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The Modernization of the French Securities Markets: Making the EEC Connection

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INTRODUCTION

France's status as the fourth largest financial market in the world renders crucial its participation in the international effort to globalize securities markets and harmonize securities regulations. France attained this prominence in the 1980s, by transforming its Bourse from one of the most highly regulated markets in Europe to one of the most deregulated. This liberalization occurred in response to both the imminence of the single European market and the need for France to increase its competitiveness in the international financial arena.

As France liberalized its markets, it initially failed to institute sufficient "prudential reregulation" to keep pace with its "access deregulation." Thus, France's securities markets lacked the necessary investor protection.

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   Before consolidation, the Paris Bourse handled the largest percentage of all stock exchange transactions in France. See Spicer & Oppenheimer, The Spicer & Oppenheimer Guide to Securities Markets Around the World 42 (1988) [hereinafter Spicer Guide] (noting that the Paris Bourse handled approximately 96 percent of transactions in France in 1988, while the regional exchanges handled the remaining four percent).


4. "Liberalization" is the term often used to describe the abolishing of access restrictions to a financial market. See P. Stonham, Global Stock Market Reforms 1-3 (1987). Relaxing exchange controls, abolishing fixed broker's commissions and allowing brokers to participate in market-making activity are just some examples of "policy liberalization" which have enhanced the "international mobility of capital." Id.

5. See N. Poser, supra note 1, at 379-80; see also 20e Rapport au Président de la République par la Commission des Opérations de Bourse 39-41 (1987) [hereinafter COB 1987 Annual Report] (discussing the increasing internationalization of financial markets around the world and the need to adapt to this phenomenon in order to compete).


7. "Access deregulation" refers to the removal of regulatory barriers, making the domestic market more accessible to foreigners. See id. at 187. Some commentators have noted the lagging pace of France's prudential regulation. See, e.g., Graham, Paris Stockmarket: Storming of the Bourse, The Economist, July 22, 1989, at 68 [hereinafter Storming of the Bourse] ("The regulators have not kept up with the speed of change."); Lark de Triomphe, The Economist, Jan. 28, 1989, at 77 [hereinafter Lark de Triomphe] (noting that the Pechiney scandal that occurred in late 1988 showed that the COB, the
protection and became more accessible and desirable only to those investors who did not fear the "dirty dealing" traditionally tolerated by the French government. This wrongdoing, specifically insider trading and market manipulation, might have continued if France had not been subjected to the scrutiny of other, less tolerant countries caused by the growing number of cross-border transactions.

In particular, foreigners became "suspicious of intrigue" after the occurrence, in late 1988, of two internationally publicized scandals that implicated the French Government. The public concern surrounding these scandals forced France to adjust its policies in order to gain credibility.

France's "reregulation" followed the example set by Great Britain in 1986, when the British government instituted the Financial Services Act. However, France has not attempted to protect its investors by adopting a statutory scheme of securities regulation. Instead, the Bourse's "watchdog agency," has "failed to keep up with the huge growth in France's financial markets since the mid-1980s").

See, e.g., COB's New Governing Board In Place; Members Now at Nine, Int'l Sec. Reg. Rep., Oct. 25, 1989, at 6 (quoting Beregovoy, France's Finance Minister at the time, who said that many apparent violations went unsanctioned because they did not fit the exact description of a punishable offense); Insider Trading Scandals: Parisians React With a Smirk and a Yawn, Int'l Sec. Reg. Rep., Oct. 11, 1989, at 6 [hereinafter Smirk] (describing one Parisian shopkeeper's reaction to securities scandals as "a fact of life"); see also Miller, France, in International Capital Markets and Securities Regulation § 7.10, at 7-29 (H. Bloomenthal ed. 1982-89) ("countless violations go unnoticed because the means to enforce criminal sanctions are painfully inadequate").

See, e.g., Graham, French Banking Finance and Investment: Buffeted by the Winds of Change, Fin. Times, Nov. 2, 1989, § III, at I, col. 1 [hereinafter The Winds of Change] ("the entire structure of France's financial services industry has come to be driven by forces from outside its frontiers" particularly "from Brussels"); Lever, SEC Probe Causes Flap in France, Nat'l L.J., Apr. 10, 1989, at 8 ("with the world growing smaller, insider trading seems to be becoming a more global affair."). This cross-border scrutiny is best illustrated by the Pechiney scandal. See infra notes 108-16 and accompanying text. During the Pechinley investigation, it was the SEC that forced France's principle regulatory authority, the COB, to conduct a thorough investigation and to publish its results. See Lark de Triomphe, supra note 7, at 77.


See id. (suggesting that France instituted measures to increase investor protection as a direct result of the Pechinley and Société Générale scandals).

See N. Poser, supra note 1, at 372. The Financial Services Act ("FSA") sets out in a single statute the self-regulatory structure of the United Kingdom's securities industry. See generally id. at 91-112 (explaining the Financial Services Act); Note, Inside Outside Leave Me Alone: Domestic and EC-Motivated Reform in the UK Securities Industry, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S285, S289-91 (1992) [hereinafter Reform in the UK Securities Industry] (same). Among other things, the FSA is designed to protect investors and to "enhance confidence in the United Kingdom as a clean place to do business." N. Poser, supra note 1, at 91.

France has no separate legal category for securities laws. See Miller, supra, note 8, § 7.01[1], at 7-5; see also La Grande Boum, The Economist, Oct. 1, 1988, at 83 [hereinafter La Grande Boum] ("In French business law, everything is proscribed unless explicitly permitted under the country's legal code."). There are only three printed securities
French government increased the regulatory authority and the autonomy of its market "watchdog," the Commission des Operations de Bourse ("COB").

This Note will examine France's recent efforts to improve its competitive position in the international financial community. It will also discuss the rationale for, and the ramifications of, the recent revamping of France's regulatory structure. Part I discusses the primary deregulatory measures instituted by the French government in the 1980s. Part II focuses on the strengthening of the COB. Part III then explores how this revamping affects France's ability to implement the European Economic Community's ("EEC's") radical Investment Services Directive ("ISD"), the final legislative measure needed for completion of a single European market in banking and investment services. This Note concludes that France is still in the process of reconciling its need for securing a powerful regulatory structure with the needs of the EEC at large.

I. FRANCE'S "BIG BANG"17 DEREGULATION OF THE BOURSE

Before the reforms of the 1980s, the French Treasury regulated the Bourse and created an almost impenetrable insular market. The violations: (1) insider trading, which has been through three substantial revisions since its enactment in 1970, the last one occurring as part of the August 2, 1989 law; (2) the dissemination of false or misleading information about an issuer or a publicly traded security; and (3) market manipulation, which was introduced in the original French penal code, repealed in 1986, and re-established in 1989 with the insider trading law in August. The market manipulation law makes it unlawful for anyone with privileged information to disclose such information outside the normal course of business. See Baumberg, SEC/COB Agreements: The French Perspective, N.Y.L.J., June 21, 1990, at 5, col. 1, n.18. Unlike the United States, France has no securities fraud provisions. See Miller, supra note 8, § 7.10, at 7-29. Instead, French law relies heavily on specific texts, such as regulations issued by the COB, that make such activities illegal. See id.

14. Otherwise translated as the Commission on Stock Exchange Transactions. For a discussion of the COB's increased regulatory authority, see infra notes 80-85, 92-97, 133-45, 160-67 and accompanying text.

15. See, e.g., Coopers & Lybrand Europe, European Banking Law 259 (1990) (stating that the ISD "is the most far reaching piece of Community legislation in the securities field"); Frustration, Confusion Reign as Policy Deadline Nears, Int'l Sec. Reg. Rep., June 17, 1991, at 4 [hereinafter Frustration, Confusion Reign] (calling the ISD a "liberalizing measure"); see also Warren, supra note 6, at 187 (stating that the ISD aims at "prudential deregulation" and is "justified on the basis of laissez faire political policies").


