OJ of 29, 8, 1977, n°C 206/2.
- (33) See, COM (85) 314 final; cit. supra; p. 4.
- (34) At the Zerp Workshop (Bremen, 1983), BEUC called for the institution at the Community level of an Office of Fair Trading similar to the one in the UK.
- (35) See case 72/74, Union Syndical- Service public european and others V. Council, (1975) ECR 401, where the Court said: "Moreover, one cannot accept the principle that an association in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category".
- (36) Humble, J.: "Codes of Practice" in : Marketing and the Consumer Movement, (1979) ed. Mitchell, p. 143.
- (37) Joerges, Chr.: Op. cit. supra (27); p. 45.
- (38) Reich, N. and Micklitz, H.W.: "Consumer Legislation in the EC Countries" (A Comparative Analysis). Van Nostrand R.C. ltd. 1980. p. 2-3.
- (39) Bourgoignie, Th.: "Eléments par une théorie du droit de la consommation au regard des développements du droit belge et du droit de la CEE"; Story Scientia. Brussels, 1988. Introduction.
- (40) OJ. n°C 3 of 7 January 1987.
- (41) See "Consumers and a Common market in financial services: Introductory BEUC policy paper" BEUC/ Ag V/ 222/88.
- (42) Positive integration is required to provide for such assistance as a Community- side - obligatory guarantee fund system (COM (88) 41 final; OJ of 12 April 1988), and obligatory deposit insurance schemes (Commission Recommendation of December 22. 1986; OJ n° 1 33/1987.)
- (43) See, Schmitz, B.: "Liberalization and regulatory reform in the field of banking services in Europe"; in "Consumers....; op. cit. supra p. 91.
- (44) In the United States, sect. 4. 104 (1)(e) of the Uniform Commercial Code defines a customer as "any person having an account with a bank or for whose a bank has agreed to collect items and includes a bank carrying an account with another bank".
- (45) See, Robinson v Midland Bank Ltd. (1925). 41 TLR 402, pst, para, . 11-12.

- (46) See, for the opening of a "credit account", *Ladbroke v Todd* (1914) 111 L.T. 43; and, *Commissioner of Taxation v. English, Scottish and Australian Bank Ltd.* (1920) A.C. , 683.
- (47) See, Ghestin, J.: "Les contracts d'adhésion et la protection du consommateur"; Créteil, 1978; p. 195, 201 ss.
- (48) The concept of consumer differs within the western legislations; See, the para. 24 of the German AGB- Gesetz; the art. 2 of the 1978 Luxembourg bill; the paragraph 1 of the Austrian Konsumentenschutzgesetz; the section 12 of the Unfair Contract Terms Act, 1977 (UK), etc...
- (49) See, "Consumer protection in the field of Consumer Credit"; Report by the Committee on Consumer Policy; OECE, 1977.
- (50) Deadline for its supplementation was the 1st of January of 1990.
- (51) See, Goode, R.M.: "Consumer Credit Law", London; Butterworths; 1989, p. 823.
- (52) OJ of 27 Mars 1979, n°C 80/4.
- (53) Indication in advertising of the total cost of credit and, when a percentage is mentioned of the effective overall annual rate (art. 3); display of interest rates and other costs of credit (art. 5); particulars which must be entered in credit agreements (art. 6(a)).
- (54) articles 4, 11, 12, 14 (1) (a-b), 14(1)-.
- (55) Opinion of 31 January 1980, OJ of 7/5/1980; n°C 113/22
- (56) EP 62. 071/def. , 7 March 1980.
- (57) Pront report, EP 59. 430/ def. , July 1980.
- (58) See Dehmen: "Die Harmonisierung der Rechtsvorschriften über Verbraucherkredit in den Mitgliedstaaten der EG"; Diss; Köln, 1979.
- (59) Goode, R.M.: "A Credit Law for Europe?" ICLQ; vol. 23, April, 1974, pp. 234-272.
- (60) Draft proposal for a Council Directive concerning the consumer and modern means of payment; CEE, XXI/267/88, April, 1988.
- (61) Commission Recommendation of 17 November concerning payment systems, and in particular the relationship between cardholder and card issuer; OJ; n°L 317 of 24 November 1988, p. 5.

- (62) Bourgoignie, Th.: "Consumer protection and the future of financial services". Paper presented to the participants of the European Finance Symposium; WORKSHOP n° 7 : the future for financial services in Europe; Antwerpen (Belgium) 4-6 November, 1988.
- (63) Cargill, T.F. y Garcia, G.: "Financial Deregulation and monetary control; Standford, U.; 1982, p. 24.
- (64) See, Tyree, A.: "EFT Systems. Consumer issues" Australian Payment System Council. Sydney, 1985.
- (65) See, Bourgoignie, TH: "Transborder Banking Services: the Consumer's interest contractual aspects ", in "Liberalization and Regulatory Reform in the Field of banking Services in Europe"; Zürich, 1989, p. 82.
- (66) At present, only Denmark has a Payment Cards Act (1984), though there have recently been recommendations to the banks from the Government appointed Review Committee on Banking Services Law in the UK ("Banking services: law and practice- Report by the Review Committee. 1988).
- (67) Well educated, better informed v. less educated consumers. Thorelli, H.; Becker, J.; Engledow, J.: "The information seekers"; Ballinger Publishing Co; Cambridge, Mass; 1975.
- (68) European Consumer Law Group: "Arguments in favour of consumer protection whit regard to the new electronic means of payment". Brussels; October; 1988. p. 4.
- (69) ibd; p. 7.
- (70) Mitchell, J.: "Consumer Protection", in "Europe and the future of financial services"; 1986. Brussels. Commission of the EEC, p. 412-413.
- (71) XV/130/90, June 1990.
- (72) UNCITRAL; A/CN 9/WG IV/WP, 46; 21st. session. 25th of May, 1990.
- (73) Pocar, F.: "La legge applicabile ai contratti con i consumatori ", in "verso una disciplina comunitaria della legge applicabile ai contratti"; Padova, 1983. p. 303.
- (74) Goccardom, J. et Bourgoignie TH.: "Droit des Consommateurs. Clauses abusives, pratiques du commerce et réglementation des prix"; Bruxelles; 1982; p. 68-69.
- (75) Von Hippel, E.: "Unfair contract terms and consumer protection"; paper presented at the Centre International d'Etudes Juridiques; Luxembourg, 18-19 July; 1983, p. 51.
- (76) COM (90) 322 final - SYN 285. Brussels, 3 September, 1990.

- (77) See Directive 87/102 EEC on consumer credit, before, as well as amending Directive 90/88, EEC.
See also Commission Recommendation 88/599 EEC on payment systems, as well as Commission Recommendation 87/598 on electronic payments.
- (78) Schmidt-Salzer, J.: "Allgemeine Geschäftsbedingungen"; München; 1971; p.9.
- (79) Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz), of 9 December 1976, Bundesgesetz-blatt, 1976: I, p. 3317.
- (80) *ibid*,; par. 1.
- (81) See, Reich, N.: "Die Freiheit des Dienstleistungsverkehrs als Grundfreiheit"; ZHR, 1989; 571-594.
- (82) OJ L 317/55 of 24 Nov. 1988.
- (83) OJ; C / 243, of. 28th. September, 1990, pp. 2-ss.
- (84) Von Hippel, E.: "Unfair contract terms..." *op. ct. supra*; p. 51.
- (85) See, Hank, R.T.D.E., 1989, P.5.
- (86) VI CONGRESO de la Asociación Jueces para la democracia. "Mercado, derecho, y Jueces"; Logroño; Junio, 1991. Documento final.
- (87) This right is based upon the principle that where one person requests another to perform services of a professional or business nature, the law implies a promise on the part of the first person to pay a reasonable sum for services rendered.
- (88) See, for example, *Price v Hong Kong Tea Co.* ; (1961) 2 F. & F. 466 (accountant's remuneration).
- (89) Pregunta escrita, nº 920/89; Sr. Joaquín Sisó Cruellas (PPE); 1 de Diciembre de 1989; 90 / C 283 / 05.
- (90) Respuesta de Sir Leon Brittan; 7 de Mayo de 1990; 90 / C 283 / 03-4. DOCE, C del 12 de Noviembre de 1990.
- (91) OJ of 27 mars 1979, nº C 80/4.
- (92) It was not settled whether the method of calculating the rate is to be fixed by the Commission or left to be dealt with by rules laid down by Member States. The Commission text of the proposed Directive adopts the latter approach, the amendment made by the Parliament proposes the former.

- (93) See, Goode, R.M.: "Truth in lending: the purposes and principles of rate disclosure"; in "Consumer Protection". 1984, Bruxelles.
- (94) "La qualité des services bancaires", in La Revue Banque; n° 491 - Février, 1989, pp. 142-143 and 144.
- (95) CEE, XI/267/88 April 1988.
- (96) Mitchel, J.: "Liberalisation and regulatory reform in the field of banking services in Europe". (A consumer view); 1989, London.
- (97) As regards the consumer implications of the second banking Directive, Mitchell provides an apparently contradictory argument: "If there is any reduction in the price of banking services to consumers, it is more likely to come from intensified competition in deregulated national markets rather than form liberalisation "per se" ".
- (98) Council of Europe, Recommendation, n° R (81) 2, on the legal protection of the collective interests of consumers by consumer agencies.
- (99) Council of Europe, Recommendation, n° R (81) 7, on measures facilitating access to law.
- (100) OJ; EEC, 1975, n° C 92/8.
OJ; EEC, 1981, n° C 133/10.
- (101) Respectively Published in March 1990 and December 1990.
- (102) See, Arora, A.: "The Draft Code of Banking Practice"; International Banking & Finance Law Bulletin, January, 1991, pp. 656-660.
- (103) Braibant, G. et Juvigny, P.: Exposés introductifs à la Table Ronde de Barcelone, Annexe. Institut International des Sciences Administratives.
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- (105) Rapport de la Commission "Informatique et libertés"; Annexes. Décreté, n° 74.938 du 8 novembre, 1974. La Documentation Française. P. 199.
- (106) Ibid; pp. 200/1.
- (107) Council of Europe; D. n° 108; STRASBOURG; 28.1.1981.
- (108) Toffler, A.: The Third Wave (London; PanBooks) 1981; p. 22.

- (109) Millard, J.C.: "Legal Protection of Computer Programs and Data"; Sweet and Maxwell. London; 1985. p. 9.
- (110) Chorafas, N.D. and Steinmann: "Implementing networks in banking and financial services"; McMillan PRESS LTD. London, 1988. p. 202.
- (111) Ibid; p. 229.
- (112) COM (90) 314 final - SYN 288; OJ, 90/C, 277/03.
- (113) The "Right to financial Privacy Act" limits access to customer records.
The "Electronic Funds Transfer Act" outlines the liabilities, duties and obligations of financial institutions in front of their customers.
The "Truth in Lending Act" and "Foreign Compt Practices", complement the above citted ones.

PART III

THE EEC BANKING HARMONIZATION PROCESS IN THE LIGHT OF THE GLOBALIZATION OF FINANCIAL MARKETS

INTRODUCTION

The last part of this thesis is divided in three chapters.

The first one is devoted to both the study of the current International Economic context and its interrelationship to the shaping of the Regulatory framework as regards banking activities in western countries.

The second chapter is dedicated to the study of the credit institutions strategies as regards the achievement of a regulatory environment which could afford them the most suitable framework for developing their business projects.

Finally we shall make a critical approach to the regulation of Financial Services and indeed, of credit institutions within the internal market programme of the Community. Those three chapters are closely related. The main arguments to be put forward may be summarized as follow:

- 1) The Free market economic pattern is the workable environment aimed by credit institutions both at an International and European level in order to develop their future commercial strategies.

- 2) The way towards "self-regulation" is beneath the recent trend on financial services "deregulation". Therefore the EEC harmonization process has been prepared taking in mind this final stage, despite many interests in order to maintain the banking regulation "rebus sic stantibus".

- 3) As a logical consequence of the two points above, the EEC harmonization process for banking activities suffers from a "legal schizophrenia". On the one hand the completion of the Internal market for credit institutions it is not related to the legal nature of the majority of the rest of the harmonization processes. We are not seeking an "Internal Market" for credit institutions. On the other hand, the legal nature of the banking harmonization process is far from clear. First, the Second Directive did not have to be enacted under articles related to freedom to provide both, establishment and services. Secondly, we need a uniform banking law. Banking questions are too numerous and too important for all the citizens of the European Community. More than a "technocratic" approach is necessary on the subject. A legal solution under both article 235 or 220 could provide a wider range of solutions for the many problems that the provision of banking services across the European frontiers actually pose.

- 4) The situation above is the consequence of the lack of willingness of the governments of the Member States to promote a European legal environment for banking services.

Two reasons seem to be beneath this attitude. First, there are fears from being deprived of sovereignty on monetary issues (which also means macro economic planing: budget, inflation, unemployment, etc...) and the control of several segments of the credit market by public owned credit institutions. Second, there is the strong pressure on the part of the managers of the most important European credit institutions over the strategic decision-making targets.

In the following chapters we shall see how complicated the situation appeared to be and how far we are from any solution involving wider citizen participation in the decision making process on the subject. Lack of democracy and social control as regards the regulation of the activities of a so much crucial sector of the economy must be regarded as basic problems to be solved in order to achieve a more reliable legislation for the regulation of the financial services in Europe.

**CHAPTER I: THE REFORM PROPOSALS OF THE UNITED STATES FINANCIAL
MARKETS FROM AN EUROPEAN PERSPECTIVE**

**A. The economic context of financial services in the near
future:**

It is a fact that the world's present sociopolitical environment is dominated by the most neoliberalist ideas.

Economic theorists as Hayer (1) and Stigler (2), are the intellectual core of the new sociopolitical environment. On the other hand, the recent political changes within the Communist World have contributed to the reinforcement of the economic neoliberal ideology. Therefore the question on what industrial policy will be developed by the western countries within the above environment ought to be answered.

The European Economic Community despite its peculiarities, shares the world economic tendencies. Thus, beneath the majority of the regulatory strategies of the Community there are economic considerations aiming to shape the sociopolitical reality on line with major western tendencies.

The main purpose of these reflections is to suggest the interrelationship between the Economic Agents and Policy makers as regards the shaping of the Economic Policies to be developed by the European Institutions. Pedersen is well aware of such

strategy: "It is big business which has the capacity to handle an internal EC market with all its range of regulations, complex legal systems, etc. Big business has more capacity in handling the internal market than either small and medium-sized firms or small states" (3).

The final outcome of this new economic environment raises concerns for many observers. What is at stake is the "old-style" national Keynesian policy and the survival of the welfare state. "Social costs become an obstacle to growth and development within the postwar model. But this is a model which big business, within the project of the internal market, is trying to reshape" (4).

Libertini remains sceptical regarding to both the philosophy and the consequences of the neoliberal tendencies: "Il filone piu importante delle ideologie della crisi non marxiste è legato a fenomeni come la crisi ambientale, demografica, energetica... nella scoperta dei costi dello sviluppo economico di mercato... la difficoltà di mantenere un diffuso consenso su valori come l'innovazione e la competizione. "Già la degradazione dell'ambiente naturale e urbano ha posto inquietanti interrogativi sulla qualità dello sviluppo, sottolineando l'inadeguatezza di una società in base alla quantità di beni prodotti, anziché in base alla quantità di bisogni soddisfatti." (5).

In many fields in Northern and Central Europe such trends will become a threat to social democratic rights as already achieved in individual member states.

What these processes add up to is that the key relation between the "model" and the key policy issues is the undermining

of the single state as a framework for handling economic, structural, public, spacial and social dimensions. Thus, the achievement of workable markets without the classical State's administrative controls, and its substitution by a global market with a minimum of administrative burdens is the goal to be achieved by these precesses. Fox, stressed this view stating that: "If consideration of industrial policy simply means consideration of procompetitive efficiencies, then the mandate to consider industrial policy would have no troublesome or complicated implications". He goes further when says that... "beyond this point, however, efficiencies combined with non-efficiency advantages of size and leverage can benefit the producer and increase power, possibly hurting the European consumer... "If economic power is the goal, member states may be jealous of their sovereign right to protect their citizens as consumers..." (6).

Before setting up new policy instruments and institutional arrangements in Europe, one should try to learn as much from history as possible. That is, to evaluate different socio-economic models and their institutional capacities to handle different kind of problems, avoiding market recommendations as the core of every economical development.

The main feature of the neoliberal tendencies is the "self-regulatory" approach. Therefore as we shall see in the following chapters, it is not the old trend towards deregulation as such. We shall talk of a "new-gremialistic" approach, similar to that of the middle age commercial organization. Each of the most relevant microeconomic sectors of the economy, comprising

financial services, develop a single strategy towards "self-regulation": own rules, own judges, etc. This complex strategy is the solution preferred by large economic organizations to the paradoxes arising from the last attempts of deregulation.

Some scholars remarked the attempts by economic agents to shape economic patterns in order to develop their market strategies. The majority of cited attempts were developed during the last two centuries but none of them was capable to achieve a suitable economic environment. First attempts to find solutions to both wild competence and socialism, relied on "economic protectionism", a concept outside of the new approach. In this sense, Ruffolo states: "L'alternativa storicamente piú frequente alla concorrenza non è il socialismo, ma il protezionismo economico. L'obiettivo del governo democratico dell'economia, da realizzare non attraverso la pianificazione statale capillare, ma attraverso la determinazione di precisi binari entro i quali può svolgersi l'azione del mercato (distribuzione del reddito, beni collettive, ecc...), può coordinarsi efficacemente solo con un mercato dinamico, e non con un mercato protetto (7)".

Other historical approaches to the regulation of market structure which do not fulfil the new market regulation approach were those of Bain (8), Waldman (9), and Williamson (10), as well as those of Clark advocating for an interventionist policy constraining market power (11). In this sense, Nonet and Selznick are of the opinion of reinforce the above "interventionist policy" of governments, within certain conditions, whenever the market conditions would make it necessary: "But government must then, proceed, as a legal actor, to establish the agencies and

mechanisms by which public ends will be furthered. In that legal capacity government transcends power politics. It looks beyond the demands made on it to the needs it must meet, reaches out to powerless interests, elicits participation, takes initiative to discover emerging problems and inchoate aspirations" (12).

The possibility for governments to move from "intervention" to "active participation" is not convincing from the standpoint of the interest of the economic agents. Such a possibility depends only on the changing conditions of citizens' political options. Therefore, economic agents prefer to ban any possibility of government participation in the market game: no laws, no administrative agencies, etc. In effect, "self-regulation" means absolute independence of every political decision which could hinder the aims of "big business". Academic support for self regulation is easily found in the "contestability theory" to interventionist policies which focused increased attention upon entry barriers and redefined their character. Economies of scale, for example, have frequently been considered as barriers to entry. However they need not permit any of the manifestations usually associated with market power. This view, calls for a major reorientation of both the charters and the operating programs of regulatory authorities. It has been argued for example, that "where public measures are called for, the types of market intervention that ought to be undertaken are, in many cases, rather different from those that have traditionally been employed, and that there are some cases in which intervention is inappropriate even though it was previously thought to be desirable..." (13). Therefore, on noting the inability of

interventionist policies to cope with some market failures, any kind of government regulation of the markets is questioned.

However, the risks of a globalization of neoliberal purposes through the "self-regulatory" approach can seriously damage the completion of the European integration Objectives. The development of Western economies during the past century suggests that, with capitalism, we experience high micro-economic efficiencies but at a price of macroeconomic inefficiencies, plus built in socio economic diseconomies, big geographical inequalities and the lack of both, internal and external, democratic institutions to control the developmental processes. Those consequences will breach the most important aims of the citizens of Europe, expressed and consecrated through a large number of national constitutions and regulations. Moreover these aims are expressly consecrated in both the Rome Treaty (1975) and the Single European Act (1987).

Creating an internal market in the hope of generating market microeconomic efficiency is not very wise when one knows from historical experience of the market system the price in terms of social destruction. As Pedersen has warned, social destruction caused by the internal market will create a need for a mixed economy of welfare state. As crucial dynamic processes in society generating social and economic development come from democracy at different levels: ... "A flexible society is needed because big business will make internal plans. That is, we could end up in a planned economy "turned upside down"..." (14).

These reflections above are useful in order to understand the Banks' strategy at both an European and a worldwide level.

Banking is a microeconomic sector of the economy, but at the same time is perhaps the most important one. As we shall see in the following chapters, the banking industry (clearly dominated by a range of no more than 100 banks in the world), is expanding its activities towards many directions: securities, insurances, corporate investment, etc... Rather curiously the above phenomena has just happened during the last ten years, beginning in the United States, following in Japan and, finally, the EEC.

This situation gives rise to serious concerns. Banking means many things, including Power and Influence. A self-regulated banking systems, with well rooted tradition of covenants, concerted practices and oligopolystic behaviours, could mean an independent source of power. Any relinquishment by governments or an administrative agency which renders a public control over banking activities may be dangerous for the political instability of the societies.

The EEC internal market policy for financial services is clearly influenced by this situation. Being aware of that, we shall better understand why the EEC harmonization process is so full of contradictions, gaps and conflicting interests. Moreover, we shall also understand the metaphoric loneliness of citizens faced with the outcomes of a financial environment created for "its own sake".

B. A historical approach to the reform proposals of the United States financial markets:

On February the fifth, 1991, Mr. Nicholas Brady presented his proposal for the "reform" of the US financial system. The necessity to adapt the US financial markets to the development of the financial products, alternative ways to the inefficiencies of the deposits insurance scheme and the elimination of the restrictions imposed by the Glass-Steagall Act (1933), the Bank Holding Company Act (1956) and the McFadden Act (1927, 1933), are the main objectives to be achieved by the above "reform" (15).

On the table now are two more proposals for dealing with these problems: a draft approved by the House Banking Committee in June and one of the Senate Banking Committee of August 3rd.

A study of these objectives can shed some light on some of the aspects underlying the EEC harmonization process in financial services. In order to do so, three questions have to be analysed:

- i) **what is the historical background of the United States Reform?**

- ii) **Does exist a dicotomy regulation v. deregulation, underlying the above "reformist proposals"?**

iii) what are its relationship with the "neoliberal" approach (through microeconomic deregulation, shaping macroeconomic environments)?

As regards the historical approach to the "reform", Scholtand draws some basic features of general importance: "We so often fail to see that the political process from which every regulatory program emerged is itself a strong kind of free market, albeit with buying power distributed differently form economic markets. The political and economic "markets" are importantly related through such linkages as campaign financing and lobbying" (16). The many directions towards the 1991 "reform" of the US markets are tending, are simply doors opened by the pressure of market forces over a very much regulated sector of the US economy since its creation on the last century.

