Hastings International and Comparative Law Review

Volume 13
Number 3 *Spring 1990*

Article 6

1-1-1990

The Single Market of 1992: Implications for Banking and Investment Services in the EC

Annabelle Ewing

The Single Market of 1992: Implications for Banking and Investment Services in the EC

By ANNABELLE EWING*

I. INTRODUCTION

The liberalization of the European Community (EC) financial services sector is a key component of the 1992 Single Market program. The Single Market program was launched in 1985 by the EC Commission[1] in order to implement the objectives of the EC Treaty of Rome of 1957[2] (Treaty). In theory, the freedom of establishment and freedom to provide services contained in the Treaty have been available to individuals and companies since the end of the transitional period (from January 1, 1970),[3] but in practice, the exercise of these rights has met with considerable obstacles in the financial services sector. Authorization requirements are imposed on EC-based banks and investment firms endeavoring to set up branches in other Member States. Additionally, providing cross-border services is virtually impossible due to the existence of exchange control restrictions and discriminatory national fiscal provisions. There is such a wide range of activities that require the prior approval of the Member State in whose territory the activities are carried on that in practice it is mandatory to establish a branch office in that Member State.

Therefore, a new approach was required to open up financial markets in the EC. The most innovative feature of the Single Market program of 1985 was the abandonment of the former insistence on complete

* Annabelle Ewing is an attorney specializing in EC law with the firm of De Smedt & Dassesse/Akin, Gump, Strauss, Hauer, & Feld International, in Brussels. This Article takes account of developments only up to December 18, 1989.

1. *See* Comm'n of Eur. Comm., *Completing the Internal Market: White Paper from the Commission to the European Council,* COM(85) 310 final (June 14, 1985).

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) 82 [hereinafter EEC Treaty] (original version at 298 U.N.T.S. 11). The goal of the Treaty was the establishment of a common market for goods, services, persons, and capital. *See id.* arts. 2, 3, at 83.

3. *See* Reyners v. Belgian State, 1974 E. Comm. Ct. J. Rep. 631, 646 (right of establishment for advocats); Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid, 1974 E. Comm. Ct. J. Rep. 1299, 1307 (right to provide services).

harmonization of national Member State legislation. Instead, the Single Market program called for only minimal harmonization of national standards, along with the principles of mutual recognition and home country control.

The goals of the Single Market program were further advanced by the adoption of the Single European Act[4] (SEA) which entered into force in July 1987. The SEA streamlined the EC decision-making process by requiring only a qualified majority vote in the EC Council of Ministers for Single Market legislation (with the notable exception of fiscal measures).[5] Significant progress in implementing Treaty objectives was made possible with this abandonment of the unanimity requirement in the Council for any issue of major significance.

In terms of the Single Market program, certain measures have been proposed and adopted with a view to the achievement of a single financial services market in the EC. These will be discussed in Part III of this Article. Part II of the Article will initially focus on the liberalization of capital movements.

II. LIBERALIZATION OF CAPITAL MOVEMENTS

Before examining the key EC legislative proposals for banking and investment services, brief mention should be made of the "capital movements" directive.[6] This directive, which will enter into force on July 1, 1990,[7] (with certain transitional derogations being permitted for Greece, Ireland, Spain, and Portugal), removes the remaining restrictions to transfers of capital within the EC.[8] The directive is the basis of the entire financial services liberalization process. Indeed, the abolition of exchange control restrictions in the Member States is the first step toward implementation of key measures designed to make the integration of banking and investment services a reality in the EC. The existence of such restrictions effectively prevents individuals or companies from freely transferring or holding financial assets.

III. BANKING AND INVESTMENT SERVICES

The two key measures in the banking and investment services sec-

---

4. *See* Single European Act, *opened for signature* Feb. 17, 1986, 30 O.J. EUR. COMM. (No. L 169) 1 (1987) [hereinafter SEA].

5. *See id.* art. 7, at 5-6.

6. *Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty*, 31 O.J. EUR. COMM. (No. L 178) 5 (1988) [hereinafter *Directive 88/361/EEC*].

