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The Impact of Consumer Protection on Banking Legislation in the European Community and the Effect of the Recent Consumer Protection Proposals

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Abstract

In this article, I will examine the means by which European Community institutions have used consumer protection, and their impact. I will also examine the new proposals concerning consumer protection, and their impact. Finally, I will look at what the likely outcome of these proposals may be, if implemented.

LL.M PERSPECTIVES

THE IMPACT OF CONSUMER PROTECTION ON BANKING LEGISLATION IN THE EUROPEAN COMMUNITY AND THE EFFECT OF THE RECENT CONSUMER PROTECTION PROPOSALS

*Thomas F. Taylor**

The law concerning consumer protection and banking has changed dramatically in Europe over the last forty-six years. These two areas have often interacted with each other, either through the action of legislative bodies or decisions of the Court of Justice. In particular, both European Community consumer protection policy and legislation have had a significant impact on banking legislation. In this Article, I will examine the means by which Community institutions have used consumer protection policy to affect banking legislation and the results obtained. I will also examine the new proposals concerning consumer protection, and their impact. Finally, I will look at what the likely outcome of these proposals may be, if implemented.

This Article will deal with the "consumer" in terms of an individual person. When I speak in terms of consumer policy or consumer protection, I will be referring to policy and protection in regard to a consumer's economic interests. A bank in this Article will refer to a "credit institution" as defined in Article 1 of the 1977 Council Directive No. 77/780 ("First Banking Directive"): "[A]n undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account"¹

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1. Council Directive No. 77/780, art. 1, O.J. L 322/30 (1977) (First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and

I. THE TREATY OF ROME

A. Initial Goals of the European Economic Community

In 1958, at the time of the establishment of the European Economic Community, the Treaty of Rome² set out several goals in its preamble. Two are important for this Article. The Parties to the Treaty stated that they were “DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe”³ That is, the Parties wished to create a common or internal market free of internal barriers. In that regard, the Treaty specifically set as two of its goals the elimination of any restrictions on the free movement of services across Member State lines⁴ and the abolition of any restrictions on establishment in one Member State of businesses headquartered in another Member State.⁵

Second, the contracting parties stated that they were “AF-FIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples.”⁶ However, no articles dealt directly with a general consumer protection policy. There were a few articles that contained within them the kernel of a more developed consumer protection position. Article 2 stated that the Community shall promote, among other things, “an accelerated raising of the standard of living”⁷ Article 39 of the Treaty stated that the

administrative provisions relating to the taking up and pursuit of the business of credit institutions) [hereinafter First Banking Directive].

2. See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. The European Union (“EU”) is currently governed by an amended version of the Treaty of Rome. See Treaty on European Union, O.J. C 325/1 (2002), 37 I.L.M. 67 [hereinafter Consolidated TEU], *incorporating changes made by* the Treaty of Nice amending the Treaties Establishing the European Communities and certain related acts, Mar. 10, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice], and the Treaty of Amsterdam amending the Treaties Establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union (“TEU”), Treaty Establishing the European Community, Treaty establishing the European Coal and Steel Community (“ECSC Treaty”), and Treaty establishing the European Atomic Energy Community “Euratom Treaty”), and renumbering articles of TEU and Treaty establishing the European Community) [hereinafter E.C. Treaty].

3. Treaty of Rome, *supra* note 2, Recital ¶ 1.

4. See *id.* arts. 59-66.

5. See *id.* arts. 52-58.

6. *Id.* Recital ¶ 3.

7. *Id.* art. 2.

objectives of the common agricultural policy include the guaranteed availability of supplies and the stabilization of markets, and also mentioned the aim “to ensure that supplies reach consumers at reasonable prices.”⁸ Article 85(3) of the E.C. Treaty made authorization for certain agreements between undertakings subject to the consumer receiving “a fair share” of the resulting benefit,⁹ while Article 86 gave, as an example of unfair practices, “limiting production, markets or technical development to the prejudice of consumers.”¹⁰

B. *The Process to Achieve the Goals*

The Treaty of Rome originally created four major institutions to carry out its goals — the Parliament, the Council, the Commission, and the Court of Justice.¹¹ The Parliament, Council, and Commission are involved in the legislative process.¹² Traditionally, the Commission has had the sole right to initiate legislation in the domain of Community affairs, particularly the Internal Market.¹³ Once agreement on the proposed text has been reached within the Commission, it is then published as a proposal. At any moment throughout the procedure, the Commission may withdraw or amend its proposal.¹⁴

After a short interim period, the Commission seeks the endorsement of the proposal by the European Parliament. The E.C. Treaty lays down four procedures by which Parliament is involved. One of these is used with each particular proposal, depending on the nature of the proposal:

1. Consultation, by which only an opinion from the Parliament is permitted;

8. *Id.* art. 39.

9. *Id.* art. 85(3).

10. *Id.* art. 86.

11. *Id.* art. 4.

12. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 82-100 (2d ed. 2002); see also The EU Committee of the American Chamber of Commerce in Belgium, *Business Guide to EU Initiatives 2004, Instruments and Implementation*, available at <http://web.lexis.com/lawschoolreg/researchlogin04.asp> [hereinafter *Business Guide*].

13. *Business Guide*, *supra* note 12, § 4. Under transitional arrangements with which we are not concerned in this Article, Member States share this responsibility on matters related to the free movement of persons. See *id.*

14. See *id.*

2. Assent, by which Parliament must approve or oppose a proposal but cannot make amendments;
3. Cooperation, by which two readings by the Parliament are given; before the second, the Council adopts a common position (used only for economic and monetary affairs); and
4. Co-decision, by which the Parliament may amend or veto (by an absolute majority) a Council common position. In this event, the Council may call a Conciliation Committee (50% Council members and 50% Parliament members — 24 members in total) to explain its position. If the point of contention remains unresolved after talks in the Committee, Parliament can veto the proposal.¹⁵

The Council must also approve proposals. Legislation can take several forms. They are as follows:

1. Regulations — Have general application and are specifically addressed to the Member States. They are binding in their entirety and are directly applicable in all Member States.¹⁶
2. Directives — Define the results to be achieved in a particular area while leaving it to national authorities to decide the form and means for achieving the desired aim.¹⁷ One specific strategy involving directives that the parties to the Treaty planned to use to achieve the goals set out in the Treaty was the process of “approximation.”¹⁸ By approximation (often called harmonization¹⁹), the Treaty is referring to the adoption of directives pertaining to a field of law applicable throughout the internal market. The Member States must adopt relatively uniform laws which implement the directives. The Member State laws usually do not have to be identical.²⁰ However, a directive might require “full” harmonization. That is, the directive might be very detailed and require specific laws of the Member States, with few, if any, exceptions.²¹
3. Decisions — Have a specific range of application and can be directed at individual Member States, companies, or

15. *See id.*

16. *See E.C. Treaty, supra note 2, art. 249, O.J. C 325/1 (2002).*

17. *See id.*

18. *See Treaty of Rome, supra note 2, art. 100.*

19. *See BERMANN ET AL., supra note 12, at 538.*

20. *See id.*

21. *See id.* at 556.

private individuals. Decisions are binding upon those to whom they are addressed.²²

4. Recommendations and opinions — Issued by the Commission, Council, Parliament, Economic and Social Committee, and Committee of the Regions. They give non-binding Community views on a number of topics, normally to encourage desirable, but perhaps un-enforceable, good practices throughout the European Union (“EU”). These may be addressed to Member States and economic operators.²³

There are also additional publications that, while not binding, carry weight within the Community. They are as follows:

1. Resolutions — Issued by the Council and/or the Parliament. Resolutions are intended to establish the fundamental principles on which Community action will be based and to determine the period within which the action will be taken. Resolutions are only declarations of intention which express mainly the “political wish” of the Council.²⁴
2. Green & White Papers — Prepared and issued solely by the Commission. Green Papers focus on a particular area of interest for which the Community has not yet produced legislation. A Green Paper is designed to be a consultative document, addressed to interested parties, all of which are then invited to give their input to any possible future legislation. Similar to Green Papers, White Papers are used as vehicles for the development of policy in areas that have not yet come under existing legislation. White Papers focus on broader areas.²⁵
3. Communications — Prepared by the Commission. Communications are usually produced as a result of comments received after the release of a Green Paper. The Commission has also issued Communications on the interpretation of Court cases and on several other subjects.²⁶
4. Studies — Studies are usually prepared by a third party at the request of the Commission. They are designed to be an overview of a particular area of activity within the

22. See E.C. Treaty, *supra* note 2, art. 249, O.J. C 325/1 (2002).

23. See *id.*

24. See *Business Guide*, *supra* note 12, § 4.

25. See *id.*

26. See *id.*

EU.²⁷

The Court of Justice has the authority to review legislative acts of the institutions of the European Community.²⁸ Although the judgments of the Court are “essentially declaratory,” Article 233 of the E.C. Treaty provides that when an act is declared void, the institution must “take the necessary measures to comply with the judgment.”²⁹ Legislative acts may be challenged by the Council, the Commission, Member States, Parliament, the European Central Bank, and the Court of Auditors.³⁰ Private parties may also institute proceedings against decisions of an institution “addressed to that person or against a decision which . . . is of direct and individual concern to the former.”³¹

II. EVOLUTION THROUGH THE 1980s

The first European Community legislative action directly concerning banking and consumer policy began in the early 1970s. At the Paris Summit conference in Paris in October 1972, the Heads of State or Government emphasized the need for the “strengthening and coordination of action for consumer protection within the European Economic Community”³² The result was the Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy (“1975 Programme”), adopted in 1975.³³ In 1981, the Council adopted the Second Programme of the European Economic Community for a Consumer Protection and Information Policy.³⁴ These two Programs set out the position of the Community on consumer protection for the first time since the sign-

27. *See id.*

28. *See* E.C. Treaty, *supra* note 2, arts. 230-31, O.J. C 325/1 (2002).

29. E.C. Treaty, *supra* note 2, art. 233, O.J. C 325/1 (2002). *See* BERMANN ET AL., *supra* note 12, at 130.

30. *See* BERMANN ET AL., *supra* note 12, at 129-32.