A comprehensive review of each of the reasons for the regulatory strategy developed in the United States is beyond the score of this overview. However it is worth noting the main features of some of them. The major impetus for most regulations affecting the banking industry was the stock market collapse of 1929..."The period from 1929 to 1933 ranks as the most severe economic tragedy in US history. The number of banks declined from 25,000 to 15,000; the money supply dropped by one third; the gross national product was cut in half; and unemployment rose to 25 per cent of the labour force..." (17). A large body of financial reform legislation was passed in reaction to the collapse of the banking system, attempting to upgrade bank safety by limiting competition, and by restricting bank entry into

nonbank financial activities. Friedman and Schwartz identified the wild free play of competitive forces, which engaged banks and financial markets in unsound activities, as the major reason of the "reform" (18). This view is widely shared by the majority of scholars. By ex., Cargill: "Banks had vigorously competed for funds...adopted increasingly risky loan and investment portfolios...became directly involved in equity markets to a degree far more excessive of what it is prudent for institutions whose demand deposit liabilities constituted the major medium of exchange for the nation..." (19).

The most important legislative outcomes of the 1930's financial reform were the Banking Acts of 1933 and 1935.

Three major provisions have to be remarked within the Banking Act of 1933: The first is the separation of commercial banking from investment banking, implemented by the prohibition on to commercial banks from underwriting and distributing stocks, bond or other securities other than federal government bonds, municipal general obligations bonds and deposit type securities. The second is the authorization to the Federal Reserve (FED) to regulate the amount of interest that banks could pay on time deposits. The last major step in fashioning the federal bank regulatory system occurred in 1956 with the passage of the Bank Holding Company Act, which gave to the FED full regulatory authority over multibank holding companies, which was extended in 1970 to all bank holding companies whether one bank or multi bank. The third is the Creation of the Federal Deposit Insurance Corporation (FDIC) (20).

The Banking Act of 1935 extended the power of the Federal Reserve Board. It authorized the Board to impose credit controls, to regulate the discount rates of the Distinct Banks and to change reserve requirements within a wide range.

The reform legislation of the 1930's determined the structure of the financial system that existed up until the passage of the Deregulation and Monetary Control Act in March 1980. Lash synthesized the process towards new financial regulation with these words: "...Because successive crisis led legislators to believe that banking required increasingly more regulation, the earlier acts were primarily designed to tighten bank regulations. In the last two decades, however, rapidly rising market interest rates in combination with major technological innovations in communication and data processing, have caused a number of regulations to have harmful effects on depository institutions" (21). Similarly, Golembe and Holland (22) .

The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) reduced regulation by eliminating state usury ceilings and tightened monetary control by extending FED requirements to all commercial banks.

Finally, a passing mention should be made to the Garn - St. Germain Depository Institutions Act of 1982. Its major purpose was to improve the situation of the "thrifts" by granting them new asset and deposit powers.

In the approach towards achieving soundness, however, the current legislation is different to 1930's. The former was based in the restraining of competitive forces. A sound financial system is now regarded as one in which competitive forces are allowed more flexibility.

C. Some questions to be answered:

All these complex networks of regulations necessarily pose numerous questions for the academic researcher. Such questions concern, for example: why is regulation still necessary?; What are its "pros" and "cons"? What optional policies to regulation should be possible to enact without damaging the instability of the whole financial sector?.

As regards the first question, it is useful to present some news of the major academic commentators. The scholars have given many "pro-regulation" arguments. First, Redisch: "Soundness of the banking system, safety for (small) individual depositors, credit allocation, promotion of competition and retardation of concentrated corporate power, protection of the (small) borrower and other "proconsumer" concerns" (23). Second, "Equity" for owners or customers of the institutions and the pursuit of economic efficiency as meaningful objectives of regulation (24). In this sense, Lash found at least five major goals of regulation: safety (to provide a sound stable financial system); competition (to promote and maintain competition among financial institutions); credit allocation (to channel credit to the most socially desirable uses); fair play (to ensure fair and just treatment of customers); monetary policy (to provide a financial environment that facilitates the conduct of monetary policy) (25). Third, Gellhorn relies on the great diversity of functions which are developed by regulatory strategies within the financial market: "Banking regulations have some function other than safeguarding depositors against loss of their funds in their bank

collapses...If suddenly, deregulators had their way and the forces of competition were given free rein, would the problems and deficiencies of the past not reappear in their old guise or in a new form?" (26). Fourth, to enhance economic efficiency and to protect certain classes of consumers (27). Fifth, the maintenance of financial and economic stability, through control of monetary conditions and the avoidance of bank failures (28). Sixth, a means of protecting "innocent" bank customers and a means of protecting "innocent" banks from the negative effects often associated with the failure of other banks" (29).

Scholars from outside the USA have also stressed the importance of banking regulation. For instance, Capriglione states: "La banche conseguano ottimali strutture organizzative ed operino mantenendo livelli di liquidità, redditività e solidità patrimoniale" (30). Similarly, Cammarano (31) and Giannini (32).

A dominant feature can be remarked within the majority of the opinions above. Regulation of the US financial markets, and so of the credit institutions' activities, can be understood as a necessary policy for the preservation of the public wealth and the macroeconomic development of the whole nation.

As regards the second question above, there are many scholars who criticize both the necessity and the form of the current financial markets' regulatory strategy within the United States. For example, Martin and Schwartz state that: "regulation has failed not because the initial purposes were implemented incorrectly but because often they have been unclear and nonoperational, leaving interpretation and implementation to the

discretion of the regulators" (33). Goldberg and White see "price regulation" and "entry regulation" as a threat to competition whereas "safety regulation" is necessary for avoiding bank failures (34). The operating procedures within the FED as regards the interrelationship between monetary policy and the structural problems of the Financial systems have also been questioned by scholars (35).

The Hunt Report, 1971 called for sweeping structural changes of the financial system, questioning the regulatory strategy for the inability of financial institutions of adapting to several changes in the financial environment (high interest rates, inflation, new financial institutions and instruments, changing technology). Both inflation and interest rates are also two negative features of banking regulation in the opinion of Lash who says that with inflation driving interest rates far above the regulated ceilings on bank deposits, brokerage firms were able to harness improved technology and offer deposit substitutes at market rates of interest. The resulting competition raised bank risk in two ways. First, the increased competition trimmed bank profit margins, leaving less margin for error. Second, the increased competition by nonbank financial institutions reduced the value of bank charters (36).

Dale, remarks another negative feature of the regulatory network of the US. In periods such as 1966-1970, Regulation Q made it extremely difficult for banks to raise adequate funds domestically. The growth of the Eurodollar market, in large part,

can be attributed to regulation on US commercial banks: "After World War II, there was a substantial demand for the US dollar. US banks, however, were at a competitive disadvantage relative to their foreign banks. They had higher costs due to reserve requirements and FDIC insurance charges, and were prevented by Regulation Q from paying competitive deposit rates... (plus) the prohibition of the payment of interest on demand deposits" (37). Therefore, US banking restrictions strongly encouraged depositors to make their dollar deposit off shore (38).

Edward and Scott note the "chartering" authority exercised by both federal and state banking regulatory authorities as the major obstacle to entry into the banking industry (39). Gower has summarized the defects of regulation as follows: complication, uncertainty, irrationality, failure to treat like alike, inflexibility, delays, over-concentration on honesty rather than competence, excessive control in some areas and too little in others (40). Carron stressed the Gower's view: "...yet the system has become even more complex. Regulations have overlapped and have left gaps. Agencies have quarrelled over regulatory policy. The problems have become specially acute in recent years with the loosening of traditional distributions among industries" (41).

The most important remark we can make of the above critical approach to regulatory policies in financial markets, is that of the viability of "deregulation" as an alternative to the current situation. Nonetheless, the deregulatory alternative is far from being the most appropriate solution. Scholars are divided on the subject. This doctrinal division is often used by banking lobbies and business interests in order to impose their view to market regulations. The US 1991 proposals seems to be in the middle of

the scholars' polemic. What, if any, are the advantages of deregulation? Would it not be better to talk of "Re-regulation"? Is "self-regulation" the final aim of the 1991 proposal?

Defenders of "deregulation" of the US financial markets have a wide range of economic reasons for it. The common core of these reasons relied on the improvement of economic efficiency through the free play of competition. For instance: First, the need to reinforce price-flexibility in the American financial markets is a strong enough argument for deregulation (42). Second, the removing of interest-rate ceiling, the widening of sources of funds and the expanding of the uses of funds for financial institutions, are objectives which foster competition; deregulation appears to be the best way for their achievement (43). Third, the administrative burdens and inefficiencies deriving from the existence of both state and federal levels of regulation should also disappear with deregulation. In this sense, Edward considers that the "liquidity rationale" (the need to prevent bank runs in order to maintain control of the money supply) could be maintained just with the adoption of a viable system of deposit insurance enjoying the confidence of the public (44). Similarly impediments to new entry as "convenience and needs" requirements, "adequately banked" (45), seeking a charter showing "good character", "certain managerial expertise" and to have capital backing (46), are restrictions which clearly worsen bank performance; the deregulation approach also tends to ban such practices. It is worth noting that the above administrative requirements are still being permitted within the EEC banking

directives. Alhadeff remarks the necessity to eliminate other more "subtle" legal restrictions on entry as the legal lending limit of 10 per cent of capital to any one borrower, which may force new banks to raise significant capital before obtaining a charter (47).

In terms of burdens imposed on banks for safety reasons, deregulation should also offer some advantages. For example O'Driscoll Jr., stated the necessity for deregulation of the current deposit insurance scheme: "As banks' funding costs came to reflect more fully the fluctuations in money market interest rates, it became imperative that their assets also yield competitive returns" (48). Thus, Banks responded to these pressures by, among other things, shortening the maturities of their assets and setting floating rates on a higher proportion of their loans. The alarming increase in the failure rate among banks suggests that in their search for higher yields, banks may have also taken on more risk.

Kaufman adds another reason: "premiums for federal deposit insurance are proportional to the insured bank's total domestic deposits rather than related to the institution's risk exposure. Thus, risky institutions pay no more for the same insurance coverage than less risky institutions do" (49).

Fourth, many scholars rely on the importance of market structure. Regulation makes banking market more concentrated. Since the performance of the industry in products is influenced by structure, the aggregate effect of a change in structure may be substantial. Therefore a deregulatory strategy seems to be

necessary. In this way studies from Phillips (50), Jacobs (51), Edward (52) and Aspinwall (53) generally find that increases in concentration clearly increase loan rates (mainly business loan rates, consumer rates and mortgage rates). In this sense, Hodgman has demonstrated the negative effect of concentration over the rates on loans to depositors (54). Heggstad (55) and Williamson (56), stated that concentrated markets tend to be less likely to innovate and may reduce their leverage. Kaufman, sees another advantage arising from the deregulation of current concentrated markets: "...the wider the range of banks available to the seller of the security, the greater the probability of his finding a safe bank and the more likely it is that the funds will be transferred from the buyer's bank to the seller's" (57). We can thus, conclude, that deregulation will make the market structure less concentrated.

Finally, fairness to customers and the reduction of the possibility for banks abuses, are other of the advantages to enjoy with deregulation (58).

As deregulation does not necessarily mean absence of regulation, scholars have given some alternatives to the current regulatory situation of the US financial markets. They include, first, the substitutability of deposit insurance for capital adequacy requirements or a judicious mix of deposit insurance coverage and increased availability of information (59). Secondly, the necessity to ease entry requirements to banks, have to present at least three main features: adequate capital resources, able management and a well designed operating plan

that would enable them to prosper in a competitive market (60). Third, only balance sheet controls are necessary (61). Fourth, relaxing restrictions on New bank formation and branching restrictions (62), as well as activity restrictions (63). Fifth, the reduction of frequency cost and disruption of bank failures through more timely resolution of bank failures (64). Sixth, changes must also affect to control mechanisms to the current ones on the creation of sources that provide information about particular institutions, parties other than the bank's stockholders or depositors who can monitor the behaviours of bankers and contractual terms that expand or more fully define the legal obligations of bank stockholders and managers to depositors in the event the bank fails (65). Seventh, the creation of a single primary bank regulator that would assume all the powers of the controller of the Federal Currency and the FDIC and those of the Federal Reserve, as well as that should be independent and not part of any other Government agency (66).

Therefore the common core of the above proposals can be summarized as follows:

- i) Retain some type of federal deposit insurance system.
- ii) Place greater reliance upon balance sheet controls (especially liquidity and equity capital requirements)
- iii) Eliminate restrictions in entry, branching and activity.
- iv) Eliminate price controls.

The proposals above apparently cope with the three basic issues that have been raised by America's deregulation over the past 15 years: whether bank can be kept more solvent by letting them into different business and be made better capitalised by letting different sorts of business own them; how to finance America's almost limitless deposit insurance protection allowing market discipline to improve bank management; and how to disentangle a bewildering batch of bank regulators.

Another group of scholars draw the possibility of a reliance on "self-regulation" rather than "deregulation". Both the philosophy and many of the recommendations of the Hunt Report, are based on a self regulatory approach: "The Commission's objective, then, is to move as far as possible towards freedom of financial markets and equip all institutions with the powers necessary to compete in such markets. Once these powers and services have been authorized, and a suitable time allowed for implementation, each institution will be free to determine its own course" (67). The replacement of the current system by a new and more comprehensive system of regulation are the recommendations of Professor Gower: "A system based so far as it is possible on self-regulation" (68).

In the view of defenders of self-regulations, such system offer a number of advantages: i) Day-to-day regulatory action would be distanced from government. ii) A private sector body able to make and enforce rules could have greater flexibility in its operation than a body unable to change its rules other than

by parliamentary legislation. iii) The retention by government of discretionary powers over matters of recurring detail have disadvantages as the relative remoteness, the lack of direct commercial experience and of specialization on the part of civil servants. iv) Self-regulating organizations are less likely than is governmental regulation to inhibit innovation and international competitiveness. v) Courts, might not always be the most competent bodies or in the best position to review agency actions or decisions (mostly as regards the recognition of the value of both forms of control and accountability) (69).

Hall (70) employs these ideas with regard to the US financial markets (mainly in the securities market). England is able to predict how bank managers and costumers would behave in an unregulated banking relationship: "...The exact position of bank managers on the continuum of the risk taking behaviour that places stockholders at one end and depositors at the other, will depend, on the reward and punishment structures devised by stockholders and depositors"..."stockholders, through the board of directors, will attempt to influence the behaviour of bank managers principally through a structure of direct rewards, (promotions, salary, bonuses, and other perquisites)"... (71). Control also can be exercised indirectly through the stock market and the market for corporate control. Depositors could exercise even more influence...given existing deposit contracts, if enough depositors became dissatisfied and responded by closing their accounts, the cursing run could force a bank into failure in a relatively short time.

D. The need for Regulation:

The 1991 proposal contains the common core of the deregulatory measures above. After a study of each of them, we can imagine the future patterns within which financial services are going to be developed in the future.

Mostly if we take into account that the current globalization of financial markets will afford to the expansion of any liberalizing reform within one of them to the others. (This situation was experienced with the New York stock exchange reform).

The majority of the measures raise the question of their necessity. In addition, it seems that only geographical constraints on bank expansion (Mc Fadden Act, 1927; 1933) and the administrative structure of banking activities control do need to be changed.

Therefore the underlying philosophy of the rest of the proposals must be questioned. Three of them are very much important for the purposes of this research. First, the creation of a financial sector within which banks keep the preeminent role should be the necessary consequence of the "reform". Secondly, the elimination of restrictions from the Glass-Steagall Act (1933) and the Bank Holding Company Act (1956) will break the wall between the "financial" and the "real" economic sectors. Stock markets will be invaded by the banks' investment in

securities. Finally, insurance could become another "plus" to the bank strategies for the controlling of the financial world.

Therefore, it is worth setting forward a long series of arguments againts the current tendencies towards both deregulation and self-regulation.

First, after the elimination of those forms of regulation for wich there is no business suport, competition would be weaker than it is now. Second, calculations of benefits to consumers from deregulation often are based on assumptions that cannot be fully sustained. We do not know as much about the income and price elasticities of demand as we would like. In the area of production also, our knowledge is incomplete, especially as regards economies of scale. Third, the potencial danger to certain classes of small business if there were economics of scale. Fourth, Public distrust of the price mechanism: excessive profits form economies of scale frequently are the result not of efficiency but of market power (72).

Fifth, as regards social damages arising from deregulation, Redisch states that: "The competitive process improves resource use in the long term in part by a process of social Darwinism that can destroy jobs, put firms out of business, or both" (73). White shares this view as regards the driving out of the small firms for the large firms stating that at the end of this process, monopoly-oligopoly will prevail in the market with the likely abuses of monopoly-oligopoly" (74). Sixth, the increased political power resulting from the increasing aggregate

concentration of bank holding company acquisitions (75). Seventh, distorting managerial effects (conflict of interest) is another risk associated with permitting banks to engage in investment banking, or to offer commingled investment funds (76). In this sense, Opper, strongly criticized three consequences of the participation of banks in the business that traditionally had belonged to the securities industry: first, as regards the bank's role as both investment banker and potential lender to the same issues: "Besides distributing the issuer's securities, the investment banker functions as the issuer's financial adviser...how, under those circumstances, can the bank provide disinterested advice! How can the bank, as underwriter, act solely in the best interest of the issuer if it has a separate and sometimes conflicting obligation to its depositors and share holders?"; secondly, as regards the impact of the investment banking business on the overall riskiness of the bank: "a correlation of cash-flow risks. Factors influencing adverse cash flow to banks are likely to be the same as those that cause difficulties in the prompt resale of an underwriter's issue. These factors include unexpected interest rate increases and the reduction of the volume of funds flowing through the financial markets". Finally, he is concerned with the competitive effect of investment banking activities of banks on the securities industry: "Because of their portfolio of commercial loans, banks enjoy a unique advantage: a close on-going relationship with potential issuers, ready access to financial inside information on a stable of potential issuers, and the ownership of much more capital in the banking industry than in securities firms. Banks do have a competitive edge over securities firms" (77). Savage and Solomon are of the opinion that branching gains to competition, deriving from deregulation, are only temporary. The larger banks, through their branches soon will drive all of the

smaller banks out of existence, leaving the industry to the oligopolistic practices of a few giants (78).

Eight, variable-rate premium insurance scheme would involve a higher average premium than the present system (79). Nine, the possibility that existing firms would try to protect their market shares by setting an entry-forestalling price. Such a practice will make it unprofitable for new firms to enter and so will maintain the monopoly positions of existing banks (80). Ten, from deregulation there is no evidence to achieve benefits for consumers, as regards the level of saving rates actually paid, deriving from a higher degree of concentration (81) (82). We can give a long list of scholars expressing this view; for instance, Eisenbeis (83), Fisher (84), Carron (85), Vitale (86), Griffi (87), Marchesini (88), Pagliuzzi (89), Nigro (90) and Capriglione (91).

Eleven, Baldwin and McCrudden find some negative aspects on the "deregulation-self-regulation" proposals:

i) Damages to basic democratic principles, as were previously remarked by the Wilson Committee, following the Radcliffe Committee before it: "the deliberate ceding of part of an elected governments sovereign powers to a separate non-elected institution insulated from party political pressures...we do not accept that there is anything about monetary policy to distinguish it sufficiently from another forms of macro economic policy

to justify taking it out of the hands of elected governments" (92).

ii) Controls in the field of investor protection can also be damaged in a "self-regulatory" environment: "control remains important for two reasons: first, organizations' powers may be abused to the detriment of their own members, third parties or the public at large. Despite the emphasis now being placed on competitiveness, there is a long tradition of restrictive practices in the financial services sector"... "secondly, a failure of regulation threatens to be as economically damaging as over regulation... There can be no conflict of interests in their matter between producer and provider on the one hand and the customer on the other" (93).

iii) The kinds of decision made in gaming regulation could not be wholly consistent with the supply of full information to applicants: "where deregulation has taken place, or, as in the financial services field, a degree of "self-regulation" has been relied on, external controls are almost necessarily a weak form of legitimation and the bench marks of expertise, efficiency and effectiveness have to be relied on instead"... "the tension between due process and effectiveness emerged in the course of agency rule-making. Large, organized interests tended to be consulted rather than the small, disorganized and less willing employers and workers" (94).

iv) The problem of assessing effective enforcement in the context of agency action is also analyzed: "where self-regulation prevails, there is a special case for developing means by which its effectiveness can be assessed and demonstrated". Therefore, the need for clarification of

agency aims and objectives emerges as a precondition for the adequate testing of effectiveness by an agency in such circumstances (95).

Twelve, we have to be skeptical about regulation substitutability by market discipline in controlling risk taking by banking firms, in "today's aggressive, trading oriented banking environment" (96). As regards proposals relying on the viability of private deposit insurance on large scale, the risk of contagious runs and macroeconomic disturbances (monetary shocks, velocity shocks, price-level shocks, and the difficulty of the determination of which insolvent banks should be closed or reorganized), are problems that a private agency could not easily solve (97).

Finally, it seems worth mentioning the opinion of De Boissier on the grounds underlying the 1991 reform-proposal: "A mon sens, pourtant, les difficultés actuelles des banques américaines sont moins liées à un excès de réglementation qu'à une mauvaise coordination entre organismes de contrôle" (98). This opinion is shared by BOBE and FERGUSON (99). Therefore, most of the arguments "pro-deregulation" seem to be beside the point. In any event, the debate is already divided and divisive, yet the heavy lobbying has hardly begun.

Some essential features as well as several hypothesis emerge from the preceding analysis of the US financial markets reform. Both the features and the hypothesis, are strongly linked to the current mentalities of the managers of the US banks.

First, as Norton (100), and Lorne-Mendelson (101) have remarked, the successful neoliberal policies within the economy of the US, enforced by both Presidents Reagan and Bush, serve as the core reason for banking managers in order to press over the political institutions for the enactment of de-regulatory measures.

Secondly, the final aim of such pressures is not at all the achievement of a more competitive an efficient market but the "regressive" creation of a "gremialist" system. Self-regulatory strategies are clearly on the basis of such approach. The social consequences of their policy are unpredictable. Moreover, if within the near future the banks are able to control both the "securities" and the "insurance" markets in the US, they will become the controllers of the economic game.