17. London's sudden deregulation that occurred in 1986 is often called the "Big Bang". See generally N. Poser, supra note 1, at 27-78 (describing the "Big Bang"); Reform in the UK Securities Industry, supra note 12, at S285-87 (1992) (same). France is said to have launched its own version of London's "big bang." See French Stockmarket Reform; Big Bang Encore, The Economist, Sept. 14, 1991, at 90 [hereinafter Big Bang Encore]; see also Graham, Foreign Investment Doubles, Fin. Times, Oct. 22, 1990, § III, at VII, col. 1 [hereinafter Foreign Investment Doubles] (noting that France's reform has been characterized as a "slavish imitation of London's Big Bang"); Lewis, Foreigners Will be able to Own French Brokers, N.Y. Times, Mar. 11, 1987, at D1, col. 1. (referring to France's reforms as "le petit bang" (small bang)).

18. See La Grande Boum, supra note 13, at 83; see also Vilmorin, The Reform of the
Bourse was under tighter governmental control than were the markets of any other western European country.\textsuperscript{19} The restrictions on membership, trading, and the like made the Bourse an undesirable market to trade in at a time of increasing transnational activity.\textsuperscript{20}

The French government's particularly restrictive approach to foreign participation in its markets worsened this situation. For example, the sale of foreign securities in France,\textsuperscript{21} and "direct" foreign investment,\textsuperscript{22} required authorization by the Minister of Finance.\textsuperscript{23} Moreover, any transfer of capital in or out of the country required government authorization.\textsuperscript{24}

Recognizing that the Bourse could not compete in a global economy without allowing greater access to foreign issuers and investors, and particularly without the infusion of foreign capital, the French government set itself to the task of "modernizing" its financial markets.\textsuperscript{25}

The evolution of the French stock market was one of the primary contributors to the Bourse's growth.\textsuperscript{26} This evolution involved numerous

\begin{footnotesize}
French Financial Markets, 407 PLI/Comm 57, 60 (1987) (noting that the traditional French market was rigid and compartmentalized, and that access to each compartment was extremely limited and each market was supervised by a different regulatory agency).

\textsuperscript{19} See N. Poser, supra note 1, at 380. As an example of how restrictive President Mitterand's government was, in 1981, after Mitterand was inaugurated, Prime Minister Michel Rocard declared that French residents could only buy foreign stock and bonds owned by other French residents. See Miller, supra note 8, § 7.25[2], at 7-69. Furthermore, under Mitterand's regime, certain major banks and companies were nationalized. See Bloomenthal, International Securities, in International Capital Markets and Securities Regulation § 1.05[5], at 1-53 (H. Bloomenthal ed. 1982-89). The Paris Bourse reacted to Mitterand's election within two days by a substantial decrease in shares traded and a drastic decrease in share value. See id. at 1-53, n.5. By the same token, when Jacques Chirac's administration came to power in 1986, it quickly set itself to the task of liberalizing the markets by privatizing the banking industry, abolishing fixed broker's commissions, and breaking up the long-established broker's cartel. See id. at 1-53 to 1-54. These reforms had an immediate impact. Before the crash of October 1987, the number of individual French shareholders tripled. See id. at 1-54; Graham, Bourse Tensions Bubble to Surface, Fin. Times, June 15, 1988, at 4, col. 1.

\textsuperscript{20} See N. Poser, supra note 1, at 380-81; La Grande Bourse, supra note 13, at 83.


\textsuperscript{22} See Vilmorin, supra note 18, at 69. "Direct investment" refers to either the securing of a controlling interest in a resident company by a direct or indirect purchase, or to the creation of a branch or enterprise in France. See id. The investment in the company must exceed 20% in order to be considered a "direct investment." See id.; see also Mazet, Foreign Investment in French Listed Equity, 407 PLI/Comm 27, 31 (1987) (discussing the issue of direct investment as an issue of control).

\textsuperscript{23} The Minister of Finance was the government official responsible for closely regulating the movement of funds in and out of France. See Miller, supra note 8, § 7.25[1], at 7-67.

\textsuperscript{24} See Miller, supra note 8, § 7.25[1], at 7-67; Décret N 68-1021, 1968 J.O. 25 Nov., 11081, D.S.L. 325, at arts. 1, 4, 5. The same authorization requirements applied to French residents wanting to make direct investments abroad. See Miller, supra note 8, § 7.25[1], at 7-67; Décret N 68-1021, supra, at art. 4.

\textsuperscript{25} See COB 1987 Annual Report, supra note 5, at 40.

\textsuperscript{26} See N. Poser, supra note 1, at 379; Lascelles, supra note 10, at VI, col. 1.
\end{footnotesize}
changes. Perhaps the most crucial change occurred in 1987, when France allowed both domestic and foreign financial institutions to purchase ownership interests in French “agents” (brokers).27 Opening up market participation to foreign financial institutions28 strengthened the agents’ financial base by providing them access to greater amounts of capital.29

Other major changes took place that directly affected brokers. In 1985, the French government began allowing negotiable rates for broker’s fees in larger transactions.30 Furthermore, agents were permitted to trade for their own accounts—that is, to underwrite31 securities, and to

27. See COB 1987 Annual Report, supra note 5, at 45. When this change was first proposed, the capital of the stock exchange firms was to be opened up gradually: 30% by 1988, 49% by 1989, and 100% by 1990. See id. at 46. The government sped up the process, however, by allowing outsiders to purchase a 100% interest as early as 1988. See 21e Rapport au Président de la République par la Commission des Opérations de Bourse 4 (1988) [hereinafter COB 1988 Annual Report]; Robert, Director of External Relations of the Commission des Opérations de Bourse, Deregulation of the Equity Markets and Reform of the Stock Exchange in France, Remarks at the New York Stock Exchange, 1 (Nov. 9, 1988) (on file at Fordham Law Review) [hereinafter Robert Paper].

28. Agents, the only “members” of the Bourse, were the only persons who could directly handle transactions on the Bourse. See N. Poser, supra note 1, at 381; Bloomenthal, supra note 19, § 1.05[5], at 1-54; La Grande Boum, supra note 13, at 83. These privileged few enjoyed a monopoly originally created by Napoleon. See N. Poser, supra note 1, at 381. Therefore, in a sense, brokers were government servants and had the protection of the government. See id.; see also COB 1987 Annual Report, supra note 5, at 40 (noting the status of brokers as government officials by virtue of their appointment by the Minister of Finance).

The number of spaces available for individual agents was limited and these positions were often passed down from father to son. See N. Poser, supra note 1, at 13; Bloomenthal, supra note 19, § 1.05[5], at 1-54. The number was fixed at 60. See id.; P. Stonham, supra note 4, at 129.

In 1988, the government called for the transformation of the “agents de changes” (individual brokers) into “Sociétés de Bourse” (incorporated member firms). See COB 1988 Annual Report, supra note 27, at 3. These firms hold the same “traditional brokerage monopoly” that had been granted to the individual stockbrokers. See Robert Paper, supra note 27, at 2.

Due to this “legal monopoly,” foreign broker-dealers could not make direct transactions on the French market. See Miller, supra note 8, § 7.25[2], at 7-68. A foreign company had to ask a French stockbroker to act for it. Presently, all transactions must still be made through a Société de Bourse, which means that those who currently hold interests in these Sociétés have acquired a seat on the stock exchange, not the right to trade themselves. See Bloomenthal, supra note 19, § 1.05[5], at 1-55. This monopoly, however, will end in 1992 with the integration of the EC markets. See id.; N. Poser, supra note 1, at 384.

29. See Lewis, Foreigners Will Be Able To Own French Brokers, N.Y. Times, March 11, 1987, at D1, col. 1; see also N. Poser, supra note 1, at 382 (“restrictions on ownership of agents severely limited the amount of capital that was available to them”); COB 1987 Annual Report, supra note 5, at 43 (stating that brokers were handicapped by the traditional organization of the French markets because they did not have access to a sufficient financial base).

30. See Spicer Guide, supra note 2, at 47. Fixed commission rates for smaller transactions were not abolished until 1989. See N. Poser, supra note 1, at 384.

31. To “underwrite” is “to assume the risk of buying a new issue of securities from the issuing corporation or government entity and reselling them to the public, either di-
manage portfolios and engage in investment banking.” This latter change marked a significant shift in French securities policy. Previously, an agent could not trade for himself or act as a market-maker, and thus had to wait for a match to execute a transaction. The illiquidity caused by this inability to underwrite or to make a market naturally drove a large amount of trading out of the French market and into the British market.