31. E.C. Treaty, *supra* note 2, art. 230, ¶ 4, O.J. C 325/1 (2002).

32. Council Resolution of 14 April 1975, O.J. C 92/1 (1975) (on a Preliminary Program of the European Economic Community for a consumer protection and information policy). *See* Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, O.J. C 92/2 (1975) [hereinafter 1975 Programme].

33. *See id.*

34. *See* Council Resolution of 19 May 1981, O.J. C 133/1 (1981) (on a Second Programme of the European Economic Community for a Consumer Protection and Information Policy).

ing of the Treaty.³⁵ The 1975 Programme called for, among other things, “effective protection against damage to consumers’ economic interests”³⁶ Specifically, the Council called for action to harmonize the general conditions of consumer credit and asked the Commission to submit proposals.³⁷ It also called for action to protect the consumer against false or misleading advertising³⁸ and to protect consumers from unfair commercial practices in areas such as contract terms.³⁹

In regard to banking, in 1973 the Council adopted Directive 73/183/EEC (“1973 Directive”), on the freedom of banks to provide services and establish themselves in States outside of the Member States where they were headquartered.⁴⁰ In 1977, the Council passed the First Banking Directive.⁴¹ The 1973 Directive applied the national treatment principle, which required the equal regulatory and supervisory treatment of all institutions operating in one country regardless of their nationality.⁴² The First Banking Directive also applied the national treatment principle,⁴³ but also started the process of harmonizing Member State laws. For example, in Article 3 of the Directive the Council required Member States to require banks to obtain authorization before commencing their activities. They were to establish the requirements for such authorization, subject to specific standards.⁴⁴

The steps in these Directives were very limited. For example, in the First Directive, Member States could still “make the commencement of business in their territory by branches of credit institutions covered by [the First Banking] Directive which have their head office in another Member State subject to authorization according to the law and procedure applicable to

35. *Id.* ¶ 1, O.J. C 133/1, (1981).

36. 1975 Programme, *supra* note 32, ¶ 14 B, O.J. C 92/2 (1975).

37. *See id.* ¶¶ 20-21, O.J. C 92/2 (1975).

38. *See id.* § II, ¶ 22 (ii), O.J. C 92/2 (1975).

39. *See id.* § II, ¶ 24 (iii), O.J. C 92/2 (1975).

40. *See* Directive 73/183/EEC, O.J. L 194/1 (1973) (on The Abolition of Restrictions on Freedom of Establishment and Freedom to Provide Services for Self-Employed Activities of Banks and other Financial Institutions Directive) [hereinafter 1973 Directive]; *see also* Jean Dermine, *European Banking: Past, Present and Future* (Dec. 2002), at <http://ssrn.com/abstract=357500>.

41. *See* First Banking Directive, *supra* note 1, O.J. L 322/30 (1977).

42. *See* 1973 Directive, *supra* note 40, art. 3 (1), O.J. L 194/1 (1973).

43. *See* First Banking Directive, *supra* note 1, art. 4, O.J. L 322/30 (1977).

44. *See id.* art. 3, ¶¶ 2-4, O.J. L 322/30 (1977).

credit institutions established on their territory.”⁴⁵ Further, a Member State could withdraw authorization for one of several reasons, including a situation where the host State’s national law provides for withdrawal of authorization.⁴⁶

Notwithstanding these limitations, the Council announced in the First Banking Directive that the results of the process in which they were engaged “should be to provide for overall supervision of a credit institution operating in several Member States by the competent authorities in the Member State where it has its head office”⁴⁷ Thus, the Council strategy at the time was to temporarily allow a host State to continue to supervise banks that entered it from another Member State, but its long-term goal was the transfer of that power to the State where the bank had its head office.

In the meantime, case law was developing that would have a direct impact on the internal market and banks. In 1974, in the *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* case involving the freedom of movement of services,⁴⁸ Dutch authorities had refused to allow a Dutch national residing in Belgium to represent a party in a Dutch administrative proceeding pursuant to a Dutch law requiring legal representatives to be residents of the Netherlands.⁴⁹ The Court overturned the Dutch law on the basis of Article 59 (now Article 49) but added that in certain circumstances “specific requirements imposed on the person providing the service cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules justified by the general good”⁵⁰ In the 1977 *Rewe-Zentral vs. Bundesmonopolverwaltung Für Branntwein* (“*Cassis de Dijon*”) case,⁵¹ the Court ruled that the administrative decision in question, which prohibited the import of a French liqueur into Germany because it did not meet certain German legal specifications, violated Article 30 (ex Article 36) of the E.C. Treaty.⁵² The Court recognized that obstacles to the

45. *Id.* art. 4, O.J. L 322/30 (1977).

46. *See id.* art. 8(e), O.J. L 322/30 (1977).

47. *Id.* Recital ¶ 3, O.J. L 322/30 (1977).

48. Case C-33/74, [1974] E.C.R. 1299.

49. *See* BERMANN ET AL., *supra* note 12, at 662.

50. *Van Binsbergen*, [1974] E.C.R. 1299, ¶ 12.

51. Case C-120/78, [1979] E.C.R. 649 [hereinafter *Cassis de Dijon*].

52. Article 30 deals with quantitative restrictions on imports. *See* E.C. Treaty, *supra* note 2, art. 30, O.J. C 325/1 (2002).

free movement of goods must be accepted "in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of . . . the defence of the consumer"⁵³ but rejected Germany's assertion that the decision was, among other things for "the protection of the consumer against unfair commercial practices."⁵⁴ In 1984, in the *Ordre des Avocats au Barreau de Paris v. Klopp* case, the Court seemed to extend its reasoning in the above two cases to the freedom of establishment.⁵⁵

The Commission took its cue from the *Cassis de Dijon* case and concluded in a communication concerning the case to the Council:

Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country, and is marketed in the territory of the latter . . .

Only under very strict conditions does the Court accept exceptions to this principle, barriers to trade resulting from differences between commercial and technical rules are only admissible:

- If the rules are necessary, that is appropriate and not excessive, in order to satisfy mandatory requirements (public health, protection of consumers or the environment, the fairness of commercial transactions, etc.);
- If the rules serve a purpose in the general interest which is compelling enough to justify an exception to a fundamental rule of the Treaty such as the free movement of goods;
- If the rules are essential for such a purpose to be attained, i.e. are the means which are the most appropriate and at the same time least hinder trade.⁵⁶

Although not mentioning the *Cassis de Dijon* case by name, the Commission in its White Paper on Completing the Internal Market did indirectly refer to that case when discussing the free movement of goods. It stated that:

53. *Cassis de Dijon*, [1979] E.C.R. 649, ¶ 8.

54. *Id.* ¶ 9.

55. Case C-107/83, [1984] E.C.R. 2971.

56. Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), O.J. C 256/2, at 2 (1980) (emphasis added) [hereinafter 1980 Communication from the Commission].

[G]oods lawfully manufactured and marketed in one Member State must be allowed free entry into other Member States. In cases where harmonisation of regulations and standards is not considered essential from either a health/safety or an industrial point of view, immediate and full recognition of differing quality standards, food composition rules, etc. must be the rule. . . . (The importer into the importing Member State) must not be required to submit such a product to additional technical tests nor to certification procedures in the importing State.⁵⁷

Consistent with these positions, the Commission brought suit against Germany for, *inter alia*, violation of Articles 59 and 60 of the Treaty, pertaining to the free movement of insurance services.⁵⁸ Germany required non-German Community insurers to be established in Germany and to obtain a new authorization from German authorities before they could sell insurance in Germany. The Court held that the requirement of establishment in Germany violated the Treaty but that the authorization requirement did not.⁵⁹ The Court used what has become known as the “general good” exception to validate the German authorization requirement. The Court acknowledged that the German authorization requirements “constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided,”⁶⁰ but it ruled that the requirements were “justified on grounds relating to the protection of the consumer both as a policy-holder and as an insured person”⁶¹

The Court’s construction of the “general good” exception can be summarized as follows:

The freedom of movement of services is a fundamental principle of the Treaty that may be restricted only

- by provisions justified by an “imperative reason” that qualifies as a general good;⁶²

57. Completing the Internal Market: White Paper from the Commission to the European Council, COM 310, ¶ 77 (June 28, 1985) [hereinafter 1985 White Paper].

58. See *Commission v. Germany*, Case 205/84, [1986] E.C.R. 3755, [1987] 2 C.M.L.R. 69; see also *BERMANN ET AL.*, *supra* note 12, at 673.

59. *Germany*, [1986] E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69.

60. *Id.* ¶ 28.

61. See *id.* ¶ 46.

62. See *id.* ¶¶ 27 & 29. As an interesting side note, it appears that when a provision “is the very negation” of the freedom to provide services, the Court sets an even higher

- if there is an absence of harmonization at the Community level in the field under consideration;⁶³
- if the provisions are nondiscriminatory;⁶⁴
- if the interest is not safeguarded by provisions to which the out-of-State provider of a service is subject in the Member State of his establishment;⁶⁵
- if the provisions are appropriate in order to protect the interest that is a general good (appropriateness);⁶⁶ and
- if the provisions are necessary for achieving the “general good” objective, i.e., the same results cannot be obtained by less restrictive rules (proportionality).⁶⁷

The Court also stated that it would look at the nature of the services involved in each case.⁶⁸ The Court determined that the insurance industry “was a particularly sensitive area.”⁶⁹ The Court found that the Insurance industry is a complex field involving complex contracts between the insurer and the policy owner. The contracts are always standardized, leaving the policy holder no room for negotiation. The insurer is usually a great deal more sophisticated than the consumer. The consumer risks grave loss if the policy does not pay promptly. Performance by the insurer can be required many years in the future. Furthermore, the financial condition of the insurer at the time of the execution of the insurance contract and certainly in the future is difficult to determine. Finally, insurance is a mass phenomenon, and the administration of the service affects large numbers of people.⁷⁰

It was obvious from this case that the insurance industry and the Commission would have to deal with the “general good” ex-

standard. *Id.* ¶ 52. The provision must be “indispensable for attaining the objective pursued.” *Id.* ¶ 52.

