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## French Banking Regulations: Can You Resist the Universal Banking Temptation?

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# FRENCH BANKING REGULATIONS: CAN YOU RESIST THE UNIVERSAL BANKING TEMPTATION?

*Blanche Soussi\**

## I. INTRODUCTION

As a French legal scholar, I was somewhat surprised when the organizers of this Symposium asked me to participate with a reflection on the theme of "Global Trends in Universal Banking." In effect, our banking regulations pose no obstacles in this area.

For me, the question of universal banking was settled. However, knowing the importance of the problem in the United States and the repercussions for European bankers of an eventual reform of the American banking rules, I thought that it would be very interesting to take part in this presentation of different banking systems. It is therefore with great pleasure that I am with you today and I am very honored.

In France, the legal authorities for banking policy are the Banking Regulation Committee,<sup>1</sup> the Credit Institutions Committee,<sup>2</sup> the Banking Commission,<sup>3</sup> the National Council of

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1. Loi No. 84-46 du 24 janvier 1984 relative à l'activité et au contrôle des établissements de crédit, Journal Officiel de la République Française [J.O.], Art. 30 (January 25, 1984) (Fr.); 1984 Gazette du Palais [G.P.] 170, 173.

The Banking Regulation Committee is presided over by the Minister of Economics and Finance; other members are: the Governor of Banque de France; a representative of credit institutions; a representative of the employees of credit institutions; and two other individuals who have in-depth knowledge of the banking field. The Banking Regulation Committee is responsible for formulating the regulations concerning banking activities.

2. Loi du 24 janvier 1984, J.O., Art. 31; 1984 G.P. at 173.

The Credit Institutions Committee is presided over by the Governor of Banque de France; other members are the Director of the Treasury, a representative of credit institutions, a representative of the employees of credit institutions, and two other individuals who have in-depth knowledge of the banking field. The Credit Institutions Committee is responsible for issuing licenses to credit institutions in order to exercise banking activities.

3. Loi du 24 janvier 1984, J.O., Art. 37; 1984 G.P. at 174.

The Banking Commission is presided over by the Governor of Banque de France; other members are the Director of Treasury, two judges from the Supreme Courts (Cour de cassation et Conseil d'Etat), and two other individuals who have in-depth knowledge of the banking field. The Banking Commission is responsible for inspecting credit institutions to oversee compliance with the

Credit,<sup>4</sup> and the Advisory Committee for Banking Services.<sup>5</sup> Each of these agencies is managed by an administration and by a Managing Director. The staff of all these agencies have a reputation for a high degree of competence.

The French banking requirements are the result of a number of regulatory schemes, including: the laws, especially the Law of January 24, 1984; the regulations of the Banking Regulation Committee; the decisions of the Credit Institutions Committee; the instructions of the Banking Commission; the instructions of the Banque de France; and, the recommendations of the Governor of Banque de France.

The French banking system is founded on the principle of universal banking. Far from being open to debate, this principle conforms to the resolutions adopted by the European Community (EC). After January 1, 1993, the Single Market, which includes banking and financial services, will be implemented throughout the EC. With this goal, many measures have been adopted by the European authorities, and the twelve Member States have taken the necessary provisions to comply with the European legislation. This is why the French banking system cannot be understood without presenting the European banking system as a whole. More importantly, the future of universal banking cannot be understood if the European banking legislation is not understood.

## II. UNIVERSAL BANKING IN FRANCE

French banking is subject to the Law of January 24, 1984,

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regulations of the Banking Regulation Committee.

4. Loi du 24 janvier 1984, J.O., Art. 24; 1984 G.P. at 173.

The National Council of Credit is presided over by the Minister of Economics and Finance. The vice-president is the Governor of Banque de France. The other members are senators, deputies, and representatives of the administration, of credit institutions and of employees of credit institutions. Altogether there are 53 members. The National Council of Credit is responsible for studying and making recommendations for the development of the credit industry.

5. Loi du 24 janvier 1984, J.O., Art. 59; 1984 G.P. at 176.

The Advisory Committee for Banking Services is presided over by a person who has in-depth knowledge of the banking field and is selected by the Minister of Economics. The other members are representatives of credit institutions and customer representatives. Altogether there are 21 members. The Advisory Committee is responsible for studying the relationships between credit institutions and their customers. It produces reports and expresses opinions.

which is often called "the Banking Law of 1984." This law was modified slightly on July 16, 1992, in order to respond to the requirements set forth by the EC.

A description of this legislation will show that the French banking system is based on the principle of universal banking. It will therefore be useful to explain the factors which led to the development of this system.

#### *A. Description of the Actual Banking System in France*

Under the Banking Law of 1984, credit institutions must, before beginning their activities, have an authorization (a "license") from the Credit Institutions Committee. This authorization is delivered if the conditions laid out by the law concerning the minimal initial capital, the competence and experience of executives, and the quality of the shareholders are fulfilled. The management, operations, and record keeping of credit institutions are all supervised regularly by the Banking Commission.<sup>6</sup>

Today, there are approximately 1,800 credit institutions authorized in France. What types of credit institutions exist, what are the kinds of activities they can carry on, and what kinds of relationships do they have with industrial firms?