Thirdly, the above "gremialistic organization", has proved to be very effective, as regards the globalization of the changes within the US financial system. The reform of the New York stock-exchange ("May day"), directly influenced both the Tokyo ("Zaiteku") and the London ("Big Bang) stock-exchanges reforms (102), which means that, the US experience necessarily will influence the EEC banking harmonization process. If the

"deregulatory" strategy touches the European institutions, we can see a supra-national market under the control of the economic agents. This possibility, half an hypothesis, must be avoided for the sake of the European interest. Despite their self-regulatory aims, banks prove to be as negligent as other organizations. Therefore, a political control is necessary. How, then, can we deal with recently situations as the BCCI, and the Salomon Brothers Scandals'? (103). How could governments manage to solve problems as the Yakuza's movements within both Nomura and Nikko in the Tokyo stock-exchange? The former ones are also a very good example of the risks run by a democratic society every time so much economic power is under the control of a few economic organizations free of any political control. In addition, the "contagious risk" of self-regulatory approaches could seriously damage several features which could constitute the core of an ideal financial environment for 1992: instability, consumer protection and social conquest.

Fourthly, it seems to be interesting for the US credit institutions to recover the control of the Eurodollar market. The first attempts to do so began with the 1981 facilities (IBFs) (104), which permitted United States Banks to market from within the US, not only as they previously did, through their branches and shell offices. Therefore a financial deregulated environment within the United States could stimulate the "coming back" of placements from the Euromarket.

All those features above pave the way to several hypothesis. First, are the managers of the most important US credit institutions, aiming to dismantle every regulatory organization within which politics could influence their business strategies? (Note that the agencies depending from the US administration are being run by experts which, at least apparently, are free of business control). Second, do they pretend to create new agencies under the control of experts linked direct or indirectly to the credit institutions?. Third, is there any possibility of "export" the new financial regulatory environment to both the European and the Japanese Markets?

It may be suggested that the answers to each of these questions is yes. The medias has already begun to be concerned on the subject. The following quotation from the Director of one of the Spanish newspapers is a good example of what we may see in near future: "El Gobierno (the Spanish one) encargó al directivo de un gran banco privado el diagnóstico de la sanidad pública..." "no está de moda la solidaridad en política, y el Estado de bienestar hace aguas (is sinking); "a los ciudadanos, no les queda más arma que el voto"; "una sanidad que hasta ahora ha sido pública y que intentan privatizar...tentación thatcheriana del gobierno" "lo que no queremos es que pase lo que a los viejos en Estados Unidos, que se mueren en las esquinas como perros" (105), (106), (107).

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CHAPTER II : FINANCIAL SERVICES DEREGULATION: THE EUROPEAN ENVIRONMENT

The aim of this chapter is to analyze some of the aspects underlying the EEC approach to the banking harmonization process. Three major features of the study can be remarked: first, in the light of the preceding discussion, similarities can be established between the United States and the European credit institutions attitude towards regulation. These similarities regard credit institutions' strategies for the achievement of a "de-regulated" environment within which they could developed their market policies profiting from freedom in the wider possible sense. Thus, the self-regulation trend can also be found on the background of the aims of the European Credit Institutions.

Secondly, the above situation influences on the shaping of the institutional framework, currently in discussion, for the regulation of the European financial markets. Mostly as regards the competencies to be given to the administrative agencies for the controlling of the credit institutions' behaviour in the market. The lack of a well defined pattern for the creation of a European Central Bank is one of its consequences.

Thirdly, a study of the Euromarket will permit one assessment of its importance as another root factor of the EEC banking harmonization process. The aim of this analysis is to show the importance of the achievement of a "de-regulatory" framework in order to avoid that the money currently placed in accounts settled European countries, could flow out to offshore placements.

A. Several factors underlying the EEC banking harmonization process in financial services:

A long list of arguments slightly different from those given by the Commission approach for the completion of the Internal market for financial services (1), seem to underlie the banking harmonization process in the EEC. Cited arguments refer to different aspects: market, developments, international pressures, credit institutions strategies, etc.

First, the lack of identity of the European banking landscape (2). The resemblance to the United States future banking landscape can be found in many aspects: the existence of a small number of large banks control over wide segments of the market, the achievement of economies of scale, cross-shareholdings and affiliations instead of takeovers of major proportions as future expansion strategies to be developed by credit institutions,... etc. Second, the importance of "external interests" on the achievements of an integrated financial market (3). The Golembe Reports stressed this view: first, taking into account the pressure coming from the US itself and from the increasing number of banking and investment banking companies headquartered in the European community; secondly, through the impetus given by the internationalisation of regulation through the coordination of bank regulation developed by the Basle Committee. Finally, due to interest groups' strategies for the achievement of a single banking market providing for a thorough

intermixture of commercial banking and investment banking activities. Therefore the changes taking place are not imposed from the top but, rather, are bubbling up from the various interest groups and are thus more responsive to the changing requirements of the market place: ... "with minimum damage to existing institutions or interests, all of which have ample opportunity to react, to seek to slow developments and to adjust to the new environment..." (4).

Third, the creation by credit institutions of holding companies with portfolios covering different industries (5).

Fourth, the importance of the increased competition driving banks towards offering non-bank services, the nature of the interaction of the globalization of financial markets (and the efforts to face up to it, notably through the proposals of the Cooke Committee) and the EC's Second Banking Directive, the role played by financial institutions in mergers and acquisitions, etc. (6). Fifth, "despecialization", (the recent tendency to merge banking and insurance activities), as well as "disintermediation" on securities markets, (increased capital requirements and the greater need for risk management induce banks to securitize increasingly their assets), which are factors moving credit institutions to achieve wider margins of competence within the highly regulated European Market (7). Consistently with the above, Huveneers gives very much importance to the universal banking model of most of the largest European credit institutions, the German concept of All Finanz, as the potential model to be achieved by the harmonization directives (8).

Sixth, the influence exercised by international banks within the Basle Committee as a very important previous step to the harmonization process in Europe: "For the banks in countries which are members of both the EC and the G-10, the coordination reached between Basle and Brussels has a considerable advantage...leading to a considerable reduction in reporting effort and cost..." (9).

Secondly, as regards the shaping of the future Institutional pattern for the regulation of the European Financial Market, Tobin (10) and Good Friend-King (11) theories, relying exclusively on the lender of last resort intervention, although not mentioned in the European Commission proposals seems to be its underlying philosophy; here can clearly be noted the influence of current US deregulatory strategies with the support of the European best positioned credit institutions. The former, aiming at the expansionism of "conglomerate firms" through the European Market will be favoured in terms of competitive edge (12). Central banks operating as lender of last resort should be the main change resulting from the enactment of the Second Banking Directive, in the opinion of Capie and Wood (13). This "self interest" regulatory approach for banks, is going to be achieved by the diversification of both the location of headquarters and the activities of the European banks, which will make supervision and regulation much more difficult: "...in time this might lead to a retreat from detailed banking supervision to a role for central banks much closer to that of the classic lender of last resort..." (14). Eight, the necessity to adapt the existing European regulatory structures, with a view to integrating national financial systems in a coherent framework

resulting from the synergic interactions of several international factors (15). This includes the linkage of the various markets through both securitization and financial innovation, (for instance index futures, options and swaps), which will lead towards a "re-qualification" of banking strategies in the retail market, (16). Therefore, current EEC regulatory strategies based on "minimal harmonisation", will permit a much more sophisticated use of financial and credit investments. Thus, individual saving should be replaced by collective management of loanable funds. "Second class" savers do not seem to be very much benefited from the harmonization process (17).

Nine, accordingly to Steinherr, even if there were no widespread crossborder establishment of banks, the structure of the banking industry in Europe would change dramatically (18). Therefore any attempt to look for an independent European strategy on the subject seems to be far from clear. The Morgan rapport on world financial markets shares the same view (19). It gives to large firms too much importance in the shaping of the banking harmonization process: "... Europe's wholesale financial markets already are quite competitive. Margins tend to be thin, and unrealized profit opportunities few. Conceivably, the lifting of capital controls, the linkage of capital and securities markets, and the expansion of European multinationals could lead to a surge in demand for financial services that only large firms could supply" (20). Therefore, few financial firms are likely to follow this route, given the importance of speed and the already overbanked nature of most European countries. Similarly, Prate which regards the banking harmonization from the perspective of "third country's influence" (21). He thinks that O.E.C.D interest

on both capital and financial liberalization between its member states have determined the EEC deregulatory strategies. Using the words of MR. Lawson, M. Prates stated: "L'Europe bancaire n'est pas une communauté d'harmonisation mais de dérégulation" (22); lately he strongly criticized the role of business interests within the decision making process in Europe (23).

Ten, importance has to be given to the agenda of the Uruguay Round negotiations within the GATT, which for the first time included talks designed to liberalize international financial services. The common core of the Financial Services Group, (including US, the EC and developing countries largest credit institutions), were arguments for "cross sectoral linkage" (24).

Eleven, agreements on capital adequacy between the member States signatories of the Bank for International Settlements (BIS), in order to face the increasing fragility of international capital markets, have to be also kept in mind as another factor influencing the EEC harmonization process (25), (26).

Twelve, the importance of filling gaps in the international accountability rules in order to deal with the existence of new financial instruments, (SWAP, FRA, CAP, FLOOR, COLLAR, NIF, RUF...). This view echoes that of Marsh about the necessity of avoiding a crash of the fragile international capital markets (27) (28). In this sense, Triperi thinks that the risks arising from the extraordinary development of the Euromarket, mostly

through the use of financial instruments affecting both the liquidity and solvency of credit institutions, were another factor taken into account by European regulators (29). Thirteen, tax fluctuations within the banking loan markets, risks arising from interest rates, position risks, etc.; all these problems have to be solved within a global market approach due to their international nature. Therefore no room exists for single European strategies on the subject (30) 31). Fourteenth, Carr maintains that the original driving forces of change can be found in the deregulation of the European securities business, the rise of the Euromarkets, and the supersedence of the international capital and currency market over domestic ones. Their impact on bank business has been amplified by the computer and telecommunications revolution. Therefore, the move towards a larger and more unified financial services market in Europe was under way long before the European Commission thought it was a good idea. Much more, the imposition of the Basle Committee rules governing capital adequacy, and their efforts to standardize bank business and accounting practices will be for the big banks, more of a headache than a heart attack. Most of them already conform to such rules (32). The fact that it has only been some of the anti-competitive aspects of structural regulation which have been relaxed (33). Fifteenth, both the neoliberal economic climate of the eighties and the influence on the European market of the world markets developments have played a decisive role (34). The lack of autonomy of the European decision makers on financial issues is one of the most relevant features of the harmonization process: "Expansionary (contradictionary) policies will be offset

by capital outflows (inflows), in particular when domestic and foreign interest-bearing assets are close substitutes and will thus no longer be able to exert a (negative) demand stimulus on the "real" economy (35). This situation, dramatic from the point of view of the economic sovereignty of EEC financial markets strategies, is confirmed by the opinion of several scholars: Kollias, "important financial centres inside and outside the EC following the US example of deregulation..." (36); Bakker (37) and de Bossierre: "L'Europe se concerte, met au point une stratégie, et finit par adopter le point de vue américain..." (38).

Sixteenth, the main reason for regulation in banking is not the protection of depositors but rather the stability of banking markets in Europe (39). Seventeenth, we can identify two forces that led to the decline of current European regulation in banking: technology and the inefficiency of the arbitrary segmentation of financial product lines across industries. To the extent that these forces are truly universal, the study of the European harmonization process can be focused on different root factors than those of the Commission proposals (40) (41). Cooke proposals (42) on a necessarily internationalization of the rules governing banking activities are founded in the same views. Similarly, Steuber (43), Le Brun (44), and Abraham (45).

Therefore, it may be suggested that a sort of fundamental harmonisation -concerning principles if not details- has been pressed upon the regulatory makers in Europe by the events we

have outlined above, rather than by any "specific" EEC plan aiming at a rational harmonisation in this field.

Several conclusions can be drawn from the above analysis. First, there exists a pressure from external markets in order to ease the European financial markets for the development of third country credit institutions strategies. Most of the features remarked above, are related to the completion of a worldwide financial market, within which only big banks could play. Therefore the Cecchini promises, regarding mostly advantages for consumers as far as retail banking is concerned, are far from being achieved by the harmonization process. In this sense, a recent study by Simon Brady (46), shows that banks were well aware that benefits would not come from interpenetration on competitors retail banking markets; profits from international operations remain small in stark contrast to the losses they can incur (47). Similarly, a Salomon Brothers report notes that: "The most important deregulation is that which is bringing down the barriers within countries, not that which in theory allows cross-border competition" (48).

Secondly, the "despecialization trend" comes along with the toppling of regulatory barriers. The forces driving banks into insurance are complex. Separation between the two industries was imposed by regulatory restrains which are being dismantled. Long term strategists talk of the struggle for savings in an increasingly competitive market. Banks must struggle to defend their market share of savings against the life insurance and

pensions industry, and against various forms of collective investments vehicles such as unit trusts (49)(50).

Thirdly, the role played by international agencies and organizations, within which lobbied the largest banks in the world, has been very important in the shaping of the banking harmonization process in Europe. GATT negotiations, the COOK Committee recommendations through the BIS Basle agreements and OECD strategies underlie the EEC rules on the subject.

Fourthly, both, financial innovations and technological developments pave the way to the globalization of financial markets. The EEC harmonization process is well aware of that situation.

B. The influence of current deregulatory strategies on the shaping of the EEC Central Bank:

The loss of sovereignty in macroeconomic and monetary policies (51), that some Community leaders still tend to speak of as a fate awaiting member states (52), is in many respects already a reality within the EEC. In any event, one should not exaggerate the progress that has been made, nor minimize the distance that is still to be traversed. It is nevertheless true that in the existing cooperation between European Central Banks (53), we have the bases on which an European Central Banking structure could be built. Therefore, the question arises on what should be the competences, if any, to be developed by the Central Bank. This question is directly linked with the above analysis on international banking strategies.

The new emphasis on market forces, the lower estimate of the value of government intervention and public expenditure, and the vogue for deregulation have at one and the same time undermined the plausibility of a Central Bank conception linked to a "public policy" strategy. The increasing globalization of banking activities, and the largest world credit institutions strategies for near future provoked the emergence of lobby relationships between credit institutions and public authorities. Therefore, the existence of the Central Bank, and the process being developed and to be developed before its creation should be questioned. Should the Bank function as Cantillon's eighteenth

century ideas proposed?. Thus, to be merely the creator of money as a supervisor of its fluctuations without any other regulatory or sanctionary power. Should it display a "lender of last resort" policy?. Should it be vested with the whole range of powers currently exercised by most of the Central Banks of the EEC countries? Whatever the answer should be, what is clear from the historical evolution towards the Economic and Monetary Union within the EEC, is that the idea of creating a Central Bank for Europe was always at stake, but only recently serious steps towards its creation have been taken.

Barre's rapport in the late sixties (55), as well as the 1970 "Commission memorandum" on the monetary union (55), set monetary mechanisms at a European level resembling those used by Central Banks at National level. The Werner rapport (56) a consequence of the European Council of the Hague (57), called for the financial integration in European banking systems, as well as for the achievement of Economic and Monetary integration in Europe through the transfer of competencies to the European Institutions. The Werner rapport, (basis of the Council Resolution of the 22, march, 1971, (58)), did not specify the terms nor the conditions of what an European Central Bank should be. The Commission Rapport of the 30 of April 1973 (59), did not help to clarify the issue.

We could explain the silence of the European Institutions in two ways. First, the governments of the Community Member States were not too faithful to the achievement of an European

Economic and Monetary Union. Therefore, the shaping of an European Central Bank had no sense. This idea can be sustained if we understand the various reports as a "psychological reaction" to the crisis provoked by Mr. De Gaulle on those dates. Taking into account that The Hague summit was held few months after the political demise of De Gaulle, the aim of giving a sensation of unity and efficiency of the European project to the European citizens could be a valid argument. Secondly, the above mentioned "international context of PAX BANCARIA" (60) could prevent any temptation by banking organizations to lobby the European Institutions .

Whatever the reason, the fact is that it was not until 1977 that a political compromise of the European Institutions regarding the achievement of an Economic and Monetary Union, was made. The Jenkins lecture at the European University Institute (61), demanding wider margins of competencies on the subject for the European Institutions, was the corner stone of a long series of debates within the European Council : Copenhagen (62), Bremen (63) and Brussels (64). It was the Council Resolution of the former which constituted the legal point of reference for the existence of article 102-A of the Single European Act in which the possibility for an Institutional reform of the Treaties on monetary issues was stated. Despite the complexity of the procedure set by article 102-A, as regards procedures to be enacted for the reform of the Treaty, the first steps towards the creation of an European Central Bank have been taken alongside the Institutional proposals.

On the other hand several well known European Politicians stressed on the necessity to create an European Central Bank: Spinelli (65), Thorn,(66) and Gonzalez (67), among others, are some examples of political compromise with such necessity, unconditionally linked to the achievement of an European Economic and Monetary Union. In this sense, a passing mention should be made to the "draft" adopted by the European Parliament on 14 February, 1984 on "The European Union Treaty", which article 51, entitled "Credit Policy", says: "The Union shall exercise concurrent competence as regards European monetary and credit policies, with the particular objective of coordinating the use capital market resources by the creation of an European capital market committee and the establishment of an European bank supervisory authority" (68).

But the most important step was the Delors' "Report on Economic and Monetary Union in the European Community" (69). Point 19 of section 1, chapter II of the Report says: "A monetary union would require a single monetary policy and responsibility for the formulation of this policy would consequently have to be vested in one decision making body"; an idea stressed by point 24 of section 2, chapter II: "The responsibility for the single monetary policy would have to be vested in a new institution, in which centralized and collective decision would be taken on the supply of money and credit as well as on other instruments of monetary policy, including interest rates". After describing some of the competencies of the new monetary institution to be created in the final stage of economic and monetary union, point 31 of section 4, chapter II places the new institutions "within the constellation of Community Institutions", which means, at the same level that the European Council, European Parliament ,

Council of Ministers, Commission and Court of Justice. Therefore, will it not have the range of "ancillary Institution".

Point 32 of section 32, chapter II, specified both the name and the most remarkable features of the new Institution: "Considering...the domestic and international monetary policy making of the Community should be organized in a federal form, in what might be called an European System of Central Banks (ESCB)..." "An autonomous Community institution...consists of a central institution (with its own balance sheet) and the national central banks". The System is entrusted to regulate price stability, monetary policy, exchange rate, reserve management, payment system and the coordination of banking supervision policies of the supervisory authorities, active with a FEDERATIVE STRUCTURE.

The European Councils of Madrid (75), Strasbourg (71), Dublin (72), and Rome ("ad hoc") (73), gave political support to the content of the Delors' rapport.

Despite the progress which have been made, two important issues must be solved: the extent of the transfer of budgetary powers to Community level, and the content of the intermediate stages before full powers are transferred to the Central Bank.

The solution of those questions is directly linked to the future strategies to be developed by credit institutions. A substantial number of competencies in the near future to the European system of Central Banks will ensure that the lobbying

over the European Central Banks authorities will replace that currently done.

Therefore, we can talk of a "second best", referring to the interest for banks' strategies in the creation of an European Central Bank. Current lobbying is being performed on a two level strategy: the national and that of the European institutions. The transfer of competences to a single European instance will necessarily increase the effectiveness of bank lobbying. In this sense, it is worthy to make some conclusive considerations:

a) The fast developments on recent years towards the achievement of an Economic and a Monetary Union coincide with the above world wide trend towards the globalization of financial services. The analysis of the historical evolution of the European Economic and Monetary Union has shown that nothing was done of importance before 1986. The recent agreement reached at Apeldoorn by the ministries of economy and finance of the EEC (74), has paved the way for the signing of the Economic and Monetary Union next December in Maastricht. Therefore, it must be questioned what, if any, are the forces supporting these changes: a political will of European integration?, macroeconomic strategies for the consolidation of the single market? decisions reached at a supra communitarial level (G-10, OECD, G-7...) within which the world largest financial services institutions are especially powerful?

b) Although the features of the future Central Bank have not been wholly shaped up to date, the current pattern of the Bundesbank seems to be the one to be achieved. Therefore, as the Bundesbank is credited with full credibility as an inflation-averse Central Bank, the future Central Bank will develop conservative policies (75). As most scholars seem to consider that this credibility is largely due to the "formal independence" of the Bundesbank (76), a status expected by the European Central Banking System vis-à-vis both, national governments and EEC institutions, it is not too difficult to believe that bankers will be satisfied with its creation. This view is stressed by the fact that the legitimate concern of all central-banks, not only the Bundesbank, is to assure to the monetary authorities called upon to manage a Federal European Bank a sufficient degree of independence vis-à-vis political authorities always suspect on inflationary laxity regarding the financing of internal deficits through money creation. Therefore, if the appointment of the Board of Governors of the European Central Bank were left exclusively to the governors of the national central banks, despite these would obviously consult previously with their ministers of finance, would be far less dependent on national political authorities than most central bank governors are today vis-à-vis their national government.

As it was stated before, the enactment of antinflationary measures (77), and independence are the most identifiable features of the banking strategies influencing the decision making processes of western societies. Moreover, taking into

account that universal banking finds in the German regulations of its financial markets the most clear example in Europe, the creation of European Central Bank undoubtedly will guarantee the continuity of worldwide current tendencies towards universal banking.

c) The centralization trend seemed to be pointing towards making the European Central Bank the eventual "single banking agency". If the regulatory balance will move in the near future from the government towards the market, the creation of an European Central Bank could seriously damage the current imbalance of both the economic and monetary powers between the governments and business managers. Mostly if, as some European countries have proposed (e.g., UK or Holland), the self-regulation trend shapes the creation of the European Central Bank. A board of governors constituted by "independent specialists" coming from private business, and vested with a short number of competencies (those expecting from a "lender of last resort"), will be an easy target for manipulating by private interests.

These hypothesis, find theoretical support among the strong criticism from the winner of the Nobel Prize in economy, Maurice ALLAIS, regarding the current conditions underlying the creation of an European Central Bank: "las propuestas de algunos gobiernos europeos sobre la creación de un Banco Central Europeo, esconden una gran hipocresía política" (78). What is at stake is the democratic control and the kind of monetary policy the Community might pursue through its own central bank. A Central Bank

restricted to acting to counter inflation and ensuring monetary stability, while the key decisions affecting growth, employment and living standards are essentially taken by free market forces, could not be used as a positive instrument of public policy to achieve aims which included the optimization of growth. It is much more than a purely technical monetary or financial question. A lack of democratic control on the subject could endanger the economic goals laid down by the Community's democratic decision-making institutions. If the system is to survive, we need a political will to proceed along this path, or in the longer run the completion of the internal market will generate forces which will threaten the achievement of economic efficiency within the EC (79) (80) (81).