In addition to changes relating to agents, the French government restructured the operation of its stock markets. In 1986, France took an important step in lengthening its trading day. Until the mid-1980s, trading occurred for only two hours, from 12:30 p.m. to 2:30 p.m. A morning session (from 9:30 a.m. to 11:00 a.m.) was finally added in 1986, and the afternoon session was expanded by one half hour. Since 1986, trading has been expanded even further. The central market now has continuous trading from 10:00 a.m. to 4:00 p.m. In this way, the French have brought the hours of their securities markets more in line with New York and London.

Additionally, in 1986, France implemented a modern computerized securities quotation and order matching system called “Cotation Assistée directly or through dealers.” Barron's Dictionary of Finance and Investment Terms 491 (3d ed. 1991). The “underwriter” derives a profit “on the difference between the price paid to the issuer and the public offering price.” Id.

N. Poser, supra note 1, at 384 (citation omitted). An investment banker “acting as underwriter or agent . . . serves as an intermediary between an issuer of securities and the investing public.” Barron’s Dictionary of Finance and Investment Terms, supra note 31, at 210. An investment bank also “handle[s] the distribution of blocks of previously issued securities, either through secondary offerings or through negotiations; maintain[es] markets for securities already distributed; and act[es] as [a] finder in the private placement of securities.” Id. Other functions of an investment banker include maintaining “broker-dealer operations, serving both wholesale and retail clients in brokerage and advisory capacities and offering a growing number of related financial services.” Id.

To “make a market” means to “maintain firm bid and offer prices in a given security by standing ready to buy or sell round lots [a generally accepted unit of trading on a securities exchange] at publicly quoted prices.” Barron’s Dictionary of Finance and Investment Terms, supra note 31, at 239.

N. Poser, supra note 1, at 382. In other words, a customer had to “rely on the possibility that the agent would be able to match its buy (or sell) order on the floor of the Bourse with the sell (or buy) order of another investor.” Id.

See Bloomenthal, supra note 19, § 1.05[5], at 1-55.

See N. Poser, supra note 1, at 382-83.

See P. Stonham, supra note 4, at 132.

See id.; Foreign Investment Doubles, supra note 17, at VII, col. 1. These trading sessions were poorly timed because they immediately preceded lunch and brokers would often leave early. See id. Additionally, brokers had fixed commission rates and enjoyed a monopoly on the market so there was little incentive to work hard. Cf. N. Poser, supra note 1, at 382 (noting that this monopoly provided agents with a comfortable and reliable income).

See P. Stonham, supra note 4, at 131-32.

See Coopers & Lybrand Europe, supra note 15, at 171. For certain stocks, continuous trading is extended until 5:00 p.m. See Graham, Simmering Casseroles Still Need Attention, Fin. Times, June 30, 1988, at 41, col. 4.

See P. Stonham, supra note 4, at 132.
en Continu” (“CAC”). In 1988, France also began working on a modern electronic system for clearing and paper settlement. As a result, transactions are now settled automatically within a reasonable period of time. Under the old clearance system, lengthy delays in settlement or, in many cases, unsettled transactions were common.

In 1983, France created a second market for trading in medium-sized companies that make at least ten percent of their capital shares public. On this lightly regulated market, it is easier and less costly for smaller companies to raise capital than on the main market. The second market is also available to foreign securities that do not meet the conditions for registration on the official market. In addition, in 1986 the Paris futures market, the “Matif,” began operations at the Bourse. By 1987, a year and a half after its opening, the Matif had already grown to be the third largest futures market in the world after Chicago and Tokyo. The Matif is the only French market to closely rival, and even surpass, the volume of activity of its London counterpart.

The privatization or “de-nationalization” of the banking industry was...
another factor that contributed to the growth of the Bourse.\textsuperscript{55} Three 1986 Laws provided for the privatization of sixty-five major French companies and banks.\textsuperscript{56} The privatization movement further broke down the "cartelised domestic markets"\textsuperscript{57} and spurred competition both nationally and internationally.\textsuperscript{58}

Finally, the Bourse could not have expanded without the willingness of French financial managers to move toward a more global market.\textsuperscript{59} French banks demonstrated this attitude, in particular, by aggressively increasing acquisitions abroad.\textsuperscript{60} This surge occurred in response to a recognition that stronger networks are needed to compete across state borders.\textsuperscript{61}

All of the above-mentioned factors contributed to "internationalizing" the French markets by abolishing both the club-like, "cliquey" atmosphere for which the Bourse was famous, and the red tape that was commonly used to constrain foreign investors. Perhaps most significantly, foreign institutions are now allowed to hold as much as a 100% interest in a member French brokerage house, and can indirectly participate in trading and market-making on the Bourse.\textsuperscript{62} Furthermore, due to the market in comparison to the Paris equity market, and the strength of London's SEAQ International, its unparalleled over-the-counter market.

\textsuperscript{55} See N. Poser, \textit{supra} note 1, at 379; Lascelles, \textit{supra} note 26, at VI, col. 1.

\textsuperscript{56} See Loi n 86-793, 1986 J.O. 2 Juill., 8240, D.S.L. 391, at art. 4; Loi n 86-912, 1986 J.O. 7 Août 9695, D.S.L. 431, at art. 2; Décret n 86-1140, 1986 J.O. 26 Oct. 12915, D.S.L. 522, at art. 5; Coopers & Lybrand Europe, \textit{supra} note 15, at 48. Prior to these measures, the French government had nationalized all banks having deposits over one billion francs (other than those with the status of real estate companies and discount houses and banks with a majority of non-resident shareholders). See Coopers & Lybrand, \textit{supra} note 15, at 48 (citing Act of February 11, 1982).


\textsuperscript{58} See Graham, \textit{Voracious Appetite for Acquisitions}, Fin. Times, May 9, 1990, at 24, col. 4 [hereinafter \textit{Voracious Appetite}].

\textsuperscript{59} Cf. N. Poser, \textit{supra} note 1, at 379 (stating that the "entrepreneurial spirit of French financial managers" contributed to the development of Paris into a major financial center during the 1980s); Lascelles, \textit{supra} note 26, at VI, col. 1 (listing the "new aggressiveness" of French financial managers as a factor which helped transform Paris into a "financial centre of considerable importance").

\textsuperscript{60} See, \textit{Voracious Appetite, supra} note 58, at 24, col. 4. Companies felt compelled to expand, and searched for the "critical mass thought necessary to compete." \textit{Id.} To mention just a few of the more ambitious acquisitions in the past three to four years, the French company Saint Gobain bought the U.S. abrasives and industrial ceramics company, Norton, for $1.9 billion, see \textit{id.}; the second-largest state owned bank, Credit Lyonnais, expanded by acquiring banks in Belgium, the Netherlands and Italy, see \textit{The Winds of Change, supra} note 9, at I, col. 1, and Pechiney, SA, a French aluminum company acquired the American National Can company for $1 billion. See \textit{Voracious Appetite, supra} note 58, at 24, col. 4.

\textsuperscript{61} See \textit{The Winds of Change, supra} note 9, at I, col. 1.

\textsuperscript{62} See N. Poser, \textit{supra} note 1, at 383. A leading Paris broker estimated that 30% of the French equity turnover in 1990 was handled by foreign-owned brokers. \textit{See Waters, Level Playing Fields may not be Open to All-Comers, Fin. Times, Feb. 14, 1991, § III, at 3, col. 5.}
lifting of foreign exchange controls and the relaxation of government authorization requirements, more and more foreign companies are being quoted on the Bourse. The growth in the presence of foreign securities and of foreign banks has strengthened the international character of the Bourse.

II. THE DEVELOPMENT OF PRUDENTIAL REGULATION

France's recently developed securities regulatory system parallels those of the United Kingdom and the United States. Like these countries, France relies heavily on self-regulation, "in which a government agency and one or more self-regulatory organizations each have their respective regulatory functions."

A. The Regulatory Authorities

Three groups are primarily responsible for overseeing France's financial markets—the Commission des Operations de Bourse, the Conseil des Bourses de Valeurs ("CBV"), and the Société des Bourses Françaises ("SBF").

The COB, the government agency chiefly responsible for regulating the French securities markets, was modeled after both the SEC and the Belgian equivalent, known as the Commission Bancaire Beige or the Belgian Banking Commission. It was created by a Government "Ordonnance" in 1967 to enhance the growth of France's securities markets, and to ensure the truth and accuracy of information distributed to the investing public. At the time of its creation, the COB was not intended to be the 'market watchdog' that it is today.

