Freedom Of Movement Of Financial Services in the European Union

Introduction

The Commission's original White Paper on Completing The Internal Market,[1] identified the liberalisation of the financial services sector as an essential element in achieving the Internal Market. The objective was to build on the removal of discrimination already achieved, based on equality of treatment of financial services institutions (such as banks) within Member States, so that those institutions would be able to offer their services throughout the Community, reducing to a minimum the barriers created by the need to comply with the regulatory requirements of both "host" and "home" states.[2]

The removal of these barriers was designed to stimulate competition between the relatively isolated national markets in financial services, especially in the retail sector (the corporate - wholesale - banking sector already operates to a much greater extent in an international market) removing some of the very wide price differentials between products and countries and lowering prices for consumers generally.

With the adoption in May 1993 of the Directive on investment services in the securities field[3] one of the last pieces of legislation needed to complete the Internal Market in financial services was put into place.[4] A number of Directives on banking and insurance services had already been adopted.[5]

The opening of the financial services market, giving consumers of those services the opportunity to choose products Community-wide, accentuates the need for regulation in order to protect customers and investors. The "liberalisation" of the financial services sector has never been intended to reduce the level of protection secured within the Community, but the process of liberalisation has illustrated clearly the inherent tension between free trade Single Market objectives and the need for governmental intervention in markets in order to protect consumers. In this short paper I will explore some aspects of this issue by looking at some of the regulatory problems that have emerged alongside the liberalising legislation. First, however, I will outline the main themes of the financial services legislation.

The Basic Principles

In liberalising the financial services market the Commission adopted the same minimalist approach which underpins much of the internal market legislation, in areas as diverse as technical standards and professional qualifications. The Commission did not seek to persuade the Member States to create a new supra-national or pan-European regulatory authority, nor to adopt a uniform system of authorisation and prudential supervision.

"... the approach adopted is to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the grant of a single authorisation valid throughout the Community and the application of the principle of home Member State supervision”.[6]

To these principles of minimum essential harmonisation and mutual recognition is added the third principle of "home country control" of institutions, which contributes to the removal of internal barriers to trade by removing the need for duplication of authorisation and supervision. The same pattern in the implementation of these principles is followed by the Second Banking Directive, the Third Directives on Life and Non-Life Insurance and the Investment Services Directive, what follows is a general summary.

Home state control

The responsibilities of the home state include authorisation, under minimum conditions set by the Directives, and responsibility for prudential supervision. Any duly authorised firm may then provide the services covered by that authorisation in any other Member State, whether or not by the establishment of a branch, without the need for further authorisation by the host state. The authorisation by the home state has thus become known as the "single licence" or "European Passport".

Firms covered

Although the Directives are intended to encourage cross-border trade in services, their operation is not limited to those institutions establishing branches or providing services in other Member States. Authorisation will be compulsory for all banking, insurance and investment firms, even those with purely domestic business, as will the prudential supervision rules.

The regime established by the Directives also applies to foreign-owned companies doing business in the Single Market: a European Subsidiary of, for example, an American owned company, will require authorisation (subject to the reciprocity provisions in the Directives[7]) by its home Member State under the EC rules; that authorisation will then be valid throughout the Community. This flows from Article 58 EC which extends the principle of non-discrimination (equality of treatment) to all

"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". A *branch* of an American company will not, however, even if authorised in one Member State, be able to take advantage of the Directives to set up further branches or offer services without further authorisation, as the branch will not fall within Article 58.

Authorisation

Access to the business of providing regulated financial services is subject to a compulsory system of authorisation by the home Member State[8]. Just as authorisation itself is compulsory, the Directives also set out the conditions which a firm must satisfy, and continue to satisfy, to be entitled to authorisation. In addition to complying with these conditions, an application must state the types of business envisaged and the organisational structure of the undertaking.[9]

The first basic condition relates to capital adequacy, both initial and ongoing. The detailed technical rules are contained in separate Directives on the "Own Funds", Solvency Ratio and Capital Adequacy of investment firms and credit institutions.[10] As far as credit institutions are concerned, the Solvency Ratio Directive deals with their credit risks[11] the Capital Adequacy Directive covers their market risks. The initial capital of credit institutions is set at a minimum of ECU 5 million[12] and the calculation of "own funds" is harmonised by the Own Funds Directive[13]. The capital requirements vary according to the range of activities authorised and the solvency ratio rules assign weightings to different types of credit risk. The 5 million ECU base is therefore a minimum in that the institution may well require more capital to support the volume and type of its business. It is also a minimum in another sense: a Member State may choose to adopt more stringent requirements for those institutions which it authorises (as a home state); however in line with the idea of mutual recognition, a Member State may not impose those more stringent requirements (as a host state) on institutions authorised in another member state seeking to do business on its territory.