The above arguments are reinforced by the fact that the new supranational financial markets need of some kind of supranational surveillance, equivalent of a central bank or supervisory authority. Therefore it is not difficult to imagine that this supranational institution to be created, will be vested with a minimum of competences. Mostly because the possibility to reach an agreement between the creators of this supranational market as regards the allocation of a large range of competences within the supranational institution is far from clear. On the contrary, the creation of said institution should be regarded from the perspective of a "lender of last resort" which competencies shall be limited to assessing risk and devising appropriate prudential safeguards. This solution will be on line to current regulatory approaches by the policy makers within the

western countries. Mostly because, as regards the achievement of an agreement on the issue, it should not be difficult to pass from "current cooperation" between monetary authorities to "common participation" in a supranational institution vested with a few competencies (82).

C. The importance of the euromarket in the shaping of the EEC current financial services regulatory strategies:

The growth of the Eurocurrency deposit market (83), which has been stimulated by the exemption of Eurocurrency deposits from monetary controls in form of minimum reserve requirements (84), rises the awkward question of what will happen after 1992 to the part of it placed in accounts based on EC territory (85). The Commission's proposals for the achievement of an integrated financial market, though not including any specific mention as regards the above question, have considered its existence. Mostly we notice that this supranational market magnifies every problem of complexity posed by the regulation of domestic banking. Therefore it is useful both to give a historical perspective of the development of this market and to show why is important for Europe regulators (and indeed for European credit institutions) to keep control over its future development.

The Euromarket developed on its own. It just corresponded to a need and was the result of excessive regulations in other markets. The Euromarket was absolutely necessary, not just in financial services, not just in services in general but also for industry. In this sense it is worth mentioning some of the factors contributing to both its creation and growth (86). First, the use by the U.K. merchant banks of U.S. dollar for external loans from accounts based in London, in the late 1950s (87).

Secondly, the birth of the "International banking" (88), as a consequence of the monetary restrictions, mainly imposed by Regulation Q and the Interest Equalization Tax in the United States (89).

Third, the economic "choc" provoked by the 1970s oil crisis. Since the great rise in oil prices at the end of 1973 the market have been important in recycling the deposits of oil-rich states, especially to poor countries: between 1973 and the end of the decade Euromarket lending to non-oil exporting, less developed countries rose nearly ninefold, to account for over 40 percent of all loans (90).

Fouth, was the suspension of dollar unvertibility (91). Fifthly, the Russians' deposits on dollars accounts in Europe, needed for international trade transactions (instead of US based accounts, because of the "cold war") (92).

In the middle seventies, the amount of currencies "floating" withing the Euromarket was, in the opinion of London, one of the reasons for the conclusion of both the 1975 and the 1983 Basle agreements (93). As the Euromarket stood on its own the monetary authorities of the G 10 decided to give some minimum rules for its functioning. This situation was aggravated by the 1974 Herstatt and the 1977 Banco Ambrosiano scandals'. In fact, the influence of the 1983 Basle agreement was felt by the 1983 and the 1986 EEC Banking directives, respectively regarding the supervision of the credit institutions on a consolidated basis

and the annual accounts. The former of the above directives was an attempt of the European regulators for establishing minimum standards to the development of new financial instruments within the Euromarket.

Those attempts, though regrettable from a "prudential" perspective, did not create a regulatory-framework capable of guarantiing the instability of the Euromarket. The achievement of the Single Market will foster the growth of the Euromarket for the increasing internationalization of commercial transactions, which will require companies for flexible and extensive financing. Those features above provide us wiht some foundations in order to show the linkage between the minimalist approach of the Commision's proposals for the creation of a unified-financial market in Europe and the Euromarket:

- (a) The EC has sufficient self interest to allow "certain islands" to remain within the Community. The special status of the Euromarket (94) will provide European companies with both extensive and flexible financing.

- (b) The fact that non - EEC Centres (e.g., Singapore, Hong-Kong, etc.) have not taken over the Euro-dollar market, suggests that if the EEC re-regulates, migration of the Eurodollar market to non - EEC countries is the likely outcome (95). Therefore, only a de-regulatory strategy could help to the maintain in Europe of EEC countries based accounts in Eurodollars.

This view is shared by de Boissierre, who remarks both the de-regulatory nature and the importance to keep control over this market: ..." toute contrainte réglementaire exagérée a pour effet de déplacer cette activité..." ..."Le développement est vital pour la Communauté financière tout entière..." (96). This opinion is stressed by Van den Bempt (97). Thus, both the governments of the Member States of the Community and the European Credit institutions are well aware of this situation. Due to the fact that Eurocurrency operations occur "offshore" but not beyond the reach of governments, Eurocurrency banks could be regulated on a territorial basis. The political and economic implications of this situation are important. Thus, the net regulatory burden of the EEC must be commensurate with that in other industrial countries. If not, there will be a migration of financial services to third countries.

The question still remains on how much of the Euromarkets profits reversed on European welfare standings. What is clear is the vital importance for European banks day-to-day financial strategies to keep control over one of the world most de-regulated financial markets.

NOTES

- (1) See next chapter.
- (2) Bellanger, S.: "Toward an Integrated European Banking System: 1992 and Beyond", The Bankers Magazine, July-August, 1988. Vol. 171, nº 4.
- (3) Carletti, S. and Aaronson, S.: "Which banks can bank on 1992?", in Banking 1992. A Eurostudy Special Report; IAN GILLESPIE ED. 1991. pp. 55-80.
- (4) MEMORANDUM RE.: "1992" - One year closer in Eurostudy...; op. cit. supra; p. 112.
- (5) " the holding companies that seem likely to arise in many cases will probably include a bank or a financial services company of some sort...". (The recent siege laid by De Benedetti and the Compagnie Financiere de Mez against Societé Générale de Belgique can provide us a good example). See, REVELL, J.: "Bank Preparations for 1992: some clues and some Queries"; Revue de la Banque. Bank en Financiewezen; march, 1989.
- (6) See, Thygesen, N.: Introduction to "Financial Institutions in Europe Under New Competitive Conditions". 1990. Kluwer Academic Publishers. Dordrecht. pp. 3-7.
- (7) Steinherr, A. and Gilibert, C.: "The impact of Financial Market Integration on the European Banking Industry". CEPS., Nº 1; 1989.
- (8) Huveneers, CH.: "Universal banks: the Prototype of Successful Banks in the Integrated European Market? A view inspired by German experience". 1989
- (9) Cornet, P.A.M.: "Issues in Banking Supervision and Regulation from the Perspective of a Banking Supervisor"; in "Financial Institution..."; op. cit. supra; note (6); p. 279.
- (10) Tobin, J.: "The Case for Preserving Regulatory distinctions", in Restructuring the Financial System. Symposium of the FRB; Kansas Ci. 1987
- (11) Goodfriend-King: "Financial Deregulation, Monetary Policy and Central Banking"; Rochester, 1987.
- (12) See, Dermine, J.: "The Specialization of Financial Institutions, the EEC Model", mimeo, INSEAD. Fontainebleau. (forthcoming).
- (13) Capie, E.H. and Wood, G.E.: "Banking Structure and Banking Stability after 1992", in "Financial Institutions"; op. cit. supr. pp. 305-18.

- (14) *ibid*; p. 317.
- (15) Dini remarks some factors: a) the uncertain economic environment of the past two decades with high volatility of inflation, interest rates, exchange rates and unprecedented imbalances in current accounts; b) rapid technical progress in data processing and telecommunications; c) greater reliance on the allocative efficiency of a properly functioning price system. In, DINI, L.: "Financial Markets Revolution: International Diagnosis and Implications for the Banking Sector"; communication to the 20th congress of the CICP, Marrakech, 20 October, 1988.
- (16) Visentini, G.: "Le recenti evoluzioni nella disciplina dell'attività finanziarie"; Appunti, LUISS (1988).
- (17) Croisset, CH.: "Si les banques venaient a disparaître quelles seraient les raisons de les réinventer ?", in *La revue Banque*; n° 490. January, 1989.
- (18) See, Steinherr, A.: "Integrated Financial Market", in *European Affairs*; Elsevier, 1989; pp. 61, ss.
- (19) Morgan, J.P.: "Financial markets in Europe: toward 1992", in *World Financial Markets*; Morgan Guaranty Trust Company. September, 9 -1988. ISSUES, pp.1 -15 ✕
- (20) *ibid*; p.10.
- (21) Prate, A.: "Perspectives de L'Europe financière et monétaire", in *LA REVUE BANQUE*, n° 487; October, 1988. pp. 955-968. ✕
- (22) *ibid*; p. 959.
- (23) See, Revell, J.: "The future of Saving Banks: a Study of Spain and the Rest of Europe". Institute of European Finance. University college of North Wales. Bangor, 1990. See also, the statistec rapport "Leaders of the pack" in *Euromoney*; december 1990; pp. 26-32.
- (24) See, Westlake, M.: "Towards a new financial order"; *Euromoney*; November. 1990; pp. 74-78.
- (25) See, Lewis, J. and March, CH.: "Too many hungry mouths to feed", in *Euromoney*, december, 1990; pp. 33-39
- (26) Bryan, L.: interviewed by MARSH, C.CH., in "The real issues behind bank reform" *Euromoney*, 1991; p. 34.
- (27) Cea Garcia, J.L.: "Los nuevos instrumentos financieros y la gestión moderna". *El País*; Saturday, 27 January. 1990. p.54.

- (28) Mostly in countries as Italy, France, Spain and West Germany. See, Molyneux, P.: "An analysis of the structure and performance characteristics of top EC banks and the strategic implications for 1992; in *Revue de la Banque*; n° 6; June, 1989. pp. 359-366.
- (29) Triperi, L.: "Controllo e gestione dei rischi della tesoreria plurimonetaria", in *Bancaria*; July-August, 1990. n° 7-8, pp. 19-22.
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CHAPTER III : AN ASSESSMENT OF THE INFLUENCE OF THE GLOBALIZATION OF THE FINANCIAL MARKETS ON THE EEC FINANCIAL SERVICES HARMONIZATION PROCESS

This chapter is the last one of this thesis. Its aim is to give an overall view of the Financial Services harmonization process from the perspective of an "agnostic".

First, the most remarkable features of the Commission Proposals will be described, as well as the opinions of high level civil servants of the Commission staff regarding the achievement of an Internal Market for financial services in 1992.

Secondly, a critical analysis will be made regarding issues which, it may be suggested, have not been rightly focused by the Commission proposals.

The final outcome of this approach should contribute to the General Conclusions of the research, mostly as regards the legal issues at stake for the achievement of an unified banking market within the 1992 Single Market.

A. The Commission proposals' for the achievement of an unified financial market:

The Single European Act set both, the objectives and the date for the creation of an area without internal frontiers in which the free movement of goods, persons, services and capital would be guaranteed (1) (2). Article 13 of the SEA (8 A of the EEC Treaty) gave formal recognition to the objectives included within the Commission's White Paper for the achievement of the internal market (3), which included the main guidelines for the integration of the European financial markets.

The Commission proposals to create a single market in financial services have two main components. The first is the complete liberalization of capital movements (4). The second is the opening up of the market for financial services by removing barriers to the cross-border marketing of financial services and the free circulation of financial products. The General method of achieving those objectives is as follows. On the one hand is the harmonization of key standards for prudential supervision of financial institutions and for the protection of investors, depositors and consumers. The White Paper talks of minimum standards covering: solvency, fitness and properness, disclosure of information to clients, consumer protection through Guarantee Funds. On the other hand is the introduction of a single licensing system for financial institutions based on mutual recognition and home country control.

From a formal perspective, the Commission's approach for the completion of the financial services unified market is coherent with that for the completion of their Internal Market. The Internal Market program is surreptitiously linked to de-regulation. The logic of the internal Market is that, without borders, resources and products will be more effectively allocated through the Community and so, a global increase of wealth will be achieved. This leads, more or less directly, according to the personal ideology and degree of social awareness of the thinker, to the idea that geographical distortions cannot be supplanted by sectorial ones in order to keep away the "allocative efficiency" of the market throughout the community. In this sense, the liberalisation of financial services in Europe means the disappearance of geographical barriers, but sectorial and communitarian ones also. Perhaps, the de-regulation approach underlying the Commission proposals is due to the Commission's view of "political feasibility". When possible, Community institutions will try to avoid changes in legislation, a consequence of the subsidiary Communitarian principle, a principle found in the Delors Report which holds that the Community should only assume competencies in areas where Community authority is more efficient than national regulation.

Therefore, three primary ideas of the Commission integration, de-regulation and political feasibility, are the basis of the Internal Market programme concerning financial services.

The minimum harmonization approach of the Commission White Paper aims to set up minimum requirements to be accomplished by banks. Although national authorities can settle more demanding requirements, this would entail a negative competition position for their national banks, though an equal protection of users of financial services since these will be provided abroad. Therefore, there is no other consequence but de-regulation throughout the EC concerning financial services, since countries will probably set up national standards as demanding as the minimal standards of community directives.

The texts where those principles have been settled stress the importance of preserving financial stability while avoiding any kind of barriers to free provision of financial services and free establishment of financial entities (5). This "spirit" is largely confirmed by the opinions of Commission civil servants.

Fitchew remarks that the Commission's aims are those in line with the examples of "deregulated financial markets elsewhere in the world" (6). "We shall have a liberalized market in the sense that we shall be open to the rest of the world..." (7)(8). Other features of importance remarked by Fitchew are related to the legal approach for the achievement of the Commission objectives. Priorities have been settled on problems relating to "mass risks", insurance (ageing population in Europe), capital adequacy rules for banks and other investment business, "public interest" restrictions and the partial harmonization of twelve different systems of contract law (9). This view is stressed by Levitt, who maintains that the direct effects of the process for financial

services will result from Community legislation on investment services, UCITS, prospectuses, insider dealing, takeovers, capital adequacy, pension funds, withholdings tax and the second Banking Directive (10). However, Fitchew recognizes that the Commission proposals will not achieve complete uniformity of market conditions by 1st January 1993, but some of this differences are going to be removed "...either by the eroding forces of competition or by actions before the Court or by further harmonisation ..." (11). Therefore, a question arises on why full harmonisation of tax regimes, consumer protection or contract law, of great importance in banking, have not been conceived as priorities to be achieved by Community legislators. Thus, the full implications of 1992 will differ with respect to "wholesale" and "retail" banking. As regards the Commission's Proposals, implications for the "wholesale" market should be greater. But as far as "retail banking" is concerned we shall view the Community as a collection of twelve nation states rather than as a single market. If things remain as their are so, then twelve sets of products will continue to have twelve separate sets of costs, with minimal benefits to the consumer from economies of scale.

Sutherland remarks the creation of "financial supermarkets" as the most relevant feature to be achieved by the Commission proposals (12). This idea is directly linked to that of dismantling the existence of specialization rules and compartmentalization of European financial markets. Many of the restrictions on who could do what and on what kind of financial investment could be bought and sold will be removed (13).

Clarotti stresses the importance of several factors. First, internationalization: the rules intending to be applied at the European Financial market have to be in accordance with those of the world financial market. Second is the achievement of the deregulatory objectives throughout "Recommendations" rather than Directives in the next future. Third is the emphasis on "liberalization": "Une nouvelle philosophie anime maintenant la Commission dans ce domaine. Elle use justement davantage à réaliser une libération totale plutôt qu'à réaliser une harmonisation totale..." (14).

The Commission proposals very much relied on the study undertaken by Cecchini on "The Cost of Non Europe" (15). For the purposes of the economic analysis undertaken by Cecchini and his team of experts, the three types of market barriers which were identified in the 1985 White Paper were regrouped into five categories: tariffs, quantitative restrictions (quotas), cost-increasing barriers, market-entry restrictions and market distorting subsidies and practices. As regards financial services, the benefits to be achieved by the integration of the European financial markets will be: commercial loans (19.2 mill. ECU); consumer credits (38.5 mill. ECU); credit cards (25.7 mill. ECU); mortgages credits (118.8 mill. ECU); traveller cheques (29.6 mill. ECU); currency exchange (196.3 mill. ECU); others: 58.9 mill. Total profits for consumers ("retail banking") will be around 3.189 mill. ECU (16). A first approach to this dates would logically make the reader very impressed. That seems to be also the reaction of the Commission civil servants. But, it may

be suggested, there are many opinions against the conclusion of the Cecchini report.

The analysis above summarized the whole Commission proposals for the creation of an European financial area. Therefore, both the spirit and the flesh, of this European Institution , as regards the banking harmonization process in Europe, must be analyzed within the context above. As the President Delors expressed in a "note" to the President of the Council: "It remains that, in the field of banking at least, the Commission considers that the directives which have already been adopted, those which it has presented to the Council and those which it has announced, form a body of texts sufficient to ensure the effective freedom to provide services..." (17). Current developments on European financial legislation do not seem to pave the way for so many "congratulations".

B. A critical analysis of the Commission proposals:

The Internal Market forces the EC to make four fundamental choices: on the nature of the financial market, on the coherence of a system of "home country control" for 12 Member States, on the level of financial security and on prudential and fiscal rules needed.

But scholars do not seem too convinced as far as the technical foundations of the Commission planning for the achievement of an Integrated Financial area, is concerned. Both the legal and the economic approaches of the Commission have received criticism, the common core of which is the lack of a coherent schedule as regards the consequences of the above approach on different socioeconomic fields.

First, we shall analyze the criticism of the legal aspects of the foundations of the financial harmonization process.

Usher (18), Pardon (19), Vasseur (20), Santamaria (21) and Baltensperger and Dermine (22) disagree on how the Commission focused the use of the principles of mutual recognition and home country control for the achievement of an integrated financial market in Europe. Usher does not share the White Paper emphasis on the free circulation of financial products equated to that of the free movement of goods: "...the fundamental problem with financial services...is that what is on offer is a continuing legal relationship, the very nature of which may be dependant upon the local legal system" (23). Baltensperger and Dermine say

that the European Commission, despite adopting the principle of home country control for banking supervision, has proposed the national treatment principle for deposit insurance, which could create stability problems for the financial systems and hinder the prevention of systematic crisis leading to default of solvent banks.

Santamaría argues that "mutual recognition" (in the abstract) as understood by the Commission approach, is not effective enough without the prior harmonization of private international law problems. Dasseuse remarks the above feature, stating that the Second Banking Directive "carefully omits" the determination of the limits to the principle of the mutual recognition of financial techniques (24). Mutual recognition is criticized by Vasseur as regards the inclusion of activities not banking "sensu stricto", within the annex to the Second Banking Directive (bonds issues, securities and real state management, financial advise, etc...). This situation is likely to create future problems related to the recognition of the activities by countries in which regulations could exclude some of them from banking.

Finally, Pardon is specially concerned as regards the use of the "mutual recognition" principle in the financial services sector. He qualifies the Commission approach as: "simpliste", "équivoque" and capable to create more regulatory distortions than those currently existing (25).

The nature of the whole financial services harmonization process is also questioned by other scholars. MC Gee and Weatherhill emphasized the above critics by maintaining that the Commission's "New Approach" to the removal of lawful technical barriers to trade follows the essence of the Court's Cassis de Dijon approach to unlawful barriers, in that the emphasis is on general objectives not precise details, which establishes "an uniform community standard which precise content is left inexplicit" (26). But their most important remark is about the relationship that they establish between the Commission deregulatory strategy with a policy of privatization. Warnings about the consequences of this approach are also stated: first, about the lack of attention to the interests of all affected parties within the system to be created; second, about the control by business groups of the standard setting process; third, as regards the shaping of future legislation, in the sense that business interests will block consumer protective initiatives; Ciampi's (27) and Blunden's (28) studies show that the "home country control" principle, as regards solvency and accountability, among other features, are techniques "imported" from the Bank of International Settlements work. Similarly, Jones (29).

Vitale relates the legal nature of the banking Directives to the neo liberal ideology looking for the lowest regulatory common denominator (30). In this sense, Capotorti is specially critical as regards the "vacuum" of the legal nature in the Commission's conception for the achievement of the financial

market: "...now sembra avere una completa filosofia delle misure da adottare...la sua azione è costretta a tener conto della mutevole congiuntura politica ed economica, dell'evoluzione delle idee e degli interessi..." (31). Micossi stressed this view remarking that the task of Community legislation is narrowed to the "identification" of a platform of common standards (32). De Boisseu warns about future risks arising from the "position risk" of the credit institutions (connecting to tax fluctuations, exchange tax...), and which are not include within the Cooke ratios, the ones adopted by the Commission's proposals (33). Dornbusch thinks that the Commission's strategy to proceed with liberalization "no matter what" could result harmful, rather than helpful, to European integration (34). Similarly, Bini Smaghi, and Vona (35) who consider that the Commission's approach is intentionally based on the notion of creating "dynamic disequilibria" that will force action by markets. Albert, after questioning the opportunity of the Commission approach towards de-regulation, is "amazed" at the lack of political opposition to the White Paper proposals for the achievement of an integrated financial market (36). Fiscal disallocation as well as financial disallocation are risks which could arise in future due to the Commission technique which gave priority to the liberalisation of capital movements instead of fiscal harmonization of the financial fluctuations, in the opinion of VAN den Bempt (37). Mattout's analysis of the international banking context shows that , mostly after the US deregulation process, what really matters to regulators is the improvement on control rather than any other objective, which is what Community regulators have done (38). Similarly, Haberer (39) and Pons (40). Fowle stresses two

factors which influenced the Commission in the shaping of the Second Banking Directive. As regards the list of activities which banks may be authorised to conduct the influence is clear of the more liberal approach of the UK, West Germany and the Netherlands which have developed institutions which are more universal in the range of services which they can offer. Secondly, he identifies some characteristics of the objectives to achieve within the Second Banking Directive with those of the United States relaxation of the prohibition of interstate banking. The former has highlighted the increasing importance of sound and coherent business strategy, cost control, sound financial condition, rigorous control over the loan book and loan provisioning, etc...(41). Tillet expresses doubts as regards conduct of business regulation within the Commission's proposals. Despite the principles of mutual recognition and home country control would increase competition among the different national regulatory systems (42), by no means would deprive national regulators of all discretion. Host countries would oversee risk-taking in the securities markets control bank liquidity and set monetary policy. Thus, Tillet thinks that difficulties will arise because while conduct of business rules will be laid down by one authority but are going to be enforced by another (43). Goode shares Tillet's opinion and identifies the paragraph 2 of the Revised Basle Concordat as the source of inspiration of this commitment (44).