As originally formed, the COB's "College," or board, consisted of five members. The COB's president was appointed by Decree of the Coun-
cil of Ministers. The other four members were usually market professionals chosen by the Minister of Finance based on their ability in law or finance and economics.

In addition to having a government-appointed Board, the COB was (and continues to be) financed by the French Government. As France has modernized its markets over the last seven years, the COB's budget has grown tremendously. In 1985, the COB had ninety-nine employees and a budget of approximately thirty million francs (approximately five million U.S. dollars). Now, the COB receives seventeen million dollars annually and has a staff of 210 employees. These figures make its resources proportionately comparable to the support provided by the United States Government to the SEC.

Not surprisingly, this increase in general staff has led to an increase in investigators—one of the factors that allowed the COB to conduct seventy-nine investigations in 1990 alone, fifteen of which were eventually turned over to prosecutors. In contrast, from 1983 through 1988, the COB had conducted a total of only 350 investigations, and turned over only thirty for prosecution.

Prior to the reforms of the late 1980s, the COB's enforcement powers were extremely limited. The agency had jurisdiction over only those

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76. See France Booklet I, supra note 21, at 15. The Council of Ministers is the central governing body in France, over which the President of the French Republic presides. See V. Spitzer, The French Constitution, Constitutions of the Countries of the World - France, art. 9, at 25 (A. Blaustein & G. Flanz eds. 1988). The Council issues decrees in areas not within the exclusive authority of Parliament, see id. arts. 34-38, at 32-34, the primary legislative body. See id. art. 34, at 32-33. These decrees deal with the practicalities of implementing the laws passed by Parliament. See id.

77. See COB Ordonnance, supra note 73, at art. 2; France Booklet I, supra note 21, at 15.

78. See supra notes 17-64 and accompanying text.

79. See Baumgardner, supra note 13, at 7, n.17; 18e Rapport au Président de la République par la Commission des Opérations de Bourse 146 Annexe III (1985). This conversion is based on an exchange rate of 6 French francs to the U.S. dollar.

80. See supra notes 17-64 and accompanying text. While the SEC's resources are ten times greater than the COB's, the U.S. market is more than ten times the size of the Bourse. See id. According to an SEC Staff Attorney in the New York regional office, the SEC had almost 2400 staff members and an annual budget of approximately $187 million dollars for the 1991 fiscal year. Telephone interview with Daniel R. Robbins, SEC Staff Attorney, Division of Enforcement at the New York Regional Office (Nov. 27, 1991) [hereinafter D. Robbins Interview].

81. In 1988, the COB had only eight investigators, see Baumgardner, supra note 13, at 7, n.22, who concentrated on insider trading and other illegal activities. By December 1988, according to the COB annual report of that year, there were 17 investigators. See COB 1988 Annual Report, supra note 27, at VII. The report also indicated that this number was insufficient. See id. By 1990, the number of investigators had reached 45. See Baumgardner, supra note 13, at 7, col. 3.

82. See infra notes 92-97, 132-47 and accompanying text.
companies offering stock to the public, either on the organized stock exchange or by way of public offering, and it could only investigate irregularities in the information disclosed by those corporations. Moreover, the COB could issue "General Decisions," "Recommendations," "Instructions," "Opinions," and "Notices," but could not issue sanctions or enjoin violations. Thus, the COB had to hope for voluntary compliance or refer the matter to a public prosecutor.

In 1988, the French Government passed a law strengthening the COB's role in assuring the accuracy of information disseminated to the public. This law broadened the COB's oversight responsibilities by rendering the Commission responsible for the proper functioning of the Bourse and the Matif. The 1988 law also granted the COB greater power to investigate illegal activity and to obtain documents necessary to its investigation, as well as the power to impose sanctions on parties who failed to cooperate with ongoing investigations. Furthermore, the

87. See id.; COB Ordonnance, supra note 73, at art. 1. A company is considered "public" when (1) it is listed on an organized exchange, (2) it uses banks, stockbrokers or other institutions in order to sell its securities, (3) it advertises to sell its securities or (4) its securities are "widely held in the public". Mazet, supra note 22, at 40.

88. See Miller, supra note 8, § 7.23[1][a], at 7-63 to 7-64. The information which must be disclosed by a public company includes such items as a prospectus, a balance sheet, financial reports, materials disseminated about an offering, etc. See Miller, supra note 7, § 7.05[2], at 7-15.

89. See Mazet, supra note 22, at 38; Miller, supra note 7, § 7.23, at 7-63 to 7-64. General Decisions are subject to the approval of the Minister of Finance and are as authoritative as statutory law. These General Decisions relate to "general matters with respect to the functioning of securities exchanges." Mazet, supra note 22, at 38. Such general matters include, for example, rules on tender offers, disclosure requirements, and transfers of a controlling interest in a company. See COB Ordonnance, supra note 73, at art. 3. Recommendations, which are not subject to the government's approval, appear in the COB's monthly bulletin and are less authoritative than General Decisions. See Mazet, supra note 22, at 38. The primary function of Recommendations is to "promote standards to better inform shareholders and the public." See Miller, supra note 7, § 7.23, at 7-64. Instructions, which also appear in the monthly bulletin, inform issuers on matters such as where to list their securities and whether a company must clear a prospectus before a public offering. See id. Opinions express the views of the COB on various issues of law and have no binding effect. See id.; Mazet, supra note 22, at 38. Notices, which are either published by the press or by the COB in its monthly bulletin, have two purposes. One is to publicize information that listed companies willfully fail to publicize. The other is to draw the public's attention to "certain risks often relating to so called diversified financial products." Mazet, supra note 22, at 38.

90. See Miller, supra note 7, § 7.23, at 7-63.

91. See id. at 7-61 to 7-63. The COB transfers a case to the public prosecutor when it believes that all the elements of an offense can be proved. See id. The prosecutor will, at its discretion, take the case through a normal criminal court proceeding. If convicted, the perpetrator will usually receive a fine rather than a prison sentence. See Lightburn, Insider Trading in France, 7 Int'l Fin. L. Rev. 23, 25 (Jan. 1988).


93. See 1988 Law, supra note 92, at arts. 12, 16; COB 1987 Annual Report, supra note 5, at 63.

94. See 1988 Law, supra note 92, at art. 13; Robert Paper, supra note 27, at 6.

95. See 1988 Law, supra note 92, at art. 15; Robert Paper, supra note 27, at 7.
1988 Law re-introduced penalties for market manipulation and expanded the definition of insider trading to include transactions involving futures contracts. The 1988 law also modified the structure of the regulatory system by establishing the CBV and the SBF. Unlike the COB, which has broad regulatory powers over all the French markets, these two self-regulatory groups are only responsible for the stock exchange.

The CBV, a twelve-member group, is specifically responsible for the regulation and discipline of the Sociétés de Bourse, and for drafting rules on the functioning of the stock exchange. These draft rules receive final approval from the Minister of Finance upon the advice of the COB.

The SBF, for its part, gains its power from the CBV. The CBV has delegated to the SBF the authority to supervise and control the market's administration, security, development, and promotion. The SBF also acts as a clearing house for transactions between stockbroker firms.

B. The Scandals of 1988 and Their Significance

Although at the time an effort was being made to increase investor protection schemes, two scandals in 1988 proved that the COB's au
ity and independence were still inadequate. These scandals threatened to undermine France's progress toward becoming an emerging financial center. The first scandal to receive public attention was the Pechiney scandal. In November 1988, Pechiney SA, a state-owned French aluminium company, announced a $1.25 billion takeover of Triangle Industries, an American can-packaging company. In the weeks before the announcement, the SEC noticed that between 200,000 and 300,000 shares of Triangle Industries stock had been traded at an average of roughly ten dollars a share. At the time of the announcement, the stock was trading at fifty-six dollars a share. Moreover, the SEC informed the COB that one-third of the orders for Triangle stock had originated from France. The COB, in its report, indicated that six French investors were involved in insider trading. This group included a close friend of President Mitterand's, as well as a "top contributor" to the Socialist party.