63. *See id.* ¶ 36; *see also* *Pubblico v. Ratti*, Case C-148/78, [1979] E.C.R. 1629; *BERMANN ET AL.*, *supra* note 12, at 556.

64. *See Germany*, [1986] E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69.

65. *See id.* ¶¶ 27 & 29.

66. *See id.* ¶ 27.

67. *See id.* ¶¶ 29 & 41; *see also* *Reinhard Gebhard*, Case C-55/94, [1995] E.C.R. I-4165, [1996] 1 C.M.L.R. 603; Commission Interpretative Communication Concerning the Free Movement of Services across Frontiers, O.J. C 334/3 (1993) [hereinafter 1993 Commission Interpretive Communication]; Michel Tison, *Unraveling the General Good Exception: The Case of Financial Services*, in *SERVICES AND FREE MOVEMENT IN EU LAW 340* (Mads Andenas & Wulf-Henning Roth eds., 2002).

68. *See Germany*, [1986] E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69.

69. *Id.* ¶ 30.

70. *See id.* ¶¶ 27, 30-31.

ception at any time they sought to craft directives attempting to supervise the industry. However, the implications for the banking industry were just as clear. The banking industry is similar to the insurance in many ways and, like the insurance industry, is a particularly sensitive area for the consumer. The banking industry fits all of the factors mentioned by the court in regard to the nature of the services involved. Banking is a complex field, many times involving complex contracts between the bank and the consumer. Contracts are often standardized, leaving the consumer no room for negotiation. The bank is often a great deal more sophisticated than the consumer. The consumer risks grave loss to a bank, both as a depositor and borrower, if the relationship is not as the consumer may understand it. Performance by the bank can be required many years in the future. Furthermore, the financial condition of a bank at the time of a consumer's entry into a relationship with it, and certainly in the future, is difficult to determine. Finally, banking is a mass phenomenon, and the administration of the service affects large numbers of people. Thus, in any area not clearly covered (harmonized) by a banking directive, the banking industry was going to have to deal with the general exception rule and with the myriad of local Member State rules that govern banking. For example, at that time no directives dealt with loan provisions, credit ceilings, specific contract terms that might be onerous, types of deposits that could be offered, the control of interest rates, marketing of services, whether contracts could be entered into away from bank premises, what other services could be offered to bank customers, or usury problems.⁷¹ As we shall see, later directives discussed below changed some of this, but by no means eliminated the opportunity of the Court to use the "general good" exception in all areas.

III. THE LATE 1980s IN LIGHT OF COMMISSION V. GERMANY

The Commission's 1985 White Paper on Completing the Internal Market called for a new approach to create a common market in several areas, including the financial area. It referred favorably to the *Cassis de Dijon* decision and the Commission's

71. See *Dermine*, *supra* note 40, at 12 (discussing the limitations on Member State limits on banks in the early 1980s).

interpretation of that case in 1980.⁷² As stated above,⁷³ the Commission considered the approval of goods by the Member State in which the goods were manufactured to be sufficient protection for consumers in another Member State of the Community. That is, home country control was sufficient in most situations. Specifically, in the 1985 White Paper it stated that:

The Commission considers that it should be possible to facilitate the exchange of such "financial products" at a Community level, using a minimal coordination of rules (especially on such matters as authorisation, financial supervision and reorganization, winding up, etc) as the basis for mutual recognition by Member States of what each does to safeguard the interests of the public. . . . Such harmonisation, particularly as regards the supervision of ongoing activities, should be guided by the principle of "home country control."⁷⁴

Consistent with the 1985 White Paper, the Council passed the Second Banking Directive for the development of the internal market in banking in 1989.⁷⁵ The directive primarily used the two tactics set out in the 1985 White Paper: minimum harmonization of essential standards and home State control.⁷⁶ In theory, once the Council has passed minimum harmonization legislation in a field, a host Member State is no longer entitled to invoke the "general good" exception in that field in order to justify the application of its own laws against a foreign service provider.⁷⁷

Thus, in the directive Articles 4 and 5 harmonized authorization conditions. That is, a Member State could not authorize banks with less than €5 million, or in particular categories, less

72. See 1980 Communication from the Commission, *supra* note 56.

73. See *Dermine*, *supra* note 40, at 10.

74. 1985 White Paper, *supra* note 57, ¶¶ 102-03.

75. See Second Council Directive 89/646/EEC of 15 December 1989, O.J. L 386/1 (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), *later codified in* Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000, O.J. L 126/1 (2000) (relating to the taking up and pursuit of the business of credit institutions) [hereinafter Second Banking Directive].

76. See *id.* Recital ¶ 12, O.J. L 126/1 (2000).

77. See Tison, *supra* note 67, at 321-81; see also 1993 Commission Interpretive Communication, *supra* note 67.

than €1 million.⁷⁸ A Member State also had to require that a bank notify it of individuals and other entities that had large holdings in the bank before the bank received authorization. The Member State could issue an authorization then only if the shareholders or members were suitable.⁷⁹ Article 6 prohibited host Member States from requiring authorization or endowment capital for branches from other Member States. In regard to an existing bank, Article 11 required any party who wished to obtain a large holding in the bank or increase her holdings to receive approval from the home State. Article 10 harmonized rules concerning the right of banks to continue in business. In particular, “own funds” normally could not fall below the amount of initial capital required in Article 4. Article 12 generally limited holdings by a bank in non-financial institutions to 15% of the bank’s own funds. Article 13 gave the home Member State authority over the prudential supervision of a credit institution. Article 16 harmonized confidentiality requirements. Article 18 permitted transborder services without branching. The directive also initiated a new key policy by setting forth activities that a bank could provide in any Member State in which it was not headquartered, the universal banking activities.⁸⁰ Applying the principle of subsidiarity, the directive allowed the home State to establish stricter rules than required by the directive in several areas, including the three mentioned above in Articles 4, 10, and 12.⁸¹

In spite of these tactics, in the Preamble and several different articles in the directive, the Council recognized the host State’s right to exercise powers over a branch of a bank from another Member State in the name of the general good.⁸² Article 19(4) required a host State to notify a credit institution of any conditions it must meet to satisfy an interest of the general good in order to commence activities in that State. Article 21(11) allowed a host State to impose restrictions on a bank’s advertising in the interest of the general good. However, Article

78. See Second Banking Directive, *supra* note 75, arts. 4(1) & (2), O.J. L 126/1 (2000).

79. See *id.* art. 5, O.J. L 126/1 (2000).

80. See *id.* art. 18, Annex ¶¶ 1-14, O.J. L 126/1 (2000); see also BERMANN ET AL., *supra* note 12, at 1194-97.

81. See Second Banking Directive, *supra* note 75, Recital ¶ 8, O.J. L 126/1 (2000).

82. See *id.* Recitals ¶¶ 16 & 17, arts. 19(4), 21(5)-21(11), O.J. L 126/1 (2000).

21(5) appears to be the most sweeping use of the "general good" exception. It permitted host States to enforce any "legal rules adopted in the interest of the general good."⁸³

As an interesting coincidence, at about the same time the Court of Justice was creating waves with its decision in the *Commission v. Germany* case, the European Community, the Commission, and the Council began a series of communications, resolutions, regulations, directives, and treaty provisions in the consumer protection area, including consumer credit protection, that turned into an avalanche of legislation that has not slowed down even today.

The Single European Act⁸⁴ was adopted in 1986. This facilitated legislation to achieve the internal market by adding Article 100a, which provides for the use of a qualified majority by the Council in order to adopt actions which "have as their object the establishment and functioning of the internal market."⁸⁵ Further banking law and consumer protection legislation was in turn facilitated because in both fields the establishment of the internal market under Article 100a was often used as the basis for legislation. The Article also codified the principle that the Commission in its proposals "will take as a base a high level of protection" concerning, among other matters, consumer protection.⁸⁶

In 1987, the Council adopted its first Directive that specifically applied the principles of consumer protection to the banking industry (as well as other financial service industries). The 1987 Consumer Credit Directive⁸⁷ was adopted by use of the recently added Article 100a of the E.C. Treaty. It stated that the wide differences in the laws of the Member States concerning consumer credit hurt the free movement of goods and services and limited the functioning of the common market.⁸⁸ The con-

83. *Id.* art. 21(5), O.J. L 126/1 (2000).

84. *See* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

85. *See* E.C. Treaty, *supra* note 2, art. 95(1), O.J. C 325/1 (2002).

86. *Id.* art. 100(a)(3), O.J. C 325/1 (2002).

87. Council Directive 87/102, O.J. L 42/48 (1987) [hereinafter 1987 Consumer Credit Directive] (Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations, and administrative provisions of the Member States concerning consumer).

88. *See id.* Recital ¶¶ 1-4, O.J. L 42/48 (1987).

sumer should be protected against unfair credit terms, and harmonization of the general conditions governing consumer credit should be undertaken as a priority.⁸⁹ This Directive allowed the Member States to set more stringent laws.⁹⁰ It dealt primarily with the calculation of the annual percentage rate, which had to be disclosed to the consumer.⁹¹ However, it also dealt with, among other things, the harmonization of consumer credit contracts,⁹² prepayment rules,⁹³ rules concerning the relationship of the parties during the existence of the contract,⁹⁴ and defenses consumers can raise.⁹⁵ It required Member States to ensure that entities offering credit were properly established and supervised.⁹⁶

At the end of the 1980s one can begin to see a pattern in regard to the relationship between consumer protection policies and the banking internal market. In the 1970s the Council and Commission would have preferred that the financial internal market, including banking, be strengthened by use of harmonization.⁹⁷ In the 1985 White Paper this strategy was modified to include home country control, along with minimum harmonization.⁹⁸ At the same time the Court of Justice used the gaps left in the harmonization of the banking industry as openings to apply the "general good" exception. The Commission and the Council also started adopting consumer protection measures for the entire Community, partly in order to encourage the free movement of goods and services, which might otherwise be limited by diverse national consumer protection rules. Thus, national consumer protection rules were a hindrance to the development of the internal market; yet, at the same time, consumer protection became a goal of the Community in its effort to strengthen the internal market.