7. *See* SEA, *supra* note 4, art. 9, at 7.

8. *Directive 88/361/EEC*, *supra* note 6, at 5.

tors are the Second Banking Directive[9] and the proposed Investment Services Directive.[10] The Second Banking Directive and the proposal for Investment Services Directive are closely interrelated and will be considered in turn.

A. The Second Banking Directive

The Second Banking Directive (Banking Directive) provides for a single banking license for banks incorporated within the Community.[11] This "passport," which will be valid throughout the EC, will apply to the authorized activities that are included in the list of "qualifying activities" annexed to the Banking Directive.[12] This list is patterned upon a liberal universal banking model and includes all forms of securities transactions.

The Banking Directive provides that the country where the bank is incorporated and duly authorized (the "home" Member State)[13] is responsible for "prudential supervision" under article 15 of the Banking Directive.[14] Giving the home Member State supervisory control requires all of the Member States to harmonize their prudential standards. In order to accomplish this harmonization, the EC has adopted supplementary legislation that will enter into force simultaneously with the Banking Directive.[15] This legislation represents the minimum framework necessary to effectively implement the Banking Directive.

Additionally, the text of the Banking Directive expressly includes prudential harmonization measures. For example, there is a minimum

9. *Second Council Directive of 15 December 1989 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, COM(87) 715 final,* 32 O.J. EUR. COMM. (No. L 386) 1 (1989) [hereinafter *Banking Directive*].

10. *Proposal for a Council Directive on investment services in the securities field, COM(88) 778-SYN 176,* 32 O.J. EUR. COMM. (No. C 43) 7 (1989) [hereinafter *Investment Directive*].

11. *Banking Directive, supra* note 9, at 1.

12. *Id.* annex, at 13.

13. *Id.* art. 1(7), at 3.

14. *Id.* art. 15, at 8. "Prudential supervision" means that the home Member State monitors compliance with EC banking rules to insure the solvency of the banks concerned.

15. These measures concern the own funds directive, *Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions,* 32 O.J. EUR. COMM. (No. L 124) 16 (1989), and the solvency ratio directive. *Council Directive 89/-/EEC of 18 December 1989 on a solvency ratio for credit institutions* (not yet published). In addition, it is understood that the Commission proposes to translate its recommendations on large risk exposure into binding texts, *Commission recommendation on monitoring and controlling large exposures of credit institutions (87/62/EEC),* 28 O.J. EUR. COMM. (No. L 33) 10, 10-15 (1987), and deposit guarantee schemes. *Commission recommendation concerning the introduction of deposit-guarantee schemes in the community,* 28 O.J. EUR. COMM. (No. L 33) 16 (1987).

initial capital requirement of five million ECU.[16] The funds of the bank may not fall below this level.[17] However, certain derogations from these measures concerning principally the so-called *Banques Populaires* have been provided for in the Banking Directive.[18] There are also detailed rules controlling shareholdings of banks. Article 11 of the Banking Directive requires banks to notify the Commission of any acquisition or disposal of a "qualified holding" (ten percent of the capital or of the voting rights)[19] in a credit institution.[20] Notification of increases or reductions in such holdings may also be required if certain conditions apply.[21] The regulatory authorities of the home Member State have the right to prevent a proposed acquisition or an increase in a qualified holding based on the lack of suitability of a proposed shareholder.[22]

Finally, article 12 of the Banking Directive imposes limitations on the level of shares that banks may hold in non-financial institutions.[23] These limitations protect the assets of credit institutions from risky investments.

Thus, it is evident that the Banking Directive provides for fairly extensive harmonization of minimum standards concerning the structure and operations affecting solvency of credit institutions. However, this minimum harmonization has been insufficient, in light of the current lack of integration of EC financial markets, to prevent limitations to the principles of home country control and mutual recognition.

