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The Case for a European Securities Commission

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Articles

The Case for a European Securities Commission

ROBERTA S. KARMEL*

The free movement of capital is one of the four freedoms set forth in the Treaty of Rome. Although good progress has been made with respect to monetary integration, culminating in the commencement of the European Monetary Union, the introduction of the euro in most of the European Union (EU) countries in 1999 and the formation of a European Central Bank, integration of the equity markets is far from complete. Despite the adoption of various directives relevant to public investors and equity trading markets, there is not an integrated European market enabling issuers to float public offerings or savers to invest and trade across national borders in a single market. The persistence of national equity markets has several causes. One important factor is the lack of a common equity culture across Europe. Nevertheless, the time is ripe for a public securities market that will transcend national boundaries. All over Europe, governments are attempting to foster an equity culture for both ideological and practical reasons. A European equity market is needed in order to finance the needs of the

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enterprises and peoples of Europe. While laws and regulators cannot create a market, they can either impede or foster one. At the very least, regulation can eliminate anticompetitive practices that inhibit market development. In addition, securities regulation designed to protect investors and instill confidence in the equity markets can change the conduct of issuers and traders that discourage savers from investing in equities. These objectives have not and probably cannot be met through directives of the European Commission. Quicker and more flexible responses to developments in the capital markets are required. This paper will argue that a European Securities and Exchange Commission (European SEC) is needed to foster an equity culture throughout Europe and to develop and administer flexible regulations to govern a European equity market. The paper will also discuss some of the programs a European SEC could undertake.

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I. INTRODUCTION

The free movement of capital is one of the four freedoms set forth in the Treaty of Rome.¹ Although significant progress has been made with respect to monetary integration, culminating in the commencement of the European Monetary Union (EMU), the introduction of the euro in most of the European Union (EU) countries in 1999 and the formation of a European Central Bank, integration of the equity markets is far from complete.² Despite the adoption of various directives relevant to public investors and equity trading markets, there is not an integrated European market enabling issuers to float public offerings or savers to invest and trade across national borders in a single market.³

The persistence of national equity markets has several causes. One important factor is the lack of a common legal framework encouraging an equity culture across Europe.⁴ In the United Kingdom corporate finance is equity based.⁵ By contrast, on the continent corporate finance depends upon internally generated funds and bank loans.⁶ Further, continental employees stand on an equal footing with shareholders as claimants on corporate profits.⁷ These corporate law differences make it difficult to create a harmonized regulatory regime to protect investors.⁸ In addition, equity market integration is discouraged by competition and political rivalry among national stock exchanges.⁹ Another impediment to a pan-European equity market is the barrier to cross border investment by pension funds and insurance companies.¹⁰

Despite the impediments to a European equity market, the

1. See *infra* Part II.A.

2. See generally E. Philip Davis, *Institutionalization and EMU: Implications for European Financial Markets*, 2 INT'L FIN. 33 (1999).

3. See Financial Services: Implementing the Framework For Financial Markets: Action Plan, COM(99)232 final at 6 [hereinafter Financial Services Action Plan].

4. See Davis, *supra* note 2, at 37.

5. See *Return of the Absent Owners*, ECONOMIST, Jan. 29, 1994, at S5.

6. See RICHARD M. BUXBAUM & KLAUS J. HOPT, 4 LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE: CORPORATE AND CAPITAL MARKET LAW HARMONIZATION POLICY IN EUROPE AND THE USA 192-93 (Mauro Cappelletti et al. eds., Integration Through Law Series 1988).

7. See Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 204 (1994).

8. See *id.* at 212.

9. See *infra* Part II.E.

10. See *infra* Part III.B.7.

time is ripe for a public securities market that will transcend national boundaries. All over Europe, governments are attempting to foster an equity culture for both ideological and practical reasons. Government planning and ownership of industry has fallen out of favor coincident with the collapse of Communism. In any event, ever increasing budget deficits are no longer sustainable by governments. One result of this political shift to a free market ideology coupled with a practical need to reduce government spending has been massive privatizations of government owned assets.¹¹ An additional impetus to the creation of an equity culture is that family owned businesses have a need for outside capital in order to retire aging owners, but banks are no longer able to fill all of the capital needs of many businesses because access to larger pools of capital are required in a global marketplace.¹² State and corporate pension fund systems are under severe economic pressure due to demographics.¹³ Therefore, alternative private sector pension schemes, based to some extent on equity investments, are under consideration.¹⁴ In short, a European equity market is needed in order to finance the needs of the enterprises and peoples of Europe.

While laws and regulators cannot create a market, they can either impede or foster one. At the very least, regulation can eliminate anticompetitive practices that inhibit market development. In addition, securities regulation designed to protect investors and instill confidence in the equity markets can change conduct by issuers and traders that discourages savers from investing in equities. These objectives have not and probably cannot be met through directives of the European Commission. Quicker and more flexible responses to developments in the capital markets are required. This paper will argue that a European Securities and Exchange Commission (European SEC) is needed to foster an equity culture throughout Europe and to develop and administer flexible regulations to govern a European equity market. The paper will also discuss some of the programs a European SEC could undertake.

11. See, e.g., Catherine Curran Butcher, *Telecommunications in the European Union*, 48 ADMIN. L. REV. 451 (1996).

12. See Deborah Ball, *IPO Boom Shows Entrepreneurial Spirit Has Reached Italy, Bucking Tradition*, WALL ST. J., July 22, 1998, at B7; John Glover, *Beyond Family Capitalism*, INSTITUTIONAL INVESTOR, July 31, 1995, at 63.

13. See GROUP OF TEN, *THE MACROECONOMIC AND FINANCIAL IMPLICATIONS OF AGING POPULATIONS 25-30* (1998) (visited Sept. 19, 1999) <<http://www.bis.org/publ/gten04.htm>>.

14. See *id.* at 41-42, 44.

II. EU CAPITAL MARKETS INITIATIVES

A. *General Objectives*

The Treaty of Rome, which laid the foundation for the European Communities (EC) in 1958, was designed to remove all restrictions on the free movement of goods, persons, services and capital within the EU.¹⁵ This plan was furthered by the EC White Paper of 1985, which set forth a program for creating a single European market by 1992. The single market was envisioned as expansive and flexible, to ensure that resources, including capital and investment, would flow into the areas of greatest economic advantage.¹⁶ National regulators would continue to play a supervisory role, but financial services would be liberalized by putting into effect EU-wide minimum standards which would supersede former national regulations.¹⁷ The White Paper also included a timetable for the adoption of securities law directives.¹⁸ The White Paper was then implemented by the Single European Act (SEA) amendments to the Treaty of Rome, which encouraged and facilitated the use of directives to harmonize the laws of Member States.¹⁹ The Treaty on European Union (TEU), or Maastricht Treaty, which came into effect in 1993 then provided for an economic and monetary union including a common currency.²⁰ Nevertheless, the TEU also introduced the principle of subsidiarity which put a brake on further harmonization of financial law.²¹

The objective of these efforts was to remove technical barriers that either added costs or restricted entry into particular markets, thereby impeding the free movement of goods, services, persons and capital. This open internal market was intended to give consumers access to a wide range of financial products, without regard to the country from which they were provided, to make the financial services sector more competitive and capable of utilizing economies of scale and to provide discipline in the conduct of

15. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 3(c), 298 U.N.T.S. 11 [hereinafter EEC treaty].

16. See Completing the Internal Market: White Paper from the Commission of the European Council, COM(85)310 final at 8 [hereinafter White Paper].

17. See *id.* ¶103.

18. See *id.* Annex at 26-27.

19. Single European Act, 1987 O.J. (L 169) 1, 25 I.L.M. 503 (1986).

20. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, 31 I.L.M. 247 (1992) [hereinafter TEU].

21. See *id.* art. 36.

economic policies. It was hoped that a single financial market would encourage rational investment and the efficient allocation of savings throughout the EU. The single market envisioned was also supposed to create an attractive and competitive integrated financial system for both EU and non-EU businesses.²²

It was recognized that the abolition of anticompetitive practices was not sufficient to create a common financial market. There was a need for EU-wide rules to underpin the stability of the financial system and to provide a satisfactory level of protection for consumers. The mechanism chosen for integration of the financial markets was a series of directives to harmonize essential standards throughout the EU and to enable financial regulators to practice home country control, but oblige them to honor principles of mutual recognition.

The first step in creating a single market in financial services was the liberalization of capital movements, giving both individuals and firms the freedom to invest capital anywhere in the EU: for example, the right to open a bank account in any Member State.²³ Although this freedom allowed an investor to take the initiative and approach suppliers of financial services, it did not insure that the suppliers were free to establish and solicit business from potential investors in every EU country. In order to create an EU-wide capital market that would not imperil the stability of the financial system, the European Commission determined that a level playing field should be established for financial suppliers and users: for example, uniform rules for stock exchange membership and harmonized capital adequacy requirements for banks and securities firms. A series of directives eliminating technical barriers to cross-border securities offerings and trading was therefore adopted.