The second basic condition for authorisation is that the persons (at least two) who effectively direct the business of the institution are of sufficiently good repute and are sufficiently experienced[14]. This "fit and proper" requirement may also be applied to those shareholders or members who have qualifying holdings (that is a holding representing at least 10% of the capital or voting rights or which makes it possible to exercise a significant influence over the management of the undertaking[15]), and authorisation may be refused if it is not met[16]. The Directive on the Reinforcement of Prudential Supervision[17] supplements this with a provision relating to institutions which form part of a group, requiring transparency of group structures and empowering the competent authority to refuse authorisation where the group structure is such as to make effective supervision difficult.

supervision

The home state's responsibility for prudential supervision includes ensuring that the initial authorisation conditions and capital adequacy rules continue to be met. There are provisions requiring notification of the acquisition, increase or disposal of qualifying holdings[18] and, in the case of banks, on the monitoring and controlling of large exposures to risk. [19]

The home state also has responsibility for ensuring compliance with prudential rules. Here we can see an evolution in the Directives. Whereas the Second Banking Directive merely states that the competent authority is to require "sound administrative and accounting procedures and adequate internal control mechanisms" (Article 13), the more recent (and post-BCCI, post-Maxwell) Investment Services Directive is considerably more specific in spelling out the concept of prudential supervision. First, the home state is required to draw up prudential rules. Second, as well as general references to sound administrative and accounting procedures, specific safeguards for investors' and clients' rights are covered. These include the protection of investors' instruments and funds, provision to minimise the risk of conflicts of interest between the firm and its clients and recording procedures which are sufficient to enable monitoring of compliance with the rules (Article 10). Persistent infringements will justify a withdrawal of authorisation.

Host state responsibilities

An institution which has been authorised by its home state will under the single licence system be able to do business by establishing branches and offering services throughout the Community without the need for further authorisation by the host state.[20] This raises questions as to the extent to which the *host state is* entitled to protect the interests of its consumers by regulating the conduct of firms doing business in its territory. On both fair competition and consumer protection grounds, a state will desire to apply its own rules to all those operating in its territory (as indeed the national treatment principle would require). Differences between national laws will however create difficulties for companies operating in a number of different national markets as well as distortions in the playing field or Community-wide market.

These issues were addressed by the European Court of Justice in the context of insurance services, prior to the completion of the legislative programme.[21] Local rules may be applied by the host state, according to the Court, only if they satisfy the following criteria:

- restrictions must be justified by imperative reasons relating to the public interest such as need to ensure compliance with professional rules of conduct or to safeguard interest of others; and

- this interest is not already protected adequately by controls in the home state; and

- the same result cannot be achieved by less restrictive means;

- local (host state) rules must be applied on a non-discriminatory basis to all those operating in the host state.

The same criteria will be applied to restrictive rules imposed by the home state insofar as they restrict cross-frontier provision of services.[22] Even national measures which meet the above criteria are only justified insofar as they are compatible with any Community legislation in the field. A state will have to ensure that its local rules (for example concerning advertising by financial services institutions) comply with the requirements of Community-wide consumer protection legislation, designed to provide a harmonised minimum level of protection as a context for the operation of host state rules.

Nevertheless, the lack of harmonisation in certain key areas, notably taxation, has led the Court to accept the operation of host state rules which impose considerable restrictions on the provision of cross-frontier services. In *Bachmann* v *Belgian State* a Belgian law that limited tax relief on life insurance premiums to policies taken out with companies established in Belgium was found, although a restriction on the provision of services, to be justified in the public interest in order to "ensure the cohesion of tax system".[23]

The earlier Directives, such as the Second Banking Directive, reflect this approach of the ECJ by permitting the host state (subject to rights of appeal) to "take appropriate measures to prevent or punish irregularities committed within their territories which are contrary to the legal rules they have adopted in the interest of the general good. These shall include the possibility of preventing offending institutions from initiating any further transactions within their territories." (Article 21(5))

This potentially open-ended provision, apparently intended to apply to conduct of business rules, ensures that all those firms offering services in one state will be bound by the same rules. Distortions of competition on the national market as a result of differences between the Member State rules will be minimised. However the Investment Services Directive goes further. In addition to giving the host state explicit responsibility for drawing up conduct of business rules for investment firms, the Directive also sets out in some detail - in contrast to the banking and insurance Directives - the principles upon which these rules are to be based. These include adequate disclosure of material information to clients, employing adequate resources, acting with due care, skill and diligence, and acting in the best interests both of the client and of “the integrity of the market".[24] The host state authorities may require firms operating in their territory to provide them with the information necessary for the conduct of monetary policy and in order to check compliance with relevant rules of conduct.[25] Failure to comply with host state rules may result in sanctions, and ultimately a withdrawal of the right to operate in that state.[26]

Liberalisation and Regulation

Cross-border rights of establishment and provision of services are intended to offer the consumer a wider choice between service providers operating on a (reasonably) level playing field. We have already seen how the most recent Directive (the Investment Services Directive) has attempted to ensure comparability between prudential supervision and conduct of business rules in the Member States, without going so far as to establish a harmonised code.