First, a Member State in whose territory a bank has established a branch or provides services (the "host" Member State)[24] retains control over monetary policy and liquidity matters.[25] However, in liquidity matters, the host Member State must cooperate with the regulatory authorities of the home Member State.[26]

Second, and more significantly, the host Member State may control

16. *Banking Directive*, *supra* note 9, art. 4(1), at 4. The European Currency Unit (ECU) is based on the weighted average of a "basket" of the Member State currencies.

17. *Id.* art. 1(10), at 6.

18. *See id.* arts. 4(2), 10(2)-(5), at 4, 6. Banques Populaires are savings banks aimed at the small investor. The derogations are intended for credit institutions in existence at the time of the implementation of the Banking Directive. *Id.* art. 10(2), at 6.

19. *Id.* art. 1(10), at 3.

20. *Id.* art. 11(1), at 6.

21. *See id.* art. 11(3).

22. The lack of suitability of a shareholder is determined on the basis of the need to insure the sound and prudent management of the credit institution. *See id.* at art. 11(1).

23. *Id.* art. 12, at 7.

24. *Id* art. 1(8), at 3.

25. *Id.* art. 14(2), at 7-8.

26. *See id.* art. 14(3), at 8.

the manner in which a foreign EC bank operates within its territory. In fact, while there is mention of the principle of mutual recognition of financial techniques (operating procedures) of foreign EC banks (albeit only in the Recitals to the Banking Directive and not in any express provision),[27] this mutual recognition may be denied under national measures, if those measures are in the "interest of the general good."[28]

It is regrettable that the term "interest of the general good" is not defined in the Banking Directive. Thus, the Member States are seemingly afforded considerable discretion to restrict the activities of foreign EC banks operating within their territories.

However, it should be noted that the Member States will not retain completely unlimited discretion in this respect. General Community law principles laid down in the Treaty and enunciated in the jurisprudence of the European Court of Justice (ECJ) will apply. If a Member State unreasonably applies the "interest of the general good" exception, the ECJ is likely to interpret this exception quite narrowly.[29]

Such a narrow interpretation is likely to occur on the basis of relevant previous decisions of the EJS. In particular, any purported restriction by the host State must relate primarily to consumer protection.[30] For example, attempts to impose mandatory compliance with a minimum loan interest rate on a foreign EC bank will probably be struck down by the ECJ, because a law of this type relates to solvency supervision rather than to consumer protection. Solvency supervision is now within the jurisdiction of the home State.[31]

Restrictions on banking services directed at commercial or professional investors may also be held unjustifiable because such investors do not need any specific protection.[32] Finally, any restrictions by a host State must be reasonable and proportionate to the desired result, and the result must also be compatible with Community law.[33] Restrictions may only be imposed if there is no equivalent protection in the home State.[34] The restrictions also must not breach the fundamental Community law

27. *See id.* para. 15, at 2; *id.* art. 18(1), at 9.

28. *See id.* art. 21(5), at 11.

29. *See* EEC Treaty, *supra* note 2, art. 177, at 137 (providing for references from national courts of the Member States to the ECJ in order that it may render a preliminary ruling on questions concerning the interpretation and uniform application of Community law).

30. *See generally* EEC Commission v. Germany, 1986 E. Comm. Ct. J. Rep. 3755.

31. *See, e.g., id.* para. 37, at 3805.

32. *See id.* para. 49, at 3809.

33. *See id.* para. 33, at 3804.

34. *Id.*

principle of non-discrimination of article 7 of the Treaty.[35]

The principle of mutual recognition may be applicable to "non-qualifying" activities (those not included in the annex to the Banking Directive) in accordance with general Community law principles.[36] In addition, financial institutions that are subsidiaries of banks will also be included within the single banking license if certain conditions are met, and will thereby benefit from the mutual recognition principle.[37] These institutions must be authorized to perform the qualifying activities listed in the annex to the Banking Directive and they must set up and carry on their activities in the same Member State in which their parent bank is authorized.[38]

Finally, with regard to the mortgage market, former plans to proceed with a separate directive have been shelved for the immediate future.[39] Therefore, the principle of mutual recognition of financial techniques also applies prima facie to the mortgage sector.[40] The mortgage industry in the EC has lobbied against this, because it considers the mutual recognition principle to be so narrow that it has very little real significance. If the mutual recognition principle proves to be unsuccessful in the mortgage context, the separate mortgage proposal may be reactivated at a later date.

