EC FINANCIAL MARKET REGULATION AND COMPANY LAW

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E.C. Financial Market Regulation

and

Company Law

edited by

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Foreword

Inducing Member States and traders to realise that they could not insist on particular shaped boxes for margarine or bottles for wine was difficult enough in the steps to create a common market. The mystique surrounding banking, insurance and financial services made it very likely that both Member States and those concerned in the provision or receipt of the services would take even more entrenched positions than were taken in relation to the free movement of goods. The technical complexities of the financial and insurance markets, the need to ensure the protection of consumers, to insist on safeguards like sufficient capital and supervision, adequate qualifications and experience, to avoid fraud, made not only likely but inevitable that the Community would take many years (which is not necessarily a relatively long time) in order to prepare and agree on the necessary legislation. January 1, 1993, however, provided the required goal and now much has been done.

The resulting Directives or proposals for Directives — on investment services in the services field, on the co-ordination of regulations on insider dealing, on provisions relating to the taking up and pursuit of the business of credit institutions, on the take-over and other bids, on the capital adequacy of investment firms and credit institutions — are highly technical and of great current interest and importance.

But they need serious analysis and comment if lawyers and their clients are going to be able fully to understand and apply them. Mads Andenas and Stephen Kenyon-Slade did a valuable job in organising a conference at Jesus College Cambridge in 1992 when many of these problems were ventilated by a very distinguished panel of speakers experienced in these areas and a large number of other participants. I was only able to attend the conference dinner but even at that it was apparent that the conference was a great success. Now they have put together a collection of Chapters based on the lectures which were given — it is most helpful to have them so quickly and with the texts of some of the relevant Directives and proposals appended in full. The Chapters show the far-reaching changes adopted. Thus in the Second Banking Co-ordination Directive it is provided that a single banking licence, replacing 11 different authorisations, will enable a bank to carry on specific bank activities throughout the Community either by branches or by provision of cross-border services. They show the principles on which the Community is proceeding — mutual co-operation and supervision, fair competition and home State control. They also show the difficulties still to be faced.

If the reasons for not focusing on financial services prior to 1986 are intelligible, it is plain that since the adoption of the Single European Act the liberalisation of financial services has been recognised to be a necessary feature of the creation of a true internal market. It may be, as Paolo Clarotti concludes, that an internal market for financial services already exists and when all the Directives of which he writes are approved "the internal market for financial services is fully achieved". Yet, as he recognises, it seems that much remains to be worked out as to detail and as to principle as time goes on. How far should stock exchange listings be mutually recognised; how much must be disclosed in bank annual reports; will the Money Laundering Directive sufficiently prevent persons taking advantage of the greater freedom of capital movement; will home State control be effective; is the will to co-operate sufficiently strong? How much further and how quickly should company law harmonisation go? How will the provisions of the Rome Convention on the Law Applicable to Contractual Obligations with its conflicts of law rules fit in with the new Community concept of the free movement of financial services?

In this book there is much detail and valuable comment — the same Directives are sometimes considered by several of the writers from different angles, *e.g.* the Thirteenth Directive on take-overs or the Investment Services Directive and the Insider Dealing Directive — but it is the better for that. As a book for the practitioner or student interested in the financial market and company law in the Community and as a series of papers prepared at a very high level it merits study in depth.

Slynn of Hadley

Preface

This book is an extension of the proceedings of a conference held at Jesus College, Cambridge University on July 20–21, 1992. The conference was arranged by the Centre for European Law, King's College, London, and the Cambridge Law Group, and was chaired jointly by Mads Andenas and Stephen Kenyon-Slade. The conference brought together specialists in European Community financial market regulation and company law, including members of the judiciary in Europe and officials of the European Commission, as well as members of the regulatory organisations, practising lawyers, and academics. The conference papers as published in this book have been amended and updated to take into account legal developments up to January 31, 1993 (and, in some cases, even more recent law is included). Proceedings at the conference generated considerable interest and proved to be a useful exercise in analysing the increasing volume of E.C. company law and banking and securities regulation, and the impact of such law in Member States.