Because it was common in France to sweep such scandals "under the rug," it was widely believed that the SEC was the driving force behind the COB's surprisingly active investigation into the Pechiney scandal and the COB's public disclosure of that scandal. The SEC, in fact, sent

107. See Lascelles, supra note 10, at VI, col. 3; Baumgardner, supra note 13, at 7, col. 3; Greenhouse, Modest Insider-Trading Stir is a Huge Scandal in France, N.Y. Times, Jan. 30, 1989, at D1, col. 1 [hereinafter Huge Scandal].
109. See Baumgardner, supra note 13, at 6, col. 6. In fact, the SEC reportedly informed the COB that friends of Mitterand's may have known about the purchase offer in advance. See Lark de Triomphe, supra note 7, at 71; see also Huge Scandal, supra note 107, at D1, col. 2 ("the scandal became public only after the Securities and Exchange Commission asked European officials for help in uncovering who was behind the surge in trading in Triangle stock").
111. See A Pungent Tale, supra note 111, at 43; Huge Scandal, supra note 107, at D9, col. 1. The "close friend" of Mitterand's refers to Roger-Patrick Pelat, a "retired executive who knows Mr. Mitterand from their days together in a German prisoner of war camp." Huge Scandal, supra note 107, at D9, col. 1. The "top contributor", A Pungent Tale, supra note 111, at 43, refers to Max Théret, a "prominent Socialist business executive." Huge Scandal, supra note 107, at D9, col. 1.
112. Lever, supra note 9, at 8; Baumgardner, supra note 13, at 6, col. 6; see also Lightburn, supra note 91, at 25 (saying that the "slap on the wrist" nature of punishment in insider trading cases demonstrates that insider trading is not yet taken seriously by the judiciary). For example, in 1987, one of France's largest banks, Paribas, allegedly used insider information to sell large blocks of stock in a company in which it held a majority of shares. Immediately thereafter the company published huge losses. See id. The scandal was barely noticed, although it was referred for prosecution. See id. Likewise, after hearing evidence of a scandal involving the purchase of shares of Thomson-CSF immediately before Thomson entered into a very sizable contract with Saudi Arabia, the court dismissed the case despite strong circumstantial evidence, on the grounds that the Prosecutor had not proven "beyond a reasonable doubt" that defendants had knowledge of the contract and had no prior trading history concerning the stock. See id.
113. Lever, supra note 9, at 8; Baumgardner, supra note 13, at 6, col. 6; Huge Scandal, supra note 107, at D9, col. 1.
two of its investigators to France to help the COB’s investigation of the affair. Even with this assistance, however, the COB took almost two months to generate a report on the scandal.

The second scandal, following on the heels of the Pechiney affair, involved the Société Générale, one of France’s largest banks. In 1988, the Conservative government, which lost power later that year, had privatized the Société Générale. According to the current French government, the problem began when Conservatives reserved control of the bank for some of their political supporters. A group of Socialist businessmen, encouraged by the former French Finance Minister, attempted a raid on the Bank in early 1989. Although the takeover bid was unsuccessful, the raiders shared a profit of about $100 million.

The COB at first did not find this coup attempt unethical and did not continue its initial investigations until February 1989, after having already begun its investigations with the SEC into the Pechiney scandal. One reason for the COB’s reluctance to pursue an investigation was that, at that time, the COB was tightly controlled by the Finance Minister, who admitted to being indirectly involved in the affair.

The Pechiney and Société Générale scandals marked a turning point for France as an international market, because they received a tremendous amount of publicity both nationally and internationally. These scandals caused the French government so much embarrassment that it approved a 1989 law, known as the “Law on Security and Disclosure in the Financial Markets,” within six months of its proposal.

115. See Baumgardner, supra note 13, at 7, n.38.
116. See COB 1988 Annual Report, supra note 27, at 60 (noting that the COB recognized the gravity of the situation and decided to issue its report to be publicly disclosed by the government on January 31, 1989).
117. See A Pungent Tale, supra note 111, at 43.
118. See id.
120. See A Pungent Tale, supra note 111, at 43.
121. See id. The COB, in fact, at first refused to open a formal inquiry into the Société Générale affair, even though the bank itself had indicated cause for suspicion and the Industry Minister had called for an investigation. See New Trail, supra note 119, at 2, col. 5.
122. See New Trail, supra note 119, at 2, col. 5; A Pungent Tale, supra note 111, at 43.
123. See, e.g., New Trail, supra note 119, at 2, col. 5 (reporting admission of Finance Minister to having encouraged the raid as part of a political strategy to diminish the economic power retained by the former right-wing government); Graham, French Discover Indirect Evidence of Insider Trading, Fin. Times, Feb. 1, 1989, at 1, col. 7 (reporting that the French Ministry “[w]as known to have been informed” before the raid by the French financier, Georges Pebereau).
124. See, e.g., Smirk, supra note 8, at 6 (noting that many books were written about both scandals); Huge Scandal, supra note 107, at D1, col. 1 (noting that the Pechiney scandal “ballooned into a huge scandal that is shaking the [French] Government” and that the conservatives were criticized for having “drag[ged] the image of France and its Bourse through the mud by playing up the scandal[s]”).
125. See Graham, Storming of the Bourse, supra note 7, at 68; see also Baumgardner, supra note 13, at 7, col. 1 (while the scandals were still being investigated, the French
Moreover, the Pechiney scandal revealed the need to grant the COB authority comparable to its foreign counterparts. While the COB and the SEC jointly investigated this affair, the COB lacked statutory power to investigate on behalf of a foreign regulatory body and was, therefore, criticized by members of the French government. This lack of authority stemmed from the protectionist French Blocking Statute of 1980, which prohibited any person from seeking or communicating commercial business information from French sources for use in foreign judicial or administrative proceedings.

Another limitation on the COB's jurisdiction was its authority to investigate only those companies that publicly offered their securities on the French markets. This limitation proved problematic when foreign intermediaries were involved. Assuming these intermediaries did not publicly offer their stock on the French markets, the COB had no authority to investigate their records.

In response to the Pechiney and Société Générale scandals, and to solve both the COB's jurisdictional problems and the general insufficiency of the COB's authority, the government passed the "Security and Disclosure" Law of August 2, 1989.

C. A More Powerful Watchdog

Among other innovations, the Security and Disclosure Law changed the structure of the COB. The COB college now consists of nine members, and is headed by a chairperson appointed by the French cabinet for one six-year term. Six of the remaining eight members are nominated by various governmental and judicial bodies and by the French stock exchange. These six members, in turn, select the final two members.
based upon the candidates' professional expertise.\textsuperscript{135} Thus, the COB's college is now made up of market professionals instead of well connected government appointees.\textsuperscript{136}

Under the Security and Disclosure Law, the COB can now impose fines up to 10,000 million francs, or ten times the amount of profit, whichever is greater.\textsuperscript{137} Not even the SEC has this immense sanctioning power.\textsuperscript{138}

Furthermore, the Security and Disclosure Law grants the COB authority to search any private or public premises,\textsuperscript{139} and to question suspects\textsuperscript{140} when investigating such matters as insider trading, false information dissemination, or manipulation of exchange rates.\textsuperscript{141} The COB may also impound any documents relating to an investigation, after obtaining approval of the Tribunal de Grande Instance, and, if accompanied during a search by an "Officer of the Judicial Police."\textsuperscript{142} Once a search has been conducted, the COB may then request the Tribunal to issue an order to seize property (including funds) or to issue an injunction.\textsuperscript{143} The new law also allows the COB to request that the Tribunal freeze assets, temporarily suspend persons from their professions, and place funds in escrow until the proceeding is over.\textsuperscript{144}

Additionally, the Security and Disclosure Law authorizes the COB to conduct investigations of securities violations at the request of foreign counterparts, and to disclose information to foreign regulators.\textsuperscript{145} The COB had been negotiating a cooperation agreement with the SEC since 1985, realizing the necessity of foreign cooperation for the Bourse's transnational activities.\textsuperscript{146} Although the two agencies did agree in principle to assist each other, a formal agreement was not signed until De-