The financial services Directives have also been amended[27] so as to strengthen prudential supervision of financial conglomerates, building on the Consolidated Supervision Directive[28]. Express reference is made in the Preamble of the new Directive to the need to strengthen supervisors' powers in the light of the BCCI affair. Transparency is to be increased by supplying information on the group structure to the supervisor at the time of authorisation and in the case of any change; the competent authority will be able to refuse authorisation in cases where the opaque relationship between members of a group would make it difficult to carry out effective supervision. Exchanges of information between regulators (especially those supervising liquidators and auditors) will also be facilitated. Consolidated supervision of a group is thus becoming not only a means of supporting the liberalisation of financial services, but a mechanism for improving the protection of investors and clients.

Identifying the home state

A further source of concern for Community regulators has been the possibility of financial institutions choosing their "home state" by reference to the lightest available regulatory regime and the competitive pressures this would generate towards minimalist regulation. One answer to this of course is to ensure that the compulsory minimum conditions for authorisation are not set at too low a level. It should however be remembered that in setting these limits the Community is acting in a global context, in particular in the context of the Basle Agreement.[29]

Another approach is to limit the extent to which companies are able to "shop around" for the most favourable regime.[30] In the banking Directives there is at present no formal requirement that authorisation must be by the state in which either the registered office or the head office is situated and Article 1 merely defines the home state as the state of authorisation, thus apparently allowing freedom of choice for the credit institution. True, the Preamble to the Second Banking Directive provides that a state should refuse to authorise an institution "where factors such as ... the activities actually carried on 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".[31] However, this is not written into the formal provisions of the Directive.

The Investment Services Directive again goes further, in requiring a company to have its head office in the same state as its registered office and in defining the home state in these terms.[32] The new Directive on Prudential Supervision brings the banking and insurance Directives into line; in order to improve supervision, the authorities need to maintain close contact with the financial undertaking's decision-making bodies.[33]

Guarantee schemes

Guarantee and compensation schemes provide a further safety net. A Directive on Deposit Guarantee schemes was adopted by the Council of Ministers in May 1994.[34] This Directive builds on the earlier Recommendation on Deposit Guarantee schemes[35] and provides for the introduction of schemes to protect depositors in the event of the failure of an authorised credit institution. The Commission has also proposed a Directive on Investor Compensation schemes to accompany the Investment Services Directive[36]. In both cases, membership of the scheme will be compulsory as a condition of authorisation and the schemes will be administered by the state of authorisation (home state).[37] The Directives set minimum levels of compensation (ECU 20,000) and reinforce the principle of home state control by requiring that clients of all branches in all Member States (not only the home state) are covered.[38] The consumer protection objective of these schemes, made explicit in the Preamble, is illustrated by the exclusion from compulsory protection of institutional investors, including credit institutions, pension funds and local authorities, although Member States may choose to extend protection to these categories.

Other Consumer Protection Measures

Fair competition and consumer protection policies are designed to minimise distortions that are the result of abuse of market power, collusion or inadequate consumer protection rules. Although Community competence in the formation of competition policy is well-established, consumer protection policy is a more recent development (it is now expressly provided for in Article 129a EC) and is subject to the principle of subsidiarity: the necessity of action at Community level has to be demonstrated in each case,[39] and Community action is intended to "support and supplement" (not replace) the policy pursued by the Member States[40].

There is no attempt made to regulate the terms of contracts with customers and clients in the financial services Directives themselves. Indeed the insurance Directives, which contain choice of law rules, expressly state that harmonisation of contractual terms is not envisaged.[41] Responsibility for regulating such contracts is determined by the choice of laws rules in the Directives, subject to the "general good" principle. All the Member States will however be operating to minimum standards set by the consumer protection Directives, a number of which concern contractual terms and are of particular relevance to financial institutions, such as the Consumer Credit Directive[42], the Unfair Contract Terms Directive[43] and the draft Directive on Distance-Selling[44].

Some of the common themes which emerge from these and other consumer protection measures can be traced back to the first consumer protection programme of 1975[45]: protection for the consumer against exclusion of essential rights and unfair contract terms in standard term contracts; the prevention of misleading presentation or promotion of goods and services, including financial services; and the principles of transparency and improved information for the consumer, supporting the consumer's freedom of choice. More recent programmes have placed consumer protection in the context of the operation of the Internal Market[46], and have used the technique of minimum harmonisation, a characteristic of Internal Market legislation generally.