There are four groups of financial law directives which relate to the efforts to develop a single securities market in the EU. These groups consist of directives on financial disclosure, directives covering public securities offerings and stock exchange listings, directives regulating trading markets, and directives regulating financial intermediaries which will be addressed in separate sections below. Another way to categorize the laws designed to create a comprehensive scheme of securities regulation is to examine what rights were granted to and what obligations were imposed upon each of the three groups affected by securities laws: issuers seeking

22. See White Paper, *supra* note 16, ¶125-27.

23. This objective was accomplished by the adoption of the directive liberalizing controls on capital movements. See Council Directive No. 88/361, 1988 O.J. (L 178) 5.

capital, savers seeking investment opportunities and financial intermediaries.

Despite the ambitious legislative program set forth in the SEA and subsequently followed, the European Commission has recognized that EU financial markets remain segmented and businesses and consumers continue to be deprived of direct access to cross-border financial institutions.²⁴ However, with the introduction of the euro, a window of opportunity has opened for integrating financial services.²⁵ The Commission therefore has set forth an action plan for improving the single market in financial services that advocates five imperatives for action, as follows:

- the EU should be endowed with a legislative apparatus capable of responding to new regulatory challenges;
- any remaining capital market fragmentation should be eliminated, thereby reducing the cost of capital raised on EU markets;
- users and suppliers of financial services should be able to exploit freely the commercial opportunities offered by a single financial market, while benefiting from a high level of consumer protection;
- closer co-ordination of supervisory authorities should be encouraged; and
- an integrated EU infrastructure should be developed to underpin retail and wholesale financial transactions.²⁶

B. Financial Disclosure and Company Law

An important series of directives was adopted setting forth minimum standards for the protection of shareholders of all EU companies. These directives also protect creditors, including bondholders and suppliers. For the most part, these directives cover both public and private companies and regulate financial disclosure and related matters. The First Directive on Company Law²⁷ provides a system of publicity for all companies and requires disclosure of information on their basic corporate documents, officers, and balance sheet items, such as paid-up capital and profit and loss accounts. The Second Directive on Company Law²⁸ applies only to public

24. See Financial Services Action Plan, *supra* note 3, at 3.

25. See *id.*

26. *Id.*

27. Council Directive No. 68/151, 1968 O.J. (L 65) 8.

28. Council Directive No. 77/91, 1977 O.J. (L 26) 1, amended by Council Directive

companies and specifies minimum capital requirements, lays down certain restrictions on issued share reacquisitions and provides for shareholder preemptive rights. The Second Directive on Company Law tends to impede rather than foster public offerings because of its insistence on par value shares and pre-emptive rights. Further, these restrictions make listing ordinary shares rather than Depository Receipts on U.S. stock exchanges difficult and expensive.²⁹

The Fourth Directive on Annual Accounts³⁰ requires that annual financial statements be published that give a "true and fair" view of a company's assets, liabilities, financial position and profit and loss. Two formats for the balance sheet and four formats for the profit and loss account are permitted. Guidelines are provided for the presentation of standard minimum footnote disclosure. The Sixth Directive on Divisions³¹ requires that certain types of restructuring be approved at an annual meeting and affords shareholders informational and fair treatment rights. The Seventh Directive on Consolidated Accounts³² specifies when accounts have to be consolidated and the procedures for doing so. The Eighth Directive on Auditor Qualification³³ lays down minimum educational and professional qualifications for auditors of public companies and provides that auditors should be persons of good repute. It does not, however, establish standards of auditor independence. The Eleventh

No. 92/101 1992 O.J. (L 347) 64.

29. Par value and pre-emptive rights generally are inappropriate for public companies. When DaimlerChrysler listed in New York, these restrictions, embedded in German law, created serious problems. See generally Noelle Knox, *NYSE Expects More Foreign Stocks*; ASSOCIATED PRESS, Jan. 13, 1999; *DaimlerChrysler's New Global Share Threatens ADRs*, INVESTMENT DEALERS' DIG., Nov. 23, 1998; Thomas S. Mulligan, *Wall Street, California Auto Giant Begins Trading Today In New Stock Format Securities: Newly Created DaimlerChrysler Has Spawned The 'Global Share,' An Alternative To The ADR*, L.A. TIMES, Nov. 17, 1998, at C1; Tracy Corrigan, *DaimlerChrysler To Start Trading: Global Equities Jury Still Out On The Share Structure*, FIN. TIMES, Nov. 16, 1998, at 27.

30. Council Directive No. 78/660, 1978 O.J. (L 222) 11, amended by Council Directive No. 83/349, 1983 O.J. (L 193) 1, amended by Council Directive No. 84/569, 1984 O.J. (L 314) 28 (revising the amounts expressed in ECUS), amended by Council Directive 1989 No. 89/666 O.J. (L 395) 36, amended by Council Directive No. 90/604, 1990 O.J. (L 317) (revising annual accounts), amended by Council Directive No. 90/605, 1990 O.J. (L 317) 60 (revising annual accounts), amended by Council Directive No. 94/8, 1994 O.J. (L 82) 33 (revising the amount expressed in ECUS).

31. Council Directive No. 82/891, 1982 O.J. (L 378) 47.

32. Council Directive No. 83/349, 1983 O.J. (L 193) 1, amended by Council Directive No. 89/666, 1989 O.J. (L 395) 36, amended by Council Directive No. 90/604, 1990 O.J. (L 317) 57 (1990) (amending consolidated accounts as concerns the exemptions for small and medium sized companies and the publication of accounts in ECUS), amended by Council Directive No. 90/605, 1990 O.J. (L 317) 60 (amending consolidated accounts as regards the scope of those Directives).

33. Council Directive No. 84/253, 1984 O.J. (L 126) 20.

Directive on Company Law³⁴ standardizes the information a Member State can require a local branch of a foreign company to disclose so that branches of foreign companies can be treated in the same manner as domestic branches.

Implementation of the EU disclosure and accounting directives did have an impact on privately owned companies that had no obligation to publicly report their assets or earnings. However, these directives have had little or no effect on financial disclosure by public companies. Since the directives allow considerable choice, EU accounting principles cannot be considered up to an international standard.³⁵ Previously, the European Commission basically recognized its lack of any effective mandate in accounting standards policy by putting its weight behind the international harmonization process of the International Accounting Standards Committee (IASC).³⁶ This expressed deference to the IASC was related to the announcement in July 1995 by IASC and the International Organization of Securities Commissions (IOSCO) of a four year program of improvements to standards and the development of new standards (IAS) that would be endorsed by IOSCO and recommended to its members.³⁷ More recently, the European Commission has recognized that it must map out a strategy for enhancing the comparability of financial reporting in Europe, amend and update the Fourth and Seventh Directives and address the issue of auditing standards.³⁸

In the meantime, many world-class European companies have been reconciling their accounting statements to generally accepted accounting principles (GAAP) of the United States in order to list on a U.S. stock exchange or raise capital from U.S. investors.³⁹ While

34. Council Directive No. 89/666, 1989 O.J. (L 395) 36.

35. See Bob Hagerty, *Lack of Comparable Accounting Rules Snarls Europe*, WALL ST. J., Sept. 4, 1992, at A4; David Waller, *Bringing Harmony to the Babel of Community Accounting Languages*, FIN. TIMES, OCT. 16, 1989, at 6.

36. See *Bean Counters, Unite!*, ECONOMIST, June 10, 1995 at 67, 68. The IASC began work in 1973 and is comprised of professional accounting bodies throughout the world. In 1989 it published its conceptual framework. See COOPERS & LYBRAND, *UNDERSTANDING IAS: ANALYSIS AND INTERPRETATION xvii-xx* (1996).

37. See COOPERS & LYBRAND, *supra* note 36, at xxiv.

38. See Financial Services Action Plan, *supra* note 3, at 7, 23.

39. During 1997, 27 European companies listed on the New York Stock Exchange (NYSE) and 22 listed on Nasdaq. In 1999, comparable listing figures were 19 (NYSE) and 13 (Nasdaq). See New York Stock Exchange, *NYSE Listed Companies* (visited Sept. 13, 1999) <<http://www.nyse.com/listed/Euro.html>> and NASDAQ, *Nasdaq International Companies* (visited Sept. 13, 1999) <http://www.nasdaq.com/mktofmkts/nonusoutput_a0.stm> (the Nasdaq figures were as of Aug. 31, 1998).

other European companies have been waiting on the sidelines for the IASC to complete its harmonization project, hoping that the U.S. Securities and Exchange Commission (SEC) will recognize IAS GAAP in documents filed with the SEC, it is not clear whether or when the SEC will reach such a determination.⁴⁰ Further, there is no European government body in a position effectively to negotiate these matters with the SEC.

One important directive in the field of company law has not been passed. The Amended Proposal for a Fifth Directive on Company Law⁴¹ deals with the structure of corporate boards and is highly controversial. It was initially proposed twenty-five years ago and could easily remain only a proposed directive well into the next century. The impasse on the Fifth Directive on Company Law is a product of the different systems of corporate finance and labor relations that have evolved in the United Kingdom, Germany and other EU countries.⁴² Of greatest importance is the historical role of equity capital in funding and ordering business in the United Kingdom, in contrast to the role of bank credit or government in ordering and funding business on the continent. In recent years, however, large privatizations of government owned enterprises⁴³ and pressures on banks to increase their capital⁴⁴ have shifted continental thinking so that businesses and governments are interested in

40. See Lee Berton, *All Accountants Soon May Speak the Same Language*, WALL ST. J., Aug. 29, 1995, at A15; Steve Burkholder, *FASB in 'Very Good' State, Jenkins Says; Baker Bill Casts Shadow*, 30 SEC. REG. & L. REP. (BNA), at 251, 253-54 (Feb. 13, 1998); *Accounting: IASC Interpretations Panel Issues Draft Guidance on Losses from Devaluation*, 69 BANKING REP. (BNA), at 273 (Aug. 11, 1997); *IASC Board OKS Financial Instrument Rules; U.S. Delegation Among Three Abstentions*, 72 BANKING REP. (BNA), at 16 (Jan. 4, 1999).