The harmonisation of E.C. company law and financial market regulation raises important questions of law and policy at both the European level and at the domestic national level. Invariably, harmonisation will involve a choice between national models and legal traditions which often differ in fundamental respects among the Member States of the European Community. At the domestic level, the discretion that national authorities enjoy in implementing any particular harmonisation directive can vary greatly, depending on the specific provisions of the directive at issue. Once implemented, national law which derives from an E.C. law source will in turn be interpreted and applied in accordance with principles of E.C. law. Therefore, the relevant Community law will be of vital importance to any lawyer working in European corporate and financial markets.

The Commission's White Paper of 1985, "Completing the Internal Market" (COM(85)310 final), set forth harmonisation measures to be adopted in order to establish a single market by the end of 1992. The impact of E.C. law in the field of domestic company law in the United Kingdom is readily apparent from various statutory changes which have occurred over the past eight years. Indeed, a measure of success has been achieved in the company law harmonisation programme. At the E.C. level, much of the structure of a harmonised company law was already in place when the Commission issued its White Paper, and this fact probably accounted for the relatively low priority accorded to company law in the White Paper. In recent years, the principal focus of attention has been on the actual implementation of the company law Directives. The White Paper's rather limited objectives in the field of company law are, however, yet to be achieved. In particular, E.C. proposals relating to worker participation and the regulation of company take-overs have proved to be great stumbling blocks, and have in turn delayed progress in other areas of substantive company law. Various solutions to the virtual dead-lock have been suggested, for example, formulating laws which would involve a lower degree of detailed regulation, or dividing proposed directives in such a manner as to isolate the more contentious issues and thus clear the path for those laws where agreement is likely to exist. For example, the proposed Fifth Company Law Directive contains relatively non-contentious provisions on the structure of a company's board, but also contains more contentious provisions concerning employee representation. Similarly, at the Commission's Edinburgh Summit, among the list of directives which were to be revised in light of the principle of subsidiarity was the proposed Thirteenth Company Law Directive on take-over law.

The present dead-lock in the E.C. legislative process on company law focuses attention on the role of the European Court of Justice. In this regard, there is a relatively large body of E.C. law which has important implications for the practising-company lawyer. Until recently, the main body of E.C. company law has consisted of E.C. legislation (mainly directives), and the rôle of the European Court of Justice was perceived to be a residual one. Although the European Court's case law is a comparatively new phenomenon in terms of influencing company law, general developments in E.C. law will increase the role of the Court. Recent cases of particular interest include *Francovich* [1992] I.R.L.R. 84 (on the development of an E.C. law doctrine of remedies and State liability) and *Marleasing* [1990] I E.C.R. 4135 (which reflects the European Court's recent jurisprudence on the direct effects doctrine).

To a large extent, company law harmonisation has been pursued in order to give effect to the right of establishment contained in Article 58 of the EEC Treaty. Article 58 gives companies the same right of establishment as individuals enjoy under Article 52 of the EEC Treaty and, in a number of cases, the European Court has applied the right of establishment and freedom of movement in favour of companies against national authorities. It is important to include such case law within the general body of E.C. company law, and to appreciate the extent to which such principles can influence the content of traditional substantive company law principles.

The European Court of Justice judgments on the application of company law Directives indicate that a teleological approach will be adopted, and that Member States will enjoy very little discretion in respect of the Directives. *Marleasing* provides an apt example. This case involved two issues: the duty of national courts to interpret national law to conform with E.C. law; and the interpretation of Article 11(2)(*b*) of the First Company Law Directive (Directive 68/151, [1968] O.J. L65/8). The Court interpreted Article 11 strictly, and found that the Spanish legislation at issue violated the Directive. In three other cases, the Court of Justice interpreted provisions of the Second Company Law Directive (Directive 77/91, [1977] O.J. L295/36), and considered the extent of the division of legislative competences between the Community and the Member States. See *Karellas* v. *Minister for Industry and the Organisation for the Restructuring of Enterprises* [1991] I E.C.R. 2691 and *Syndesmos EEE, Vasco* v. *Greece* [1992] I E.C.R. 2134 and Joined Cases C-134–135/91, *Kerafina-Keramische and Finanz Holding AEG and Vioktimatiki* v. *Hellenic Republic*, judgment of November 12, 1992 (not yet reported). See also (1993) 14 C.L.D. 36. For example, in *Kerafina*, the Court held that Article 25(1) of the Second Company Law Directive may be invoked by individuals before national courts against public authorities, and that domestic legislation which conflicted with the Directive would be invalid. It is inevitable that the body of case law which interprets and applies the first two company law Directives will increase dramatically, especially in the light of the European Court's teleological approach, the limited discretion given Member States, and the quite disparate ways in which the Directives (particularly the First Company Law Directive) have been implemented in certain Member States.