89. See *id.* Recital ¶ 5, O.J. L 42/48 (1987).

90. See *id.* art. 15, O.J. L 42/48 (1987).

91. See *id.* art. ¶ 4(2)(a), O.J. L 42/48 (1987).

92. See *id.* art. 4, O.J. L 42/48 (1987).

93. See *id.* art. 8, O.J. L 42/48 (1987).

94. See *id.* arts. 6(2) & (3), O.J. L 42/48 (1987).

95. See *id.* art. 9, O.J. L 42/48 (1987).

96. See *id.* art. 12, O.J. L 42/48 (1987).

97. See First Banking Directive, *supra* note 1, O.J. L 322/30 (1977).

98. See 1985 White Paper, *supra* note 57.

IV. *THE 1990s*A. *Legislation*

In 1992, the European Community adopted the Treaty of Maastricht, which substantially amended the E.C. Treaty.⁹⁹ The Treaty of Maastricht implemented massive changes in the relationship of the European Community Nations. However, it did little to develop consumer protection policy in regard to the provision of financial services. The Treaty of Maastricht did generally highlight the importance of consumer protection, introducing a new E.C. Treaty Article 129a on consumer interests, which directed the Community to contribute to "protecting the health, safety and economic interests of consumers."¹⁰⁰ Also, Article 3, which lists the fields of Community activities, was amended to include Article 3(s) which stated that the activities of the Community will include "a contribution to the strengthening of consumer protection . . ."¹⁰¹ Article 129(a) stated that the Community (1) "shall contribute to the attainment of a high level of consumer protection,"¹⁰² (2) shall take into account consumer protection "in defining and implementing other Community policies and activities,"¹⁰³ and (3) shall adopt measures to attain the above objectives through measures to complete the internal market.¹⁰⁴ However, it appears that the E.C. Treaty limited the Community's ability to enact legislation that has as its goal the outright insurance of a high level of consumer protection by stating in Paragraph 3(b) of the Article that consumer protection will be pursued outside the area of expansion of the internal market only in order "to support, supplement and monitor the policy pursued by the Member States."¹⁰⁵ In addition, the Member States retained the right to enact more stringent protective measures than those adopted by the Community pursuant to

99. See Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by SEA, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741). The TEU was signed at Maastricht, the Netherlands, on February 7, 1992, and entered into force on November 1, 1993.

100. *Id.* art. 129a, O.J. C 224/1 (1992).

101. *Id.* art. 3(s), O.J. C 224/1 (1992).

102. *Id.* art. 129a(1), O.J. C 224/1 (1992).

103. *Id.* art. 129a(2), O.J. C 224/1 (1992).

104. See *id.* art. 129a(3)(a), O.J. C 224/1 (1992).

105. *Id.* art. 129a(3)(b), O.J. C 224/1 (1992).

Paragraph 3(b). The result is that any strong consumer protection legislation by the Council would still usually be based on E.C. Treaty Article 95 (ex Article 100a), i.e., the Community's right to establish the internal market.

In 1993, the Council adopted the Directive on unfair terms in consumer contracts.¹⁰⁶ The Directive relied on Article 95 (ex 100a) for its authority.¹⁰⁷ By defining seller or supplier broadly, the Directive included contracts between banks and its individual customers.¹⁰⁸ This Directive had a real impact on the banking industry, but it still failed to deal with a fairly broad array of bank activities. Article 3 for the most part limited the application of the directive to pre-formulated standard contracts (such as, in the banking sector, loan agreements and surety agreements).¹⁰⁹ Furthermore, the Directive left loopholes for the creditor. For example, Article 4 set out a general rule concerning the determination whether a contract was unfair. The party making the determination was to take into account the nature of the services to be rendered by referring, at the time of conclusion of the contract to, "all circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent."¹¹⁰ However, the price, as opposed to the services supplied, was not to be considered if the terms were in plain language. The Directive adopted an annex that contained "an indicative and non-exhaustive" list of the terms it regarded as unfair.¹¹¹ Subparagraphs (g) and (j) of the Annex prohibited the supplier from having contract provisions terminating a contract without reasonable notice or enabling the supplier to alter the terms of the contract unilaterally without a valid reason,¹¹² but these Subparagraphs were limited by Subparagraphs 2(a) and (b). These two Subparagraphs applied specifically to financial services. Subparagraph (a) allowed a supplier to terminate a contract without notice for a "valid reason" if the consumer is notified immediately thereafter.¹¹³ Sub-

106. See Council Directive 93/13/EEC, O.J. L 95/29 (1993) (on unfair terms in consumer contracts).

107. See *id.* pmb. ¶ 1, O.J. L 95/29 (1993).

108. See *id.* art. 2(c), O.J. L 95/29 (1993).

109. See *id.* art. 3, O.J. L 95/29 (1993).

110. *Id.* art. 4(1), O.J. L 95/29 (1993).

111. See *id.* art. 3(3), O.J. L 95/29 (1993).

112. See *id.* Annex ¶ 1(g) & (j), O.J. L 95/29 (1993).

113. See *id.* Annex ¶ 2(a), O.J. L 95/29 (1993).

paragraph (b) permitted the supplier to alter interest rates and other charges without notice for a "valid reason" if the consumer is notified at the earliest opportunity thereafter and the consumer can dissolve the contract immediately.¹¹⁴

Notwithstanding the above, the Directive contained some quite valuable provisions. The Annex prohibited terms of a contract that, among other things, required a consumer to pay a disproportionately high sum if the consumer failed to fulfill his obligations under the contract,¹¹⁵ irrevocably bound the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract,¹¹⁶ enabled the seller or supplier to alter the terms of the contract unilaterally without a valid reason specified in the contract,¹¹⁷ or hindered the right of the consumer to take legal action or exercise other legal remedies.¹¹⁸ In the banking area, these provisions limited a bank's power to charge high default fees, limited the bank's ability to unilaterally modify loan and deposit agreements and prevented the bank from inserting provisions by which a borrower or depositor could not seek legal remedies for bank defaults.

The Directive was not intended to assist in the creation of the internal market for the banking industry. Partial harmonization was the method by which the Council stated it chose to implement the rules set out in the Directive.¹¹⁹ The Directive, by its terms, also set a floor for the Member States to observe, and a weak one at that. In Paragraph 13 of the recitals to the directive, the Council "presumed" that the contractual provisions that any Member State required in contracts covered by the Directive did not contain unfair terms.¹²⁰ Article 1 of the Directive specifically stated that such provisions were not subject to the Directive.¹²¹ In Article 8, the directive stated that the Member States could adopt or retain "the most stringent provisions compatible with the Treaty in the area covered by this Directive"¹²² The

114. *See id.* Annex ¶ 2(b), O.J. L 95/29 (1993).

115. *See id.* Annex ¶ 1(e), O.J. L 95/29 (1993).

116. *See id.* Annex ¶ 1(i), O.J. L 95/29 (1993).

117. *See id.* Annex ¶ 1(j), O.J. L 95/29 (1993).

118. *See id.* Annex ¶ 1(q), O.J. L 95/29 (1993).

119. *See id.* Recital ¶ 12, O.J. L 95/29 (1993); *see also* art. 1(1), O.J. L 95/29 (1993).

120. *See id.* Recital ¶ 13, O.J. L 95/29 (1993).

121. *See id.* art. 1(2), O.J. L 95/29 (1993).

122. *Id.* art. 8, O.J. L 95/29 (1993).

result is that, although the Directive is important because it recognized certain minimum requirements in consumer contracts, it did not go very far to prevent Member States from permitting banks to use standard form contracts with consumers whose terms might vary considerably from State to State, so long as the terms did not clearly violate consumer protection provisions.

The Council issued the Directive on Cross-border Credit Transfers ("DCCT") in 1997.¹²³ One purpose of the DCCT was to establish "the minimum requirements needed to ensure an adequate level of customer information both before and after the execution of a cross-border credit transfer."¹²⁴ The DCCT included complaint and redress procedures for customers, together with the arrangements for access thereto.¹²⁵ It also established minimum execution requirements which institutions offering cross-border credit transfer services should adhere to, including the obligation to execute a cross-border credit transfer in accordance with the customer's instructions.¹²⁶ This Directive was followed by an even stronger regulation on the Euro in 2001,¹²⁷ by which the Council and Parliament mandated that, among other things, charges for cross-border payments in euro were to be the same as payments within a Member State.¹²⁸ The regulation applies to payments up to €12,500 (effective January 1, 2006, €50,000) within the Community, but does not apply to payments made between institutions for their own accounts.¹²⁹ It also required institutions to provide customers certain information about their charges and the changes thereto.¹³⁰

B. *The Court of Justice*

In the 1990s, the Court of Justice provided new guidance in regard to the "general good" exception. In 1991, in the *Commission v. France* and *Sager v. Dennemeyer & Co. Ltd.* cases, the Court made it clear that the Treaty provisions prohibited all (even non-

123. Directive 97/5/EC of the European Parliament and of the Council, O.J. L 43/25 (1997) (on cross-border credit transfers).

124. *Id.* Recital 8, O.J. L 43/25 (1997).

125. *See id.*

126. *See id.*

127. *See* Regulation (EC) No. 2560/2001 of the European Parliament and of the Council, O.J. L 344/13 (2001) (on cross-border payments in Euro).

128. *See id.* art. 1, O.J. L 344/13 (2001).

129. *See id.* art. 3, O.J. L 344/13 (2001).