Minimum standards

One aspect of this technique, as we have already seen, is the adoption of minimum standards. The Unfair Contract Terms Directive[47], for example, only covers standard terms[48] but it would be open to Member States to implement it so that the same principles applied also to individually negotiated terms. Similarly, although the definition of “consumer” adopted in the Directives[49] has been interpreted rather strictly by the European Court of Justice, the Court has also confirmed the right of a Member State to extend protection to other categories of person in its implementing legislation.[50] Indeed the minimum standards clause in the Doorstep-Selling Directive[51] has been held to justify a Member State imposing a total ban.[52]

The minimum standards approach is indeed now expressly provided for in the context of consumer protection by Article 129a. Community action is not only to "support and supplement" Member States' own policy but is subject to a proviso in paragraph 3 *allowing* the Member States to maintain or adopt more stringent protective measures if they wish, as long as these are compatible with the Treaty.

This latter requirement is especially important as - unlike the market access Directives examined above[53] - the standards adopted by a Member State, even if more stringent, will be applicable to *all* institutions doing business in the territory of that Member State including branches of financial institutions authorised elsewhere. Compliance with home state standards will not be sufficient. Compatibility with the Treaty will include fundamental provisions such as non-discrimination and freedom of movement, and the European Court would presumably apply the general criteria it has developed for the application of host state rules to service providers.[54]

It is not always possible to reconcile a minimum standards approach with the requirements of free movement. The case of comparative advertising illustrates the point. The issue is difficult not only because the Member States have very different attitudes to comparative advertising (some currently excluding it altogether) but also because advertising itself is a service in its own right and therefore the free movement provisions apply to the providers of advertising as well as to those using their services. The draft Directive on Comparative Advertising, having stated that such advertising *shall be allowed,* although under strict conditions, then excludes comparative advertising which complies with the Directive, from the operation of the minimum standards clause which allows Member States to adopt more stringent rules in respect of misleading advertising.[55] It would not then be possible for a Member State to prohibit comparative advertising completely, nor even to impose more stringent conditions on its use than are provided for in the Directive.

Use of general terms

Another example of the minimum harmonisation technique can be found in the use of general rather than detailed definitions of terms such as "unfair" or "misleading", supplemented by a non-exhaustive list of examples. The Unfair Contract Terms Directive links the concept of an unfair term to good faith: “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties" rights and obligations arising under the contract, to the detriment of the consumer"(Article 3).

The recitals amplify this: good faith requires fair and equitable dealing taking account of the legitimate interests of the other party as well as of, *inter alia*, the strength of the bargaining position of the parties and whether the consumer had an inducement to agree to the term. There is in addition an Annex containing "an indicative and non-exhaustive list of the terms which may be regarded as unfair". This methodology allows a Member State considerable flexibility to define unfairness more precisely if desired, relating it to existing statutory provision.

Similarly, in the Misleading Advertising Directive a basic definition of “misleading" (covering representations which deceive or are likely to deceive and are likely to affect the economic behaviour of consumers or to injure a competitor) is accompanied by an indication of factors to be taken into account.

Effective remedies

Although remedies for the enforcement at the national level of Community law rights have always been held by the European Court to be a matter for national law, the Court has nevertheless formulated some basic ground rules which should apply:

- the conditions attaching to the availability of remedies must be no less favourable than those governing the same right of action in an Internal matter;
- national rules must not make it impossible to exercise Community law rights; if necessary national rules may have to be set aside;[56]

These principles - and especially the second - have been developed by the Court in the more recent cases[57] into a general principle of effective protection, based on Article 5 EC. Effective protection also forms the foundation for the provisions on remedies in the Consumer Protection Directives.[58]

In the case of unfair contractual terms, for example, the unfair term itself will be unenforceable. In addition, Member States, in ensuring that effective means exist to prevent continued use of unfair terms, shall include provision for "action according to the national law concerned" by persons or organisations "having a legitimate interest under national law in protecting consumers" (Article 7(2)). The UK implementation of this provision is instructive: while refusing to contemplate the possibility of granting consumer organisations direct rights of action, the original Department of Trade and Industry (DTI) position that the provision did not need implementation at all has also been abandoned in favour of a solution also adopted in the implementation of a similar provision relating to misleading advertisements.[59] The procedure is a combination of administrative and judicial, with the Director General of Fair Trading acting as a "filter" for consumer complaints. Any person, or consumer organisation, may make a complaint to the Director General who is under a duty to consider it and who may then decide to apply for an injunction.[60]

Transparency

The principle of transparency can be traced back at least to the Council's 1975 preliminary programme on consumer protection and information[61]: consumers have a right to be given full information both pre-contractually - including advertisements and in the contract itself.