The Banking Directive contains controversial provisions concerning third country (non-EC) banks. These provisions have been modified several times during the legislative consideration of the Banking Directive.

The Commission's original proposal required prior notification if a third country bank requested the authorization of subsidiaries or the acquisition of shares in EC credit institutions.[41] The proposal also provided for an initial suspension of activity pending the successful outcome of reciprocity negotiations.[42] This has been changed in the final version. The definitive text of the Banking Directive dispenses with the require-

35. EEC Treaty, *supra* note 2, art. 7, at 84.

36. *See generally Banking Directive*, *supra* note 9, paras. 7, 19, at 1, 2.

37. *Id.* para. 18, at 2.

38. *See id.* art. 18(2), at 9-10.

39. *See Proposal for a Council Directive on the freedom of establishment and the free supply of services in the field of mortgage credit, COM(84)730 final*, 28 O.J. EUR. COMM. (No. C 42) 4 (1985).

40. *See Banking Directive*, *supra* note 9, annex, at 13.

41. *Proposal for a Second Council Directive 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, COM(87) 715 final*, art. 7(1)-(3), 31 O.J. EUR. COMM. (No. C 84) 1, 4 (1988) [hereinafter *Proposal for Banking Directive*].

42. *Id.* art. 7(4).

ment of prior notification.[43]

The new approach implements a two-tier formula that distinguishes between a lack of "comparable access" (mirror-image reciprocity), and a lack of "national treatment" (non-discrimination) afforded to EC banks in the third country in question.[44]

The Banking Directive provides for negotiations with the relevant third country if a lack of comparable access exists. These negotiations are to be conducted by the Commission upon receiving a mandate from the Council. During negotiations, authorization requests will not be suspended. Additionally, there will be no sanctions if the negotiations are unsuccessful.[45]

If there is a claim of lack of national treatment, the Commission may negotiate on its own initiative to secure non-discriminatory treatment for EC banks in the third country in question. In addition, it may initially limit or suspend future or pending requests for authorization for three months.[46] This period may be extended at the discretion of the Council.[47]

These modifications to the Commission's original proposal have generally been welcomed by third country banks. However, the terms "comparable access" and "national treatment" have not yet been defined, and the manner in which they will be applied is still unknown. Thus, concern about these provisions still remains.

A grandfather clause[48] in the text of the Banking Directive provides some comfort. The clause will be effective as of the date the Banking Directive enters into force (January 1, 1993).[49]

Moreover, an express provision in article 9(6) states that any action taken by the EC must be in conformity with its international obligations.[50] Therefore, the conclusion of the current General Agreement on Tariff and Trade (GATT) negotiations on services within the framework of the Uruguay Round (which are on schedule for completion by the end

43. *See Banking Directive, supra* note 9, arts. 8, 9, at 5, 5-6.

44. *See id.* art. 9, at 5-6.

45. *See id.* art. 9(3), at 5.

46. *See id.* art. 9(4). In fact, the Commission may only reach such a decision after consulting the Banking Advisory Committee (composed of national representatives and chaired by the Commission). Should this committee issue a negative opinion, the Commission must submit the proposal for such a sanction to the Council who may refuse it by a simple majority. *See generally id.* art. 22(2), at 11-12.

47. *Id.* art. 9(4), at 5.

48. *See id.* art. 9(4), para. 4. (The grandfather clause provides a cut-off point prior to which such reciprocity provisions will not apply.)

49. *See id.* art. 24, at 12.

50. *Id.* art. 9(6), at 6.

of 1990) may preempt this issue. It is hoped that a multilateral agreement will be reached that will render any "protectionist" reciprocity provisions unnecessary.

The Banking Directive, following general Community Law principles, expressly provides that Community Law does not extend the freedoms of establishment and services provided in the Treaty to third country branches in the EC.[51] Therefore, third country branches operating without an EC incorporation will not benefit from the single banking license. Instead, their operations within the Community will be subject to the discretion of the national regulatory authorities of those Member States in whose territories the branches carry on their activities.