130. *See id.* art. 4, O.J. L 344/13 (2001).

discriminatory) restrictions on free movement of services unless they fit within the "general good" exception.¹³¹ In the *Commission v. France* case, France required tourist guides accompanying groups of tourists from another Member State to possess a license obtained normally by passing an examination. The government required the license for guides taking tourists to places that could be visited only with a specialized professional guide.¹³² In *Sager*, the Court applied the "general good" rule to a case in which a party with its registered office in the United Kingdom was providing patent renewal services in Germany.¹³³ On the other hand, the Court ruled in the *Gouda v. Commissariaat voor de Media* ("*Mediawet*") case that even discriminatory rules may be acceptable if "they can be brought within the scope of an express exemption," such as public policy, public security or public health, exemptions contained in then-Article 56 (now Article 46).¹³⁴ This ruling was made within the context of a proceeding between ten operators of cable networks and the institution responsible for supervising the operation of cable networks in the Netherlands, the Commissariaat voor de Media. The Commissariaat imposed a law governing the supply of radio and television programs, radio and television license fees, and press subsidies concerning the transmission of advertising contained in radio or television programs broadcast from abroad.¹³⁵

In the case of *Alpine Investments BV v. Minister van Financien*,¹³⁶ the Court made several points. The company was a Dutch securities brokerage company making cold-calls to potential customers outside the Netherlands. The Netherlands instituted a rule that no company in the Netherlands could make cold-calls anywhere, including calls into other Member States. Alpine Investments had no branches anywhere but the Netherlands. The Court determined that, first, the existence of an identifiable recipient of services was not necessary in order to apply Article 49 concerning the provision of services.¹³⁷ Second,

131. See *Commission v. France*, Case C-154/89, [1991] E.C.R. I-659; *Sager v. Denemeyer & Co. Ltd.*, Case C-76/90, [1991] E.C.R. I-4221.

132. *France*, [1991] E.C.R. I-659, ¶ 1.

133. *Sager*, [1991] E.C.R. I-4221, ¶¶ 15-17.

134. *Gouda v. Commissariaat voor de Media*, Case C-288/89, [1991] E.C.R. I-4007 [hereinafter *Mediawet*].

135. See *id.* ¶ 2.

136. Case C-384/93, [1995] E.C.R. I-1141, [1995] 2 C.M.L.R. 209.

137. See *id.* ¶ 19.

the Court ruled that Article 49 covered both importing and exporting services.¹³⁸ Third, it ruled that the Dutch rule could be justified under the “general good” exception.¹³⁹ The Court, in a sense, used two State interests to reach its decision. It stated that, first, protection of consumers outside of the Netherlands was not a direct interest of that State, but that such protection does nonetheless have a direct effect on the good reputation of Dutch financial services. The Court then held that maintaining the good reputation of the national financial sector constitutes an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services.¹⁴⁰ It stated that the prohibition of calls protected consumers and also maintained the good reputation of the national financial sector. The prohibition protected “investor confidence in the financial markets of that State”¹⁴¹

In response, Alpine Investments asserted that, even so, the measures taken by the Netherlands were not necessary to protect consumers (i.e., they were not proportional). It pointed to a less restrictive rule in the United Kingdom. That rule only required the calling company to record its unsolicited calls. In response, the Court ruled that, among other things, “the fact that one Member State imposes less strict rules than another Member State does not mean that the latter’s rules are disproportionate and hence incompatible with Community Law.”¹⁴² That is, just because one Member State’s laws are stricter than another does not mean the stricter law is automatically disproportionate when analyzing the proportionality factor in the “general good” exception.

In the process of making these rulings, the Court created an additional question: would the nature of the financial services and products to be provided and the level of sophistication of the consumer be factors in applying the “general good” excep-

138. *See id.* ¶ 31.

139. *See id.* ¶ 56.

140. *See id.* ¶ 43.

141. *Id.* ¶ 50.

142. *Id.* ¶ 51. *See* Criminal Proceedings Against Mac Quen, Case C-108/96, [2001] E.C.R. I-837, [2002] 1 C.M.L.R. 29. It is interesting to note that if the Court had not ruled that the Netherlands prohibition was acceptable under the general good exception, at some later point it would probably have had to make a decision about the U.K. rule and possibly strike down the U.K. rule.

tion?¹⁴³ As discussed above, in the *Commission v. Germany* case, the Court had stated that they might be. The issue came up again in this case without full resolution.

In the *Parodi v. Banque de Bary* case, the Court confirmed the application of the “general good” exception to banking services.¹⁴⁴ More importantly, it seems to have resolved the issue concerning the nature of the service and the sophistication of the consumer. In *Parodi*, a Dutch Bank in Amsterdam made a loan to a French company (“Parodi”) in 1984. At the time, there was a French law that required foreign banks to be registered in order to supply banking services. The Dutch bank was not registered. The First Banking Directive was in effect, but the Second Banking Directive had not yet taken effect.

In 1990, Parodi brought an action against the bank to have the loan declared void. The Court in this case was not asked to make a determinative ruling on the facts but was only asked to establish the criteria by which the national court could make its decision.¹⁴⁵ The Court held that the French law would violate Article 49 (ex Article 59) of the E.C. Treaty in regard to the freedom of movement of services unless, in effect, it met the criteria of the “general good” exception.¹⁴⁶ The Court indicated that consumer protection was a general good, but it pointed out that even so the rule had to be necessary to protect the recipient of services (i.e., appropriate). The Court indicated here that the French rule seemed to be more for the protection of a saver/depositor rather than a borrower.¹⁴⁷ In addition, the Court made it clear that “a distinction must be drawn according to the nature of the banking activity in question and of the risk incurred by the person for whom the service is intended.”¹⁴⁸ The Court pointedly indicated that the State may have less interest in protecting some types of borrowers (here a sophisticated company) than others.¹⁴⁹

143. *See id.* ¶ 42.

144. Case C-222/95, [1997] E.C.R. I-3899, [2002] 1 C.M.L.R. 29.

145. *See* E.C. Treaty, *supra* note 2, art. 234, O.J. C 325/1 (2002).

146. *See Parodi*, [1997] E.C.R. I-3899, ¶ 32, [2002] 1 C.M.L.R. 29.

147. *See id.* ¶ 28.

148. *Id.* ¶ 29.

149. *See id.* One might assume that, based on the Court’s analysis, the French court would hold that the French rule did not satisfy the conditions set out by the Court and, thus, rule in favor of the bank. This was not the case. The French court later ruled in favor of Alpine Investments. *See Tison*, *supra* note 67, at 341.

The Commission has interpreted this position to be that it is necessary to give consideration, in each individual case, to the need for protection of the recipient of the banking services offered by examining the nature of the service and the level of sophistication of the recipient.¹⁵⁰ “In other words, in order to respect the principle of proportionality, they (the Member States) should take account of the degree of vulnerability of the person they are setting out to protect.”¹⁵¹ Thus, in the banking area, as well as in other financial service areas, one might assume that rules that tend to protect the more vulnerable are more likely to be enforced under the “general good” exception than rules that protect the more sophisticated.

The Court in the *Parodi* case, however, did not stop with the above ruling. It seemed to imply that its ruling resulted from the fact that the “general good” exception should be applied only because the First Banking Directive imposed certain minimum conditions on the Member States.¹⁵² The First Banking Directive was only a first step toward “mutual recognition by Member [S]tates of authorizations issued by each of them to credit institutions. It is common ground that such mutual recognition was made possible only by the entry into force of” the Second Banking Directive.¹⁵³ Assuming that this interpretation of the Court’s reasoning is correct, Sideek Mohamed, Associate Professor of Law, Stockholm University,¹⁵⁴ has asserted that the Court should be (and has been) stricter in allowing such national rules intended for some general good after the passage of the Second Banking Directive.¹⁵⁵

In two cases involving banking activities that have been decided since the *Parodi* case, the Court has ruled that national measures have violated one of the “freedoms.” In the *Criminal*

150. See Commission Interpretive Communication: Freedom to provide Services and the Interest of the General Good in the Second Banking Directive, SEC (97) 1193 Final (June 20, 1997).

151. *Id.* ¶ 24-25.

152. See *id.* ¶ 25.

153. *Id.* ¶ 24.

154. See Staff Catalogue, Department of Law, Stockholm University, available at <http://www.juridicum.su.se/jurweb/kontakt/person.asp?lang=eng&personid=91>.

155. See Sideek Mohamed, *Consumer Protection in the EC Financial Market*, 8 CONSUMER L.J. 383 (2001).

Proceedings Against André Ambry case,¹⁵⁶ French law required that if a travel agent had obtained a bank guarantee from a non-French bank in order to secure its activities, the non-French bank had to further obtain an agreement from a French institution assuring the availability of funds. The Court ruled that the French law violated both Article 49 of the Treaty concerning the freedom of services and the right to provide services under the Second Banking Directive.¹⁵⁷ The law discouraged financial institutions established in other Member States from offering the security required directly to a travel agent in France. The Court then looked at the factors concerning whether the law could be justified as a protection of consumers (i.e., did the “general good” exception apply). The Court stated that the law could not be justified in that it applied the requirement of security not only to guaranty the repatriation of travelers, but also applied the requirement to all securities provided by credit institutions and insurance companies in the Member States.¹⁵⁸ The law was, therefore, “not commensurate to the objective pursued” (i.e., not proportional). In addition, the Court ruled that even the portion of the law that might apply to providing security for the repatriation of travelers was not justified because funds can be made available between European banks very quickly.¹⁵⁹

In the *Caixa-Bank France v. Ministère de l'Economie, des Finances et de l'Industrie* case, France prohibited banks established in France from paying interest on demand accounts. The Court ruled that the application of this prohibition against a subsidiary of a Spanish bank established in France violated the freedom of establishment provisions of the Treaty.¹⁶⁰ To justify the law's restriction on freedom of establishment, the French Government asserted that the law, among other things, protected consumers. It asserted “that the prohibition was necessary for maintaining the provision of basic banking services without charge. Introducing remuneration for sight accounts would substantially in-

156. Case C-410/96, [1998] E.C.R. I-7875 (Dec. 1, 1998) (reference for a preliminary ruling from the Tribunal de Grande Instance, Metz).

157. *See id.* ¶ 39.

158. *See id.* ¶ 33-34.

159. *See id.* ¶ 36.

160. *See Caixa-Bank France v. Ministère de l'Economie, des Finances et de l'Industrie*, Case C-442/02, [2004] E.C.R. __, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62002J0442.

crease the operating costs of banks, which, to recover those costs, would increase charges and introduce charges for the various banking services currently provided free, in particular the issuing of cheques."¹⁶¹ The Court, however, stated that the measure went beyond what is necessary to attain its objective.¹⁶² The Court speculated that a more appropriate approach to the problem might be to allow "consumers to choose between an unremunerated sight account with certain basic banking services remaining free of charge and a remunerated sight account with the credit institution being able to make charges for banking services previously provided free, such as the issuing of cheques."¹⁶³ In other words, no law at all might be the proportionate response to the problem, leaving the issue to the market.