41. Amended Proposal for Fifth Directive Founded on Article 54(3)(g) of the Treaty Concerning the Structure of Public Limited Companies and the Powers and Obligation of Their Organs, 1983 O.J. (C 240) 2. A related effort is the proposed Statute for the creation of a European company. Amended Proposal for a Council Regulation on the Statute for a European Company, 1991 O.J. (C 176) 1.

42. See generally THE LEGAL BASIS OF CORPORATE GOVERNANCE IN PUBLICLY HELD CORPORATIONS (Arthur R. Pinto & Gustavo Vinsentini eds., 1998).

43. See James A. Fanto, *The Transformation of French Corporate Governance and United States Institutional Investors*, 21 BROOK. J. INT'L L. 1, 10-18, 49-58 (1995); Cosmo Graham, *Privatization—The United Kingdom Experience*, 21 BROOK. J. INT'L L. 185, 190-192 (1995); *Out of Order: Shareholder Rights in France*, ECONOMIST, Mar. 12, 1994, at 87.

44. The Basle Committee on Banking Supervision, a committee of bank supervisory authorities from the Group of Ten countries proposed new guidance in 1988 for the amount of capital internationally active banks should hold as a financial cushion. These new rules, known as the Basle Accord, became fully effective in 1992. See Lawrence L.C. Lee, *The Basle Accords As Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1, 21-22 (1998); Nancy Worth, *Harmonizing Capital Adequacy Rules For International Banks And Securities Firms*, 18 N.C. J. INT'L L. & COM. REG. 133, 162-163 (1992).

developing an equity culture. Nevertheless, it is unlikely that legal regimes will be revised on the continent so that corporations will be managed for the sole benefit of shareholders rather than also for the benefit of creditors and employees or that co-determination will be ended in Germany and other countries. Although the European Commission has recognized the problems different corporate governance regimes pose to the development of an EU financial market, the political difficulties of harmonization are so great that the European Commission has merely recommended a review of national codes of corporate governance to identify barriers to the development of a single market.⁴⁵

C. Offerings and Listings

A second group of directives establishes standards for disclosure in public offerings and listings of securities. The Admissions Directive⁴⁶ sets forth minimum requirements for the admission of shares and debt securities on Member State stock exchanges. The Listing Particulars Directive⁴⁷ requires that, prior to being listed on a stock exchange, companies provide investors with a prospectus containing all information necessary to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the securities. The Interim Reports Directive⁴⁸ imposes an ongoing requirement on stock exchange listed companies to publish semi-annual profit and loss reports and developments of significance to investors. The Public Offer Prospectus Directive⁴⁹ regulates public

45. See Financial Services Action Plan, *supra* note 3, at 15.

46. Council Directive No. 79/279, 1979 O.J. (L 66) 21, amended by Council Directive No. 82/148, 1982 O.J. (L 62) 22. Euro-securities were excluded for policy reasons and trade in an unregulated market. Todd A. Sulger, Comment, *Harmonization of Securities Market Regulations in the European Union: Is the Price Tag Too High?*, 29 CAL. W. INT'L L.J. 221, 225 (1998).

47. Council Directive No. 80/390, 1980 O.J. (L 100) 1, amended by Council Directive No. 82/148, 1982 O.J. (L 62) 22, amended by Council Directive No. 87/345, 1987 O.J. (L 185) 81, (amending the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities of official stock exchange listing), amended by Council Directive No. 90/211, 1990 O.J. (L 112) 24, (amending the mutual recognition of public-offer prospectuses as stock-exchange listing particulars), amended by Council Directive No. 94/18, 1994 O.J. (L 135) 1, (amending the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities of official stock exchange listing, with regard to the obligation to publish listing particulars).

48. Council Directive No. 82/121, 1982 O.J. (L 48) 26.

49. Council Directive No. 89/298, 1989 O.J. (L 124) 8.

offerings of transferable securities throughout the EC, either by the issuer or selling shareholders. Specific items of information disclosure are mandated and exemptions are provided for small issues and private placements.

These minimum disclosure standards provide a foundation for imposing an obligation on securities regulators to recognize the disclosure regulatory standards of other EU Member States. An amendment to the Listing Particulars Directive⁵⁰ provides that EU Member States must recognize stock exchange listing applications of issuers from other Member States without requiring additional information, if an application filed simultaneously (or contemporaneously) is approved by the issuer's home state. The Second Mutual Recognition Directive⁵¹ provides for similar mutual recognition of any public offer prospectus which has been subject to scrutiny and approval by a competent authority. The workings of these directives demonstrate the principles of minimum standards, mutual recognition and home country control that are basic tenets of the single market in securities.

The mutual recognition provisions of the listing particulars and public offer directives held out the promise of creating a single market in securities and generally improving financial disclosure. This has not happened, however, due to the rivalries and suspicions of the European stock exchanges, which will be discussed more fully in connection with the Investment Services Directive (ISD). It should be noted that the mutual recognition provisions are very narrow; they only come into play in the instance of simultaneous or virtually simultaneous listing applications. There is no obligation for a stock exchange in one country to list an issuer because it is listed on an exchange in another EC Member State. In fact, exchanges commonly insist on a translation of listing particulars and often impose additional requirements on issuers desiring to list.

The Eurolist project of the Federation of Stock Exchanges in the EU was supposed to result in more general mutual recognition, but that project foundered and did not become a meaningful pan-European market.⁵² However, two competing models of a pan-European market now are taking shape. One is EASDAQ, the European Association of Securities Dealers Automated Quotation,

50. Council Directive No. 87/345, 1987 O.J. (L 185) 81.

51. Council Directive No. 90/211, 1990 O.J. (L 112) 24.

52. See Hal S. Scott, *Regulation of the Relationship between European Union Stock Exchanges: Lessons from the United States*, in *EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND* 283, 289 (Guido Ferrarini ed., 1998) [hereinafter *EUROPEAN SECURITIES MARKETS*].

which had its first full year of trading in 1997 and was specifically established to serve the entrepreneurial high growth company sector. It is governed by a single legal system under Belgium law and the ISD. The listing prospectus must be at least in English; financial information must be presented in IAS or U.S. GAAP and there are quarterly reporting requirements.⁵³

The other pan-European market is the EURO.NM initiative which includes the Nouveau Marché in Paris, the Neuer Market in Germany, the EURO.NM Belgium in Brussels and the NMAX (Nieuwe Markt) in Amsterdam. This is a multijurisdictional system that will harmonize the rules and regulations of all these markets and integrate the markets electronically, to provide high growth companies with access to international investors.⁵⁴ This market also requires issuers to make active and timely disclosures to investors. In the Neuer Market, annual reports must contain financial statements that are presented in IAS, U.S. GAAP or German accounting standards with reconciliation, share ownership must be published by the management, quarterly reporting is mandatory and seminars must be held at least annually for equity analysts.⁵⁵

A common trading platform for European blue chips stocks is being planned by the Deutsche Borse and the London Stock Exchange, possibly in conjunction with the Paris Bourse.⁵⁶ This will be a multijurisdictional, cross-border joint venture, in which there will continue to be home country regulation. Harmonized financial disclosure therefore is not assured. Nevertheless, technology, competition and the introduction of the euro have sped up the formation of alliances by stock exchanges and these alliances are more focused than prior experiments.⁵⁷

53. See EUROPEAN ASSOCIATION OF SECURITIES DEALERS AUTOMATED QUOTATION, 1997 ANNUAL REPORT OF THE MARKET AUTHORITY 2, 31 (1998).

54. See DEUTSCHE BORSE, A.G., NEUER MARKET 8 (2d ed. 1997).

55. See *id.* at 5.

56. See *Paris To Join Frankfurt-London Stockmarket Alliance*, HANDELSBLATT, Dec. 21, 1998, at 29; John Carreyrou & Genevieve Oger, *Paris Bourse Seeks To Join London, Frankfurt In Pact*, WALL ST. J. EUR., Nov. 13, 1998, at 16; *Paris Exchange May Join U.K., German Alliance*, WALL ST. J. EUR., Oct. 15, 1998, at 15; Suzanne McGee and Silvia Ascarelli, *European Market Link-Up Faces Hurdles*, WALL ST. J., July 8, 1998, at C1.

57. See Paul Arlman, *European Equity Markets After the Euro: Competition and Cooperation Across New Frontiers*, 2 INT'L FIN. 139, 142-44 (1999).

D. Securities Trading

A third group of directives deals with securities trading. The Major Shareholdings Directive⁵⁸ requires disclosure to the issuer and to competent authorities of significant acquisitions or dispositions of listed securities. The EU Insider Trading Directive⁵⁹ harmonizes the law on insider trading by requiring all Member States to adopt legislation to prohibit insider trading. Of possibly more far reaching importance than either of these directives is the Proposed Thirteenth Directive on Company Law⁶⁰ that would establish minimum standards for the conduct of takeovers of companies with listed securities. This directive has been extremely controversial because it goes to the heart of corporate governance and therefore has not yet moved forward.