\textsuperscript{135} See id.
\textsuperscript{136} See supra text accompanying notes 76-77.
\textsuperscript{137} See Law of August 2, 1989, supra note 132, at arts. 9-2, 1, 2.
\textsuperscript{138} See Baumgardner, supra note 13, at 7, col. 1. The SEC's sanctioning power is limited to three times the profit made, or losses avoided, by the insider trading. See D. Robbins Conversation, supra note 82.
\textsuperscript{139} See Law of August 2, 1989, supra note 132, at art. 4.
\textsuperscript{140} See id. at art. 2.
\textsuperscript{141} See id. at art. 4. To search premises, however, the COB must obtain authorization from the "President du tribunal de grande instance," a Court of original jurisdiction, in the jurisdiction in which they are searching. See Mercadel, Regional Developments: France, 24 Int'l Law. 817, 818 (1990).
\textsuperscript{142} See Law of August 2, 1989, supra note 132, at art. 4; Mercadel, supra note 141, at 818. The officer of the judicial police is the authority charged with monitoring this type of search. See Law of August 2, 1989, supra note 132, at art. 4.
\textsuperscript{143} See Law of August 2, 1989, supra note 132, at art. 5.; Mercadel, supra note 141, at 818.
\textsuperscript{144} See Law of August 2, 1989, supra note 132, at art. 5.
\textsuperscript{145} See id. at art. 3.
cember 1989, after both the occurrence of the Pechiney affair and the enactment of the Security and Disclosure Law granting the COB statutory authority to enter into such agreements. In contrast to this current autonomy, at the time of the Pechiney and Société Générale scandals, the COB could only turn these cases over to the Minister of Justice for prosecution.

The COB's 1989 agreement with the SEC was the first such cooperation agreement with a foreign counterpart. Signed on December 14, 1989, it calls for the two regulatory authorities to provide mutual assistance with investigations. Further, it attempts to alleviate problems in detecting cross-border fraud, as in the Pechiney scandal. Specifically, it was created to formalize cooperation between France and the United States on a wide range of enforcement matters, including the protection of investors against "inadequate disclosure, insider trading, manipulation and failure of market professionals to carry out their responsibilities."

On the same date, December 14, 1989, the SEC and the COB also signed what is referred to as an "Understanding." This Understanding goes beyond the first Agreement, because it provides for consultations between the two regulatory authorities to reconcile the differences in their approaches to securities regulation.

In addition, between 1989 and October 1991, the COB began negotiating exchange of information agreements with countries other than the United States. Some of the COB's more recent negotiations involved its counterparts in Canada, Switzerland and Mexico. Furthermore,

147. See Baumgardner, supra note 13, at 6, col. 6.
149. See Greenhouse, France Seeks More Power for Its S.E.C., N.Y. Times, Mar. 9, 1989, at D1, col. 6; Huge Scandal, supra note 107, at D9, col. 3.
150. See Baumgardner, supra note 13, at 5, col. 1.
152. See Baumgardner, supra note 13, at 7, col. 2.
154. This agreement is formally known as the "Understanding Regarding the Establishment of a Framework for Consultations between the Securities and Exchange Commission and the Commission des Opérations de Bourse". Id. at 7, col. 3.
155. See id. at 5, col. 1.
156. To demonstrate the importance of these agreements, over half of the investigations conducted by the COB in 1990—that is, forty out of seventy-five—had overseas implications. See More Than Half of Investigations Involve Foreign Business COB Says, Int'l Sec. Reg. Rep., July 1, 1991, at 3.
the COB co-drafted a set of ethical principles with London's regulatory body, the Securities and Investment Board ("SIB"). These ethical principles focus specifically on the relationship between financial intermediaries (that is, banks and investment firms) and their clients.

In March 1990, the COB ensured that its newly enhanced policing authority would not go unnoticed, when it proposed new requirements pertaining to "insider trading, market manipulation, and reporting of financial information." In May 1990, the Finance Minister approved these proposed regulations. The new regulations generally provide for more stringent transparency requirements and offer a clearer definition of insider trading. The new regulations also include a measure known as "rescrit," which allows a company to determine if its future actions will gain COB approval by consulting with the COB prior to implementation of its plan. If, at that time, the COB determines that a company's plans comply with the COB's guidelines, it generally grants written approval. This prior approval operates to protect the

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authority to exchange information with each other. See id. They are similar to the information agreement between the COB and the SEC. See id. at 10.


159. See id. These intermediaries must (1) have the resources necessary to properly perform and supervise their activities in compliance with the regulatory system; (2) supply customers with all necessary information when dealing on their behalf; (3) apply fairness and diligence in their relationship with clients; (4) take steps to avoid conflicts of interests; and (5) promote integrity and transparency in accordance with the requirements of the market in which they are dealing. See id.

160. N. Poser, supra note 1, at 388; see 23e Rapport au Président de la République par la Commission des Opérations de Bourse 87 (1990) [hereinafter COB 1990 Report].


162. See COB 1990 Report, supra note 160, at 87. Thus, the COB now requires that listed companies publish "exact, precise, sincere" information on any fact that would affect the share price, as soon as that fact becomes known to the company. See Annexes, Règlement n 90-02, 1990 J.O. 20 Juill., 8600, D.S.L. 344, at arts. 2, 4. Moreover, the published information must be as complete as the information filed abroad. See id. at art. 7. The new regulations also provide guidelines for what information with respect to listed securities must be publicly disseminated. See id. at arts. 4-8.

163. See COB 1990 Report, supra note 160, at 95-97; Annexe, Règlement N 90-08, 1990 J.O. 20 Juill. 8602, D.S.L. 345, at arts. 1-6. The new rules forbid insiders—who include the following: (1) corporate managers and staff; (2) dealers and other personnel involved in the preparation and execution of an order; (3) people receiving privileged information through their work; and (4) anyone receiving such information from people in the other three categories—from profiting from the information they have or passing it on to anyone else. See id. at arts. 2-5. Privileged information includes any non-public information that may influence the stock price. See id. at art. 1. The original insider trading law, adopted in 1967 by Ordonnance No. 67-883 of September 28, 1967, only included directors, officers, and key executives of any publicly traded company and their spouses in the definition of "insiders". See Lightburn supra, note 91, at 23.


pany from incurring subsequent sanctions.166

The new insider trading rule, the last rule to receive approval from the Finance Minister, allows the COB to impose a civil penalty without having to prove fraudulent intent.167 Although this rule makes sanctioning semi-automatic, the COB believes that because the boundaries of insider trading are clearly defined, would-be violators have no excuse for claiming that they either misunderstood the law or had no notice of it.168

The COB's new sanctioning power seems to have produced results. The number of insider trading investigations has increased169 and, as the COB's spokeswoman, Marie-Claude Robert, suggests, the COB may have finally managed to instill fear in would-be violators.170 Furthermore, by allowing sanctions, the French have found a solution to the "all or nothing" problem of either prosecuting or allowing the wrongdoing to be swept under the rug.171 Although the number of cases referred to prosecutors has increased since the passing of the Security and Disclosure Law,172 only recently did the COB use its power to impose civil fines.173

III. TAKING DEREGULATION TO ITS EXTREME: FRANCE AND THE EEC'S INVESTMENT SERVICES DIRECTIVE

The aim of the Investment Services Directive ("ISD"), which has been

167. See id. at VIII, col. 6; COB 1990 Annual Report, supra note 160, at 100. This rule received criticism from the judiciary, which believed that the rule granted the COB judicial, as well as executive authority. See Sanctioned to Protect, supra note 166, at VIII, col. 6.
168. See Sanctioned to Protect, supra note 166, at VIII, col. 6.; see also COB 1990 Report, supra note 160, at 100 (stating Réglement N 90-08 draws a clearer line between permissible and impermissible conduct).
170. See An Old Club Transformed, supra note 81, at D6, col. 5. In this article, Robert states her belief that there is "less insider trading now because of [the COB's] new pow-
ers." Id. She also believes that the changes have made the COB "much more like the S.E.C." Id.
171. See Sanctioned to Protect, supra note 166, at VIII, col. 6.
172. In 1990 alone, 15 cases were referred to prosecutors, see An Old Club Transformed, supra note 81, at D6, col. 5, as compared with 30 in the six years between 1983-1988. See Baumgardner, supra note 13, at 6, col. 4.
173. See Letter from I. Fuzellier, Commission des Operations de Bourse to Joel Reidenberg, Associate Professor, Fordham University School of Law (November 22, 1991) (enclosing Decision de Sanction à L'Encontre de la S.A. Compagnie Foncière de la Banque D'Arbitrage et de Crédit, COB Bulletin, N 250, 7-11 (Sept. 1991)) (on file at Fordham Law Review). In this decision, the COB, citing the 1990 regulations as a source of its authority, imposed a fine of 800,000 francs (approximately $35,000) on the S.A. Compagnie Foncière for insider trading. See COB Bulletin, supra, at 9, 11.
called the "cornerstone" of Europe's single market, is to give member state investment firms a "European Passport" to freely provide investment-related services in any EC country. A "passport," authorized by the firm's home state, would obviate the need for further approval in any member state in which the investment firm chooses to trade or establish a branch. Furthermore, a firm approved by its home state would be permitted to obtain either direct or indirect membership in the stock exchange of any EC country.