The European Parliament had called for additional controls at the EC level for third country branches, including a mandatory level of capital of five million ECU for each branch.[52] Although this approach was rejected, the Commission has agreed to review the treatment given to these branches immediately prior to the implementation of the Banking Directive. If it is determined that third country branches are receiving more favorable treatment than foreign EC branches in certain Member States, the Commission may draw up a supplementary directive to remedy the competitive distortions.[53]

In summary, the Banking Directive provides for significant steps toward integration of financial markets, despite the limitations to the mutual recognition of financial techniques and the existence of numerous discriminatory national fiscal provisions.[54]

Member States may still establish their own national supervisory and regulatory controls for their own domestic banks. However, it is anticipated that pressure from Member States with highly regulated markets will eventually restrict deregulation to the minimum levels in the Banking Directive.[55]

In the meantime, EC-incorporated banks should take advantage of the differences in the national laws of the Member States either by estab-

51. *See id.* para. 19, at 2.

52. European Parliament Second Reading of the Second Banking Directive, Minutes of Proceedings, Nov. 22, 1989, PE 136.783, at 22.

53. *See* Verbatim Report of the debate held in the European Parliament, Nov. 22, 1989, at 182 (prior to the Second Reading vote).

54. In certain Member States a withholding tax applies only to those interest payments made by a local borrower to a foreign EC bank (as opposed to a domestic bank).

55. The possibility of reverse discrimination (for example, when domestic banks are subject to more stringent requirements than foreign EC banks) is not contrary to Community law, notwithstanding the competitive distortions that may exist. *See* Procureur de la République v. Waterkeyn, 1982 E. Comm. Ct. J. Rep. 4337, 4367-68 (Opinion of Advocate-General Rozès).

lishing branches in other Member States or providing cross-border services, thereby limiting supervision of the bank to that of the "home" Member State. Banks in less regulated Member States may then sell financial products and services that local banks in the host Member States are not aware of or are unable to provide. Marketing techniques of the home State may be used as well, subject to the "general good" legislation of the host State.[56]

On the other hand, domestic banks in highly regulated Member States may want to create subsidiaries in Member States with a more lenient regulatory environment, and serve the home Member State from the subsidiary.

This strategy should be effective despite the Banking Directive's "anti-circumvention" provision.[57] This provision states that an authorization request will be refused if there appears to be a clear intention to evade national rules that would otherwise be applicable to the requesting bank.[58] Circumvention will be judged by reference to the laws of that Member State in which the bank carries on or intends to carry on the greater part of its activities.[59] However, the guidelines in the anti-circumvention provision are unclear and may simply be the political desires of those Member States with more draconian regulatory regimes. In addition, a home Member State may have little interest in refusing authorization requests on the basis that its own regulatory environment is quite flexible. The refusal of such an authorization request may in certain circumstances be contrary to that Member State's own interests.

To overcome the anti-circumvention provision, a bank must establish a "head office" (the central place of administration) in the same Member State as the registered office.[60] As a result, at least some of the bank's administrative activities may be conducted in the Member State of authorization. Thus, the requirements of the anti-circumvention provision would be effectively met.

B. The Investment Services Directive

The draft Investment Services Directive[61] (Investment Directive)

56. *See Banking Directive, supra* note 9, art. 21(11), at 11.

57. *See id.* para. 12, at 1-2.

58. *Id.* This recital has not been incorporated into an express provision of the directive.

59. *Id.* at 2.