The Major Shareholdings Directive has provided investors with some information not previously available about the owners of industry in some countries. This is the type of information which could be useful to potential bidders in tender offers, but attitudes and regulatory systems in Europe are quite divergent with regard to contests for corporate control.

The Insider Trading Directive was adopted in order to harmonize insider-trading laws throughout the EU, but it has had the more important effect of causing certain countries to create or change their securities market regulators. Prior to the EU Insider Trading Directive the laws in Europe concerning insider trading were not uniform.⁶¹ The EU Insider Trading Directive required Member States to implement its provisions in their national laws by June 1, 1992. The EU Insider Trading Directive defines "inside information" to mean "information which has not been made public of a precise nature relating to one or several issuers of transferable securities or to one or several transferable securities, which, if it were made public,

58. Council Directive No. 88/627, 1988 O.J. (L 348) 62.

59. Council Directive No. 89/592, 1989 O.J. (L 334) 30 [hereinafter EU Insider Trading Directive].

60. Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids 1989 O.J. (C 64) 8, amended by 1990 O.J. (C 240) 7, amended by 1997 O.J. (C 378) 11.

61. France was the first European country to regulate insider trading and it did so in 1967. See generally Amy E. Stutz, Note, *A New Look at the European Economic Community Directive on Insider Trading*, 23 VAND. J. TRANSNAT'L L. 135, 155-167 (1990). When the EU Insider Trading Directive was passed, insider trading was a criminal offense in the United Kingdom, but not violative of any statute in Germany. See *id.* at 155, 161. See also Ursula C. Pfeil, Comment, *Finanzplatz Deutschland: Germany Enacts Insider Trading Legislation*, 11 U. J. INT'L L. & POL'Y 137, 137 (1996).

would be likely to have a significant effect on the price of the transferable security or securities in question[.]”⁶²

Primary insiders are prohibited from either trading or tipping, and secondary insiders are prohibited from trading, but are not subject to the anti-tipping provisions. It is clear that, unlike the U.S. insider trading laws, determination of illegal trading is based not on breach of a fiduciary duty, but rather, on possession of non-public information. The EU Insider Trading Directive lays out broad guidelines, but Member States may enforce stricter laws.⁶³ In addition, although the prohibition of insider trading is prescribed for all Member States of the EU, the penalties are to be determined by each Member State. The Directive states that the penalties must be “sufficient to promote compliance with [the] measures.”⁶⁴

The last major market center to adopt the Insider Trading Directive was Germany, and this delay happened in part because Germany had no viable regulator to administer this law. Indeed, Germany was two years late in complying with the EU Insider Trading Directive.⁶⁵ When the insider trading regulations were finally adopted in 1994, they were part of a large, comprehensive program to develop a fairer and more attractive investment environment in the German marketplace with centralized regulation to supersede regulation by the *länder* or states. The law created a new agency, the Federal Supervisory Authority for Securities Trading (FSA), to administer the Insider Trading Directive and for other regulatory purposes. The FSA is a federal agency under the Federal Ministry of Finance.

Although prohibiting insider trading is important, other market integrity standards for maintaining fair and equitable markets are also important. The U.S. Securities and Exchange Commission polices the public securities markets by enforcing a general antifraud statutory provision⁶⁶ and provisions outlawing the manipulation of

62. EU Insider Trading Directive, *supra* note 59, art. 1, § 1.

63. *See id.*, art. 6. The Directive states, in part, that “[e]ach Member State may adopt provisions more stringent than those laid down by this Directive or additional provisions, provided that such provisions are applied generally.” *Id.*

64. *Id.* art. 13.

65. The EU Insider Trading Directive required Member States to adopt insider-trading laws by June 1992. *See* Stephen J. Leacock, *In Search of a Giant Leap: Curtailing Insider Trading in International Securities Markets by the Reform of Insider Trading Laws under European Union Council Directive 89/592*, 3 TULSA J. COMP. & INT’L L. 51, 55 (1995). When Germany had not responded, the European Commission instituted infringement proceedings in October of 1992. The insider law was finally passed on July 8, 1994. *See id.* at 62-63.

66. Securities Exchange Act of 1934 (Exchange Act) § 10(b), 15 U.S.C. § 78j(b) (1994) and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1998).

securities prices.⁶⁷ IOSCO has recommended that securities regulation should promote trading transparency and detect and deter manipulation and other unfair trading practices.⁶⁸ The European Commission has recognized the need for a directive to address market manipulation, but this is not a top priority item.⁶⁹ Another important omission in the law at the EU level is the regulation of takeover bids, a gap that affects not only the integrity of securities markets, but also corporate restructurings across national boundaries.⁷⁰

Management of corporations for the benefit of shareholders in the United Kingdom, in contrast to stakeholder management where shareholder claims are equal to the claims of creditors and labor on directors' loyalty on the continent, result in key differences in European corporate finance systems. These differences account for the very different legal and business environments for hostile takeovers and the impediments to the adoption of a directive on takeovers designed to protect investors.⁷¹ Hostile takeovers are common in London and they are regulated by the Panel on Takeovers and Mergers, a self-regulatory body which implements the City Code on Takeover and Mergers (City Code).⁷² The two most important principles in the City Code are that the shareholders of an offeree company must decide whether or not an offer should succeed, and that all equity holders must be treated equally.⁷³ In addition, after an offer is communicated to the board, or even if a board has reason to believe an offer is imminent, the offeree board is prohibited from taking any action without the approval of shareholders at a general meeting "which could effectively result in any bona fide offer being frustrated or in the shareholders being denied the opportunity to decide on its merits."⁷⁴

67. Exchange Act, § 9(a), 15 U.S.C. § 78i(a) (1995).

68. See *Forward and Executive Summary to Objectives and Principles of Securities Regulation*, in *THE SEC SPEAKS IN 1999*, at 285 (1 PLI Corp. L. & Prac. Course Handbook Series No. B-1104, 1999).

69. See Financial Services Action Plan, *supra* note 3, at 23.

70. See *id.* at 24.

71. See Ingrid Depser, *Amended EC Proposal for a 13th Council Directive No. on Company Law Concerning Takeovers and other General Bids*, 19 INT'L BUS. LAW. 483, 484 (1991).

72. See Jonathan Brayne, *Tender Offers Involving U.K. Companies*, 21 REV. SEC & COMM. REG. 67, 70 (Apr. 27, 1988).

73. See Simon MacLachlan & William Mackesy, *Acquisitions of Companies in Europe—Practicability, Disclosure, and Regulation: An Overview*, 23 INT'L LAW. 373, 387-88 (1989).

74. PANEL ON TAKEOVERS AND MERGERS, *THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SHARES*, General

Initially, the draft of the Thirteenth Directive on Company Law was concerned with the equal treatment of the parties involved in takeovers and the transparency of corporate takeovers while a takeover bid was in progress.⁷⁵ It was patterned after the City Code to some extent. There was a provision for a mandatory bid once a threshold position of one-third of the voting shares were acquired. Also controlling target-company shareholders would have been required to act in the interests of all shareholders by not frustrating the bid.

Since capital formation depends upon equity capital in the U.K. there is a constant monitoring of management performance, protection of minority shareholders, and efficient resource allocation. On the continent, as exemplified by Germany, management is given a long-term mandate, its first duty is to the business, and then the employees and the company's bankers. Further, there is stable and knowledgeable ownership of business with close ties to banks.⁷⁶ Given this difference, the British regarded takeovers as the ultimate discipline over bad management, whereas the Germans considered hostile bids as inimical to three ingredients of their post-war success—management's ability to take the long-term view, harmonious labor relations, and the disciplinary function of German banks. Accordingly, German law countenanced numerous barriers to hostile takeovers.⁷⁷ Because the Germans and other continentals believed that the Thirteenth Directive adopted the pro-takeover underpinnings of the U.K. system, they opposed it. The British also opposed it because they did not wish to see their self-regulatory system replaced by a statutory system.

However, the European Commission believed that there was a need to facilitate the restructuring of European companies to meet international competition, so an amended version of the Thirteenth Directive was put forth.⁷⁸ By this time, takeover activity had increased to some extent and the need for shareholder protection had become more apparent.⁷⁹ The amended Thirteen Directive required

Principle 7, at B-2 (9th ed. 1996).

75. Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, *supra* note 60, at 8.

76. See David Chamy, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 151-57 (1998).

77. See Depser, *supra* note 71, at 484.

78. See Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, *supra* note 60, at 9.

79. See Lois Moore, *The EC's Proposed Takeover Directives*, N.Y.L.J., May 28, 1991, at 1. Takeover activity has continued to increase. See *Merger Monday*, ECONOMIST, Oct. 18, 1997, at 61.

each Member State to designate a supervisory authority to put the Directive into effect, a requirement that previously had been included in the EU Insider Trading Directive.⁸⁰ There was provision for mutual recognition.⁸¹

The amended Thirteenth Directive fared no better in achieving acceptance and a consensus in favor of adopting it than the original proposed directive. In 1997 a new and streamlined proposal for a takeover directive was put forward by the European Commission.⁸² This proposal takes into account the subsidiarity principle and leaves Member States some latitude in deciding how to achieve the goals of the directive. The Directive would apply to securities traded on a regulated market of a company governed by the law of an EU Member State.