The creation of an internal financial market is crucial to achieving the free movement of capital and the free provision of financial services. In the financial and securities law fields, some, albeit limited, progress was made in the early stages via the so-called stock exchange Directives and the first generation of Directives on financial institutions. The latter Directives sought to achieve supervisory co-operation among Member States, and also sought to prevent discrimination against the subsidiaries of financial institutions from other Member States. The internal market programme of 1985 set forth new policies relating to financial markets. Under these policies, banks, securities houses and insurance companies should benefit from a single Community-wide licence guaranteeing the free provision of services and the free establishment of branches in all Member States. Minimum standards for supervision and capital adequacy were also to be established in Community legislation.

As the internal financial market was nearing its completion, the Council reached a common position in late 1992 on the Investment Services Directive ([1989] O.J. C43/7, amended [1990] O.J. C42/7). This Directive has very recently been adopted in an unaltered form and was the last outstanding piece of major Community legislation in the field of financial services. According to the original time-table set out in the Commission's White Paper, the implementation deadline for Member States was January 1, 1993. It was claimed that any later date of implementation would have left the internal financial market seriously flawed. In particular, the aim of establishing a level playing-field for different kinds of financial institutions would not have been realised with the result that banks would have had access to the internal market, whereas securities houses and other intermediaries would still be restricted by national borders. However, it transpired that January 1, 1993 was not a realistic deadline for implementation of the Investment Services Directive. The provisional deadline is now December 31, 1995, which involves a three-year postponement. As long as political agreement has been reached, this delay should not have serious consequences for competition between banks and non-banks in the investment services field.

For all practical purposes, the legal structure for the internal financial market is now in place with only a slight delay to the criteria set forth in the Commission's White Paper of 1985. The City of London's existing regulatory structures do not seem to be seriously threatened by the various Community measures. Indeed, despite accommodating German banking and other continental traditions, a capital markets model as represented by the City of London seems to serve the new economic policies in the Member States better than any alternative. Implementing the E.C. Directives in the United Kingdom, however, remains a very complicated task.

As with the Jesus College conference in Cambridge, this resulting publication addresses and analyses the challenges that Community law presents in the areas of company law and financial market regulation. We are of course immensely grateful to the conference speakers who contributed their papers to this publication. We are especially grateful to Lord Slynn of Hadley for delivering the speech at the conference dinner and for writing the Foreword to this book. We are also deeply appreciative of all the encouragement and invaluable assistance given by Dr. Barry A.K. Rider, the Dean of Jesus College. We are also most grateful to the Master of Jesus College, Lord Renfrew of Kaimsthorn, for his personal involvement in ensuring that the conference was such a splendid event. Finally, we would like to thank the editorial team at Sweet & Maxwell for their great assistance in the publication of this book.

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PUBLISHER'S NOTE

After the contributions to this book were written, the Investment Services Directive (Directive 93/22, [1993] O.J. L141/27) and the Capital Adequacy Directive (Directive 93/6, [1993] O.J. L141/1) were adopted by the Council, and their full texts were published: these are reproduced in Appendices 4 and 5 respectively. References in the Chapters of this book to Articles of the draft Directives will generally correspond to Articles in the Directives (as finally adopted), as reproduced in these Appendices.

Table of Cases

1. Alphabetical list of all cases