Desiata remarks that many conditions have still to be met before talking of a fully integrated European financial market, and so he does not agree with the inclusion of that objective within the Commission White Paper (45). The global increased competitiveness of the financial market which has put substantial pressure on interest margins and has stimulated the activity of the banks in international markets as well as the tendency towards securitization, are for Jozzo (46), and Revell (47) "external" factors underlying the Commission's proposals. Therefore the linkage to any "Communitarian principle, sensu strictu", seems to be far from clear. What really matters to European regulators is to face the issue of devising more stringent regulatory and enforcement modalities to take account of the breaking down of the segmentation of localised markets. London thinks that the Commission's proposals cannot be understood as intrinsically enacted for the achievement of "final stages" but as "transitorial" measures. If the single European Act does not embody any new competencies for the European Institutions in the Monetary field, and, as said before, the White Paper measures have been embraced by the Single European Act, the finality of the financial services harmonization process must be regarded with a short-medium term perspective (48). Therefore, the Commission presented a set of proposals aiming to adapt existing regulations to some of the new problems created by the development of the financial services markets in the Community.

Dufloux and Karlin's studies on the achievements of the Cooke committee show the influence of the Basle approach as regards some of the Community Directives: the Second Banking Directive, the own funds Directive, the solvency ratios Directive as well as two recommendations (49). It is worth noting that tax harmonization is the only thing in which the Basle group did not reach an agreement. This seems to confirm that the Commission proposals, within which tax issues are still unsolved, are only a copy, slightly adapted to the European financial environment, of the B.I.S. works (50). Davidson says that, in financial services, the Community is seeking to maintain the capacity to provide a centre complementing New York or Tokyo (51). Ferguson does not believe that "harmonisation" should be the right word to define the Community set of regulatory rules (52) for the achievement of an integrated financial services market. Kingston, after distinguishing between wholesale banking and retail banking, identifies "international pressures which are little to do with 1992", as the forcing sources to notice for the understanding of the Commission proposals (53).

Vasseur talks of "liberalisation-harmonisation" rather than harmonisation to define the legislative process enacted for the Community. He concludes that if the above process ends in an excessive de-regulatory environment a change towards re-regulation should be necessary (54). Mitchell thinks that the Commission approach is too "rigid" as the regulatory rules are failing to take account of the reality of the financial marketplace and the needs of consumers (55). Oort criticized some

of the Commission's White Paper terminology; concepts as "minimal coordination of surveillance standards", or "reasonably similar conditions", which have not been worked out in more detail, could lead to serious distortions of competition as long as, for instance, banks from countries with low standards on capital adequacy could unfairly out-compete banks from countries with higher standards on the latter's non domestic markets (56).

The completion of the planning for the achievement of a legal environment within which the European Community citizens could profit of a more efficient financial market seems to be a "fairy tale". The adoption of principles and technique which could work in other sectors, as the free movement of goods, or which have been shaped for a global market, gives to the observer the impression that "the harmonization of financial services" is the "Cinderella" of the whole set of rules aiming to harmonize other fields within the EEC.

As regards the economic approach of the Commission, criticism have been made of both the methodology and the principles underlying the building of the integrated financial market.

Wyplosz expresses disappointment with the use of the Cecchini report for many reasons. First it is a "micro-economic" study (57) which conclusions cannot fail to have macro-economic implications. Secondly, from a macro-economic point of view, it does not make a separation between the implications for the goods

markets and those concerning financial markets. Thirdly, the growth-enhancing effect is attributed to the supply side of the economy while the validation of the supply side boost by the demand side is needed (58). Bishop disagrees on the final benefits for consumers, unless there is sufficient "currency stability" to make it practical to manufacture European-scale financial products: "currency stability will be seen as an essential prerequisite to obtaining the extra scale of output from an industry whose raw materials is that currency" (59). Andreu notices the fact that the Price Waterhouse study analyzed 16 financial products (7 from banking) within several countries of the EEC, what differs from the technic used by the OECD study (Revell, 1980) which arrived to different conclusions. Therefore, the final outcome of the Price Waterhouse Study is not too much reliable (60).

Similarly, Molyneus maintains that the estimated gains in consumer surplus of the Cecchini reports are far from certain (61). Hoffmeyer says that the analytical material provided by Price Waterhouse, (based primarily on a comparative static analysis), illuminates actual price differences but does not provide much evidence on two important aspects. One is the distinction between retail and large transactions (62). The second is the shape of the "penetration curve", which means the time needed and the final effect of opening up for more competition. He maintains that, while the biggest impact -on large transactions- has already occurred, the penetration into retail transactions will probably be extremely slow, if any (63). Therefore, the Cecchini report implies some methodological

problems: First, the prices quoted do not represent actual consumer cost. Second, the way in which differences in the definitions used create discrepancies between the estimates for gains in consumer surplus for the entire credit sector. Third, cross-subsidization between financial products may often occur, which will obviously distort any figures. Fourth, it is possible that the countries with the lowest expected priced reductions could, instead, actually face price increases as cross-border demand for their products rose.

As regards other economic implications of the Commission's approach, De Bossiere thinks that the pattern to be created by the achievement of the White Paper's objectives will resemble much more to a free trade area for capitals than to a Common Market. He also disagrees as regards the effects on competition: "...du fait des cloisonnements fiscaux et réglementaires, un certain nombre de niches artificielles ont été créés qui donneront à certaines entreprises des positions monopolistiques de fait..." (64). Such distortions could be expected also as regards savings. If the division existing within the EC at present over the issues of withholding tax and bank secrecy, remains after 1992, wealthy individuals will be tempted to place their savings in any country but their own, leading to a large distortion of savings patterns.

Norup argues that the White Paper set of rules for financial services will not in themselves bring along any considerable macroeconomic alterations. Therefore, the growth will not be as strong as assumed by the EC Commission (65).

Other issues which are worth mentioning regard social policy and fiscality. Both issues have not been considered directly at all by the Commission approach.

The impact of the single market on employment in the sector is as yet uncertain. Financial services is an industry that relies heavily on a highly-skilled workforce. The ferocity of competition for skilled employees may increase and may also lead to redundancies and a decline in job security in some areas (66). Santomero thinks that employment issues will become highly political. All institutions seek low cost production points. One can expect to find them considering alternative site relocations to reduce operating costs, (mostly as regards social security burdens); such decisions will cause local governments to behave in a protectionist manner (67).

Rodríguez López and Salcedo Gener remark the absence of any achievement within the mortgage credit field, within the Community Strategy. In their view, the creation of a single market for financial services will favour universal banking while specialised banking is not taken into account. As housing is one of the major social policy aims, mostly for the lesser favoured

citizens, the damage to the human face of the single market is a fact (68).

On the other hand, it is worth questioning why the Commission proposals do not take into account some of the developments within the company law field, as regards both the participation of the workers in the profits of the credit institutions as well as in their administrative councils. If the proposals place the accent on "asset profitability", opening the door for cost accounting and economic analysis in banks, leading them to review their development strategy in the same terms as any commercial enterprise, why not to do the same as regards workers participation (69)?; Scholars as Mimola (70), Sciarra (71) and Kahn-Freund (72) have analyzed the impact of the second Company Law Directive, specially as regards the Bullock Report in Britain (73), within which some advantages were given to the workers of the company. Therefore, if valid for companies, why not include in the Commission proposals some social benefits for the workers of the credit institutions? (74).

It is also striking that the Commission did not take into account the Kirchner Report (75) which called for the extension of industrial democracy and recognized that union employer relations will also have to undergo change, as well as the 1980 OECD report in which retail banking was seen as a high cost area, because of the level of investment required in human and material resources, which banks were seeking to cut (76). Retail banking (bank branching), is currently threatened by both, new technology

(provision of electronic points of delivery) and customer behaviour (self-service) (77). This situation will foster some of the problems for branching expansion after 1992 as the huge costs of establishing a market presence, changing local customs and habits or people's preference for familiar names and institutions, which do not contribute to the creation of jobs.

Finally, Bertrans relies on the lack of solutions for the less qualified workers within a highly technified environment (78). In such regulatory context, it is probably that situation as the one in Segers (79), should arise again.

As regards fiscal issues some observations have to be made. Taxation differences preoccupies many of those involve in financial services. The lack of Community proposals for the harmonization of matters as withholding tax on dividends and interest (80) (81), as well as in financial transactions (82) (83), could provoke distortions as regards the placement of capital investments depending on the fiscal treatment given by the different Member States. As far as saving fiscality is concerned, a matter of concern for the majority of the citizens, the Commission's answer to a parliamentary question by Mr. de Clercq and Mr. Donnea (84) was not very much convincing. Up to now, agreement has been reached only as regards "cooperation" between the Member States, but the problem of double taxation is still unsolved (85).

NOTES

- (1) OJ L 169, 29/6/1987, specially articles 13-19.
- (2) It is worth noting that declaration n° 3 of the SEA states as not legally binding the date of 31 december, 1992 for the completion of the internal market.
- (3) COM (85); 310 final; Bull, C.E., n° 6, 1985.
- (4) See COM (86), 326 final, and Directive 86/566 EEC, OJ L 332, 26/11/1986.
- (5) See, Commission of the ECs: "Completing the Internal Market: an area without internal frontiers. The progress report required by article 8B of the EEC Treaty; november, 17, 1988.
- (6) See Fitchew, G.: "Overview. European Financial Markets: The Commission's Proposals" within European Banking in the 1990s. Blackwell ed.; 1990, p. 13.
- (7) Ibid.
- (8) A very good example of this spirit is the content of U.C.I.T.S. Directive of the 22 of june, 1987; O.J. n° L 185 of july 7, 1987.
- (9) See Fitchew, G.: "The progress to date an EC perspective, in Reestructuring Europe's Financial Services, 1992 and beyond. Rooster. 1989.
- (10) Ibid., p. 9.
- (11) Ibid, p. 24 and p. 32.
- (12) See, Sutherland, P.: "1^{er} janvier 1993: ce qui va changer en Europe" Presses Universitaires de France, 1987.
- (13) The long list of activities for which the single banking licence would be valid is proof of this.
- (14) Clarotti, P.: "Le système bancaire européen" in "The European Integration of Financial Markets", 1986, Maastricht, p. 11.
- (15) Commission of the EEC: "Research on the cost of non-Europe", Luxembourg, 1988.
- (16) See the pages 27 and 60-63 of volume 9 of the "Research on the cost of non-Europe", Financial Services (Price Waterhouse), 1988.

- (17) See "The note from the President of the Commission to the President of the Council". Informal meeting of the Ministers for Economy and Finance at Knokke - april, 1987, last paragraph of point 3 (2).
- (18) See, USHER, J.: "1992 and the implications for banking and finance. An overview". Europe. institu. Univ. de Saarlandes. 1989. pg. 3 y ss.
- (19) See, Pardon, J.: "La libre circulation des services financiers: a la recherche de la doctrine de la cour de Justice a propos des établissements financiers" in "Le marché Interior des Services Fiananciers". Maastricht, 1987.
- (20) See, Vasseur, M.: "Les problèmes juridiques de L'Europe Financière"; La Revue Banque; nº 486; septembre, 1988. pg. 40 y ss.
- (21) See, Santamaria, A.: "Le Societá nel diritto Internazionale Privato". Guffrè Ed. Milano, 1973.
- (22) See, Baltensperger, E. and Dermine, J.: "Prudential and Regulatory issues". Op. ct. supr, pg.18.
- (23) See, Usher, J.A.: Op. cit. supra; pg. 3.
- (24) Dassesse, M.: "Retail banking services in 1992"; in 1992: the legal implications for banking. Cranston, Ed. London, 1989. pg. 61 y ss.
- (25) Pardon, J.: Op. cit. supra, pg. 48-49.
- (26) MC Gee, A. and Weatherhill, S.: "The Evolution of the Single Market Harmonisation or Liberalisation"; in the Modern Law Review 53, 5 september, 1990. pg. 583.
- (27) Ciampi: "Coordinamento internazionale della vigilanza ed efficienza del sistema bancario", in Bancaria, 1983. pg. 233 y ss.
- (28) Blunden: "Cooperazione internazionale nella vigilanza sulla aziende di credito", in Bancaria, 1977. pg. 906 y ss.
- (29) Jones, N.: "The Single Market for Financial Services", in Banking, 1992 Ian Gillepsie, Ed; 1991, pg. 16 y ss.
- (30) Vitale, P.: "Introduction to L'attuazione delle Direttive CEE in materia creditizia . Giuffrè Edit. Milano, 1983. pg. 13.
- (31) See, Capotorti, F.: "Intervento Conclusivo", in L'attuazione...; op. cit. supra, pg. 441.

- (32) Micossi, S.: "The Single European Market: Finance". Banca Nazionale del Lavoro Quarterly Review; V. XLI, n° 164-167, 1988. pg. 217 y ss.
- (33) De Boisseu, CHR.: "Les raisons de la faillite bancaire", in Le FIG-ECO; cit. supra, pg. 34.
- (34) Dorn Busch, R.: "Money and Finance in European Integration"; mimeo INSEAD; January, 1988.
- (35) See, Bini Samghi, L. and Vona, S.: "The Effects of Economic Convergence and Competitiveness on Trade among EMS Countries", in Macroeconomic Policy and Economic Interdependence; edited by D. Hodgman and G. Wood. London. MacMillan, 1988.
- (36) Albert, M.: "Préface" to "La création d'un espace financier intégré en Europe" Ed. Economica. Burssels, 1989. pg. 6 y ss.
- (37) Van den Bempt, P.: "La fiscalité de l'épargne" within "Les problèmes fiscaux liés à la libération des mouvements de capitaux et des prestations de services financiers". in "La création..."; Op. cit. supra; pg. 41 y ss.
- (38) Mattout, J.P.: "Droit bancaire international" La Rev. banque, Ed. Paris, 1987. This idea is clearly content in the speech of Mr. Diors to the seminar organized by CAHIERS DE DROIT EUROPEEN: "Vers un marché unique des services financiers" Brussels, 27-28, April, 1989.
- (39) Haberer, J.P.: "Les banques intenationales et les nouvelles données financières de 1983", Banque, 1983. pg. 677, y ss.
- (40) Pons, J.F. and Margerie, G.: "Une nouvelle étape sur la voie de la déréglementation"; Banque. 1983, pg. 311 y ss.
- (41) Fowle, M.: "1992. Its impact on European Banks, their structure, operations and accounts", in 1992: The legal implications for banking. Cranston, Ed. London, 1989. pg. 19-43.
- (42) These systems would be under great pressure to converge, since regulations that limit the ability of a country's own banks to offer certain products disadvantage those relative to banks from other EC countries that allow thes products.
- (43) Tillet, P.: "Banking regulation and 1992" in 1992, The legal..., cit. supra; pg. 43-59.
- (44) Goode, R.: "1992: the insolvency implications for banks" ibid; pg. 93-102, specially page 98.

- (45) Desiata, A.: "Financial innovation and the development of an European financial market", in Europe and the future of financial services. Commission of the EC. Proceedings from the symposium of 5,6,7, November, 1986. Brussels, pg. 83-97.
- (46) Jozzo, A.: "Credit institutions", in "Europe and the future...", cit. supra, pg. 193-211.
- (47) See also Revell, J.R.S.: Ibid. pg. 663-667.
- (48) London, C.: "Le secteur bancaire au regard du droit communautaire", in Rev. Trim. dr. europ; 23 (4) , Oct-Dec. 1987; pg. 593-619.
- (49) "Surveillance et contrôle des grands risques des établissements de crédit"; JO,CE, N° 33/10 du 4,2, 1987.
- (50) See, Dufloux, C. and Karlin, M.: "Le réglementation prudentielle des banques: les travaux récents du comité Cooke" (I) and (II), in La Revue Banque; n°. 489-490, December, 1988 and January, 1989.
See also, from the same author: "les dispositions adoptées au sein de la Communauté économique européenne", in la Revue Banque; n° 491-492, February. March, 1989.
- (51) Davidson, R.J.: "Towards and Integrated market in banking", in 1992 Planing for Financial Services and the Insurance Sector. Butterwoths, Eruofi plc. ed. 1989; pg. 167-175.
- (52) Ferguson, D.G.: "European Harmonisation: problem or opportunity?"; ibid. pg. 216-225.
- (53) Kingston, T.D.: "The challenge of 1992: implications for the financial sector". ibid; pg. 236-241.
- (54) Vasseur, M.: "Vers L'Europe financière unifiée problemes juridiques". Revue de jurisprudence commerciale. Nov. 1987; pg. 109, y ss
- (55) Mitchell, J.: "The Integration of Personal Financial Services within the European Community: a consumer perspective", in "Le Marché Interieur..."; cit. supra; pg. 119-128.
- (56) Oort, C.: "A completed internal market for banking services: a view from the industry"; ibid. ; pg. 145-151.
See also, SCAMACCI, P.: "L'articolazione dei mercati finanziari condiziona la struttura degli intermediari", in Bancaria. March, 1990. pg. 17-21.
- (57) The Single Act is clearly a set of microeconomic policy measures.

- (58) Wyplosz, C.: "Asymmetry in the EMS: intentional or systemic?"; INSEAD Working Paper nº 88/41; Bologne. August, 1988.
- (59) Bishop, GR.: "The progress to date banking", in "Reestructurating Europe's financial Services"; Op. cit. supra, pg. 41.
- (60) Andreu, J.M.: "La Banca y el futuro: un panorama complicado"; ICE, Nº 2132, 2-8 May, 1988. Pg. 1626.
See also, "Los servicios financieros ante el mercado interior"; ICE, 27 March, 2 April, 1989. pg. 1302.
See also the opinion of Mr. José Luis Leal (President of the AEB), "minimizing" the implications of 1992 for retail banking. Mostly as regards the opening up of accounts by little savers among the EEC. "EL País" (Economía); 21 september, 1991.
- (61) Molyneux, P.: "AN Analysis of the structure and performance characteristics of top EC banks and the strategic implications for 1992", in Revue de Banque, nº 6, June, 1989. pg. 365.
- (62) This is the difference in possibilities of substitutions for an individual person with connections with a single branch versus a big-firm that has a broader choice.
- (63) See, Hoffmeyer, E.: "Is there over-optimism on European Financial Integration? in Dammarks National Bank Monetary Review; February, 1989. Pg. 19-24.
- (64) de Boissiere, TH.: "Vaincre la fragmentation: une perspective generale d'un point de vue financier", in "The Internal Market for Financial Services". E.I.P.A. Maastricht. 1987. pg. 97 y ss.
- (65) Norup, P.: "Harmonisation and liberalisation efforts within the EEC with particular emphasis on the Danish banking environment", in Strategic Planning for 1992. Buterworths and Eurofi. plc Ed. 1989, pg. 210-215.
- (66) See the Fifth Report of the Trade and Industry committee: "Financial Services and the Single European Market". House of Commons. Session 1988-89.
- (67) Beatty, R., Santomero, A. and Smircock, M.: "Bank Merger Premiums. Analysis and Evidence". New York. Salomon Brothers Center. New York University. 1987.
- (68) Rodríguez López, J. and Salcedo Giner, J.M.: "Crédito especializado y mercado único". El marco hipotecario de la CEE. El País; February, 7. 1990.
See also, Rodríguez López, J.: "Liberalización Financiera y precios inmobiliarios" in El País, september, 4, 1991.

- (69) See, Levy-Lang, A.: Banking Strategies for the 1990s; in Financial Institutions in Europe under new competitive conditions. KLUWER Academic Publishers. 1990. Pg. 39-46.
- (70) Mimola, A.: "Democrazia azionaria e democrazia industriale in Gran Bretagna". LIGUORI, ED. 1981.
- (71) Sciarra, S.: "Democrazia azionaria e democrazia industriale". BARI. 1978.
- (72) Kahn-Freud, O.: "Industrial Democracy" Industrial Law Journal, 1977; pg. 65 y ss.
- (73) January, 1977.
- (74) See also, Davies, P.: "The Land of Industrial Democracy". Industrial Law Journal, 1977.Pg. ss.
- (75) Commission of the EEC: "Report on the Social implications of introducing New Technology inthe Banking Sector". November, 1983.
- (76) "Costs and margin in banking: An International Survey".
- (77) Mckinsey Group. "Retail Banking Conference". London, 1982.
- (78) Bertrand, O.: "Transformation des services financiers. Qualifications et formation in Europe and the future of Financial Services. Brussels. 5,6,7, November, 1986.
- (79) Case 79/85 of 10 July, 1986.
- (80) See, "The Single European Market: Survey of the UK Financial Services Industry". Bank of England. May, 1989.
- (81) In the long term, free movement of capital and a Single market in financial services may involve some loss of revenue to governments from this source.
- (82) Stamp duty, stock market, turnover tax, tax on insurance premiums, tax treatment of insurance catastrophe reserves and corporate taxation.
- (83) See, "Stamp duty and indirect taxes on transactions in securities in force in member countries of the European Community". Committee of Stock Exchanges in the EEC. November, 1988.
See, also: "European Trends in Direct Taxation towards 1992: Saving Tax Considerations as applied to European Corporations" 3rd edn. Price Waterhouse. February, 1989.
- (84) WQ, n° 1135/90 of 14, may, 1990.
- (85) CA form miss SCRIVEWER of 30, July, 1990. OJ, N° C- 303/40 of 3, December 1990.

CHAPTER IV: CONCLUSIONS

Several features have to be underlined on the above analysis of the current "de-regulatory" environment of Financial Services in Europe.

First, the EEC Institutions have no choice for the development of an European Policy Based exclusively on European Interests which could help the achievement of an Integrated Financial area. Despite a success on the achievement of an European Policy in other economic sectors (coal, steel, agriculture, fish, etc.) the Financial Services sector is far from an independent decision making process. Decisions are taken in function of international developments within the financial markets.

Secondly, the Institutional effort for the creation of an European Central Bank lacks of many supports for the shaping of an institution which could guarantee the implementation of Public Policy measures for the incrementation of European Welfare Standards.