Nevertheless, the general principles of the Thirteenth Directive that would have to be followed in national law are unchanged. They are that holders of securities in target companies who are in the same position must be treated equally, the addressees of a bid must have sufficient time and information to enable them to reach a properly informed decision, the board of an offeree company must act in the interests of the company as a whole, false markets must not be created in the securities of companies involved in a bid, and target companies must not be hindered in the conduct of their business beyond a reasonable time. Further, national rules would have to be established for a decision to bid to be made public once the supervisory authority and target company are notified and the bidder would be required to draft a disclosure document and submit it to the supervisory authority. The Directive recognizes that prompt announcement of an intention to launch a takeover bid reduces opportunities for insider trading. The target company board would be prohibited from taking action to affect the success of the bid after receiving notification of the bid. Rules would have to be published on withdrawal or nullity of bids, revision of bids, treatment of competing bids, and disclosure of the outcome. Whether mandatory bids would be required at any point would be left to the laws of the Member States.

80. The supervisory authorities were then given the mandate to assure, among other things, that holders of securities in the target company would be treated equally; target company shareholders would have time and information to reach an informed decision on the bid and the target company board would not frustrate the bid. Mandatory bid provisions and mandated disclosure in offering documents also were specified. See Amended Commission Proposal for a Thirteenth Council Directive on Company Law Concerning Takeover and Other General Bids, art. 6(a), 1989 O.J. (L 395) 2, 6.

81. See *id.* art. 6(3).

82. See 1997 O.J. (C 378) 11.

The twice amended Directive remains an anathema to the British who fear that, despite the recognition of the Takeover Panel as a proper supervisory authority, it would change the workings of the Panel by tangling its operations in endless legal challenges.⁸³ The prospects for adoption of the Thirteenth Directive are therefore murky.

E. Financial Intermediaries

A fourth group of directives addresses the regulation of financial intermediaries. The Second Banking Directive⁸⁴ established a legal framework for a single banking market in the EU that began on January 1, 1993. It provides that a bank established and licensed in one EU Member State may provide financial services throughout the EU without obtaining additional regulatory approvals in other EU states. This right to establish branches in other EU countries, and to market and sell services in any country directly, without being required to obtain a license from the host country, is often referred to as the single passport. Although banks are subject to home rather than host country control, minimum capital adequacy and other standards are set forth in the Second Banking Directive as a predicate for mutual recognition.

The UCITS Directive⁸⁵ sets forth minimum standards for Undertakings for Collective Investments in Transferable Securities. The effect of the directive is that any closed-end investment fund within an EU Member State that complies with EU minimum standards and has been duly authorized by the appropriate home country regulator can be freely marketed throughout the EU without prior authorization of the host country. The Third Life Directives⁸⁶ provides a passport for life insurance companies but has accomplished little with regard to liberalizing cross border securities investment. A Pension Funds Directive has yet to be adopted.⁸⁷

83. See *More Talks on Defining Takeover Bids Directive*, EUR. REP., Jan. 19, 1999; *Euro-takeovers*, FIN. TIMES, Jan. 14, 1997, at 17.

84. Council Directive 1989 No. 89/646, O.J. (L 386) 1, amended by 92/30, 1992 O.J. (L 110) 52, amended by 93/6, 1993 O.J. (L 141) 1, amended by 95/26, 1995 O.J. (L 168) 7.

85. Council Directive No. 88/220, 1998 O.J. (L 100) 31.

86. Council Directive No. 92/49, 1992 O.J. (L 228) 1 amended by Council Directive No. 95/26, 1995 O.J. (L 168) 7, (reinforcing prudential supervision); Council Directive No. 92/96, 1992 O.J. (L 360) 1, amended by Council Directive No. 95/26, O.J. (L 168) 7, (reinforcing prudential supervision).

87. The Proposal for a Council Directive Relating to the Freedom of Management and Investment of Funds Held by Institutions for Retirement Provision was withdrawn. 1993

The ISD⁸⁸ establishes a single passport for securities firms and minimum standards for regulation of stock exchanges. The related Capital Adequacy Directive (CAD)⁸⁹ establishes financial responsibility requirements for securities firms. The ISD is intended to allow investment firms to open branches and offer services on a cross border basis. It provides a common licensing requirement among the member states, mutual recognition of the license granted in the home state by all other member (or host) states and guiding principles for conduct of business rules. However, the ISD did not result in any meaningful harmonization of conduct of business rules because Article 11(2) provided that implementation and supervision of compliance with rules of conduct should remain the responsibility of the host state.

Leaving such powers to host member states is a clear departure from mutual recognition principles.⁹⁰ In addition, it is unclear how conduct of business rules should be enforced when an investment firm conducts business transnationally without opening a branch in a state other than its host state. It can be argued that in such a situation, the conduct of business rules of the home state should apply.⁹¹ But this interpretation would undermine the political compromise embodied in Article 11(2). Furthermore, if an aggrieved investor were to bring an action in the host state, there would be a misalignment of civil and regulatory jurisdiction, and an extraterritorial application of home county law.⁹²

Another important gap in the ISD relates to its provisions concerning stock exchanges. The directive contains a number of provisions applicable to "regulated markets." These include a requirement for listings to be conducted in accordance with the listing directive, a reporting requirement to a competent authority for transactions, whether effected on or off a regulated market, transparency requirements, an optimal concentration requirement and

O.J. (C 171) 11 and a Communication on Pension Funds, 1994 O.J. (C 360) 7 was annulled. See also Case C-57/95, French Republic v. Commission, 1997 ECJ CELEX LEXIS 7314 (1997). See generally *Local Answer for Pension Reform*, FIN TIMES, May 30, 1998, at 9.

88. Council Directive on Investment Services in the Securities Field, No. 93/22, 1993 O.J. (L 141) 27 corrected 1993 O.J. (L 170) 32 and 1993 O.J. (L 194) 27.

89. Council Directive on Capital Adequacy of Investment Firms and Credit Institutions, No. 93/6, 1993 O.J. (L 141) 1.

90. See Gerard Hertig, *Imperfect Mutual Recognition for EC Financial Services*, 14 INT'L REV. L. & ECON., 177, 181 (1994).

91. See Christopher Cruickshank, *Is There A Need to Harmonize Conduct of Business Rules?*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 131, 132-33.

92. See Johannes Köndgen, *Rules of Conduct: Further Harmonisation?*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 115, 126.

a provision for cooperation among the regulated markets. Due to the inability of the European stock exchanges and governments to agree to a market structure model, the ISD almost failed and required so much flexibility of implementation to gain approval that it does not provide a standard for pan-European exchange trading. In large part, these disagreements were the product of competition between SEAQ International in London and continental exchanges for trading volume in non-U.K. stocks, but the continental exchanges have reclaimed some of this trading volume, and the advent of remote membership and electronic trading may make this rivalry moot.⁹³

In addition to its failure to come to grips with transparency requirements, the ISD does not provide a comprehensive approach to many issues that arise in the regulation of markets, for example the need for an exchange to be licensed, to have adequate financial resources, to run proper markets, to have adequate monitoring and enforcement, to provide satisfactory arrangement for clearance and settlement and to cooperate with regulators.⁹⁴ In addition, the ISD does not address the very difficult question of when a securities firm or facility should be required to register as a "regulated market."⁹⁵

The European Commission has recognized that the ISD is in urgent need of upgrading.⁹⁶ Further, new technologies require European wide definitions of what is a "regulated market" or an exchange and a common approach to the authorization and supervision of alternative trading systems.⁹⁷ Such regulation would be in accord with IOSCO's Objectives and Principles of Securities Regulation that recommend that the establishment of trading systems, including exchanges, be subject to regulatory authority and oversight, and to ongoing supervision.⁹⁸

93. See Ailsa Röell, *Competition among European Exchanges: Recent Developments*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 213, 214-18. See also *A New Broom for Europe's Capital Markets*, ECONOMIST, Nov. 5, 1994 at 75.

94. See Andrew Whittaker, *A European Law for Regulated Markets? Some Personal Views*, in EUROPEAN SECURITY MARKETS, *supra* note 52, at 269, 270-71.

95. The SEC has engaged in a lengthy rulemaking effort to attempt to distinguish proprietary or alternative trading systems from exchanges. Although this has been recognized as an issue in Europe there is little consensus as to how it should be handled. Compare Fabrice Demarigny, *A European Directive for Regulated Markets? A French Reaction*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 275, 280-82 with Ruben Lee, WHAT IS AN EXCHANGE? THE AUTOMATION, MANAGEMENT AND REGULATION OF FINANCIAL MARKETS 295-316 (1998) [hereinafter WHAT IS AN EXCHANGE?]