60. See *infra* notes 65-66 and accompanying text in connection with the draft Investment Services Directive.

61. *See Investment Directive, supra* note 10. The European Parliament has recently adopted its First Reading, *Investment Services in the Securities Field: Proposal for a directive COM(88) 778 final,* Oct. 25, 1989, PE 135.514, at 11 [hereinafter First Reading], of the draft

has a much lower profile than the Banking Directive. It is closely tailored to the Banking Directive and applies to banks that provide those investments listed in the annex to the Banking Directive.[62] The Investment Directive provides nonbank EC investment brokers with a single license to perform these services, including brokerage, portfolio management, professional investment advice, marketing, underwriting, and investment dealing.[63]

Banks already covered under the single license of the Banking Directive with respect to a particular investment activity will not need additional authorization to carry on that activity in terms of the Investment Directive.[64] The general provisions of the Banking Directive will apply in this context unless otherwise specified in the Investment Directive.[65]

Authorization from the home Member State is required to conduct qualifying activities.[66] The Investment Directive expressly requires that the registered office and the head office of the bank be in the same Member State.[67] The Investment Directive does not provide for any comprehensive authorization requirements.[68] For example, no detailed rules on capital adequacy are stated which, in terms of the general principle of home country control, will be within the jurisdiction of the home State under the general principles of home country control.[69]

However, the Commission is in the process of preparing a draft directive on capital adequacy,[70] currently at the working draft stage. A formal proposal is expected in January 1990. This issue is controversial, with the proponents of a minimum capital entry "barrier" (and greater

directive. This has now been examined by the relevant Directorate-General of the Commission (DG XV) and the Commission's Amended Proposal is expected to be published later this month.

62. *Compare Banking Directive, supra* note 9, annex, at 13, *with Investment Directive, supra* note 10, annex, at 14; *Opinion on the proposal for a Council Directive on investment services in the securities field,* 32 O.J. EUR. COMM. (No. C 298) 6, 9 (1989) [hereinafter *Opinion*].

63. *See Investment Directive, supra* note 10, annex, at 14.

64. *Opinion, supra* note 62, at 9.

65. *See id.*

66. *Investment Directive, supra* note 10, art. 4(1), at 8.

67. *Id.* art. 3. Although an "activities" criterion has been put forward by the European Parliament in the text adopted at First Reading, *supra* note 60, Sir Leon Brittan, the Commissioner responsible for financial services, indicated during his statement to the European Parliament prior to the vote at First Reading that such a condition was unnecessary. Rather, shell companies could be avoided by the satisfaction of the head office requirement.

68. *See Investment Directive, supra* note 10, arts. 4-6, at 8-9.

69. *See id.* arts. 4(2), 8, at 8; 10.

70. The draft working paper on capital adequacy is an internal document and is not publicly available.

regulation thereafter) apparently winning the day as this Article is being written.

The current proposals require nonbank investment brokers to have initial capital of 250,000 ECU, but with similar derogations to those provided for by the Banking Directive.

The provision against market risk, which is applicable to banks under certain circumstances as well as to nonbank investment brokers, is still being debated. The discussions include methods for calculating the amount of funds required to cover the various risks listed in the Investment Directive.

It is unlikely that the Investment Directive will provide for the simultaneous entry into force of the Capital Adequacy Directive. Although this goal is desirable, the primary concern at this point is to ensure that the Investment Directive and the Banking Directive enter into force at the same time.

Generally, the Investment Directive gives the responsibility for supervisory and prudential supervision to the home Member State.[71] Several prudential controls are identified in the draft directive, including the use of proper accounting procedures, the segregation of client or firm monies and securities, the keeping of adequate records, and the use of a proper system to minimize conflicts of interest.[72]

However, the directive applies a dual approach with respect to another prudential requirement. A general Member State compensation scheme is required to protect against bankruptcy or default of the investment firm.[73] Foreign EC branches are subject to the rules of the host Member State, with contributions based solely on activities in the host Member State.[74] Otherwise, home State control will apply.[75]

The acquisition of qualified shares in investment firms is governed by prudential rules similar to those originally provided for in the banking sector in the Commission's original draft proposal.[76] These rules probably will be modified to conform to the provisions of the Banking Directive.[77]

The host Member State will retain control over "conduct of busi-

71. *Investment Directive, supra* note 10, art. 9, at 10.
72. *Id.* art. 9, at 10.
73. *Id.* art. 9(1).
74. *Id.*
75. *Id.* art. 9(2).
76. *Compare id.* art. 7, at 9, *with Proposal for Banking Directive, supra* note 41, art. 9, at 4.
77. *See Banking Directive, supra* note 9, art. 11, at 6-7.

ness" rules.[78] As with the Banking Directive, the principle of mutual recognition of financial techniques of the home Member State will be subject to the public policy considerations of the host Member State.[79] The Economic and Social Committee has criticized the Investment Directive because it has not provided a clear demarcation line between home State prudential supervision and host State control.[80] However, as with the Banking Directive, the invoking of a host State public policy will be limited by the application of general Community law principles.