Thirdly, the international interdependence of the financial markets have been reinforced in recent decades for the growth of the Euromarket. This situation affects both the independence of the national monetary authorities as regards its monetary policy capacity and also the whole financial markets instability. For instance the financial instruments created within the Euromarket

foster the process of credit "securitisation" and so, that of the "des-intermediation" of the credit institutions. Therefore, there exists the risk that in near future an uncontrolled flux of capitals towards the Euromarket could happen. This situation would imply a concentration of risks within the Euromarket and so could threaten the instability of the European Financial markets.

Recent scandals regarding the behaviour of financial institutions should ban hesitations from current mentalities of the European regulators. In this sense, a quotation may point the finger on the right direction: ... "La caída del grupo Eurocapital, como antes la de Corporación Intra, demuestra la fragilidad de algunas aventuras financieras" ... "que, poco o nada aportaron al bienestar colectivo y a la economía nacional, sino que enriquecieron a sus inversores" (1).

NOTES

(1) See, El Sol, thursday, 3 october, 1991, p. 14.

PART IV

GENERAL CONCLUSIONS

INTRODUCTION

The final outcome of this research consists of two parts. First, some critical considerations have been done as regards the legal implications of the EEC approach to the achievements of the "harmonization of the banking services". Secondly, we advance several conclusions as regards the main foundations of the EEC banking harmonization process.

These considerations aim to embrace the whole range of fields with which the preceding analysis has been concerned: first, the socioeconomic environment influencing the above process; second, policy making considerations regarding both the role of political decisioners and the credit institutions strategies for the achievement of their objectives; third, the consistency of the EEC set of rules as regards the above mentioned influences; and, fourth, the European financial landscape of next future and the implications for other sectors of the Community life.

CHAPTER I: A CRITICAL VIEW TO THE LEGAL IMPLICATIONS OF THE HARMONIZATION PROCESS IN THE BANKING SECTOR

We wish first to make several reflections on both the legal nature of the banking directives and the consequences deriving from their "rôle" as the "corner stone" of the harmonization process in establishment and services of banking activities within the EEC. This raises several questions about both the "instrumentality" and the "morality" of law and, more generally of the "rôle" of law in the industrial society. According to this aim we shall describe some of the weaknesses arising from the legal nature of cited banking directives, first considering their nature, [plus their original purpose], in a system of supranational (and national) law and secondly considering the legal institutions, ideas, rules and processes placed in their social, economic and political context.

A. The directive as the legal instrument for the implementation of banking harmonization in Europe:

Concerns about the use of the Directives as the most appropriate instrument for the development of the harmonization process within the EEC have been largely expressed by the scholars (1) and governments (2).

If we want to note some of the problems concerning the suitability of the use of the Directives in the harmonization process, we have to face the problem from a double perspective: the legal and the contextual (the situation within which the norm is going to be effective).

The EEC treaty uses different terms such as "approximation", "harmonization" and "co-ordination" (3). Which has created differentiated system of extensive powers to act for the community. Leaving aside the controversy arising on the meaning of each of these terms within the scholars (4), we shall reflect on the concept of "harmonization" as it is content in the article 100 and 100A of the EEC Treaty, despite the articles of the Treaty of Rome which mention specifically the financial sector speak of "coordination" rather than of "harmonization", and that is the terminology used by the two banking Directives above analyzed, cited concept can be questioned in different ways:

First we shall try to open the path to the elucidation of its juridical content in terms of its underlying form. The elucidation of law through the notion of form is a way of exhibiting the immanent intelligibility of the law's content. So, admitting that "form and content are correlative and interpenetrating" (5), the first legal issue arises: Is the form of the Directive (6) adequate enough to fulfil the objectives of the harmonization process? As far as the form of the Directives is concerned, regarding the Banking harmonization Directives within the general evolution of the Directives in the rest of the harmonization processess, we cannot discern a development towards more detailed texts than those of the begining (7). Thus, the criticisms from relevant scholars as Cerexhe (8) or Schwartz (9) on the form adopted by directives to express their contents are still applicable. If the banking Directives aim to establish standards or to uniform design several of the fields of the banking activities it should be regreatable to cut dicretionally margins of the national authorities which could damage the achivement of wider margins of banking integration through law. This statement is easy to illustrate in the Banking Directives by making a comparison between the preambles of Directives 12/12/1977 and 15/12/1989, which use "declarations of intentions" far from the real content expressed through their articles.

Secondly, Criticisms can be raised also by taking into account the standards for the "efficient operation", (by efficient operation we mean the provision of practical solutions to legal problems) of a legal system as an instrument. It has been analyzed by both civil law and common law authors, and may be summarized as follows: "...there must be rules; these rules must be of a general nature; they ought not to be contradictory; they ought no to demand the impossible; there must be a congruence between official action and the declared rule..." etc. (10).

If "clarity of the rules" certainly represents one of the most essential ingredients of legality, it does not seem that the existence of some articles within the Banking Directives using concepts which render very difficult the delimitation of the margin of discretion of the Member States can help to achieve an uniform application of the underlying principles within the harmonization process. An example is article 5 (2) of Directive 15/12/1989.

The above criticism of the lack of clarity of some of the contents of the banking directives, seems to be far from the aim of another formalist statement: "the forms of justice represent the conceptual structures applicable to the understanding of juridical phenomena, and the content of law is intelligible to the extent that its justifications express these structures" (11). Similarly, as Nonet and Selznick state: "...Precise rules sharpen legal control but also forms attention on forms and details, leaving intact the substance and the larger pattern of public policy" (12).

Third, the lack of clarity as regards the wording of some of the articles of the banking directives, can also endanger the achievement of its uniform applicability through the EEC. What happens if the member states have not purported to implement the Directive? The question whether the Directive has the capacity of producing direct effects would become an issue; the European Court would leave to decide whether, the time limit for the implementation having expired, it had to give effect to the provisions of the Directive which were both directly effective and inconsistent with the existing national law. The accepted view is that only a provision which had direct effect could prevail over conflicting provisions of the national law, as it was stated in cases Siskina (13) , Re-imported oranges (14), Amies (15) , etc. Up to date the solution given by the European Court refers to "directives whose terms were clear and precise enough regarding the limits of the measure of discretion left to a member state". Thus, directives using "declaration of intentions" and lacking of clarity in its texts render very difficult an uniform implementation within the member states.

That is what happens with some of the articles of the Banking Directives. We can find within them concepts as "honorability" or "professional skill" which do not have a uniform meaning through the legal orders of the Community Member States. [It is a serious mistake to assume generally that , though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the Courts or to special

administrative tribunals. The decision of the European Court in the "Marleasing case" (Case 106/89) of 13 november, 1990 could provide us an example in the above sense.

Fourth, concerns can arise on the lack of internal coherence of the Directive. In other words: where is the coherence of a legal instrument which many times needs a previous coordination of the basic conditions for the attainment of the objectives of the harmonization process? (16). How can we face the problem of the lack of convergence between the Member States any time they try to clarify some of the legal concepts which are the basis for both "coordination" and "harmonization"? (17). As Goode states: ... "But if agreement cannot be reached on the basic framework within which the detailed rules are to operate, and with which they must need be consistent, the utility of harmonising specific rules in part of the field comes seriously into question..." (18).

These questions arise respect of Banking harmonization because of the lack of "univocity" of some of the terms used by the Directives, as it is reflected in the content of articles 8 and 9 of Directive 15/12/1989. Thus , if agreement cannot be reached on the basic framework within which the detailed rules are to operate, and with which they must be consistent, the utility of harmonising specific rules in part of the field comes seriously into question.

Fifth, "protection of the standards of external morality" also raises concerns. The standards in respect of the external morality of a legal system regard the substantive values and aims which that system is intended to serve. At a Community level, the first are the requirements of welfare economics (settled by the EEC treaty in article 2). Some of these requirements are the "harmonious development of economic activities" and the "increased stability", which inspires the regional policy on the basis of solidarity and coordination of national economic policies. Assuming those aims, it does not seem that, the content of article 18 of the second Banking Directive clearly opens the way to economic dangers for the weakest financial structures of some regions of the Community will be in according to these standards.

Finally, the legal nature of the harmonization process itself is in question. Concerns arise from the legitimation of the Council any time it acts through Directives. If articles 3H, 100, 100A and 101 of the EEC Treaty on the one hand, and articles 27, (54.3 (g)), 57(2) and 99 of the EEC Treaty on the other hand, constitute the legal foundation of the harmonization process, that necessarily means that processes enacted with the aim of achieving "convergence" between the Member States cannot be assimilated to the harmonization process (19). So, if the banking directives try to regulate fields mixing them under both harmonization and convergence processes, (20) is it legally coherent to enact the Banking Directives, (touching fields as fiscality, social policy, contractual obligations, human rights,

consumer protection or competition policy, (21)), on the sole basis of article 57(2) of the EEC Treaty (22)?.

About the real extent of article 57(2), it is worth noting the opinion of Roth: ... "Doubts may arise in view of the wording of article 57(2) in association with 57(1) EEC, which confers competence for co-ordination only for the purpose of "facilitating" the provision of services"... "it is true that the concern of article 57(2) EEC is not the approximation of laws as an objective in itself, but the facilitation of the international provision of services"... "makes it possible for the Community to orientate the administrative law of Member States towards co-operation between the administrative authorities of the states..." (23). Therefore only a harmonization approach based in "control" (but not on freedom), of some of the aspects related to the provision of services by credit institutions could be enacted under article 57(2) of the EEC Treaty.

This raises another question on the substance of the instrument being used. Given a certain form of integration aimed by the Community and a certain legal vehicle to be used to that effect, to what extent does the instrument accomplish its substantive function which is to achieve economic integration? In so far as these objectives were concerned which were outside the narrow exclusive legislative competence of the Community, questions might arise regarding the exercise of their sovereign powers by the Member States; such questions would be solved on the basis of the interpretation of other provisions of the EEC treaty, such as article 220. Explicit or implicit provisions would provide the answers. In the result, there could be

concurrent powers with that of the Community being parallel to that of the Member States. Therefore, for the so much complicated world of banking activities it seems reasonable to rely on the use of articles 235 and 220, as Marx and Schwart maintain for those regulations involving conflict of laws, the development of international substantive rules, and mechanisms for achieving co-operation between the administrations of the Member States in order to overcome territorial restrictions of vocational supervision... (24).

Article 235 could also provide a useful solution, mostly because the provisions of article 235 have been the basis for the implementation of the objectives within articles 2 and 3(a)-(k) of the EEC Treaty. In the scrutiny of EEC article 235, the question of implicit, and perhaps exclusive, competence in regard to its powers of legislation, would arise: did the Community have powers, supplementary to those expressly provided, to legislate? The normal principle regarding implied terms or provisions would prevail: those legislative powers needed to effect the objectives of the Community would be implied (As it was stated in cases Massey-Fergusson (25), and Commission v Council (26), (27)). But, it is worth noting that dangers exist regarding the impairment of the capacity of the Community and its institutions to carry out a so much complex process as it is the Banking harmonization in Europe; the unitary nature of the Community and its supranational legal system could be threatened and the scope of Community Law restricted. The solution would depend on the possibility to achieve a harmonization between the competing and

overlapping fields of existing and future international Conventions (including those of the Council of Europe) and those made between the Member States alone. The solution can be provided also, on the basis of article 220 of the EEC Treaty which provides, "inter alia", that the Member States shall "to the extent necessary", engage in negotiations with each other with a view to ensuring for the benefit of their nationals, the mutual recognition of companies..."; the purpose consists in facilitating transnational contacts in the corporative field and also encouraging some types of concentration. Since the topics mentioned in the article 220 essentially raise issues regarding conflicts of laws, it does seem that the conclusion of an International Convention is a more effective instrument than those mentioned in article 189 although it is subjected to national ratification and implementation.

Therefore we can conclude with Roth that, as in the domain of financial services matters are somewhat more complicated, it is not sufficient "to declare the law of the home country to be applicable to all product-related regulations" (28). Other solutions are required.

B. The contextual approach:

One of the main features of the present century (regarded from the socioeconomic and political perspectives), is the "transformation" of the relationship between both the state and the law, on the one hand, and the state and the economy, on the other hand. In fact, with the creation of the "welfare state", the State tends to shape the economy through the law (29).

But the study of these "phenomena" must take into account both sides of the same "coin": the economic and the legal ones. Yet as far as the economic side is concerned, when legal scholars look outside law, they find that economics have developed paradigms that seem to provide a powerful analytic framework for the study of the law. The economic model whose objective test relates to "efficient allocation of resources" serves as a first step for legal analysis. Posner, for example, is convinced that "it may be possible to deduce the basic formal characteristics of law itself from economic theory" (30). Consequently he argues that "the ultimate question for decision in many law suits is, what allocation of resources would maximize efficiency?".

On the other hand, as far as the legal side is concerned, the scholars talk of the "juridification of the Economy" (31), as a scientific "phenomena" which is studied within the "economic law", as a self profile branch within the study of the law. "Economic Law" seems to be a similar concept within western countries. Quadri, for example states: "Il diritto pubblico

dell'economia è la nuova disciplina giuridica che studia i mezzi e gli strumenti messi a disposizione dal diritto per l'intervento pubblico nell'economia" (32). Jacquemin et Schrans argue that: "L'aspect fundamental du droit économique, dont découlent tous les autres, nous paraît être son caractère instrumentaliste. La règle de droit se présente, en effect, comme un instrument destiné a exercer le plus efficacement possible certaines fonctions vis-à-vis de l'économie" (33). Despite, Hirsch's conception of economic law is different from the preceding ones in that it involves explicitly substantive economic objectives requiring political choices, it embraces some features similar to those above: "Guidelines given by economic theory require two successive steps: first, income should be redistributed in the most desirable manner; second, resources should be allocated in the most efficient manner. The formulation of prudent legal rules would have to proceed by considering both goals" (34). Those quotations above offer a similar approach to the study of the Economic Law, despite of the opinion of some scholars as Professor Daintith: "...The subject of economic law, uncomfortably poised on the dividing line between existing legal categories like commercial law and administrative law, and whose administration is still largely a preserve of civil servants where even practising lawyers do not enter, has therefore, as one would expect not been recognised at all" (35).

Assuming that the most important expression of the economic law can be found within the "Economic Constitution" of the western countries (36), a notion which has been developed very far in german literature, legislation and jurisprudence and to a lesser extent also in Belgian and French literature (37), we

can talk of a public instrumentalization of the economic law in order to achieve a large number of objectives arising from the socioeconomical aims of the western countries. Those aims can be summarized on Cranston's statement about the foundations of the Welfare State: "The regulation of private capital and the provision of benefits and services are the primary techniques of the Welfare State" (38).

Paradoxically, the instrumentalization of the law for the achievement of the objectives of the Welfare State were not within the aims of the EEC Treaty (39). Although the EEC Treaty does in certain areas (notably in agriculture) contemplate a managed economy and, although, being a "traité-cadre", and it certainly allows for an implementation along dirigistic lines, there is little doubt that the techniques of the "decentralization market economy" form the basis for the operation of the Community. Despite the high sounding ambitious, enunciated in the first clause of the preamble to the Treaty of Rome: "to lay the foundation of an ever closer union among the peoples of Europe", the European Community in ther first fifteen years of its existence was essentially a "low policy" Community, concerned with trade, agriculture, the four fundamental freedoms, transport and social policy.

Thus, the creation of a supranational legal order within the EEC treaty was conceived in order to achieve commercial objectives (40), far from the idea of a wider economic integration per se. Many questions arise from the wording of the EEC Treaty: to what extent is the EEC Treaty neutral with regard

to the "economic order", to what extent does it leave room for either a neo-liberal or a more socialist economic system at both the Community and at the national level? How far can planning go at the Community level without depriving Member States of all essential parts of their autonomous national economic policy? to what extent are General Community rules of the game sufficient, leaving the Member States free to follow their own policy within the framework of these rules? (41).

The instrumentality of the law within the EEC Treaty obviously did not reach the standards aimed for the achievement of a wider integration as it is defined by Jimenez: "Every process of economic integration requires harmonization and unification of the social, legal, economic and administrative disparities existing between the member countries. The greater the harmonization is, the stronger the integration will be" (42).

On the other hand, as the EEC Treaty does not embody and enforce fundamental social norms, it is commonly accepted by the scholars that the writers of the EEC Treaty were influenced by the most "Smithsonian idealism", leaving to the free play of the market the solution of the problems related to the achievement of a Common Market (43), and so, leaving aside any public instrumentalization of the law for those purposes.

The gaps of the Treaty lie within the most important foundations of the "Welfare State", as defined by Cranston: "...The regulation of private capital and the provision of benefits and services are the primary techniques of the Welfare

State" (44). Thus, neglecting these techniques, the Treaty facilitates several practices: freedom of contract gives capital the advantage in standard-form contracts; free services can encourage over-consumption, abuse and inefficiency; "...legal and administrative controls may be as effective as user charges in curbing such practices" (45).

A market economy system left to itself however is liable to result in several forms of disorder, not only as regards social policies and welfare economics, but also in respect of the inherent efficacy of the system as such. That seems to be the main reason for which, since the early years of the creation of the European Communities until nowadays, the way for a process of an "increasing interdependence" among the economies of the EEC Member States, has been opened. This process offers a new perspective on the issue: the involvement within the building of the Common Market of both the Member States and the European institutions (46).

As Lord Mckenzie Stuart stated: "there have been political developments affecting the decision-making process in the Community, developments which are not easily to be reconciled with the terms of the Treaty" (47). In fact, after the economic crisis of the seventies we can remark a firm determination by the part of the Member States in order to walk together towards wider margins of integration (48). Thus the "neo-liberal" terms (ignoring distributive justice), of the EEC Treaty seemed to lose the political support of the governments of the Member States, during the years going after the creation of the Common Market.

The process of "economic interdependence" involved also a point of importance: progress towards economic union inevitably meant the relinquishment by Member States of some powers and a greater centralization at Community level of the decision-making function in relation to economic matters. Assuming those features, it seems that the evolution of the European integration process falls within a theory between federalism and functionalism. According to the federalists, peace and integration in the international system can only come about if the nation-states, in one decisive act of self abnegation, were to delegate their sovereign power to the international level (49). The functionalistic approach is task-oriented and hopes for cooperation in relatively non-controversial humanitarian, social, or economic matters (50).

Some of the early functionalistic ideas have been further developed by several "neo-functionalists". Neo-functionalism differs from early functionalism in that it establishes some prerequisites to effective problem solving which involve a partial but direct threat to the autonomy of the nation-state. Neo-functionalism envisages a cumulative and expansive process whereby a supernational agency slowly extends its authority by real delegation of decision-making power from the nation state. This will create a universal welfare orientation and the process could be set in motion without involving political sources of friction (51).

Mc Mahon summarized this evolution with these words: "greater economic convergence, the development of a comprehensive consultative launching of the European Monetary System are but some of the notable achievements that must be recorded"... "indeed when one realizes how little power the Treaty gives to the Community and how much power the Member States have reserved to themselves, the cooperation and the convergence that have occurred in this period have been considerable" (52).

A prominent feature of this evolution towards the integration is the so-called "spill-over" effect. Lindberg says that "spill-over" refers to a situation in which a given action, related to a specific goal, creates a given situation in which the original goal can be assured only by taking further actions, which in turn creates further condition and a need for more action, and so forth. In the end this makes the individual nation-states increasingly dependant on each others' policy aims and goals, joint action on one problem would necessarily lead to joint action on others (53).

Therefore we can remark the instrumentalization of the European law in order to achieve the objectives arising from the aims of the EEC Integration process. Thus, the EC's contemporary legal evolution may be illuminated by emphasizing that the Member States had a firmly rooted history of interventionist activities for the raising of welfare levels which preexisted their effort to integrate markets, and influenced in the instrumentalization of the EEC law. In this sense, Savy: "...There exists such a thing as an optimum economic system for the EEC, the "mixed economy" system, of which the economy of the market forms the

basis, and where the public authorities intervene to ensure the conditions of effective competition..." (54). Consideration of political theory, of the law and of reality, lead to a rejection of this postulate. The fundamental legal principles of the economic systems of the Member States at no point prohibit economic experiments of socialist inspiration, which reduce the liberty of action of private economic agents in the general economic interest.

Whether "interrentionist" or not, the fact is that all the Member States and the prospective candidates witnessed an immense increase in public expenditure during the 1950s and 60s, notably on welfare. They also, whether overtly or covertly indulged extensively in "economic planning".

As far as the involvement of both the Member States and the EEC Institutions within the building of the Common Market is concerned, it is worth noting the words from Pescatore in the early years of the creation of the Community: "... une simple libération des échanges entre les pays participant à un régime d'union économique ne peut pas conduire à la constitution d'un marché commun parfait. Pourquoi? la raison en est qu'à notre époque le fonctionnement de l'économie dépend non seulement du libre jeu des mécanismes naturels du marché: il est profondément influencé par l'intervention de ce qu'on peut appeler, dans une expression générale, les plans économiques ou, pour utiliser une expression plus imagée, les "stratégies économiques", non seulement del l'Etat, mais encore des grands pôles d'influence privés" (55). These consideration are the basis of Pescatore's demanding for the achievement of a veritable "Economic Policy" at Community level through "harmonization" of the different

economic policies of the Member States. Brenner shares the same view (56).

As legal structures do not always operate as their designers intended, the above "process of increasing interdependence" among the economies of the EEC Member States influenced the legal nature of the EEC harmonization processes, and the content of the directives, the legal instrument used for the enactment of the harmonization processes. In our society, freedom does not lead to the compulsory straightforward working out of a set programme; it should be kept in mind that integration implies purposefull collaboration chosen voluntarily. As Pelkmans stated: "a further movement of European Economic Integration towards a full implementation of market interdependence would seem to demand a more substantial commitment towards a concurrent growth in policy interdependence or positive integration" (57).

The above mentioned "spill-over process" clearly appears on the development of the Banking harmonization process, as the necessary achievement of the economic and monetary union will, in turn, increase the Community relevance of such matters as budgetary policy, regional and structural policy, and income policy.

At the meantime that the evolution towards the achievement of higher degrees of European Integration, the EEC law received the influence of the new areas regulated by the law of the Member States: consumer protection, environmental policy, social issues, economic concentration, etc. These issues entered within the EEC

legal framework through articles 100 and 235 of the EEC Treaty. The positive reaction of the scholars on this issue can be summarized as follows: ... "the second important fact gaining acceptance is the harmonization of instruments as well as objectives of socioeconomic policy among the Member States..." (58). Thus, Articles 100 and 101 of the EEC Treaty changed its underlying purpose (59). In the words of Pescatore: "de cette manière, même l'aspect interne des différentes matières que nous avons énoncées - politique et législation économique, des règles professionnelles, politique et législation fiscale, sociale... vient à entrer dans le champ des compétences communautaires; toutefois, il s'agit ici d'une compétence non pas d'intervention directe (comme cela a lieu pour la libération des échanges), mais bien d'une compétence d'orientation et de coordination" (60).