96. See Financial Services Action Plan, *supra* note 3, at 5.

97. See *id.* at 6.

98. See THE SEC SPEAKS IN 1999, *supra* note 68.

F. *European Securities Exchanges and Regulators*

Before the mid-1980s European equity markets were structured the way they had been in the nineteenth century. Continental exchanges featured call auction markets with open outcry dealing where publicly licensed single-capacity intermediaries conveyed customers' orders and were compensated by statutorily fixed commissions. In London, stock trading was managed by dealers who received orders through single capacity brokers, and commissions were fixed by the exchange.⁹⁹ Stock exchanges were closed membership organizations, sheltered from competition by national regulation.¹⁰⁰ In general, stock exchange listing requirements established public company disclosure standards although some countries introduced government supervision of company disclosure prior to the 1986 Single European Act.¹⁰¹ The stock exchanges also established and enforced conduct of market trading rules. The degree of government intervention varied. Three different patterns have been catalogued. In the U.K., Ireland and the Netherlands, regulation was primarily self-regulatory and the government merely provided some legal backing for the regulatory apparatus. In Latin European states, such as France and Italy, the stock exchanges were government owned but they had negotiated considerable self-regulation which was then rubber stamped by government. In Belgium, Luxembourg and Germany, the government was involved in certain areas, but not others.¹⁰²

International competition, technological developments and a shift in political preferences led to changes in stock exchange structure and regulation in the 1980s and 1990s. Commission rates were unfixed, single capacity was eliminated, exchange floors disappeared and new marketplaces in the form of proprietary trading systems were launched. Stock exchanges became limited companies owned by their members, in contrast to state owned organizations. Cross border stock exchange linkages were introduced. More government securities regulation came into force, partly as the result of the Insider Trading Directive and the ISD and partly for other reasons such as government privatization of state owned utilities and

99. See Marco Pagano, *The Changing Microstructure of European Equity Markets*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 177, 178.

100. See *id.*

101. Belgium had had such regulation since 1935. Luxembourg introduced it in 1965, France in 1967 and Italy in 1974. Eddy Wymeersch, *The Implementation of the ISD and CAD in National Legal Systems*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 3, 6.

102. See *id.*

other enterprises.¹⁰³

Implementation of the ISD, the CAD and Insider Trading Directives confronted EU member states with the problem of deciding which government agency should oversee and regulate securities firms and markets, in particular whether such oversight should be assigned to banking regulatory authorities or securities commissions. In many jurisdictions prudential supervision was given to the bank authorities, but other regulatory responsibilities were given to existing, reformed, or newly organized securities commissions.¹⁰⁴ Because of the political difficulties of allocating responsibilities with respect to securities regulation, the ISD was not promptly implemented. The last country to do so was Spain in 1998.¹⁰⁵

The result of these developments was that national securities commissions were strengthened, investor protection became a greater priority than had previously been the case and many new laws and regulations were promulgated. These trends are likely to continue because of ongoing privatization of enterprise, the need to create alternative retirement vehicles to unfunded pension systems and the need to retire the aging capital of the generation that created the post World War II economic resurgence of Europe.¹⁰⁶

Creating an equity culture requires a regime of investor protection. But without further harmonization of securities laws, new and more vigorously enforced securities regulations will impose a serious burden on financial intermediaries required to comply with different regulations in different jurisdictions. Furthermore, securities trading has become globalized and stock exchanges conduct business in a manner that transcends national boundaries. Whether national conduct of business rules will sufficiently protect investors involved in cross border trading is problematic. Also, there is a need for cross border surveillance of securities markets by

103. See Pagano, *supra* note 99, at 178-204.

104. The concept of a bank lead supervisor is recognized internationally in the Basle Concordat issued by the Basle Committee in 1983, and supplemented in 1990 and 1992. Because banks are subject to consolidated supervision, enforcement of the CAD was generally given to banking supervisors. See George Graham, *BIS Weighs Expanded Role*, FIN. TIMES, June 9, 1997, at 4; Peter Marsh, *Central Banks Act on Fraud: Guidelines Designed to Prevent Repeat of BCCI Disaster*, FIN. TIMES, June 22, 1992, at 2; Robert Preston, *Bank Seeks Tougher Standards*, FIN. TIMES, May 21, 1992, at 10; Richard Dale, *Someone Must Be in Charge*, FIN. TIMES, July 22, 1991, at 12.

105. See George Graham, *The Stock Exchange, Beyond The Storm, Small Will Be Beautiful, With Frankfurt and London Tying up Big Business, the Bolsa May Need to Specialise*, FIN. TIMES, Oct. 19, 1998, at 2.

106. See Pagano, *supra* note 99, at 203-04.

regulators and pan-European clearance and settlement systems. While much can be accomplished through the cooperation of national securities regulators, a European securities market will require a pan-European securities regulator.

III. RULE BY A EUROPEAN SECURITIES COMMISSION

A. *Why a Commission is Needed*

The principle of subsidiarity embodied in the TEU would militate against the establishment of a European SEC if the objectives of securities regulation could be sufficiently achieved at the national level.¹⁰⁷ The problem with securities regulation, however, is that it is derived from, and to some extent continues to be, self-regulation formulated and enforced by stock exchanges. Further, European stock exchanges compete with one another as marketplaces for the trading of securities. They do cooperate in certain ways, but they compete with regard to liquidity, transparency and cost.¹⁰⁸ Also, they compete for listings, including new products. Stock exchanges in Europe have already been privatized and now they are being demutualized.¹⁰⁹ Some have and others may become listed companies. All of these developments involve conflicts of interest that stand in the way of an integrated European regulatory system for a pan-European equity market.

Whether the introduction of the euro will result in the demise of some European stock exchanges remains to be seen.¹¹⁰ While joint ventures and mergers among various exchanges are in the planning stages, there are numerous obstacles to their successful fruition. Mutual companies are difficult to merge and the merger of a mutual company and a limited company is even more difficult. If, for example, the London, Frankfurt and Paris exchanges merged, what disclosure and accounting standards would apply to their listed companies? What regulator would surveil trading and enforce insider trading and similar laws? What regulatory system and what civil law system would protect investors? The mixture of public and private law applicable to securities trading makes the harmonization of standards for investor protection difficult. Traditional concepts of

107. See TEU, *supra* note 20, art. 3b.

108. See Marco Onado, *Competition among Exchanges or Financial Systems?*, in EUROPEAN SECURITIES MARKETS, *supra* note 52, at 225, 228.

109. See Arlman, *supra* note 57, at 141.

110. See Onado, *supra* note 108, at 229.

jurisdiction do not easily apply to Internet and other computerized trading systems for securities.¹¹¹

Stock market crashes and financial firm failures have become international, just like trading markets. The problems of uncoordinated regulatory supervision have been amply demonstrated in recent bank failures.¹¹² There has not been a stock market decline since 1987 requiring regulatory intervention.¹¹³ But as governments encourage an equity culture by privatizing enterprise through public offerings and suggesting that retirement savings be invested in equities, government regulators will be forced to assume more of a stake in the stability of financial intermediaries and equity markets and to ensure investor protection.

Opponents of a European SEC argue that private market incentives will find and maintain an optimal level of investor protection.¹¹⁴ However, the real question for the future is whether the newly empowered national securities regulators in Europe will be willing and able to establish a harmonized regulatory structure or whether a pan-European securities commission would be better able to do the job. Just as the euro required the establishment of a European Central Bank, a pan-European equity market will require a European SEC. Furthermore, without a European SEC, such a pan-European market may never come into existence. The rivalries between the London, Paris, Frankfurt and other stock exchanges are too strong and there is not a sufficient European tradition of investor protection to overcome the opposition of financial intermediaries to more rigorous regulation. There remain too many barriers to cross-border investment by insurance companies and pension funds.

Solving all of these problems through the process of formulating directives is impractical. It takes much too long for directives to be negotiated and then implemented. The capital markets are creative and dynamic. This is one reason why self-regulation has worked well for the securities industry, despite its

111. See Regulation of Exchanges, Exchange Act Release No. 38,672, 62 Fed. Reg. 30, 485 (1997), at 30521-30 (June 4, 1997) [hereinafter Concept Release].

112. See Richard Dale, *Reflections on the BCCI Affair: A United Kingdom Perspective*, 26 INT'L LAW. 949 (1992); Joseph J. Norton & Christopher D. Olive, *Globalization of Financial Risks and International Supervision of Banks and Securities Firms: Lessons from the Barings Debacle*, 30 INT'L LAW. 301, 309-16 (1996).

113. In 1987, the market break in the U.S. triggered similar declines all around the world. See REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS, Fed. Sec. L. Rep. (CCH) Special Report No. 1267, at 9-14 (Jan. 12, 1988).

114. See Benn Steil, *The ISD and the Regulation of European Market Structure, in THE EUROPEAN EQUITY MARKETS: THE STATE OF THE UNION AND AN AGENDA FOR THE MILLENNIUM* 113, 136-37 (1996); Whittaker, *supra* note 94, at 269, 273.

inherent limitations. Transferring oversight of the self-regulatory process to fifteen different national securities regulators will not result in a pan-European securities market, but rather will compound the problems of a fragmented system for the trading and regulation of securities. A central, flexible regulator that could deal directly with the markets and financial intermediaries could provide more appropriate and better oversight. In addition, the need to harmonize U.S. and European securities regulation¹¹⁵ could perhaps be accomplished more easily by a single European regulator working with the U.S. SEC than by fifteen different negotiators.