There are detailed provisions regarding notification procedures for establishing branches and providing cross-border services.[81] However, these provisions do not amount to an "authorization requirement" for the establishment of a branch,[82] on the basis that the host State has no jurisdiction to prevent either the establishment of branches or the provision of cross-border services.[83]

There is also a provision that requires each Member State to nominate national regulatory authorities to supervise investment activities subject to the directive.[84] In addition, collaboration between the regulatory authorities of all of the Member States is to be encouraged.[85]

The Investment Directive has a reciprocity provision that is identical to the one in the original Commission proposal for the banking sector.[86] This provision will probably be subject to amendments similar to those now codified in the Banking Directive.[87]

An express provision in the Investment Directive embodies the principle of "Community preference" with respect to third country branches operating without an EC incorporation.[88] Therefore, as in the banking context, foreign branches will be subject to the vagaries of the national laws of each Member State.

Finally, the Investment Directive liberalizes access to stock ex-

78. *See Investment Directive, supra* note 10, art. 9, at 10.
79. *See id.* art. 13, at 11.
80. *See Opinion, supra* note 62, at 7.
81. *See Investment Directive, supra* note 10, arts. 11, 12, at 11.
82. *See id.* art. 10(2), at 10.
83. *See id.* arts. 12, 13, at 11-12.
84. *Id.* art. 14, at 12.
85. *Id.* art. 15.
86. *Compare id.* art. 6, at 9, *with Proposal for Banking Directive, supra* note 41, art. 7, at 4.
87. The European Parliament Legal Affairs Committee, which was responsible for drawing up the First Reading Report presented to the full Parliament, rejected an amendment introducing similar reciprocity provisions, and adhered to the more protectionist approach in the Commission's earlier text in the banking sector.
88. *See Investment Directive, supra* note 10, art. 5, at 9. "Community Preference" means that third countries should not receive more favorable treatment than foreign EC nations. *Id.*

changes, financial futures, and options markets in a host Member State for investment firms authorized to carry out these activities in their "home" Member State.[89] Investment firms are given the option to establish a branch, incorporate a subsidiary, or acquire an existing member firm in order to become a member of the stock exchange in the host State's territory.[90] However, because banks are excluded from the membership of stock exchanges and organized securities markets in some of the Member States, banks seeking membership in the stock exchanges of those States will not be able to proceed by way of a branch office.[91] They will be required either to incorporate a subsidiary in those states or to acquire an existing member firm.

While the basic groundwork has been laid with respect to the liberalization of this sector, it remains to be seen what substantive revisions will be made to this draft directive. Furthermore, it is the issue of capital adequacy that will dominate with respect to the facilitation of a real single market for investment services.

IV. CONCLUSION

It is clear that a fairly extensive liberalization of EC financial markets has been proposed in the banking and investment services sectors. However, while the mutual recognition principle has been incorporated into this legislation, a certain retreat from the logical consequences of the application of this principle has occured. As the 1992 deadline approaches, and the necessary implementing legislation is adopted in the Member States, the fate of the actual completion of the Single Market program may be left in the hands of private parties. Successful access to the competitive opportunities that will be made available by this legislation may only be secured, in the final analysis, after private litigants have instituted the necessary proceedings before their national courts, with the European Court of Justice acting as final arbiter.

89. *See id.* art. 10, at 10-11.
90. *See id.* art. 10(1)-(3), at 10.
91. *See id.* art. 10(4)-(6), at 11.