Two main features characterized the harmonization processes enacted under articles 100 and 101 after the seventies: the political component and the absence of a previous programation.

The "political component" (61) was the consequence of the necessity to find a solution based on "consensus" to the problems arising from the new areas regulated by the harmonization processes. As Pescatore stated: ... "une fois de plus, nous nous trouvons en présence d'une interaction assez complexe des compétences, nationales et communautaires, destinée à favoriser une transaction raisonnable entre l'intérêt national et l'intérêt commun" (62). Similarly McGee and Weather Hill: ... "harmonization demanded arduous negotiation to produce even minor legislation... if an uniform Community standard is established, but its precise content is left inexplicit" (63). Since compromise is a necessary part of the process of European integration, the instrument most commonly used for unification

is the directive. Use of the directive as the preferred instrument for approximation of laws shows that much of the approximation has been only partial or optional and that there are serious misgivings regarding Community minimum requirements. These limitations are accounted for partly by legal factors (the extent of disparities between national laws, the Commission's lack of authority to monitor compliance with the rules of directive), by Economic factors (duality of objectives, conflicts of interest) and political factors (fear of loss of national sovereignty, protection of home industries, etc.).

Thus, the institutional framework of the EEC seems to be ideal place for the allocation of "interests". The legislation enacted by the Council of Ministers of the Community does not escape to this influence. To put it optimistically, ...*"cette interdépendence des intérêts et des volontés permet d'aboutir, parfois au prix de grandes difficultés et de longues négociations, à des solutions à la fois constructives et équilibrées"*...(64).

The second feature above, the absence of a previous programation of both the terms and the intensity of the fields to harmonize, exacerbates the weakness of the harmonization process (65). This was remarked by Roy Jenkins, who was "concerned about the progressive expansionism of the fields which the Commission tried to harmonize" (66). Scholars have been remarked the consequences of this situation: ...*"Even where policy appears to exist, it may not involve clear goal specification, to what extent do politicians want to be seen as in favour of certain ideals or goals while actually doing nothing*

about them?" (67). To what extent, therefore, are some policies formulated without an intention to ensure implementation? Any system in which policy making and implementation are clearly separated provides opportunities for the promulgation of symbolic policies. Similarly, Roth: "Over the years, the Community's harmonization concept has changed substantially... this reorientation has led above all to an increasing reduction in the intensity of regulation considering necessary" (68).

The weakness has been reflected within the harmonization process, particularly in the lack of practical legal solutions to the problems at stake in favour of unpractical political compromises (69), and subsequently, by the lack of implementation of many of ECJ judgements and the lack of transposition of directives (70).

Within the above described context the Banking Directives seemed to suffer of the same illness that the rest of the harmonization processes. The European Commission's proposals on this area can be questioned in many aspects, as for instance, whether its action was meaningful, appropriate in terms of its temporal enactment and, finally, as regards the suitability of the legal instruments used for its implementation. The procedure opted for implies that harmonization is to be implemented in a largely pragmatic and gradual way.

All this in keeping with the characteristic of the EEC-integration process as a unification of democratic mixed economies. There is in fact a need to shift the emphasis in the

EEC from long-term targets to the actual integration process. This idea already seems to find acceptance in Brussels in respect to the harmonization of banking law, in which the emphasis is put on "pragmatical" aspects suggesting that other approaches, concentrated too much on long-run ends, have been not taking into account (71).

As regards the first Banking Directive we can note some weaknesses.

First, from the "formal perspective" it appears as a "framework directive" (72). We can attribute the wide range of objectives contained in the preamble, to the expansionist policy of the Commission, criticized by Jenkins (in so far as there is not any real possibility for the attainment of all of them). Hernandez Castilla stressed the effects of a lack of programation within the Banking harmonization process with these words: "...lo que resulta evidente es que no existe hoy en día un modelo bancario de la Comunidad" (73). Thus, the approximation between the different financial systems of the Member States has been the result of national answers on problems arising from common economic processes (74). Several problems can arise from this kind of policy-making. As Nonet stated: "the proliferation of objectives within the rules invites complexity and poses problems of consistency. Canons of interpretation are required" (75).

Secondly, the emphasis has been put on "control" rather than freedom (76). That seems to confirm the rôle of the "political consensus" for the enactment of legislation within the EEC harmonization processes.

Thirdly, both Italy and Belgium failed to fulfil on duly time with the obligations deriving from the Directive, which confirms the existence of "structural problems" within the financial markets of some of the Member States of the Community which render difficult the application of measures imposed on "consensus" rather than on an overall assessment of the many economic issues.

In so far as the Second Banking Directive is concerned, it is worth noting the presence of socioeconomic objectives within the first proposal sent to the Council by the Commission (77). Thus, it seems that, again, "political consensus" influenced in the final version because these objectives faded away from it, and that the achievement of immediate advantages is considered more important than the implementation of major long-term purposes.

Unfortunately, present efforts towards economic and monetary union show a striking analogy in method to the development already outlined in respect of the banking harmonization process. Great ends no longer dominate the programme of activities: instead it aims at implementing specific matters pragmatically (78). The EEC harmonization process has become an instrument for

the achievement of a wide variety of objectives and not only for commercial aims. Thus, the Directive, as the legal instrument which is on the basis of the harmonization processes, necessarily reflects the legal weaknesses consequence of both, the "political consensus" and the wide variety of fields which aimed to coordinate.

From a "moral perspective" of the banking harmonization directives, concerns may arise on several issues.

First, as it was stated before, it seems that the producers of benefits (the banks) have self-interested reasons for the enactment of the directives by the council according to their aims and without forced contribution from the "incidental beneficiaries" (the consumers). Such statement is linked to the concerns of some scholars, as Soper: "acknowledgment of the value of law arises out of a rational appraisal of self-interest in the maintenance of a coercive social order. A system that ignores the individuals' self interest undercuts the basis for the bond between ruler and ruled" (79).

Second, from a socioeconomic perspective, and, as far as the weakest Member States of the Community is concerned, since not all submissions to the Directives are beneficial, would they respect the law even if the paradigm applies?

The European institutions which shaped and enacted the banking harmonization process seem to suffer the illness stressed by Weber on the rationality of the work of bureaucratic

organizations: "Bureaucracy is not a dynamic institution committed to solving problems and attaining objectives. Rather, it is a relatively passive and conservative system preoccupied with the detailed implementation of received policies" (80). The European Institutions (mostly the Council and the Commission) seem to lack sensitivity to their social environment; the European legal arena on the issue needs an enlargement of participation.

The warning on the risks arising from these weaknesses can be summarised by a statement from Nonet and Selznick: ..." Policy is attenuated and regulation weakened when industrial power meets no effective challenge from the unorganized mass of consumer; when decentralization and "grass roots" participation means that powerful local interests overshadow wider but more remote interests; when specialization results in narrowing administrative constituencies, so that other related interests are neglected; when active participants are divorced from the groups they represent, and when the claims they press distort the needs for which they speak" (81). Thus, there is a "penumbra" within the EEC harmonization process on banking activities in which interests play a "preeminent rôle".

NOTES

- (1) Timmermans, C.: "Die Europäische Rechtsangleichung im Gesellschaftsrecht. Eine integrations und recht politische Analyse"; in "Rabels, Z.", (48), 1984; pages 25-27.

Kaiser, J. M.: "Grenzen der EG-Zuständigkeit, Europa-Recht"; Heft, 2; April-June, 1980, pages, 102,ss.

Marx, F.: "Funktion und Grenzen der Rechtsangleichung nach art.100" EWG- Vertrag; (Köln-Berlin-Bonn-München); 1976; pages 153-154.
- (2) See on this issue the controversy arising from cases van Duyn, [(4-12-1974), Recc. 1974, pages 1337 ss.], V.N. Ondernemingen, [(1-12-1977), Recc. 1977, pages 133 ss.], and Delkvist, [(23-11-1978), Recc. 1978, pages 2327, ss.] among others, on the recognition of the Direct Effect.
- (3) See articles 2, 3(h), 6, 100 (A) of the EEC Treaty, among others.
- (4) See, among others: Temple Lang, John: "The Common Market and Common Law" p. 37; the American Bar Foundation; University of Chicago Press; 1966. See also: Parry & Hardy, "EEC Law" , p.358-9. Cf. Lipstein, "Law of the EEC"; p. 268.
- (5) Weinrib, E.J.: "Legal formalism on the Inherent Rationality of Law"; THE Yale Law Journal, volume 97, number 6; May, 1988; pages 958, ss.
- (6) See paragraph 3 of the article 189 of the EEC Treaty.
- (7) See Vallee, "Le Droit des Communautés Européennes" , Ed. Presses Universitaires de France; Paris, 1983; page, 98, who remarks cited evolution on the way the Directives are shaping.
- (8) Cerexhe, E. "Le Droit Européen"; page 259.
- (9) Schwartz, I. "Zur Konzeption der Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft", in the volume "Probleme des Europäischen Rechts"; Festschrift für Walter Hallstein, Frankfurt, a.m.; 1966; page 514.
- (10) Schrans, G. "The morality and the instrumentality of European Economic Law"; working paper, 01/7010; E.U.I; p. 25.
- (11) Weinrib, E.J. : op. cited in (5), page 1013.
- (12) Nonet, PH. and Selznick, PH. : "Law and Society in transition". Harper Colophon Books. New York; page 61.

- (13) [1977] ,3 W.L.R., 818.
- (14) [1975], 2 C.M.L.R., 45.
- (15) [1977], 1 C.M. L.R., 336.
- (16) Schwartz, I.: "Commentaries to article 220 of the EEC Treaty", in "Groeben Boeckh-Thiesing" Kommentar Zum EWG-Vertrag, vol. II. Baden-Baden, 1974; page 629.
- (17) Pipkorn, J.: "Zür Entwicklung des europäischen Gesellschafts und Unternehmens rechts"; in ZHR, 137 (1973); page 37.
- (18) Goode, R.M.: "A Credit Law for Europe? ICLQ, vol. 23, april, 1974, p. 250.
- (19) Ipsen: "Europäisches Gemeinschaftsrecht". Tübingen, 1972; pages 696-698.
- (20) Giron Tena, J.: "El Derecho Español ante el Derecho Comunitario de Sociedades". Cuadernos de Derecho y Comercio, 5. Madrid. Junio de 1989.
- (21) See "Conclusions"of the first part of this thesis.
- (22) As it says the preambles of both, the 1977 and the 1989 Banking Direcitves.
- (23) Roth,W.H.: "The European Economic Community's Law on Services: harmonization"; CML Rev., 25:35-94, 1988, pp. 63, 65 y 69.
- (24) Marx: "Funktion und Grenzen der Rechtsangleichong nach art. 100 EWG - Vertrag, (1976), p. 89.
Schwartz: "Zur konzeption der Rechtsangleichong om der Europäischen Wirtschaftsgemeinschaft", in Festschrift Hallstein; (1986), p. 505.
- (25) Case 8/73, 7/ZA Bremerhaven v MasseyFergusson (1973), ECR 897.
- (26) Case 45/86, Commission v Council, (26, march 1987).
- (27) A similar interpretation seems to be largely expressed by the scholars: Usher, J.A. : "The gradual widening of European Community Policy on the basis of articles 100 and 235 of the EEC Treaty", in Structures and Dimensions of European Community Policy; Florence 1113 June, 1987); ibd. "The scope of Community Competence: its recognition and enforcement" (J.C.M.S.; V. XXIV; n° 2, December 1985). And Schwartz, I. : "Article 235 and law making powers in the EEC "; I.C.Q.L.; Vol. 27; July 1978.
- (28) Roth, W.H.: citt. supra.; pp. 90-91.

- (29) Assmann, H.D. : "Wirtschaftsrecht in der Mixed Economy"; Königstein, 1980; pages 9, ss.
- (30) Posner, R.A.: "Economic Analysis of Law"; 2nd ed. ; Boston: "Little Brown"; 1977 pages:393, 320.
- (31) Assmann, H.D. : "Zur Stenerung Gesellschaftlich ökonomischer Entwicklung Zur Recht", in "Assmann/Bruggemeir/Hart/Joerges"; Wirtschaftsrecht als kritik des Privatrechts; Königstein: 1980; pages 241 and ss.
- (32) Quadri, G.: "Diritto Pubblico dell'economia" .Società Editrice Napoletana. Napoli; 1977; p. 9.
- (33) Jacquemin, A. et Schrans, G.: "Le Droit Économique". 2ème. édition mise a jour; 1974. Presses Universitaires de France. Paris.
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- (38) Cranston, R.: "Legal Foundations of the Welfare State". Weidenfield and Nicholson. London. 1985.
- (39) Dagtoglou, O.D.: "Legal Nature of the EEC", in "Thirty years of Community law"; pages 35 and ss.
- (40) Behrens : "Integration&theory", in Rabels Z; 1981. pages 8,ss and 27, ss.
- (41) See, Themaat, P.V.L.: op. citt. supra., pp. 9-10.
- (42) Soto Jimenez, R.A.: "Some notes on harmonization in the Central AMERICAN Common Market". Bulletin; vol. XXV: January, 1971. pages 8 at 13; (U.S.D.)
- (43) Marx, F.: OP. citted in (1), page 147.
- (44) Cranston, R.: "Legal Foundations of the Welfare State". Weidenfelds and Nicolson; London. 1985. page, 327.

- (45) Cranston, R.: *Ibd.* page 333.
- (46) Mac Mahon, B.: "Progress towards economic and monetary union", in "Thirty years of Community Law", pages 430, ss.
- (47) Lord Mckenzie Stuart: "The European Communities and the Rule of Law"; Stevens & Sons. London; 1977; Page 81.
- (48) See the content and the preamble of the "Werner Rapport"; 1970. Luxembourg-Brussels; off. of publications of the European Commission.
- (49) Lindberg and Scheingold, 1970, p. 11.
- (50) The functionalistic theories were formulated in the wake of the second world war and David Mitrany, the English political scientist, published his pioneer study "A Working Peace System" in 1946.
- (51) Hass, Ernst, B.: "Beyond the Nation-State", 1964, p.10-13.
- (52) MC. Mahon, B.: Cp. citted in (37), page 410.(42: Lindberg and Scheingold, 1970, p.11).
- (53) Lindberg, (op. citted in 42, pages 9-10). Integration is thus viewed as a process, not a condition, and the end of the process will be an international political community.
- (54) Savy, R.: "Coordinating or Approximating Economic Legislation", in "The Economic Law...", citt. supra.; p. 95.
- (55) Pescatore, P.: "La repartition des competences et des pouvoirs entre les etats membres et les Communautés Europeennes". *Derecho de la Integración*; nº 1. Octubre, 1976; pp. 30-31. Buenos Aires. Argentina.
- (56) Brenner, M.: "The Treaty and Economic Integration", in "The European Economic Communities afer twenty years". *The Annals of the A.A.P.S.S.* 1978. Philadelphia; page 22.
- (57) Pelkmans, J.: "The Institutional Economics of European Integration", in "Integration through Law"; V. I; Florence (EUI). 1986. Book 1, page 249.
- (58) "Le transfert des objectifs économiques des autorités nationales aux autorités supranationales"; in *Cahier économiques de Bruxelles*; nº 29. 1965.
- (59) Marx, F.: *Op. cit.* in (1); page 147.
- (60) Pescatore, P.: *Op. cit.* in (43), page 86.
- (61) Kaiser, J.H.: *Op. cit.* in (1), pages 102 ands 114.
Timmermans C.: *Op. cit.* in (1); page 35.

- (62) Pescatore. P.: Op. cit. in (43), page 35.
- (63) McGee, A., and Weatherhill, S.: "The evolution..."
- (64) Ibid. ; page 90.
- (65) The Commission of the EEC has elaborated Programs for the harmonization of establishment and services or free movement of goods but not for the "coordination of the legislations of the Member States" in the new fields.
- (66) Speech of Roy Jenkins to the European Parliament on October, the 10th, 1978.
- (67) Barret and Hill: "Policy, Bargaining, Structure", in "Implementation Policy and Politics"; vol. 12; n° 3; (1984) p. 222-223.
- (68) Roth, W.H.: "The European...", op. cit. supra., p. 39.
- (69) Ficker, H.C.: "Commentaries to article 100 of the EEC Treaty", in Groeben-Boeckh-Thiesing, "Kommentar zum EWG-Jertrag; vol. II. Baden-Baden. 1974, page 1280.
- (70) See the European Commission Rapport and the National rapports of both, the first and second annual conferences on the subject: "The 1992 challenge at National Level"; (1989-1990; november. EUI, Florence (ITALY)).
- (71) See, Troberg, P.: "Harmonization of the European Banking Systems: How?", in Bank eb Effectenbedriff, september, 1974.
- (72) See note (81) of the first part of this thesis.
- (73) Hernández Castilla, N.: "El Libro Blanco del Mercado Interior: Banca y Valores Mobiliarios"; I.C.E.; (25/9/, 1/10, 1989); Page 3721.
- (74) By example:
 a) Since late sixties to 1973 it was an expanding tendency within the EEC Member States in order to approximate the basic rules regulating credit institutions; in France, the elimination of the differences between the concept of commercial and industrial bank, more easy procedures for the creation of subsidiaries and branches, the limitation of the interest rates, etc... Similarly, Great Britain, Holland and other OECD countries as the United States and Canada.
 b) During the last fifteen years the reforms introduced by the governments of the Member States within their financial systems has been the reaction to 1973 economic crisis; most of cited reforms lean on "control" rather than "de-regulation". (See on this way, the 1977 EEC Banking Directives).
- (75) Nonet, PH.: Op. cit. in (12); page 62.

- (76) See note (80) of the first part of this thesis.
- (77) See note (133) of the first part of this thesis.
- (78) See, Van Esch: "Economische en Monetaire Unie" Deventer, 1975.
See also, Wortmann, H. and Bonn, F.: "Theorie und Praxis der Währungsintegration in Europa", in Das Bankwesen in grosserem Europa. Baden-Baden, 1974.
- (79) Soper, PH.: "A theory of Law". Harvard University Press. Cambrigde (Massachusets). 1984; page 84.
- (80) Bendix, R.: "Max Weber : an Intellectual Portrait" New York; Doubleday, 1960; page 410.
- (81) Nonet PH. and Selznick ,PH. : op. cit. in (12) pages 101, 102.

CHAPTER II: THE SOCIOECONOMIC ENVIRONMENT INFLUENCING THE EEC BANKING HARMONIZATION PROCESS

As legislative outcomes are very much influenced by the socioeconomic environment within which they have been shaped, it is worth remarking some features of the current socioeconomic environment which, in our view, have influenced the EEC regulatory strategy of banking activities:

i) The swing of the pendulum in favour of the "invisible hand" has rendered obsolete national regulatory frameworks based on restrictions to capital flows or the provision of financial services (1).

ii) Banks have played the card of "innovation" to convince regulators of adopting "de-regulatory" strategies fitting to the current socioeconomic environment" and to the globalization of the financial markets. But financial innovation only contributes in a modest way to progress in the society as a whole (2). The relation between financial innovation and economic growth does not show a clear-cut interaction between the two variables (3).

iii) Three factors have to be remarked which contributed to the above "globalization" of the financial markets. The first is, the necessity to increase the monetary flux in order to avoid financial unbalances between the world financial markets. The imbalances were created by both the

oil crisis and the end of the gold convertibility of the dollar. The second is the fluctuation of the inflationary taxes within the economies of the western societies. The third is, the development of telecommunication and informatics.

These features changed the surface of the financial markets: markets grew to the detriment of the classic intermediary function developed by credit institutions. Therefore, the macroeconomic environment reshaped the financial environment (4). Credit institutions had to face the new situation which changed at least two aspects of their customary behaviour. First, companies went to the stock markets looking for cash instead of borrowing through loans. Second, savers reduced their saving tax and changed the allocation targets of their investments (5). Credit institutions' strategies as regards the above changes were based on at least, these points:

- a. The diversification of their activities.
- b. The innovation of their financial instruments adapting them to both the "deflationist context" and the financial necessities of companies and savers.
- c. Internal policies in order to reduce costs and risks, as well as a major concern about the situation of their own funds and liquidity (7).

The development of the above strategies established a new kind of credit institutions. Their main features are the progressive performance of the universal bank pattern and the interpenetration within both the insurance and securities markets (8).

The final outcome of this macro micro economic relationship can be clearly seen in the policy making of western countries regulators (see below). Therefore, what underlies the current financial services regulation is a set of rules reflecting the internal credit institutions strategies adapted to an external macroeconomic context. This could explain why regulators have paid much more attention to the "suggestions" from the supply side of the market.

Thus, the socioeconomic environment influences the regulatory processes related to credit institutions, leaving a little room for the inclusion of public policy considerations. There is no autonomous and independent programming of the financial services regulations. Governments and the European institutions react to external factors, which often are imposed by an "international context" which they cannot influence. Therefore, any kind of public policy consideration (as for instance, consumers) is given a secondary place. This is not the case for credit institutions which, in general terms, are better prepared than citizens for adapting their "profit making" mentality to changes within the international context.

The skeleton of the process above can be outlined as follows: A) giving a market situation where credit institutions develop their activities under a given regulatory environment + B) external factors change the above market situation + C) credit institutions adapt their strategies to the new situations before the regulatory environment changes + D) the new regulatory environment changes to reflect both the new external factors and the credit institutions' strategies adapted to the new socioeconomic environment.

Therefore, the democratic aspect, as regards participation of citizens and trade unions, of the set of financial regulations, is normally a very low priority. Legislation is enacted for conjunctural reasons under the shadow of the credit institutions' interests.

NOTES

- (1) See, Vanheukelen, M. and Pelkmans, J.: "The European Integration of financial markets". EIPA, Maastricht, 1986.
- (2) See, Schumpeter, J.A.: "The theory of Economic Development". Galaxybook, New York, 1961.
- (3) See, Godsmith, R.W.: "Financial Structure and Development". New Haven, Yale University Press, 1969.
- (4) See, Ethier, W.I. and Marston, R.C. eds.: "International financial markets and capital movements". Essays in International Finance section; Princetown, n° 157, september, 1985.
- (5) See, Aglietta, M.: "Europe: la décennie de tous les dangers". Doc travail. CEPII, n° 85, 5, september, 1985.
- (6) Geiger, H.: "Différences de structure et de compétitivité dans les industries de services financiers en Europe", in Europe and the future of financial services, op. citt. supra, pp. 37-55.
- (7) See, Naouri, J.C.: "La réforme du financement de l'économie"; Banque, n° 459, march, 1986.
See also, Silber, W.: "The process of financial innovation" American Economic Review, may, 1983.
- (8) Jaffre, P.: "L'unification du marché des capitaux", Banque, n° 460, april, 1986.