It should be noted that neither case modified the factors to consider regarding the "general good" exception. The Court merely applied the proportionality element of the exception to the pertinent law and found that law too broad. Of course, one could argue that the Court applied the facts in the cases more stringently against the exception, but it is hard to support that argument in these cases. Both involved fairly weak arguments in favor of the position that the laws in question gave any real protection to the consumer. They appeared to be more likely to protect local financial interests. Even so, these two cases alone probably are not enough to indicate a trend in the Court's rulings. For example, in the non-banking case of *Reisburo Broede v. Gerd Sandke*,¹⁶⁴ a German statute prohibited certain debt collection services without the representation of an attorney. A French collection service was attempting to use its managing director in Germany, a non-lawyer, to collect certain debts. The actions were dismissed since no attorney represented the service.¹⁶⁵ The Court of Justice ruled that the law in question was a restriction of the freedom to provide services.¹⁶⁶ However, it

161. *Id.* ¶ 20.

162. *See id.* ¶ 21.

163. *Id.* ¶ 22.

164. Case C-3/95, [1996] E.C.R. I-6511. *See* Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein, Case C-424/97, [2000] E.C.R. I-5123, [2002] 1 C.M.L.R. 11 in which the court recognized the application of the "general good" exception in a case in which the State governmental authority required a dental practitioner to have certain linguistic abilities. *See id.* ¶ 61.

165. *See id.* ¶ 11.

166. *See id.* ¶ 27.

stated that the law was justified by the "general good" exception, the general good being the protection of creditors or safeguarding "the sound administration of justice in relation to the provision of litigation services on a professional basis."¹⁶⁷ The Court rejected the arguments that the law was not proportional or appropriate.¹⁶⁸

During this period the Commission issued two Communications concerning the provision of services across Member State lines that dealt with the banking industry. In 1993, the Commission issued the *Commission Interpretive Communication Concerning the Free Movement of Services across Frontiers* ("1993 Communication").¹⁶⁹ In 1997, it issued the *Commission Interpretive Communication: Freedom to provide Services and the Interest of the General Good in the Second Banking Directive* ("1997 Communication").¹⁷⁰ Both of these communications interpreted the Court's position concerning the "general good" exception. Neither communication criticized the Court or its rulings in any way. However, both broadly interpreted the Treaty provisions creating the freedom to provide services and, in the case of the *1997 Communication*, the freedom of establishment, and narrowly interpreted the "general good" exception. For example, in the *1993 Communication*, the Commission went to some length to clarify that the prohibition on restrictions on the free movement of services applied to any restriction, even if non-discriminatory, if it was "liable to prohibit or otherwise impede the activities of the provider of services established in another Member State."¹⁷¹ The Commission then re-emphasized the point by asserting that this means that the prohibition "covers any measure which might hinder trade in services between Member States."¹⁷² The Communication then lists those State interests justifying a "general good" exception (e.g., consumer protection, protection of workers, etc.¹⁷³) and spends the remainder of the Communication emphasizing that

167. *Id.* ¶ 36.

168. *See id.* ¶ 40.

169. Commission Interpretative Communication Concerning the Free Movement of Services across Frontiers, O.J. C 334/3 (1993) [hereinafter 1993 Communication].

170. Commission Interpretive Communication: Freedom to provide Services and the Interest of the General Good in the Second Banking Directive, SEC (97) 1193 Final (June 20, 1997) [hereinafter 1997 Communication].

171. 1993 Communication, *supra* note 169, § III. 1.

172. *Id.*

173. *See id.* § III.2.(a).

the Court will not recognize local Member States restrictions on free movement of services if the public interest is already protected by rules of the State of establishment or if the result achieved by the restriction cannot be obtained by less restrictive rules.”¹⁷⁴

The 1997 *Communication* is broader than its 1993 predecessor. It deals with both the free movement of services and the freedom of establishment.¹⁷⁵ However, in the sections dealing specifically with the application of rules adopted in the interest of the general good, it seems to give the same message as the 1993 *Communication*. For example, in its analysis of the factors to consider in order to determine whether to apply the “general good” exception (lack of harmonization, proportionality, etc.), the Commission emphasized the need to examine the “nature of the services and the level of sophistication of the recipient.”¹⁷⁶ The Commission stated that there may be circumstances in which a more sophisticated customer would need less protection than others or that there may be transactions in which less protection is needed.¹⁷⁷ The Commission even gave a short tutorial on the procedures by which an institution can challenge a national measure that restricts a freedom that the institution considers unjustified.¹⁷⁸

One should also keep in mind that one can argue that the “general good” exception, as set out by the Court, is becoming a narrow exception in the financial services context. Consider the following. First, any Member State rule restricting the freedom of movement of services or the freedom of establishment must meet all six of the factors dealing with lack of harmonization, proportionality, appropriateness, etc.,¹⁷⁹ in order to fall under the exception. As stated above,¹⁸⁰ there is also some reason to believe that the Court is applying these criteria more strictly against the State restrictions. Second, the Court has stated that

174. *Id.* § III.2.(b) & (c).

175. 1997 *Communication*, *supra* note 170, pt. II, § B.

176. *Id.*

177. *See id.* For example, the Commission adopted a concept of the European Parliament and Council Directive 94/19/EC on deposit guarantees described as a “circumspect recipient of services.” O.J. L 135/5 (1994).

178. *See* European Parliament and Council Directive 94/19/EC, O.J. L 135/5 (1994).

179. *See supra* notes 62-67 and accompanying text.

180. *See* Mohamed, *supra* note 155, at 389-91.

it would look at the nature of the services involved in each case.¹⁸¹ As suggested by the *1997 Communication*, the Court may use this tactic to exempt certain categories of consumers from the need for protection. Finally, with the increased number of directives that were passed in the banking and consumer protection areas in the 1990s, there are simply fewer areas that are not harmonized and that, therefore, are open to Member State restrictions that might qualify under the “general good” exception. The next section of this Article is an example as to where the Commission may be headed in that regard.

V. *CURRENT CONSUMER PROTECTION PROPOSALS*

In 2002, the Commission issued a *Communication on Consumer Policy Strategy for 2002-2006*,¹⁸² which asserted that in order to ensure a high level of consumer protection, eliminate barriers to cross-border trade and encourage cross-border shopping, the Community:

must go further to enable consumers and business to realize the benefits of the internal market. Central to this idea was the establishment of common consumer protection rules and practices across Europe. This meant moving away from the situation of different sets of rules in each Member State towards a more consistent environment for consumer protection across the EU.¹⁸³

The Commission went on to state:

There is also a need to review and reform existing EU consumer protection directives, to bring them up to date and progressively adapt them from minimum harmonization to “full harmonization” measures. The Green Paper and the Commission’s Strategy on Services make it clear that the simple application of mutual recognition, without harmonization, is not likely to be appropriate for such consumer protection issues. However, provided a sufficient degree of harmonization is achieved, the country of origin approach could be applied to remaining questions.¹⁸⁴

181. See *Commission v. Germany*, Case 205/84, [1986] E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69.

182. See *Communication on Consumer Policy Strategy for 2002-2006*, COM (2002) 208 Final.

183. *Id.* ¶ 3.1.

184. See *id.* ¶ 3.1.2.1.

Consistent with this position, in 2002 and 2003, the Commission proposed two consumer protection directives that, if passed, will have a significant effect on the banking industry of the European Community. These two proposals were for a directive on the harmonization of the laws, regulations, and administrative provisions concerning credit for consumers¹⁸⁵ and for a directive concerning unfair business-to-consumer commercial practices.¹⁸⁶

The proposals emphasize the weakness of both partial harmonization and the use of minimum clauses in prior directives. In the *Consumer Credit Proposal*, the Commission states that it is attempting to establish an internal market with no local exceptions.¹⁸⁷ The method by which the Commission wishes to meet its goal is maximum harmonization. "All types and forms of credit that are available to private individuals will, in principle, be harmonised."¹⁸⁸ This position is brought home in no uncertain terms by Article 30 of the proposed Directive.¹⁸⁹

The *Unfair Commercial Practices Proposal's* criticism is even stronger. It acknowledges unfair commercial practices can create barriers to the functioning of the internal market.¹⁹⁰ Such practices undermine consumer confidence, impair the consumer's ability to make informed choices, and give the trader acting unfairly an advantage over the party who is playing by the rules.¹⁹¹ The *Unfair Commercial Practices Proposal*, however, goes one step further. It states that the Member State consumer protection laws can also exacerbate these barriers to the functioning of the internal market. "The minimum clauses in existing consumer protection legislation . . . perpetuate this problem by allowing Member States to add divergent requirements and pro-

185. See Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers, COM (2002) 0443 Final, O.J. C 331/200 (2002) [hereinafter *Consumer Credit Proposal*].

186. See Proposal for a Directive of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Directives 84/450/EEC, 97/7/EC and 98/27/EC, COM (2003) 0356 Final [hereinafter *Unfair Commercial Practices Proposal*].

187. See *id.* Explanatory Memorandum, ¶ 2.2.

188. *Id.* Explanatory Memorandum, ¶ 3.