B. *What a Commission Should Do*

1. Jurisdiction

A European SEC would probably resemble the U.S. SEC to some extent, but it would come into existence at a different time in the development of the capital markets and in the context of a different political and legal system. Engineers of a European SEC should learn from the mistakes as well as the successes of the U.S. model. For example, it is probably not politically feasible or even desirable for a European SEC to be the primary regulator for banks as well as securities firms, yet European banks have historically been the dominant players on European stock exchanges, so some degree of functional regulation of banks probably would be desirable.¹¹⁶ Similarly, while a European SEC need not necessarily regulate insurance companies, it should take an active role in dismantling current barriers to cross border investment and mergers by insurance companies. On the other hand, it would be foolish to separate the regulation of equity and derivatives markets as is now the case in the United States, but is not currently the case in Europe.¹¹⁷

115. See Arlman, *supra* note 57, at 146-47.

116. See Cam F. Justice, Note, *The European Market: Creating a Unified Competitive Banking System*, 2 ILSA J. INT'L & COMP. L. 741, 754-56 (1996). The areas where a European SEC could appropriately regulate banks are with regard to manipulative trading and customer protection. However, there would be no reason for a European SEC to assume responsibility for bank safety and soundness or capital adequacy regulation.

117. See Lugar Says Banking Agencies, Not CFTC, May Be Appropriate Derivatives Regulators, 30 SEC. REG. & L. REP. (BNA), at 1785, Dec. 18, 1998.

2. Disclosure Policy

One of the most important areas that a European SEC should regulate is financial disclosure. The EU directives regarding corporate disclosure and accounting principles have not succeeded in creating a sound legal environment for initial public offerings of small and mid-sized companies or for cross border listings on European stock exchanges. Investors need consistency and comparability in financial statement presentations and timely disclosure of material corporate events. This is why EASDAQ and the EURO.NM markets require their listed companies to reconcile their financial statements to U.S. GAAP or IAS. But even if the IASC completes its monumental task of establishing a set of international accounting principles, IAS will not become a reality unless it is recognized by the world's primary securities regulators. Further, as time passes, these IAS principles will require interpretation and change as well as enforcement. In addition, there is a need for international auditing standards for public companies. A European SEC could perform an important role in exercising oversight of private sector accounting bodies and giving a European input to the work of the IASC. Such input could give the IASC more credibility within Europe as a European SEC could counterbalance the influence of the U.S. SEC. At the same time, a European SEC could negotiate regulatory policies with the U.S. SEC more effectively than fifteen different securities regulators can.

A European SEC also should have a role in establishing and enforcing harmonized annual and periodic disclosures by public companies, as well as disclosures when companies make public offerings. Firms do not appear to have the incentives to voluntarily make the disclosures investors require.¹¹⁸ Although the European Commission determined that an Insider Trading Directive was necessary, and such a directive was subsequently implemented in all of the EU countries, the connection between the ban on insider trading and prompt public disclosure of material corporate events generally has not been made.

A European SEC also could be the repository for reports issued pursuant to the major shareholdings Directive and any disclosures made in connection with takeovers, especially if the Thirteenth Directive is ever passed. Full and fair disclosure can be an alternative to regulation, particularly if disclosures made are promptly and effectively disseminated.

118. See Onado, *supra* note 108, at 240-41.

3. Market Structure

Issues of market structure are highly contentious and it is not immediately clear or universally agreed that governments should be involved in designing securities trading markets.¹¹⁹ When a financial intermediary executes trades as an agent, best execution is imposed by laws covering fiduciary duty.¹²⁰ But when an intermediary acts as principal or dealer it is less clear that a customer is covered by fiduciary duty law.¹²¹ Further, the customer may be willing to pay a larger spread or commission to obtain immediate liquidity. Yet, in any regime where investor protection is an important value, the ability of a customer to obtain best execution is an important regulatory principle. For these reasons, a European SEC would have to focus on issues of transparency and access, even though appropriate regulatory standards acceptable to the various EU member states might be very difficult to formulate. One difficulty would be that this could involve a European SEC in direct or indirect regulation of banks, insurance companies and investment funds. This type of regulation is, and likely will remain, the province of other regulators.

An important function of a European SEC would be to police financial intermediaries for manipulative and anticompetitive practices. The Insider Trading Directive is one type of manipulative activity already addressed, but other kinds of fraudulent trading activities have been common in stock markets from time to time.¹²² Further, since in the past the pricing mechanism for a particular security has tended to gravitate to one exchange, even where securities are dually listed, the so-called natural monopoly created has led to anticompetitive trading activities.¹²³ While such practices could be addressed by the EU Commission as part of its anticompetition mandate, a more specialized approach by a European

119. For a strong argument that they should not be so involved see WHAT IS AN EXCHANGE?, *supra* note 95, at 260-61, 264-65, 308-09.

120. See Division of Market Regulation, United States Securities and Exchange Commission, MARKET 2000 AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS, at V-1 (1994) [hereinafter MARKET 2000].

121. See *id.* See also E.F. Hutton & Co., Exchange Act Release No. 25,887, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,303 (July 6, 1988).

122. These include manipulation of securities prices, false and misleading statements by public companies and their officers and directors, and churning and other forms of overreaching by securities firms. See VII-VIII LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3510-25, 3874-79, 3939-85 (3d ed. 1989).

123. See MARKET 2000, *supra* note 120, at III-8-11; GENERAL ACCOUNTING OFFICE, SECURITIES TRADING—SEC ACTION NEEDED TO ADDRESS NATIONAL MARKET SYSTEM ISSUES 18-32 (1990).

SEC might be more appropriate and more effective.¹²⁴

With the advent of alternative or proprietary trading systems it is quite possible that the nature of securities trading will change the pricing mechanisms for securities trading. Whether such systems should be treated as regulated markets under the ISD or some other type of financial intermediary is a question a European SEC would have to confront.¹²⁵

4. Market Stability

One reason it is important to distinguish between stock exchanges or regulated markets and other types of financial intermediaries is because of the need for prudential rules. The CAD sets forth capital requirements for securities firms, but the ISD does not set forth capital requirements for regulated markets. In times of financial stress it is important that financial regulators have some power and responsibility to assure that regulated markets will have the capability to continue to function.¹²⁶

Related to this challenge is the need to eliminate the undue and unnecessary risks of inadequate, inefficient or inappropriate clearance and settlement systems. While regulators may not be in as good a position as private enterprise to design effective clearance and settlement systems, they do not have the conflict of interest that arises because financial intermediaries profit from certain kinds of inefficiencies in trading and clearance and settlement systems.¹²⁷

124. In the United States, the securities industry has a limited exemption from the antitrust laws necessary to make the securities laws work. Although antitrust cases have been brought against securities industry participants, these have been resolved as a practical matter by the SEC. See, e.g., Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the NASDAQ Market, Exchange Act Release No. 37,542 (Aug. 8, 1990); Michael Schroeder, *Fines on 28 Securities Firms Mark End to Nasdaq Trading Inquiry*, WALL ST. J., Jan. 12, 1999, at B6.

125. The U.S. SEC has been struggling with this question and has analyzed the problems at length. See Concept Release, *supra* note 111.

126. See *id.* at 30497.

127. This is because securities firms and banks profit from their ability to leverage cash balances and securities they hold for third parties. See Richard Waters, *Europe Extends the Fuse Leading to Big Bang*, FIN. TIMES, May 29, 1991, at 21. Following the 1987 market break, the G-30 determined that to contain risk in the global marketplace, the settlement cycle should be shortened, trade guarantees should be promoted and the simultaneous exchange of monies and securities should be assured. They also found that efficiency could be improved by providing book-entry settlement, netting systems, and standardized communications and settlement schedules. The Group adopted nine recommendations to this end. See U.S. WORKING COMMITTEE GROUP OF THIRTY, CLEARANCE & SETTLEMENT PROJECT, IMPLEMENTING THE GROUP OF THIRTY RECOMMENDATIONS IN THE UNITED STATES, at II-1-2 (1990). A decade later much remains to be accomplished and European stock

Some regulatory oversight by a European SEC of clearance and settlement systems could be helpful in achieving an efficient and workable pan-European securities market that is not fraught with systemic risk.

5. Forum for Investor Protection

Private litigation as a mechanism for enforcing investor protection is not as readily available in Europe as in the United States. However, it is difficult to achieve an equity culture without effective investor protection, including the opportunity for civil redress and a forum for articulating standards of best practices. Litigation under the federal securities laws in the United States has been subject to some serious abuses and remedial legislation to address these problems has recently been enacted.¹²⁸ In view of the multiplicity of jurisdictions involved and the expense of ordinary civil litigation, a pan-European arbitration system, similar to that operated by the securities industry in the United States might be one way to achieve a forum for investor protection without the costs of civil litigation.¹²⁹ Alternatively, a mechanism for redress similar to CFTC reparations proceedings might be feasible.¹³⁰

Even if a European SEC were not to become involved in enforcing the rights of investors, it could play an important role in articulating standards for investor protection. The ISD has not done so and this is a significant impediment to equity investment in a pan-European market. Furthermore, in order to solve some of the problems of pay as you go social security systems by encouraging private equity investment, better investor protection mechanisms should be considered by European governments.¹³¹

The European Commission has recognized that consumer uncertainties regarding redress in contractual disputes is a significant

exchanges do not have an integrated clearance and settlement system. See Randall D. Guynn, *Securities Ownership, Transfer and Pledging Laws*, 1996 CAPITAL MARKETS F. Y.B. (International Bar Association) 343-398.

128. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-47, 109 Stat. 737 (1995); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

129. See Marc I. Steinberg, *Securities Arbitration: Better For Investors Than the Courts?*, 62 BROOK. L. REV. 1503 (1996).