One of the earlier Directives, the Consumer Credit Directive[62] is based on the principle of adequate information: the consumer must be informed as to the total cost of the credit including the annual percentage rate (APR) and other terms and conditions, such as repossession and the right to discharge the obligation. The agreement must be in writing and contain minimum essential information. In its report on the operation of the Directive, the Commission summarises the argument in favour of maximum transparency: "only informed consumers, with full knowledge of the range of products on offer and the various contractual rights and obligations connected to agreements, will benefit from the advantages of healthy competition. The marketplace itself, to work efficiently, needs consumers who know how prices compare and who act on that knowledge. This is particularly true of the financial services market where transparency is essential for healthy competition which, in this sector in particular, is crucial to all other aspects of the Internal Market."[63]

The right of financial institutions to advertise their services throughout the Community is expressly stated in the banking, insurance and investment services Directives. The Second Banking Directive, for example, provides: "Nothing ... shall prevent credit institutions ... from advertising their services through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good." (Article 21(11))

These national rules, as well as being justified as protecting the general good, must comply with specific Community rules on advertising. A recent decision illustrates the way in which a national rule protecting the "general good" may be affected by a Directive of this type. In *Alpine Investments BV* v *Minister van Financien*[64], the Court of Justice has held that a Dutch prohibition on "cold calling" (telephone sales without prior consent of the potential customer) in the context of selling commodities futures, although a restriction on the cross frontier provision of services, was justified. The maintenance of the good reputation of the national financial services sector was an "imperative reason of public interest" directly effected by the protection of consumers, including those in other Member States. The draft Distance Selling Directive[65] (which covers selling by a wide variety of means, including mail order, telephone, radio, video text, e-mail and tele-shopping) would impose even greater restrictions on advertising. In addition to the consumer's right to "opt out" of receiving solicitations (such as direct mail), the Directive requires prior consent (opting in) from the consumer in the case of certain types of communication: fax, electronic mail, telephone and automatic calling units.

As we have seen, Community policy on advertising is concerned not just with consumer protection but also with freedom of movement for service providers and even the advertising services themselves. The Misleading Advertising Directive[66] is intended to protect the interests not only of consumers and the public in general, but also of the advertisers (including financial institutions) in fair competition. This objective is brought out clearly in the draft Directive (amending the Misleading Advertising Directive) on Comparative Advertising[67]. The Recitals state that comparative advertising "when it compares details which are relevant, always verifiable and neither misleading not unfair, may be a legitimate means of informing consumers to their advantage". In contrast, unfair comparative advertising "may distort competition, cause damage to competitors and have an adverse effect on consumer choice".

Self-regulation and the Internal Market in financial services

The question of the appropriate balance between legislation and self-regulation is gaining in importance and is linked to the question of balance between Member State and Community regulation (if only because the framework for self-regulation will be the national organisation of the industry). The minimum harmonisation approach of the Internal Market Programme, including the financial services legislation, has been successful not least because of the degree of flexibility which it allows to Member States. The demands of both consumer protection and fair competition in an open market are tilting the balance in two ways. First, as we have just seen, towards harmonisation of national rules governing the "retail" aspects of financial services, including advertising and contractual terms, at least to a level at which mutual recognition is possible. Second, towards legislation, where the Commission has hitherto relied on self-regulation, co-ordinated by means of recommendations. In both cases the principle of subsidiarity - at what level will action be most effective - applies.

This second trend may be illustrated by briefly examining the Commission's approach to both distance selling and cross-border payments. The Distance-Selling Directive[68] supplements a Commission Recommendation on Codes of Practice for the protection of consumers in respect of contracts negotiated at a distance,[69] and is not intended to exclude self-regulation.[70] In the Directive the Commission has attempted to address the problem of dishonest (or merely financially insecure) suppliers who leave the customer empty-handed after taking money in advance. A number of possible solutions were considered: the Commission had originally proposed (in the recommendation on codes of practice) self-regulatory guarantee schemes, but the European Parliament proposed a mandatory guarantee scheme. This was rejected by the Commission on the ground that it wished to leave room for self-regulation, and the current draft insists on the consumer's right to refuse to pay before delivery or performance. The supplier will no longer be able to require (although he may request) payment in advance[71]. It is not easy to see how this uneasy compromise between self-regulation (voluntary guarantee schemes will still exist) and legislation can be enforced effectively; it is intended to allow the consumer to make a judgement as to the reliability of the supplier, but it cannot prevent the supplier from making a judgement as to the credit-worthiness of the customer and refusing to supply on credit. A mandatory guarantee system would have been both more transparent and more effective at protecting consumers.