The ISD was amended in 1990 to align with the Second Banking Directive, which allows banks a similar "passport" to operate in any member state. The European Commission intended the ISD to become effective simultaneously with the Second Banking Directive, but it appears that, due to recent controversy, the ISD may not be in force on January 1, 1993.

The ISD has created a division in the EC member states over three main issues: (1) the public reporting requirements; (2) whether trading should occur only on regulated markets; and (3) whether banks that have already obtained clearance in securities should be allowed to participate in direct trading on securities markets. Two factions or "camps" have emerged in response to the ISD. The French lead one

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176. See id. at 593.
177. See id. at 610, art. 13.
179. See Warren, supra note 6, at 221; Frustration, Confusion Reign, supra note 15, at 4; see also Banking on Europe, supra note 178, at S400-407 (discussing the Second Banking Directive).
180. The target date is January 1, 1993. See Financial Services, supra note 16, at § 4.6; see also ISD, supra note 175, at 593 ("it is necessary for reasons of fair competition, to ensure that non-bank investment firms benefit from similar freedom to create branches and provide services across frontiers as that provided for by the [Second Banking Directive]"); Frustration, Confusion Reign, supra note 15, at 4 (implementation of the ISD is vital for the Second Banking Directive to achieve its goal).
camp known as the "Club Med" camp or the "protectionist" group.\textsuperscript{184} The Club Med camp, composed mostly of southern European countries including France, Italy, Spain and Belgium,\textsuperscript{185} objects to the liberality of this directive.\textsuperscript{186} The other camp, lead by Great Britain and termed the "North Sea Group," urges the full liberalization potential of the ISD.\textsuperscript{187} This faction also includes Germany, Ireland and the Netherlands.\textsuperscript{188}

A. France's Specific Objections to the ISD

France views the ISD as discouraging regulation.\textsuperscript{189} The Chairman of the SBF in France has criticized the Directive for "failing to ensure market transparency and basic enforcement."\textsuperscript{190} Unlike the North Sea camp, which wants to enhance trading outside the regular markets, the French want trading to take place on a single, regulated market, believing that investors need full protection.\textsuperscript{191}

Apart from the politically inspired competition between France and Great Britain, competition also exists on a very practical economic level. France has allowed large institutions to trade with each other off the market only on a matched basis, while London's Stock Exchange Automated Quotations System ("SEAQ") has been significantly less regulated.\textsuperscript{192} London's SEAQ is the most substantial over-the-counter

\textsuperscript{184} See, e.g., Johnson, French Put EC Broker Plans in Jeopardy, The Daily Tele., July 9, 1991, City Section, at 18, available in LEXIS, Nexis Library, Int'l File ("the French lead a group of temperamentally protectionist countries"); Setting Markets Free, supra note 183, at 18 (the Club Med camp "wants securities to be traded on tightly regulated markets... to protect... Europe's other small investors," although the "simpler truth is that the southern Europeans want to protect their exchanges from competition").

\textsuperscript{185} See North-South Fight, supra note 183, at 4; Setting Markets Free, supra note 183, at 18.

\textsuperscript{189} See infra notes 189-91 & 216-20 and accompanying text.

\textsuperscript{187} See, e.g., Financial Services, supra note 16, at § 4.7 (noting that the northern group wants "maximum flexibility and freedom" for investors); Setting Markets Free, supra note 183, at 18 (commenting that the Northern group wants to minimize rules on market structure in order to maximize competition).

\textsuperscript{188} See Financial Services, supra note 16, at § 4.6.


\textsuperscript{192} See Dawkins, Block Trading Review, supra note 191, at 19, col. 5.
market in Europe. In fact, it controls ninety percent of all cross-border, off-market activity. Currently, the French have no equivalent to compete with London’s over-the-counter market. Instead, France has a small, tightly regulated “hors cote” or over-the-counter market for securities that are not quoted on the official list. This market is used for either small companies or stocks with low trade volumes, and not for block trading. Thus, France has insisted on limiting trading only to established, regulated markets.

France is motivated by other concerns as well. Due to the traditional stockbroker’s monopoly, France is reluctant to freely open up membership to its long-closed Bourse. In addition, given the scandals that have permeated the French securities industry, France wants transactions reported to regulatory authorities and wants the reporting to occur on the same evening as the transaction.

In an attempt to satisfy the needs of the opposing camps, compromises were proposed by the two EC Presidencies in 1991. The first came from the Italian Presidency, which took over the Council of Ministers in December 1990. The Italian compromise, similar to the compromise

194. See Frustration, Confusion Reign, supra note 15, at 4; see also Louth, supra note 193, at *2 (reporting that the exact figure in 1990 was 93%).
195. See Coopers & Lybrand Europe, supra note 15, at 172; P. Stonham, supra note 4, at 141.
197. See supra note 28.
198. See Frustration, Confusion Reign, supra note 15, at 4; see also France Booklet I, supra note 21, at 122 (noting that, in France, outsiders will not gain free direct access to the stock market until 1993 and currently must rely on their “associations” with member firms).
199. See ISD Stalled, supra note 174, at 2; EC Commissioner Seeks Compromises, supra note 191, at 8. This requirement is particularly directed at those firms that trade “off-market.” Presently, these traders have 24 hours to report. See Eurupdate, supra note 191, at § 7.1.9.
200. The EC President presides over the European Community’s Council of Ministers, the institution responsible for ensuring that the economic policies of the individual member states are reconciled with those of the Community. See Treaty Establishing the European Economic Community in Treaties Establishing the European Economic Communities, arts. 145-146, at 263-264 (1987) [hereinafter EEC Treaty]. The Council of Ministers is made up of representatives of the governments of the twelve Member states. See id. at art. 146. The office of the President rotates among each of the twelve members of the Council, and is held for a term of six months. See id.
201. The Portugese Presidency, which took over the Council of Ministers in January of 1992, has been working on another compromise, but has yet to resolve the conflict over the reporting requirements. See Atkins & Hill, U.K. Plans to Put Brake on Single Market; British EC Presidency Under the Conservatives May Put New Legislation in Jeopardy, Fin. Times, Feb. 10, 1992, at 14, col. 2; see also Member States Fail to Break Deadlock, supra note 181, at 1 (“The Commission [had been] in close contact with the Portugese in the hope that the next six months will produce a breakthrough.”).
later proposed by the Dutch Presidency, allowed transactions to be limited by member states to regulated markets if (1) the investor resided in the country in which the transaction occurred; (2) the shares involved were listed in the country imposing the restriction; (3) the relevant investment firm provided services in that country; and (4) the value of the transaction was under a certain threshold.

The Dutch, in a further effort to save the ISD from complete failure, offered another compromise. Like the Italian proposal, the Dutch plan would essentially have allowed member states to require that trading occur on regulated markets if certain conditions were met. The Dutch proposal included only three conditions: (1) the investor must reside in the country in which the transaction occurs; (2) the investment firm must operate through either a main office or branch in that country or under the freedom to provide services there (that is, with a "passport"); and (3) the transaction must involve an instrument that is normally traded on a regulated market in that country. The Dutch compromise ultimately provided that member states must permit an investor to trade "off market" if the investor so desires with the stipulation that a member state could make permission conditional upon its "explicit authorization." In determining whether to grant authorization, the host state would consider the investor's need for protection.

Concerned that this solution would encourage investors to flock from regulated exchanges to private transactions, France rejected the Dutch compromise. Great Britain, for its part, favors no directive over a watered down version.