130. See Jerry W. Markham, *The Seventh Amendment and CFTC Reparations Proceedings*, 68 IOWA L. REV. 87, 94-103 (1982).

131. The author has analyzed these problems at length in Roberta S. Karmel, *The Challenge to Financial Regulators Posed by Social Security Privatization*, 64 BROOK. L. REV. 1043 (1998).

stumbling block to the achievement of a single financial market.¹³² Accordingly, efficient and effective judicial and extra-judicial dispute settlement mechanisms need to be developed.¹³³ Therefore, the European Commission has recommended the development of an EU-wide complaints network.¹³⁴ Without a European SEC to police and participate in the enforcement of investor grievances, however, it is unlikely that such a complaints network would have sufficient credibility to promote the investor confidence necessary for cross-border investment.

6. Surveillance, Investigation and Co-Operation with Foreign and Bank Regulators

In globalized capital markets, many violations of securities laws are transnational. This means that unless national laws are given extraterritorial effect, there will be inadequate law enforcement, but if laws are applied extraterritorially, there will be conflict between regulators and confusion on the part of regulated persons as to what are the proper rules. Not only does the substantive law differ in various EU member states, but the law regarding extraterritoriality differs, as well.

For example, in the United Kingdom, individuals are not guilty of the offense of dealing on insider information unless they were within the United Kingdom at the time they were alleged to have done any act constituting or forming part of the alleged dealing or the dealing was alleged to have occurred on a U.K. regulated market. Further, individuals are not guilty of encouraging or disclosing insider information unless they were either within the United Kingdom when they were alleged to have disclosed the information or encouraged the dealing, or the recipient of the information was within the United Kingdom when the information or encouragement was transmitted.¹³⁵

In Germany, the territorial scope of the criminal sanctions is governed by the Penal Guide.¹³⁶ Criminal sanctions for insider trading apply to: violations committed within Germany; violations committed abroad against a German victim, provided that the act

132. See Financial Services Action Plan, *supra* note 3, at 10.

133. See *id.*

134. See *id.*

135. See Criminal Justice Act, 1993, §62 (Eng.).

136. See Tony Hickinbotham & Christoph Vaupel, *Germany*, in INTERNATIONAL INSIDER DEALING 140 (Mark Stamp & Carson Welsh, eds., 1996).

constitutes a criminal offence at the place where committed; and violations committed in a foreign country if the act constitutes a criminal offense in that country, if committed by a German citizen or by a foreigner who is found in Germany and not extradited.¹³⁷

A European SEC would alleviate these problems to the extent that substantive standards were harmonized at the EU level and the commission were given some powers of enforcement. If national regulators were to retain enforcement powers, however, the European SEC could still play a role in the surveillance of the capital markets and in the coordination of the investigation of questionable or illegal activities by national regulators.

Securities regulators do not have a long history of mutual cooperation and the coordination of investigative activities that bank regulators have long enjoyed. Nevertheless, many securities regulators now have exchanged Memoranda of Understanding (MOUs) and cooperate extensively with regard to their investigative activities.¹³⁸ Further, they meet with some frequency in connection with the work of IOSCO and regulators within Europe have formed the Forum of European Securities Commissions (FESCO). A European SEC could play a constructive role in making FESCO a viable and effective organization for harmonizing regulation and assuring enforcement cooperation by a European SEC.¹³⁹ In addition, a European SEC could coordinate appropriate policies and enforcement activities with European banking regulators and the European Central Bank.

Also of importance would be the ability of a European SEC to cooperate with securities regulators and other bodies outside of Europe. Today, there are at least fifteen different government voices speaking on regulatory issues on behalf of Europe and another group of self-regulators taking positions on various issues. This does not give Europe the effectiveness with respect to international issues that

137. See *id.* at 140-41.

138. See *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 INT'L LAW. 780, 823-26 (1995). The European Commission and the U.S. SEC issued a Joint Statement on the Establishment of Improved Cooperation in September 1991 and the U.S. has MOUs with most European securities regulators. Joint Statement on the Establishment of Improved Cooperation Between the United States Securities and Exchange Commission and the Commission of the European Communities, SEC Int'l Series, Release No. IS-320, 49 SEC Docket 1461 (Sept. 30, 1991). See also Michael Lerner, *FESCO to Ink European MOU to Speed Up Cross-Border Enforcement*, INSTITUTIONAL INVESTOR, Oct. 5, 1998, at 1.

139. See *FESCO's Wittich Stresses Need to Focus on Business Conduct Rules*, INT'L SEC. REG. REP., Oct. 8, 1998, at 12; Michael Lerner, *Euro-Regulators Aim For More Uniformity in Conduct of Biz Regime*, INSTITUTIONAL INVESTOR, June 29, 1998, at 1; *Securities Regulators Start Euro Forum*, INSTITUTIONAL INVESTOR, Dec. 29, 1997, at 2.

it would have if a European SEC existed. Further, if the European capital markets become integrated, the size and strength of a pan-European equity market would make a European SEC a significant and effective negotiator on issues of policy and law enforcement.

7. Prudent Investor Rules

Despite the principle of free movement of capital many EU member states have prudent investor rules that restrict cross border investments by pension funds and insurance companies. Some of these rules prohibit pension funds or insurance companies from investing more than a certain percentage of their assets in foreign securities.¹⁴⁰ Other rules prohibit more than a certain percentage of assets in equities, or require that a certain percentage be invested in domestic government bonds.¹⁴¹ Furthermore, some governments seek to balance their budget deficits by tapping the assets of pension funds to invest in government bonds or to invest in domestic industries.¹⁴² Cross-border investment of pension fund and insurance company assets cannot increase if national governments refuse to relinquish their control over the regulation of investments. A reluctance to do so led to the defeat of the Pension Funds Directive.

Nevertheless, prudent investor rules for pension funds and insurance companies are important for assuring the ability of such financial intermediaries to meet their obligations. Scandals involving the improper investment of retirement savings have made regulators cautious about abandoning prudent investor rules.¹⁴³ Furthermore, such worries will increase if European governments are forced to supplement pay as you go government pensions with supplemental private sector pensions because of the aging of European populations.¹⁴⁴

A European SEC could facilitate cross-border investment of

140. See ECMI Report *Examines Barriers to European Market Integration*, 2 WORLD SEC. L. REP. (BNA) at 20, 21 (1996). *Outside the Cocoon*, ECONOMIST, Mar. 30, 1991, at 72.

141. See *Outside the Cocoon*, *supra* note 140.

142. See Gillian Tett & David Owen, *Brussels Approves French Budget Plan*, FIN. TIMES, Nov. 1, 1996, at 18; Barry Riley, *Pension Fund As Financier To Public Sector Deficit*, FIN. TIMES, Nov. 3, 1993, at 21.

143. See Steve Stecklow & Sara Calian, *Financial Flop: Social Security Switch In U.K. Is Disastrous; A Caution to the U.S.?*, WALL ST. J., Aug. 10, 1998, at A1; Supplementary Pensions in the Single Market: Green Paper from the EC, COM(97) 283 final at 10.

144. See GROUP OF TEN, *supra* note 13, at 25-29; Craig R. Whitney, *In Europe, Too, Social Security Isn't So Secure*, N.Y. TIMES, Aug. 31, 1997, at E4.

pension and life insurance assets by formulating European-wide prudent investor rules and establishing capital adequacy rules for such financial intermediaries.

IV. CONCLUSION

As an American comfortable with securities regulation at the federal level, the author has a perspective that is at odds with the approach to securities regulation in Europe, where it is generally felt there is no need for a common EU securities supervisory body.¹⁴⁵ Yet, the U.S. SEC can rightly claim some responsibility for the size and strength of the U.S. equity markets. A common currency should foster a pan-European equity market, but fostering sufficient investor confidence in such a market to create an equity culture is a significant challenge.

Up to now the British have not believed it was in their national interest to have a European SEC created, and London has the largest capital market in Europe.¹⁴⁶ Further, the French and other continental countries believe EU securities initiatives are too "Anglo-Saxon and self-regulatory."¹⁴⁷ This impasse was at the heart of the controversies over the ISD and probably will stand in the way of the establishment of a European SEC for the immediate future. The most the European Commission has been willing to recommend is a Securities Committee of an advisory nature.¹⁴⁸ The European Commission has endorsed the creation of FESCO, but has not recommended the creation of a European SEC.¹⁴⁹ Rather, the European Commission has adopted a wait and see attitude, stating that in time, "the option of a single authority to oversee securities markets supervision may emerge as a meaningful proposition in the light of changing market reality."¹⁵⁰ But political positions, like the capital markets, can change quickly if circumstances create a climate for change. If pressed, many European securities regulators probably

145. See *Comprehensive Strategy Unveiled for European Union Financial Services*, 30 Sec. Reg. & L. Rep. (BNA), at 1575, Oct. 30, 1998. But see Ruben Lee, *Securities Regulation in the EC: Some Problems and Solutions*, INT'L SEC. REG. REP., Aug. 24, 1993, at 9; *Europe's Exchange and Mart*, ECONOMIST, July 11, 1998 at 14.

146. See Whittaker, *supra* note 94.

147. See *Comprehensive Strategy Unveiled*, *supra* note 145.

148. See Financial Services Action Plan, *supra* note 3, at 15.

149. See *id.* at 14.

150. *Id.*

would concede that the creation of a European securities commission is needed and will occur in due course.