A similar debate as to the efficacy of voluntary codes of conduct and self-regulation is taking place in the context of electronic and cross-border payments. In its second three-year consumer policy action plan for 1993-1995 "Placing the Single Market at the Service of European Consumers", the Commission stated that effectiveness of trans-frontier payments is a priority for the proper functioning of the Internal Market because it is a "prerequisite for consumer confidence".[72] Since 1987 it has issued a number of Recommendations dealing with electronic payments and cross-border financial transactions, including credit cards.[73]

The 1990 Recommendation focuses on cross-border financial transactions, which are recognised by the Commission to be more complex than domestic transfers: the use of intermediary institutions, differences between clearing systems and exchange transactions all mean that payments will be more expensive and take longer. The primary aim is to increase transparency: customers need to know what costs and time scales are involved in cross-border payments, how charges are allocated between transferor and transferee, and complaints procedures. The Commission did not then see a need to harmonise the varied practice in the Member States, ranging from binding legislation to co-operative and voluntary procedures. However, in 1993 the results of an independent survey intended to evaluate the transparency and performance of cross border payment services were published.[74] Against a background of over 200 million retail payments in 1990, and in spite of guidelines drawn up by the European Credit Sector Associations, nearly 60% of banks surveyed provided no written information to their customers about cross-border payment services. The survey also revealed considerable variation in standards, including time taken and charges; double charging is still widespread. Although some progress has been made, the Commission is disappointed with the results of its approach based on Recommendations and self regulation. After taking the advice of consultative groups representing banks, consumer organisations and small businesses[75] the Commission has issued a draft Directive on Cross-Border Transfers within the EU.[76] In the Preamble to the draft, reference is made to the failure of a self-regulatory approach, justifying in terms of subsidiarity the adoption of a binding measure.
It is evident that the liberalisation of the financial services sector, the opening up of the Single Market, has not after all been accompanied by widespread de-regulation. On the contrary, we are seeing increased powers for supervisory authorities, increased activity at Community level regulating contracts, advertising, payment systems and even some signs of a shift away from self-regulation. It is not merely a question of levelling the playing field but of trying to ensure that the players are playing to the same set of rules and that the rules are enforced.

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[1] Commission of the European Communities, Completing the Internal Market COM(85)310 final, 14 June 1985.

[2] The terms "home" and "host" state are widely used in the legislation. The home state is the state of the registered office; the host state is the state in which an institution has a branch or provides services; see for example, the definitions in Article 1 of the Investment Services Directive.

[3] Directive 93/22/EEC of 10 May 1993 on investment services in the securities field OJ 1993 L 141/27. Implementation by 1 July 1995, to enter into force by 31 December 1995.

[4] Article 7a defines the Internal Market as "an area without Internal frontiers in which the free movement of goods, persons, services and capital is ensured ...." The financial services Directives are based on Article 57(2) of the EC Treaty which provides for the adoption of Directives to co-ordinate national provisions regulating the activities of the self-employed and the provision of services.

[5] Directives are now in place covering banking (Second Banking Directive 89/646 OJ 1989 L386/1); life insurance (Third Directive on Direct Life Insurance 92/96/EEC OJ 1992 L360/1); non-life insurance (Third Directive on Direct Non-Life Insurance 92/49 OJ 1992 L 228/1); together with Directives on capital adequacy for credit institutions and investment firms.

[6] Third recital of Directive 93/22/EEC.

[7] See Article 7 Directive 93/22/EEC; Article 9 Directive 89/646/EEC.

[8] See Article 3(1) Directive 77/780/EEC (First Banking Directive) OJ 1977 L322/30; Article 3(1) Directive 93/22/EEC (Investment Services Directive). For the most recent (14th version) list of all credit institutions authorised in each Member State, see OJ 1994 C 156/1

[9] See Article 3(4) Directive 77/780EEC; Article 3(4) Directive 93/22/EEC.

[10] Council Directive on Capital Adequacy 93/6/EEC OJ 1993 L141/1. Directives 92/30/EEC OJ 1992 Ll 10/52 and 93/6/EEC also cover the supervision of groups of credit institutions and investment firms on a consolidated basis.

[11] The Solvency Ratio Directive 89/647/EEC OJ 1989 L386/14.

[12] Article 4(1) Directive 89/646/EEC (Second Banking Directive).

[13] Directive 89/299 OJ 1989 L124/16.

[14] Article 3(3) Directive 93/22/EEC; Article 3(2) Directive 77/780/EEC.

[15] Article 1(10) Directive 89/646/EEC; Article 1(10) Directive 93/22/EEC.

[16] Article 5 Directive 89/646/EEC; Article 4 Directive 93/22/EEC.