189. See *id.* art. 30.

190. See *Unfair Commercial Practices Proposal*, *supra* note 186, ¶ 14.

191. See *id.* ¶¶ 15 & 16.

vide differing degrees and types of protection.”¹⁹² The scope and application of the Member States’ general legal principles regulating marketing and unfair commercial practices vary widely.¹⁹³ This “complex patchwork of different national requirements adds costs to those who market cross-border and for many is such a deterrent that they simply do not try.”¹⁹⁴ In a clear reference to the “general good” exception, the proposal states that:

In the absence of uniform rules at the Community level, obstacles to cross-border services and goods or the freedom of establishment could be justified in the light of the case-law of the Court of Justice as long as they seek to protect recognized public interest objectives and are proportionate to those objectives.¹⁹⁵

The Commission asserts that these obstacles should be eliminated “by establishing uniform rules at Community level to the extent necessary for the proper functioning of the Internal Market and to meet the requirement of legal certainty.”¹⁹⁶ The Commission leaves no doubt about its intent to fully harmonize the entire field of commercial practices.¹⁹⁷

The result is that in the *Unfair Commercial Practices Proposal* the Commission has proposed general principles and some necessary specific legislation that attempt “full harmonization” and provisions “for mutual recognition based on the country of origin.”¹⁹⁸ The *Unfair Commercial Practices Proposal* asserts that “Member States will not be able to use the minimum clauses in other directives to impose additional requirements in the field coordinated by this Directive.”¹⁹⁹

The *Consumer Credit Proposal* was finalized in 2002. The proposed Directive is intended to replace the 1987 Consumer Credit Directive and will repeal it.²⁰⁰ It covers loan agree-

192. *Id.* ¶ 19.

193. *See id.* ¶ 20.

194. *Id.* ¶ 22.

195. *Id.* ¶ (4).

196. *Id.*

197. *See id.* Explanatory Memorandum, ¶¶ 44 & 45.

198. *Id.* ¶ 26.

199. *Id.* ¶ 30.

200. *See id.* art. 36.

ments.²⁰¹ An agreement can be either a form agreement or individually prepared.²⁰² The proposed directive does have important exceptions, e.g., no coverage for: (1) agreements which grant credit for the purchase or transformation of real estate that the consumer owns or is seeking to acquire and which are secured by a mortgage; (2) employment agreements; (3) short-term (three months or less) credit agreements that charge no interest or fees; (4) credit agreements granted by a creditor outside the scope of his principal activity at lower than market rates, which are not offered to the public; and (5) credit agreements concluded with investment firms for the purpose of allowing an investor to carry out a transaction.

The proposed Directive would apply to both credit and surety agreements.²⁰³ Article 4 requires advertising to be clear and comprehensible. Article 5 is an outright ban on the negotiation of credit or surety agreements outside business premises.

Article 6, Paragraph 2, states that the creditor may obtain appropriate information about the consumer²⁰⁴ and must provide certain specified information in writing about the credit agreement to the consumer.²⁰⁵

The proposed Directive would also require that the creditor establish among the products offered by the creditor, and advise the consumer about, what would be the most appropriate type of product and most appropriate total amount of credit for the consumer, taking into consideration: (1) the financial situation of the consumer; (2) the advantages and disadvantages of the product proposed; and (3) the purpose of the credit.²⁰⁶ The creditor should assess, "by any means at his disposal, whether the consumer . . . can reasonably be expected to discharge" his obligation.²⁰⁷

Each Member State would be required to establish a central database of consumers who have defaulted on loans and re-

201. See Consumer Credit Proposal, *supra* note 185, art. 1(c), O.J. C 331/200 (2002).

202. See *id.* art. 2(c).

203. See *id.* art. 3, ¶ 1.

204. This information may only be used "for the purpose of assessing the financial situation of those persons and their ability to repay." *Id.* art. 7.

205. See *id.* art. 6, ¶ 2.

206. See *id.* art. 6, ¶ 3; see also *id.* Explanatory Memorandum, ¶ 3 (Examination of the Articles, Article 6).

207. *Id.* art. 9.

quires the creditor to consult the database prior to making each loan.²⁰⁸ Article 10 sets out certain specified provisions that must be in the credit agreement. Under Article 11, the consumer has a fourteen day right of withdrawal.²⁰⁹

One of the most important set of provisions in the proposed directive is the standardization of the calculation of interest rates that the creditor must use in disclosures to the consumer. There are three rates that can be used in various situations.²¹⁰

The proposed directive also describes what it considers unfair terms of a credit agreement,²¹¹ and covers the right to make early repayments.²¹² It defines defenses against assignees of credit instruments,²¹³ and sets out terms concerning the relationship of the parties upon the nonperformance of a credit agreement.²¹⁴

The proposed directive contains additional provisions concerning lines of credit, debit accounts, and open-end credit agreements,²¹⁵ the duties and rights of a guarantor or surety,²¹⁶ and the registration and obligations of creditors and credit intermediaries (representatives of creditors).²¹⁷ The registration requirement does not apply to credit institutions, i.e., banks.²¹⁸

The result is a directive that is much more comprehensive than the 1987 Consumer Credit Directive. Of particular interest are: (1) the provisions that require the creditor to determine the suitability of the credit for the consumer and to advise the consumer as to the best course of action; (2) the effort of the Commission to achieve maximum harmonization in the field; (3) the creation of a central database; (4) the very detailed requirements concerning disclosure and credit agreements; and (5) the determination of formulas for interest rates.

The *Unfair Commercial Practices Proposal* was finalized in 2003. The proposed directive covers only individual consumers but

208. *See id.* art. 8.

209. *See id.* art. 11.

210. *See id.* arts. 12-14.

211. *See id.* art. 15.

212. *See id.* art. 16.

213. *See id.* art. 17.

214. *See id.* arts. 24, 26-27, 32 & 33.

215. *See id.* arts. 20-22.

216. *See id.* art. 23; *see also* arts. 2(e); 3, ¶ 1; 4-5; 8, ¶¶ 3, 9; 10, ¶ 3; 15 & 17.

217. *Id.* arts. 28 & 29.

218. *Id.* art. 28, ¶ 3.

covers a large range of services and goods. This includes the provision of financial services.²¹⁹ It does not, however, cover the rules concerning the validity, formation or effect of a contract.²²⁰ It does not repeal or modify the 1993 Directive on unfair terms in consumer contracts. Article 3 states that if there is a conflict with any other directive dealing with unfair commercial practices, the latter will prevail.²²¹

Article 4 states that traders will comply only with the laws of the State in which they are established, i.e., home State rules.²²² Member States "shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive."²²³

The proposed directive prohibits unfair commercial practices and sets out both a general rule defining what unfair commercial practices are and a specific list of unfair practices. Practices not in the list of unfair practices may still be ruled unfair if they meet the criteria of the general rule.²²⁴ Under the general rule a commercial practice is unfair if "it is contrary to the requirements of professional diligence, and it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is specifically directed to a particular group of consumers."²²⁵ This general categorization is divided into two types of unfair commercial practices, misleading commercial practices and aggressive commercial practices.²²⁶ Annex 1 of the proposed directive lists the practices that are considered unfair in all circumstances.

The proposed directive amends Directive 1984/450/EEC in regard to comparative advertising, permitting it under certain conditions.²²⁷ It also makes minor amendments to Directives 1997/7/EC (distance selling) and 1998/27/EC (injunctions).²²⁸

219. See Unfair Commercial Practices Proposal, *supra* note 186, arts. 2 (a) & (d).

220. See *id.* art. 3, ¶ 2.

221. See *id.* art. 3, ¶ 5.

222. See *id.* art. 4, ¶ 1.

223. *Id.* art. 4, ¶ 2.

224. See *id.* art. 5.

225. *Id.* art. 5 ¶ 2.

226. See *id.* arts. 6-7.

227. See *id.* art. 14.

228. See *id.* arts. 15-16.

This proposal, like the Consumer Credit Proposal, is much more comprehensive in the area of consumer protection than anything before it. It is interesting particularly because of its effort to fully harmonize the area of commercial practices in regard to consumer protection and because it attempts to lay out a Community-wide definition of unfair practices, thus essentially limiting any host State general good claim.

To date,²²⁹ the *Unfair Commercial Practices Proposal* has reached the stage at which the Council has issued a common position with a view to the adoption of the proposal as a directive.²³⁰ The Council has accepted the concept of full harmonization that the Commission originally set out but has weakened the proposal in several ways. Among other things, and most importantly for the purposes of this Article, the Council position states Member States, “[i]n relation to ‘financial services’ . . . may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.”²³¹ The position also allows the Member States to establish more restrictive requirements for transactions involving “immovable property.”²³² Next, the Council position eliminates the concept of home State control and mutual recognition that was contained in the Commission proposal.²³³ Finally, the Member States will have up to eight years after the entry into force of the directive in which they “shall be able to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonization clauses.”²³⁴

A second report on the *Consumer Credit Proposal* by the Committee on Legal Affairs and the Internal Market was issued on

229. December 31, 2004.

230. Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. /2004 of the European Parliament and of the Council, Institutional File: 2003/0134 (COD), CONSOM 63, MI 215, CODEC 929 (November 15, 2004) [hereinafter the Common Position].

231. *Id.* art. 3.9.

232. *Id.*

233. *Compare* Unfair Commercial Practices Proposal, *supra* note 186, Recital 9, *with* Common Position, *supra* note 230, Recital 9.

234. Common Position, *supra* note 230, art. 3.5.

April 2, 2004.²³⁵ As a result the Commission issued an Amended proposal for a directive on October 28, 2004.²³⁶ The Committee report and the amended proposal contain sharply different positions. Altogether, the Committee Proposal contained at least 152 amendments of the original *Consumer Credit Proposal*.²³⁷ Of those, the Commission accepted “as such” forty-five Committee amendments. It rejected forty-four amendments and accepted “in part or subject to reformulation” the remainder of the Committee amendments.²³⁸

The Committee report and the amended proposal agree on several changes to the original Consumer Credit Proposal. Among others, they agree to changes in which:

1. Credit intermediaries will no longer be covered by the Directive.²³⁹ Acting as a credit intermediary “means offering or presenting credit agreements, undertaking other preparatory work for such agreements, or concluding credit agreements.”²⁴⁰
2. No central data base will be created.²⁴¹
3. The use of a “total lending rate” will be deleted; the use of a calculated annual percentage rate will continue.²⁴²
4. Creditors will not be required to give consumers advice concerning loans.²⁴³
5. Registration of persons offering credit will not be required.²⁴⁴
6. The Directive will not apply to
 - a. Pawn businesses.²⁴⁵
 - b. Credit agreements “granted outside the sphere of

235. Second Report on the proposal for a European Parliament and Council directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, Final A5-0224/2004, RR/531630EN.docs, PE 338.483 (April 2, 2004) [hereinafter Second Report].