Other possible solutions have been proposed. One solution, for example, recognizes that the North Sea Group is particularly concerned with promoting block traders or "wholesale investors," while France is con-

202. See infra notes 204-09 and accompanying text.
203. See Off-Exchange Trade Compromise Unlikely to Succeed Quickly, supra note 189, at 4-5.
205. See id.
206. See id.
207. See ISD Stalled, supra note 174, at 2.
208. See No Progress, supra note 204, at 8.
209. See id.
211. See, e.g., Touted 'Level Playing Field' Looks Uneven as EC Fails to Agree on Investment Services, Thomson's Int'l Banking Regulator, Aug. 30, 1991, at 8 ("[T]he advantages of a single investment services passport would be outweighed by the costs of making concessions in the current areas of disagreement."); Fox, Britain Suggests Dropping EC Financial Directives, Reuters, Jan. 30, 1992, available in LEXIS, Nexis Library, Intl file (statement of Paul Tillett of the British Bankers Association) ("We would rather have no Investment Services Directive at all than to have one which actually inhibited investment business."); Hill, supra note 182, at 29, col. 6 (British "would rather see the ISD withdrawn altogether than accept what it claims are protectionist measures by other states").
cerned with protecting the small investor. Thus, if the French could establish a less-regulated, off-market exchange similar to SEAQ, then the Directive could mandate trading on organized markets for everyone but the "wholesale investor." A similar proposal suggests that the other point of contention, the speed of publication after a transaction, could be resolved by granting more time for a large trade to be published.

Presently, the conflict surrounding this transparency issue provides the greatest obstacle to compromise. France continues to advocate immediate disclosure of transactions and a "minimum level of price transparency." It opposes allowing an exemption to this requirement for services such as London's SEAQ. France claims that in such markets "the investor is given insufficient details of trading prices and volumes." Great Britain, however, contends that an instantaneous and detailed reporting requirement would hinder its market-makers and commodity brokers who rely on secrecy. Great Britain further argues that the damage this stringent requirement would cause would extend to its entire "quote-driven" system, affecting its more sophisticated markets.

The EEC's Commission believes the opposing factions await a text

213. See id. In fact, the CBV recently published a report that encourages block trading off the market at privately agreed to prices. See Big Bang Encore, supra note 17, at 92.
215. See id.
217. See ISD Continues to Dog EC Finance Ministers, supra note 181, at 3; Member States Fail to Break Deadlock, supra note 181, at *1.
218. See ISD Continues to Dog EC Finance Ministers, supra note 181, at 3.
221. Id.
222. See id.
223. Under this system, dealers "buy speculatively and confidentially." Member States Fail to Break Deadlock, supra note 181, at *1. On SEAQ, the domestic equity market in London, the price of large trades are not published until 90 minutes after they occur. See ISD in Trouble, supra note 219, at 12. This delay gives marketmakers a chance to "reduce their exposure" before their transaction is revealed to the market. See id. On SEAQ International, however, details of individual trades are never published. See id. This practice represents the preference of large investors who use SEAQ International. See id.
224. See Member States Fail to Break Deadlock, supra note 181.
225. The European Commission, which receives its authority from Articles 155-63 of
that will "guarantee" the preservation of their respective systems. Keeping in mind the needs of both groups, the Commission has been working with the Portugese Presidency to produce a new compromise.

B. A Justified Resistance?

It is clear that the ISD is aimed at removing regulatory barriers in order to internationalize securities markets. One could argue, however, that this Directive undermines "prudential regulation" of the sort recently instituted by France. While the ISD is intended to harmonize prudential conditions, these conditions may not be as prudent as France would like. In the past three years, the French government has made a concerted effort to promote as much transparency as possible in its markets, primarily by strengthening the COB.

It has been argued that France is using this transparency argument to cover the distrust it harbors toward London and the other members of the North Sea Camp. The problem France faces, however, cannot simply be attributed to its historical distrust of those EC states that oppose it on this issue.

For one thing, France's securities market is still far behind London's in size and activity. Furthermore, without a loosely regulated over-the-counter market, France's growth may be stunted as it blends into a market controlled by Britain and/or Germany under the ISD. If France, however, refuses to accept the ISD, it will take the blame for hindering the goal of European harmonization.

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EEC Treaty, supra note 200, is the institution from which all EEC legislation originates. See K-D Borchardt, The ABC of Community Law 19 (1991). 226. See Member States Fail to Break Deadlock, supra note 181, at *1. 227. See id. 228. See supra notes 175-79 and accompanying text. 229. See Coopers & Lybrand Europe, supra note 15, at 249. In fact, in the preamble of the ISD, the Commission states that the purpose of the adopted approach is to achieve "the essential harmonization necessary and sufficient to secure the mutual recognition of authorization and of prudential supervision systems." ISD, supra note 175, at 593. 230. See Off-Exchange Compromise Unlikely to Succeed Quickly, supra note 189, at 5 (explaining the French criticism of the ISD for making no reference to transparency, setting no minimum standards for reporting on transactions, and providing no guidelines for the conduct of intermediaries). 231. See supra notes 77-81, 87-91, 126-40 and accompanying text. 232. See Frustration, Confusion Reign, supra note 15, at 4; Louth, supra note 193, at *2. 233. See supra note 53. 234. Great Britain and Germany, countries in which off-exchange trading abounds, "stand to gain the most" from ensuring that unrestricted off-exchange continues. See Louth, supra note 193, at *2. Thus, these countries want the ISD to allow investors the opportunity to "opt out" of trading on regulated exchanges. See id. 235. Great Britain also argues that, if the French succeed in their demands, customers will be "deterred from operating on the European market, and could be driven to markets outside the EC such as Switzerland." Johnson, supra note 184, at 18; see also, Louth, supra note 193, at *1 ("Non-European firms are frequently put off listing in Europe by having to choose just one bourse, or face the complexities of listing on several. This is not
The proponents of the ISD argue that the Directive is crucial to the successful development of a single European market. With the ISD in force, they argue, investors will no longer have to face the separate regulations of each individual state and, therefore, will be further encouraged to participate in the EC market. Furthermore, proponents of the ISD believe that it will be instrumental in preventing a sudden nationalization movement, both in France and in other EC countries.

The ISD presents France with the problem of striking a balance between its regulatory needs as a nation, given the "traditionally lenient French attitude toward financial scandal," and the needs of those other member states who may have a traditionally stringent attitude toward market corruption. In addition, the ISD demonstrates the need for member states to institute regulatory measures with the European Community in mind, rather than as detached, autonomous entities.

In order for the Bourse to remain competitive and to retain at least some sense of autonomy, France must reach the point at which the ISD represents an "opportunity" rather than a "threat" to its securities markets. In other words, without undermining its recent emphasis on investor protection schemes, the French Government needs to create a less-regulated, off-market exchange that can compete with London's SEAQ.

Despite the criticism France has received in the dispute over the ISD, it would be inaccurate to classify France's reaction as a move toward nationalism in light of all it has done to internationalize. Rather, it is self-preservation that understandably keeps the remaining regulatory barriers in place.

CONCLUSION

France's deregulation occurred as a controlled, step-by-step process in anticipation of a rapidly approaching single European market. As a result of this process, however, France realized that liberalization means not only eliminating access restrictions, but also increasing transparency. In other words, it could not deregulate without "reregulating." The most efficient and obvious way for France to promote transparency and, therefore, integrity, was to mitigate government interference and to install a watchdog agency "with teeth."

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236. See note 174 and accompanying text; see also, Louth, supra note 193, at *1 (stating that a uniform European market for securities is one of the "lynchpins" of the EC's "single market drive"); ISD in Trouble, supra note 219, at 11 (referring to the ISD as the "missing link in the Community's financial services programme").


238. Whelan, supra note 169, at *2.

239. See generally Malloy, Bumper Cars: Themes of Convergence in International Regulation, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S1, S1-22 (1992) (discussing the need for a "converged pattern of regulation" among international regulators).
While its 1980s liberalization process has turned the imminent single market into an opportunity for France to expand, France cannot afford to completely “let loose” and succumb to the pressure to break down all cross-border barriers. Despite the fact that the French Government’s installation of prudential regulation was expedited as a result of the Pechiney and Société Générale scandals, this process is still in its early stages. Once France is confident that it has developed the mechanisms needed to maintain control of its markets, the French government can more readily purge the vestiges of its protectionist and nationalistic traditions and will be better able to participate in those decisions that are made for the benefit of the EEC at large.