[17] Directive 95/26/EC on Reinforcing Prudential Supervision OJ 1995 L168/7. This Directive has become known as the "BCCI follow-up Directive" and is intended to strengthen the powers of supervisors. See further below.

[18] Article 11 Directive 89/646/EEC; Article 9 Directive 93/22/EEC.

[19] Directive 92/12 l/EEC OJ 1993 L29/1; The Directive requires notification of risks representing 10% or more of the institution's own funds and certain levels of exposure are prohibited (exposures

over 25% of own funds, or over 20% if the client is a parent or subsidiary of the lender). There are also limits set on the overall total of "large exposures".

[20] Note that the single licence does not extend to subsidiaries: as separate legal entities these require authorisation on their own account, subject to a narrow exception for subsidiaries of credit institutions in Article 18(2) Directive 89/646.

[21] Case 205/84 *Commission* v *Germany* [1987] 2 CMLR 69.

[22] Case C-3 84/93 *Alpine Investments BV* v *Minister van Financien,* 10 May 1995, [1995] ALL ER(EC) 543.

[23] Case C-C-204/90 [1 992]ECR I-249; see also *(Commission* v *Belgium* (re insurance premiums) C-300/90. Under the Third Life insurance Directive (Art 44(2)) issues of taxation are governed by the law of state of commitment; this will generally be the state of habitual residence of the policy-holder.

[24] Article 11 Directive 93/22 EEC.

[25] Article 19 Directive 93/22/EEC.

[26] Article 19(5) & (6) Directive 93/22/EEC. See also Article 21 Directive 89/646/EEC.

[27] Directive 95/26/EC OJ 1995 L168/7.

[28] Directive on Consolidated Supervision 92/30 OJ 1992 Ll 10/52. This replaced and extended an earlier Directive (83/350/EEC OJ 1983 L193/18). Further, see Magliveras` contribution to this work.

[29] The Basle Committee on Banking Regulations and Supervisory Practices, International Convergence of Capital Measurement and Capital Standards of July 1988

[30] It should be noted that the regulatory regime will not be the only (or even the main) factor influencing a company's choice of residence: the taxation environment may be more important in financial terms.

[31] Preamble to Directive 89/646/EEC, recital 8. See also the judgement of the ECJ in case 39175 *Coenen* [1976]1 CMLR 30.

[32] Article 1(6) and 3(1) and (2) Directive 93/22/EEC.

[33] See note 27 above Article 3 requires an amendment to the banking and insurance Directive to the effect that the head office of the financial undertaking must be in the same Member State as its registered office

[34] Directive on deposit guarantee schemes 94/l 9/EC OJ 1994 L 135/5.

[35] Recommendation concerning the introduction of deposit guarantee schemes 87/63/EEC OJ 1987 L33/16. The Preamble to the Directive states that this recommendation did not achieve the desired result.

[36] Article 12 Directive 93/22/EEC provides that investment firms must inform clients of any available compensation scheme, and refers to the Commission's intention to harmonise such schemes. Draft Directive on Investor Compensation Schemes COM(93)381 final OJ 19g3 C321/15.

[37] Under the deposit guarantee *Recommendation* (which pre-dated the Second Banking Directive establishing the basic principle of home state control) the host state had responsibility for the guarantee scheme of branches.

[38] It will however be possible for the financial institution to take part in a host state scheme as well in order to increase protection for clients there: Article 4(2) of Directive 94/19 on deposit guarantee schemes; Article 4 of the draft Directive on Investor Compensation Schemes.

[39] Article 3b EC. The practical effects, and even the theoretical basis, of this doctrine have not yet been worked out.

[40] Article 129a (l)(b) EC

[41] See recital 18 of the Third Direct Non-Life Insurance Directive 92/49 OJ 1992 L 228/1. This Directive also prohibits the host state from requiring prior approval of terms and conditions, notification only is allowed: Art 39. Note, however, that there are two instances of harmonisation of contractual terms in the Third Life Insurance Directive (92/96 1992 OJ L360/1): the inclusion of a right of withdrawal (Art 15 Directive 90/619 OJ 1990 L 330/50, amended by Art 30 Directive 92/96) and additional rules on provision of information to the policy-holder (recital 23, Art 31 and Annex II Directive 92/96).

[42] Council Directive 87/102/EEC OJ 1987 L42.

[43] Council Directive 93/13/EEC of 5 April 1993 OJ 1993 L95/29.

[44] COM(93)396 final SYN 411 of 7 October 1993. OJ 1993 C308/18.

[45] Council Resolution of 14 April 1975 on a preliminary programme of the EEC for a consumer protection and information policy OJ 1975 C92/1.