236. Amended proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers repealing Directive 87/102/EC and modifying Directive 93/13/EC, COM (2004) 747 final (Oct. 28, 2004) [hereinafter Amended Proposal].

237. See Second Report, *supra* note 235, at 74.

238. See Amended Proposal, *supra* note 236, at 3.

239. See Second Report, *supra* note 235, amend. 29.

240. *Id.* amend. 37.

241. See *id.* amends. 68–71.

242. *Id.* amend. 16.

243. See *id.* amends. 15 & 65.

244. See *id.* amend. 29.

245. See *id.* amend. 55.

any commercial or professional activity (private credit agreements)”²⁴⁶

- c. Loans involving amounts up to €1,000.00 and above €50,000.00.²⁴⁷
7. Prepayment rights by the consumer have been weakened.²⁴⁸
8. Door-to-door sales will be permitted.²⁴⁹

The Committee report and the Commission disagree concerning the following matters:

1. The Commission maintains its position that the Directive should incorporate the strategy of “total harmonisation” and the “imperative nature of the Directive.”²⁵⁰ In contrast, the Committee report adds provisions that clearly state that the Member States may adopt “more far-reaching provisions for the best possible consumer protection in accordance with Treaty obligations.”²⁵¹ The Committee endorses the idea of “targeted harmonisation to allow the Member States sufficient scope to assure all consumers in the Community of optimum protection of their interests and an equivalent level of protection” with “full harmonisation” in some areas “to ensure comparability between credit offers”²⁵²
2. The Committee report exempts credit unions from the Directive.²⁵³
3. The Committee report exempts all credit agreements concerning or secured by real estate.²⁵⁴
4. The Committee report exempts all surety agreements from the Directive.²⁵⁵
5. The parties differ on the method of calculation of the annual percentage rate with one of the major differences being that the Committee Report would not include costs voluntarily entered into by the customer or which can be obtained from another source.²⁵⁶ As such, insurance pre-

246. *Id.* amend. 56.

247. *See id.* amend. 58.

248. *See id.* amend. 96.

249. *See id.* amends. 12 & 64.

250. *See Amended Proposal, supra* note 236, at 3.

251. Second Report, *supra* note 235, amend. 140.

252. *Id.* amend. 6.

253. *See id.* amend. 4.

254. *See id.* amend. 49.

255. *See id.* amend. 47.

256. *See id.* amend. 91.

miums would often not be included in the calculation.

The changes in the *Unfair Commercial Practices Proposal* will effectively open the door to permitting Member States to create more restrictive provisions in banking that favor consumers in fields covered by the directive in the name of the general good.²⁵⁷ It remains to be seen whether the limitations proposed by the Committee Report in regard to the *Consumer Credit Proposal*, and opposed by the Commission, will be adopted. If the Commission strategy of “total harmonisation and imperative nature”²⁵⁸ does prevail, it still remains to be seen whether, in the field of credit arrangements, the proposed directive will foreclose any additional action by the Member States or the Court of Justice in the area of banking that would have the effect of limiting freedom of movement of services or freedom of establishment of businesses from other Member States. One can argue it will not.

First, the “general good” exception is a very complicated rule to apply. Even a sophisticated judge might misinterpret it and, as a result, permit the application of a Member State law that limits one of the Freedoms. At least one author has asserted that this has nearly already happened. Michel Tison in his article, *Unraveling the General Good Exception*,²⁵⁹ accuses the Court in the *Ambry* case²⁶⁰ of “on the one hand acknowledging that the French law was contrary to the single passport provided in the Second Banking Directive, which is based on ‘sufficient’ harmonization of prudential standards, and on the other hand proceeding to the ‘general good’ test notwithstanding the existence of harmonization.”²⁶¹ In that case the Court does speak in terms of the French law violating both the Treaty provisions concerning the free movement of services and, at the same time, violat-

257. In a press release, dated February 24, 2005, the European Commissioner for Health and Consumer Protection announced that Parliament voted to approve the Unfair Commercial Practices Directive. The Council has yet to endorse the directive. Reference IP/05/213 [February 24, 2005], available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=ip/05/213&format=HTML&aged=0&language=EN&guiLanguage=EN>.

258. Consumer Credit Proposal, *supra* note 185, art. 30.

259. Tison, *supra* note 67, at 338.

260. Criminal Proceedings Against André Ambry, Case C-410/96, [1998] E.C.R. I-7875.

261. Tison, *supra* note 67, at 338.

ing the Second Banking Directive,²⁶² but the Court may simply be stating that the law is violating the directive and, if that law does not apply, it violates the Treaty. The language of the opinion is not clear.

A court could also very narrowly construe the field that a particular directive covers.²⁶³ In the *Reisburo Broede* case²⁶⁴ the Court ruled that a German law could require a debt-collection agency acting in Germany to use an attorney to represent it, even though the law of France (the state of establishment of the agency) did not require such representation. The Court based its opinion primarily on the “general good” exception applied to the principle of freedom of services, with the general good being the protection of creditors or the sound administration of justice.²⁶⁵ The Court stated as part of its reasoning in the case “that, in the absence of *specific Community rules in the matter*, each Member State is free to regulate the exercise of the legal profession in its territory.”²⁶⁶ Thus, the Court at some point may rule that this type of language gives it the prerogative to apply the “general good” exception in *fields* in which the Council has legislated, but in which the Council has not passed a specific rule concerning the issue before the Court.

A possible example of this type of reasoning by the Court is the *Caixa-Bank* case.²⁶⁷ In that case the Court held that the Second Banking Directive did not “refer to restrictions on the establishment of companies which, like Caixa-Bank, make use of freedom of establishment in a Member State as subsidiaries of credit institutions established in other Member States.”²⁶⁸ It then went on to apply the factors concerning the “general good” excep-

262. *Ambry*, [1998] E.C.R. I-7875, ¶¶ 25 & 39.

263. See *Commission v. Germany*, Case 205/84, [1986] E.C.R. 3755, [1987] 2 C.M.L.R. 69. In *Germany*, the Court ruled that even though supervisory standards were harmonized in the First Non-Life Insurance Directive, several supervisory issues were not covered. See *id.*, [1986] E.C.R. 3755, ¶¶ 34-40, [1987] 2 C.M.L.R. 69. Thus, there was still room for the Member State to regulate foreign insurers in the interest of the general good. See *id.*, [1986] E.C.R. 3755, ¶ 41, [1987] 2 C.M.L.R. 69; see also *Tison*, *supra* note 67, at 337.

264. Case C-3/95, [1996] E.C.R. I-6511. See *Kemikalieninspektionen v. Toolex Alpha*, Case C-473/98, [2000] E.C.R. I-5681.

265. See *id.* ¶ 36.

266. *Id.* ¶ 37 (citing *Ordre des Avocats au Barreau de Paris v. Klopp*, Case C-107/83, [1984] E.C.R. 2971) (emphasis added).

267. See *Caixa-Bank*, Case C-442/2, [2004] E.C.R. ___.

268. *Id.* ¶ 7.

tion. Such reasoning gives one pause. One could argue that, among others, Article 18.2 of the Second Banking Directive (now codified as part of Article 19 of Directive 2000/12/EC) goes straight to the heart of the issue of restrictions on the establishment of subsidiary banks from other Member States. It states in part that the:

Member States shall also provide that the activities listed in Annex I may be carried on within their territories, in accordance with Articles 20(1) to (6), 21(1) and (2), and 22, either by the establishment of a branch or by way of the provision of services, by any financial institution from another Member State, whether a subsidiary of a credit institution or the jointly-owned subsidiary of two or more credit institutions

...²⁶⁹

Keeping in mind the above, one might predict areas where the “general good” exception may still be used by the Court. For example, Article 3 of the Consumer Credit Proposal exempts the application of the proposed directive to agreements that are granted at annual percentage rates lower than those prevailing on the market or are not offered to the public generally.²⁷⁰ A Member State might issue rules that it feels protect borrowers that fit within these exceptions and use the “general good” exception to defend an attack on the rule. The total impact of restrictions on such loans could have a significant impact on out-of-State lenders.

The Commission foresaw the possibility of such narrow construction in its 2001 Green Paper on European Union Consumer Protection when discussing the different possible methods of structuring a directive on commercial practices. It stated that a framework directive based on the more restrictive concept of misleading and deceptive practices:

would not cover the full range of matters covered by a comprehensive duty to trade fairly (e.g., the use of selling techniques based on undue influence). Accordingly, divergent national approaches on matters falling outside the scope of the duty could continue to develop and further specific regu-

269. Second Banking Directive, *supra* note 75, ¶ 19.

270. See Consumer Credit Proposal, *supra* note 185, art. 3(2)(d)(ii)-(iii). The Second Report would amend this exception to apply only to loans from employers to employees. See Second Report, *supra* note 235, amend. 56.

lations at EU level would probably be needed.²⁷¹

CONCLUSION

The history of the development of the “general good” exception and directives legislating consumer protection in the banking area indicates that consumer policy has had a major impact on the development of regulations on banking. Consumer policy has been used as both a restrictive tool on the development of the internal market for banking and an implementing tool. The Court of Justice has used consumer protection to limit the application of freedom of services and freedom of establishment through the exception. Arguably, the exception is not as robust as it once was, but it still has the potential for use by the Court to support Member State restrictions in the name of the general good. The Commission and Council have used consumer protection to try to strengthen the internal market by legislating consumer directives that affect the banking industry. The Commission has now proposed very broad Community legislation concerning consumer protection. If passed, the proposals will create large areas of harmonization in the banking field. However, we cannot be sure that we have heard the last of the “general good” exception in the banking area. It is a complex concept and could be used by a Court intent on approving Member State restrictions that might not otherwise pass muster in light of the Treaty provisions on freedom of movement of services or the freedom of establishment. In conclusion, we can look forward to further interaction between the Court in its application of the “general good” exception and the Commission’s efforts to bring about the internal market.

271. Green Paper on European Union Consumer Protection, COM (2001) 531 final, ¶ 4.2.