CHAPTER III: POLICY MAKING CONSIDERATIONS

Regarding current developments of the financial markets regulatory outcomes of the Community, we ought to know in advance what "financial policy", if any, the Community should establish in the near future.

Therefore, it is worth remarking some of the most important features within the decision-making process shaping the European financial environment. Some of the points to be stressed might answer some questions regarding why decision-makers have chosen a concrete set of rules, what factors have been taken into consideration for such decisions, and who, if anyone, is interested in the achievement of the objectives contained in the legal outcomes.

First, as regards the regulator's aims, we have to differentiate that of nationals from that of the Europeans. Economic and monetary policy may prove to be one of the policy areas which poses the sharpest supranational challenge in the run-up to 1992 and, to an ever greater extent, thereafter. Therefore, along with business interest considerations, it is worth underlining some of those related to the surreptitious conflicts between national and European interests (1).

Despite economic interests to which we shall refer later, there is a more fundamental issue such as democratic control and the kind of monetary policy the Community might pursue. This

issue is intimately linked to both, the role and character of an EC central bank and the future direction of economic strategy.

As regards the EC Central Bank the political options are confronted between two neatly labelled factions: the monetarist anti-inflationists for whom the EC Central Bank should be restricted to acting to counter inflations and ensuring monetary stability, and the neo-Keynesian supporters who believe that the EC Central Bank should be used as a positive instrument of public policy.

A similar situation can be regarded as far as economic strategies is concerned. Therefore, conflicts arise because, while the European Community institutions' dominant consensus is that decisions affecting growth, employment and living standards should be left to market forces, some of the governments of the Member States are more interventionist-minded economic strategists, thinking that the EC Central Bank should modify free market forces rather than act merely to reinforce them.

The institutional outcome of the above conflicts is the lack of a remarkable draft featuring what is the way the Economic and Monetary Union is going to achieve the aims for which it was conceived. This situation could find a solution by entrusting to the organs of the Community the definition and the carrying out of economic policy regarding short-term objectives. Which would mean giving the Community the right to prohibit inappropriate uses of policy instruments by member states (2).

Socioeconomic issues, very much influence the Policy makers' aim (3). Among the, factors to which financial services are reacting are, the ageing population in Europe, European industrial restructuring, Japanese interest in the European market..., etc. The ageing population in Europe (4): The latest available projections indicate a rise of only 1.8% in the population of the Community by the end of the century. This situation will have some consequences. First, as regards longevity, we can expect to see almost six million of octogenarians by the end of the century. Secondly, the ratio of employed to retired people should fall significantly. Thirdly, social security programmes for the provision of a secure income in retirement for their citizens are going to be affected. If, in 1985 2.3 working people available to support 1 retired person, in 2035, 1.6 working people available to support 1 retired person (predicted). Therefore, governments will almost certainly not be able to fund their social security programmes : "all over Europe governments are now moving towards the positive encouragement of personal financial planning as their actuaries predict certain bankruptcy if they attempt to continue to fund existing programmes from their reducing work forces" (5). Thus, the shift of responsibility from the state to the private financial institutions to secure citizens' standards of living in retirement seems inevitable.

European industrial restructuring. Another major source of new demands for financial services has been the process of multinationalisation of corporate business (6). To preserve business relations with multinational enterprises, financial

institutions had to strenghten their presence in foreign markets, which has favoured the spreading of particular lending and funding techiques. This situation has led to government action aiming to promote the efficiency of financial markets by fostering innovation and reducing structural rigidites. This strategy is rather difficult to implemente and cannot be pursued by any government on its. It implies a unity of intent and a real will of co-operation among different regulatory authorities. Thus, the strengthening of prudential regulation and the harmonizing of supervision is lagging behind the evolution of the market (7)(8).

Japanese interest in the European Market is another factor. To date, American investment in Europe is far greater than Japan's (9) whether things will stay that way is another matter. Last year, the Japanese confortably outstripped America in mergers and acquisitions in Europe (10). This situation contributes to enhance the "globalization" trend. The emergence of this trend has led the global players among the leading financial companies to establish their operations in strategic positions within Europe. Additionally, Japan has become the world's leading creditor nation fulfilling the role of supplying capital flows to the entire world economy.

As stated in the above paragraph, the multinationalisation of the commercial activities by the European companies made them need more capital and in many cases a wider shareholder base. Japan have made a major contribution in this area facilitating capital flows.

The change to "positive reciprocity" from "negative reciprocity" within the Second Banking Directive can provide an example of how much European Governments influenced policy making in order to preserve the Japanese capital flow to the "Fortress Europe" to be created by the completion of the White Paper set of rules for the achievement of the Internal Market.

Apart of the above three issues, a passing mention should be made as regards citizens' behaviour related to saving. Two main changes within the current decade can be underlined. First is the reduction of the saving tax little investors used to save. Second is the shift towards both insurance and qualified financial instruments (as UCITS) of the investment tax of retail banking customers'. These changes enhanced the "despecialization" banking pattern (closely linked to the German "Allfinanzbanking"), rendering obsolete specialized credit institutions' market strategies. Thus, policy makers have also been aware of the above market situation when shaping current regulatory environment.

Some consideration can be drawn from the above analysis regarding socioeconomic issues influence on policy makers' strategies.

First, it seems clear that the momentum of international deregulation and innovation is such that it is important for monetary authorities to take an active interest in deregulation accompanied by measures in the area of supervision.

Secondly, if "deregulation" is the option to be developed by policy makers in near future, regulators should answer what social benefits, in terms of wealth increases, can be expected from some of the factors underlying "deregulatory" policies, for instance, financial innovations or stock exchange globalization.

Thirdly, should profit margin increases be reinvested in the creation of companies, research, or technology? Should the above policy-making be not just efficient in itself, by its own measurement, but also play a role which is efficient for the economy as a whole?

Fourthly, does de-regulation really imply a decrease of current prices of the "retail banking" financial products, affecting (as consumers) to the majority of the European citizens?... or does it mean more speculation and wealth concentration for a limited number of market players sharing the monopoly rents which exist in it instead of driving them down?

Fifthly, we should question the relationship between Policy makers and credit institutions. To put it in a nutshell, are Policy makers free enough to shape a financial environment which most important forces are not under their control? If, as stated above, not even social security expenses can be afforded by governments, or, if, for instance, electoral campaigns are funded with loans from credit institutions, we should not be very convinced about the capability of policy makers for the shaping of a banking policy based on the public interest.

The European decision making process shares the above features as regards the attitude towards banking regulation by Policy makers.

Therefore, the EEC legislative outcome admits several criticisms:

First, it is very difficult to create a European financial regulatory environment when there exist factors shaping it which are not specifically European. Examples are, all factors contributing to the "globalization" of financial markets or the nature of the activities currently developed by the European Financial Institutions.

Secondly, the legitimacy of the decision making process is far-from clear. Unless means are found of explaining the way in which the Community has developed the financial services decision making process, we run the risk of triggering off national,

regional and sectorial opposition to Community rules which will certainly be costly. Lack of transparency and control are factors contributing to a "democratic deficit" which is unacceptable in terms of the EEC's foundations. The singularity of the "small credit institutions community" as regards their influence on its own functioning regulation makes a reality the statement of Hirsch when says that, except where control is attempted in small communities, this gives the controlled ample scope to manipulate information so as to escape restrictions (11).

Thirdly, regarding the EEC set of rules for the achievement of the Integrated Financial Market we can notice the absence of proposals in a number of areas which are of great importance to the Financial sector. There is little or no harmonization in areas such as company law, taxation, consumer protection, etc. As the problems in banking are a mirror of problems elsewhere (in financial markets in general, in the markets for property and for labour) the absence of regulation in the above fields will drive monetary authorities to devise more complex or more coercive means of controls. This will provoke a paradoxical situation: while markets and market forces press towards de-regulation regulators should probably apply, in function of the context, more stringent regulations. This confirms the above theory (see, "Corollary" to the first part), that the EEC has no common pattern for the shaping of the financial environment.

A consequence can be found in the way that Community policy makers have used the law for the implementation of the White Paper objectives for the Financial sector. Regulators have been looking for a "Common denominator" as they did in other economic sectors, for instance the achievement of the free movement of goods. But the result have not been peacefully accepted by the scholars. For example, Mottura criticized the above approach: "...il discorso dell'armonizzazione finanziaria non ha basi sufficienti... siamo quindi esposti a un rischio: scadere nella ricerca di un minimo comun denominatore qui, di fatto, dà un scarso contributo alla costruzione di un modello finanziario comune..." (12).

All these considerations above open the question of who may benefit from a regulatory enviroment where many issues have still to be regulated.

As we have seen above, de-regulation has been offered by Policy makers, as an standard solution to the complexities of exercising public control over financial markets. By retreating from intervention regulators can certainly give up searching for solutions, but they cannot, in doing to, abolish the opportunism which is the heart of the policy problem. Opportunistic behaviour by powerfull private interest is a key problem which European Policy makers have fostered with current de-regulatory strategies for the financial markets (13). In a recent report from Euromoney (14), some Europe's leading bankers expressed their view as regards current EEC regulatory strategies (15). It is useful to quote some of them:

- (a) "For us, neither the ratios nor the definition of capital is the problem... Therefore Basle or EC capitals requirements are not a new matter to dealt with..."
- (b) "International capital adequacy requirements are a common minimum threshold added to former domestic regulations in order to organise competition on a "level playing field"... "they are reasonable because of the various changes taken place in the financial markets..."
- (c) As regards the transformation process of international/European Guidelines: ... "through deregulation the attractiveness of financial markets will be improved..."

The opinions above show that bankers were prepared for current regulatory changes. Therefore, it may be stated that credit institutions are the best positioned to face the changes to be introduced by the set of rules enacted for the EEC within the European Financial environment (16) (17). In addition, the position of banks shall be reinforced by the "synergic interaction" of the less common denominator regulatory strategy of the EEC. The theory of the "opportunistic niches" (developed by economists) (18) fits the banks behaviours within the EEC regulatory strategies: "niches" exist as regards the many issues affecting banking behaviours and which have not still been regulated by the EEC. These "niches" let credit institutions develop their profit making strategies without any regulatory obstacle. Therefore, the eskeleton of the current EEC regulatory strategies regarding financial markets can be sketched in the following way:

- a) Four objectives are to be achieved by the EEC regulatory strategies:
- i) increasing welfare and protection standards for consumers (the first).
 - ii) facilitate the provision of services to the producers (the second).
 - iii) public policy considerations: both national and european interest as regards the instability of the financial system.
 - iv) third country interests.
- b) The above objectives have to be balanced by decisioners in order to shape a policy which satisfies each of the interest at stake.
- c) When the financial enviroment changes, Policy makers have to regulate the new enviroment for public policy reasons.
- d) "Changes" are used by "producers" (in an opportunistic maner) for the shaping of the new regulatory outcomes. Always in the European enviroment, Policy makers have favoured the producers for, at least, two reasons: first, because the rules to be applied to the new financial enviroment fit to the producers' strategies; secondly, because rules leave a wider room for market forces to play than for interventionist policies to act.

- e) The final "outcome" establishes a new hierarchy as regards the "income" objectives:
- i) European interest is subordinated to third countries interests', acting through the globalization of the financial markets.
 - ii) National interest are not strong enough to shape the European financial environment. Nor the English, not even the Germans have given a unitarian pattern for the shaping of the European Financial environment.
 - iii) Producers' interests are on the globalization of financial markets. Therefore, they are on line with those of the third countries' credit institutions.
 - iv) Consumers (citizens) have to dealt with a set of regulations where their interests have not been taken into consideration.

We can therefore conclude by saying that, as regards financial services, the European Policy Makers have considered the supply side of the economy interests in a major proportion than any other interests.

An analysis of the EEC regulatory outcome on the subject will help to confirm the above statement.

NOTES

- (1) See, Palmer, J.: "1992 and Beyond". Commission of the EEC. Luxembourg, 1989.
- (2) See, Segre, C.: "La coordination des politiques de conjoncture dans La CEE". I.E.E: (ULB), Brussels, 1967.
- (3) See, Levitt: "The progress to date: investment services", in Restructuring Europe's financial services, op. citt. supra.
- (4) See, Thomas, H.: "The changing pattern of European Investment", in Strategic planning for 1992; op. citt. supra., pp. 227 y ss.
- (5) Ibid., p. 229.
- (6) See, "Recent Innovations in International Banking", BIS, April, 1986.
- (7) See, ONADO, M.: "New products and new markets", in Europe and the future..., citt. supra, pp. 691 y ss.
- (8) See also, Tugendhat, Chr.: "Opening up Europe's Financial Sector to Intra-Community Competition". The Banker. January, 1985, pp. 21-25.
- (9) See Business Life, B.A. Magazine: "The changing face of European investment", october, 1991.
- (10) For instance, they clocked up \$ 5,6. billion, \$ 3,9 billion of it in the UK. On the other hand, monthly trade figures show Japan's surplus with the EC is soaring into two-billion-dollar territory.
- (11) Hirsch, F.: "Social limits to Growth", London, Routledge & Kegan Paul", 1977, pp. 139, 131 and 143.
- (12) Mottura, P.: "Intervento Conclusivo", in L'attuazione delle Direttive CEE in materia creditizia. Giuffr  Edit., 1983, Milano, pp. 448-449.
- (13) See, Perrow, Ch.: "Complex Organisations: a critical essay". Glenview. Scott Foresman. 1972, pp. 1-60.
- (14) Special supplement. April 1991.
- (15) Those of the BNP, Credit Lyonnais, Cr dit Agricole, Deutsche Bank, Commerzbank, DG Bank and Banco Ambrosiano Veneto.

- (16) See, Juvigny, F.H.: "Les Pouvoirs Publics Français et des Résistances à la Création d'un Marché Bancaire Intérieur Unifié", in Financial Institutions in Europe Under New Competitive Conditions, 1990, Kluwer Academic Publishers, pp. 83-94.
- (17) See also Tulasne, D.: "The banker's role in Europe today and tomorrow", (forthcoming).
- (18) See, among other Stigler, G.: "The Theory of Economic Regulation". The Bell Journal of Economics and Managerial Science, II, 1971.

Savings-Thomas, R.: "Concentration Ratios and the Degree of Monopoly". International Economic Review, XI, 1970.

Lilienthal, D.E.: "Big Business: A new Era". New York. 1953.

Scherer, F.M.: "Industrial market structure and Economic Performance", Chicago, 1980.

CHAPTER IV: THE REGULATORY OUTCOME OF THE EUROPEAN INSTITUTIONS AS REGARDS THE ACHIEVEMENT OF AN INTEGRATED FINANCIAL MARKET FOR EUROPE

A. Current trends:

Two considerations have to be made in this sense as regards what the Community has harmonized and what is to be harmonized.

The main items which have been harmonized are the definition of what constitutes a credit institution, calculation of ratios to establish banks' solvency liquidity and profitability, annual account, supervision on a consolidated basis, obligation for supervisory authorities to cooperate and exchange information, requirement that all banking businesses be licensed and indication of minimum licensing criteria.

On the other hand, partial agreement as regards minimum levels have been achieved for: prior licensing requirements, requirements in respect of major share holders of banks, deposit insurance (Recommendation) and large exposures limitations (Recommendation). Things still remains to be done in very important aspects as: rules on participation in non-banks activities, rules on ensuring compliance with home state's rules (secrecy rules), rules on links between banking and insurance industries and on links between banking and the securities industry, and bank holding companies.

This non-exhaustive list above of harmonization measures gives an overall view of what are the main achievements of the community action for the regulation of financial services. Therefore, we can see that only some of the main issues affecting the life of credit institutions have been harmonized. (More precisely, only those issues for which financial institutions were prepared). The other items, of very much importance for the maintenance of current (and future) strategies of the largest players in the financial markets, are still to be harmonized. No other but purely "technical" considerations linked to the industrial structure of the financial services sector, have been harmonized through Directives which adoption procedures is protected and where the actual points at which decision are taken is not clear. For the rest of the issues, the Community has adopted a "wait and see" approach, hoping that many of the problems will be solved by the market itself (1).

Secondly, as regards the legal instrument used for the harmonization of the above issues. The use of Directives, and the principles of home country control and mutual recognition far from contribute to the achievement of a uniform regulatory environment and could create distortions and the maintain of twelve different regulatory environments.

As stated above this is the consequence of the less well defined concept of harmonization within the EC legal order. Community harmonization of policies is much more vague in practice, and much less well defined in the Treaty of Rome, than

is generally believed. Thus, peculiar difficulty resides in attaining an over all approach to all major instruments for united objectives. Moreover, additional complexities arise from the absence of a will for collaboration between very strong national institutions, such as central banks and sometimes ministries of finance and national economy. Therefore, it may be useful to consider the issues through Private International Law. On the basis of a Convention under article 220 (3) of the EEC Treaty, Member States could provide a uniform answer to the many issues arising from the development of a Common strategy for the regulation of Financial Services in Europe. This solution, which was conceived for company law harmonization by some scholars, (for instance Beitzke (2), Stein (3) or Savatier (4)), despite implies a slower decision making process than Directives, will have also the additional advantage to provide a global view of what the Community must or must not regulate in the European interest. Additionally, it could be helpful for distinguishing "liberalization" from "harmonization", by stating in what areas "liberalization" requires "harmonization".

Unfortunately, historical experiences of the 1970s projects for the enactment of a European Banking Law found the opposition of both governments and financial institutions. More than twenty years later we can notice the same attitude within the European "Legal arena".

Financial institutions develop the most important role within the current economic structures of Western Societies. Therefore, the implications of any regulatory strategy in this sector can not be compared to the rest of the strategies regulating other economic sectors. Attitudes against transparency and control of the above regulatory processes by the citizens of so-called democratic societies are a breach to the main foundations of the Western countries legal frameworks.

B. The European Financial landscape of the future. An approximation from today's perspective:

After 1992, Europe will need a rather long span of economic stability enhanced by convergent and non-inflationary fiscal and monetary policies in order to adapt each of the Member States' economic structures to the new unified environment (5). Therefore, governments capability to regulate national markets will be shifted, through a cautious step-by-step process, to the European Institutions. Thus, given the current "dominant consensus" within the European Institutions as regards economic policy strategies, market forces will become the decisioners of the economic growth and so, whatever will make financial institutions will be of very much importance for all the European citizens. In the above sense we can remark some of the features which, possibly, will affect the European landscape after 1992:

First, while the short-run effect of 1992 will increase competition in the financial services sector, without achieving benefits of scale, the long-run effect could be a reduction in the number of players (6). This situation will be the "regional" reaction to the world's forecasting for financial services behaviour which says that by the early part of the next century there will be only some twenty international financial institutions dominating the world banking stage (7).

Therefore we can expect a market structure of an oligopolistic nature.

Secondly, if the interpenetration of credit institutions within other industrial sectors, mostly through the securities market, is going to continue as is currently happen (8), banks will have the key of the most important factors for the economic growth. Thus, taking into account that only some institutions will consolidate economic influence in next future, the decision making targets will be concentrated in a short number of "manager directories".

Thirdly, if third countries investment and cash flow to the European market is increasing, the European Economy will show a dangerous surface. National governments will not have very much capability to intervene, whenever the market could not allocate efficiently the resources for the creation of wealth. European Financial Institutions will not have complete capability for the shaping of the economic environment, despite their privileged market situation, because of the existence of third countries economic interests. Fourthly, as regards the current situation of the financial services' industrial structure, some changes can be forecast, mostly as regards "despecialization" and the creation of financial conglomerates. It seems probable that the largest banks dominating the banking sector will also dominate the above financial system through participation in holding companies.

NOTES

- (1) Fitchew, G.: Presentation to Financial Times Conference. Venice, 16 may, 1989.
- (2) "Zur Aner Kennung von Handelsgesellschaften in EWG-Beereich, in Aussenwirtschaftsclienst des Betrieb-Beraters", 1968, pp. 91-99.
- (3) "Conflicts-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market", in Michigan Law Review, 1970, pp. 1327-1331.
- (4) "Le marché commun au regard du droit international privé", in Rev. crit. dr. int. privé, 1959, pp. 237-244.
- (5) See, Lusser, M.: "Don't Jump to (monetary) conclusions", in European Affairs, 1989, pp. 66-69.
- (6) See, Bishop, G.: "The progress to date: banking", in Reestructuring Europe's Financial Service, 1992 and beyond, citt. supra., pp. 8-10.
- (7) See, McLuskie, W.G.: "1992, A Corporate treasurer's view", in IBI, 1992. Planing for Financial Services and the Insurance Sector". Butterworths and Eurofi, plc. Ed. 1989, pp. 160 y ss.
- (8) See, Goldsmith, R.W.: "Financial Structure and development". Yale University Press. 1969, pp. 390-409.

See also, Statistical data from Torrero Mañas, A. in "Relaciones banca-industria", Espasa Calpe Editores, Madrid, 1991.

FINAL REMARKS

The European Economic Community must establish a more coherent Financial Policy according to the main foundations of the EEC Treaty. It is far from clear if the creation of wealth is a matter of market forces concerned, or if industrial democracy does not contribute to enhance the efficiency of the undertakings. It is unacceptable that "key" decision making processes, as the Financial Services one should be maintained apart of the citizens' control. Freedom is a word which expresses the capacity of human beings to develop their capabilities without losing their dignity. Freedom could help market forces to a better allocation of wealth. But in no way could it justify that an economic sector can build its own regulatory environment apart from others.

Despite its complexity, the financial markets needs a wider presence of the public regulators.

The whole society must have the sensation that what is happening in the "financial galaxies" is a question of public concerned (1). The wild play of the market forces is not the most suitable way for achieving wider margins of freedom and wealth. Therefore, any policy making paving the way to "self regulation" seems to us merely second best and fit with the spirit of the EEC Treaty. "Cooperation", "Solidarity" and "democratic control" are some of the words that any Policy maker should not ban from its dictionary. Whatever regulatory strategy within the EEC must,