[46] See for example Council Resolution of 13 July 1 992 on future priorities for the development of consumer protection policy OJ 1992 C186/1; Commission's second action plan 1993 - 1995 "Placing the Single Market at the Service of European Consumers" COM(93)378 of 28 July 1993.

[47] Directive 93/13/EEC OJ 1993 L95/29.

[48] A standard or "not individually negotiated" term is defined as one drafted in advance so that the consumer has not been able to influence the substance of the term, particularly in the case of a pre-formulated standard contract.

[49] For example under Article 2 of Directive 93/13/EEC, a consumer is any natural person who is "acting for purposes which can be regarded as outside his trade or profession"

[50] Case C-361/89 *France* v *Di Pinto* [1993]1 CMLR 399.

[51] Directive 85/577/EEC on contracts negotiated away from business premises OJ 1985 L372/31 72/31

[52] Case 383/87 *Buet* v *Ministère Public* [1989] ECR 1235. The Court was also influenced by the fact that according to the Preamble, the Directive is not intended to affect the freedom of Member States to prohibit doorstep selling.

[53] Under the single licence principle, as we have seen, a Member State may choose to apply stricter authorisation criteria to the institutions for which it is the home state, but must accept (as a host state) authorisations granted by other Member States based on the minimum criteria.

[54] For example in case 205/84 *Commission* v *Germany* [1987] 2 CMLR 69; *supra* at note 21 also Case 383/87 *Buet supra* note 52.
[55] Proposal for a European Parliament and Council Directive concerning comparative advertising and amending Directive 84/450/EEC; COM(94)151 final of 21/4/94; article 1(3) and (7).

[56] See case 33176 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989; case 45/76 *Comet* v *Produktschap* [1976]ECR 2043; case C-2 13/89 *R* v *Secretary of State for Transport ex parte Factortame* [l990] ECR I-2433.

[57] See case C-2 13/89 *R* v *Secretary of Stale for Transport ex parte Factortame* [l990] ECR I-2433.

[58] And indeed other Directives such as those dealing with remedies in relation to public procurement: Directive 89/665/EEC OJ 1989 L395/33; Directive 92/13/EEC OJ 1992 L76/1 4

[59] Council Directive 84/450/EEC OJ 1984 L250/17; see also proposed amendment to include provision for comparative advertising, COM(94)15 1 final of 21/4/94. The Directive requires that individuals or organisations regarded under national law as having a "legitimate interest" must have the right to take enforcement action although this may be by means of an administrative complaints procedure rather than by legal action: Art 4(1).

[60] Unfair Terms in Consumer Contracts Regulations (1994) SI 1994/3159.

[61] *Supra* note 45

[62] Council Directive 87/102/EEC OJ 1987 L42 . The Directive sets standards for the regulation of the terms of consumer credit contracts as well as obliging the Member States to establish an authorisation and supervisory regime for credit suppliers (and those arranging credit agreements) where they are not authorised as credit institutions under the First and Second Banking Directives.

[63] Commission Report on the Operation of Directive 87/102/EEC, COM(95) 117 final, at para 46.

[64] Case C-384/93, 10 May 1995, [1995] ALL ER (EC) 543.

[65] COM(93)396 final OJ 1993 C308/18.

[66] Council Directive 84/450/EEC OJ 1984 L250/17.

[67] Proposal for a European Parliament and Council Directive concerning comparative advertising and amending Directive 84/450/EEC; COM(94) 151 final of 21/4/94.

[68] *Supra* note 65.

[69] Commission Recommendation 92/295/EEC OJ 1992 L156/21.

[70] Article 14(4) of the draft Directive provides that compliance by means of voluntary supervision by self-regulatory bodies is not excluded, as long as this does not replace provision for effective judicial and/or administrative redress. The consumer must be informed not only of rights granted by the Directive but also of the existence and content of relevant codes of practice (Article 15).

[71] Article 8 .

[72] COM(93)378 of 28 July 1993, at par. 41

[73] Commission Recommendation 87/598/EEC of 8 December 1987 OJ 1987 L365; Commission Recommendation 88/590/EEC of 17 November 1988 on payment systems. OJ 1988 L3 17; Commission Recommendation 90/109/EEC of 14 February 1990 on transparency of banking conditions relating to cross-border financial transactions. OJ 1990 L67. See also its discussion paper "Making Payments in the Internal Market" COM(90)447.

[74] Transparency and Performance of remote cross-border payments: A survey by the Commission. Commission Press Release IP(93)670 of 29 July 1993.

[75] The Payment Systems Technical Development Group has members drawn from central and commercial banks; the Payment Systems Users Liaison Group has members from banks, consumer organisations and small businesses.

[76] Commission proposal for a Directive on cross-border transfers COM(94)436 final OJ 1994 C360/13; amended proposal COM(95)264 final.