##### 1. Types of Credit Institutions

There are six categories of credit institutions: Banks, which can carry on all banking operations; Mutual or Cooperative Banks; Savings and Loans; Municipal Credit Institutions, which can also carry on all the possible banking operations, but with certain restrictions resulting from their particular by-laws<sup>7</sup> — for example, some of them are prohibited from making commercial loans; Financial Companies, which can only carry on certain banking operations<sup>8</sup> — for example, real estate loans or leasing; and, Specialized Financial Institutions, to which the State had

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6. The need for licensing is detailed in Articles 2 and 6 of règlement No. 91-03. *E.g.*, Instruction de la Commission Bancaire No. 90-05 du 14 septembre 1990, modifiée par l'Instruction No. 91-01 du 22 février 1991, modifiant le modèle des documents comptables transmis par les établissements de crédit et les maisons de titres à la commission bancaire; Règlement du Comité de la Réglementation Bancaire No. 91-03 du 16 janvier 1991 relatif l'établissement et la publication des situations trimestrielles et du tableau d'activité et de résultats semestriels individuels et consolidés des établissements et des maisons de titres.

7. Loi du 24 janvier 1984, J.O., Art. 18; 1984 G.P. at 172.

8. Loi du 24 janvier 1984, J.O., Art. 18; 1984 G.P. at 172.

entrusted a task of public interest<sup>9</sup> — for example, home mortgage loans such as *Crédit Foncier de France*, *Crédit National*, *Sociétés de développement régional*.

## 2. Activities that Can Be Conducted by a Credit Institution as Authorized by the Credit Institutions Committee

The Banking Law of 1984 enumerates the banking operations that a credit institution may conduct; however, this law also allows credit institutions to engage in related operations as well as non-banking operations.

### *a) Banking Operations*

According to article 1 of the Banking Law of 1984, banking operations include receiving deposits, lending, and managing payment systems.<sup>10</sup> A bank is authorized to receive all types of deposits and to engage in credit transactions without any restrictions on its clientele. For example, a bank can make personal loans and business loans, as well as housing loans, loans to finance export, etc. Moreover, the various activities can be conducted within the bank itself rather than through bank subsidiaries.<sup>11</sup>

Only the credit institutions that have received a license from the Credit Institutions Committee can carry on banking operations. This is a monopoly of credit institutions. The conduct of banking activities without a license is an offense that can lead to a fine and imprisonment. However, the law does contemplate some exceptions.<sup>12</sup>

### *b) Related Operations*

Article 5 of the Banking Law of 1984 lists some related operations that a credit institution may conduct: exchange transactions, gold and precious metals transactions, securities and commodities transactions, property management consulting, and financial advice.<sup>13</sup>

Here, I would like to bring up three points. First, all credit institutions (of any category) can carry on these related opera-

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9. Loi du 24 janvier 1984, J.O., Art. 18; 1984 G.P. at 172.

10. Loi du 24 janvier 1984, J.O., Art. 1er; 1984 G.P. at 170.

11. *Id.*

12. Loi du 24 janvier 1984, J.O., Arts. 11 & 12; 1984 G.P. at 171.

13. Loi du 24 janvier 1984, J.O., Art. 5; 1984 G.P. at 170.

tions. Second, this list of related operations in article 5 is not exhaustive — credit institutions can conduct other related operations that are not on this list, such as renting safes or selling insurance products. Third, the related operations are not part of the monopoly of credit institutions. In effect, firms that are not credit institutions can carry on the operations listed in article 5. Thus, anyone can give financial advice without an authorization from the Credit Institutions Committee.

### *c) Non-Banking Operations*

Article 7 of the Banking Law of 1984 allows credit institutions (of any category) to carry on any other activity with respect to certain conditions.<sup>14</sup> In particular, the activities must be incidental to banking operations. Hence, credit institutions, for example, may offer computer services to their customers.<sup>15</sup>

## 3. Relationships between Credit Institutions and Industrial Firms

The relationships between credit institutions and industrial firms can work in two ways. The first way is through credit institution investments in industrial firms. Article 6 of the Banking Law of 1984 authorizes credit institutions to invest in the capital of industrial or commercial firms.<sup>16</sup> Details of the acquisition of holdings are fixed by the Banking Regulation Committee.<sup>17</sup> Credit institutions face no limitation if the investment is in the insurance business. Furthermore, there is no limitation if the investment is in a securities firm or if the investment represents less than ten percent of the capital of an industrial or commercial firm. Investment is permitted if it is temporary and only for the purpose of facilitating a client transaction.<sup>18</sup> Conversely, a

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14. Loi du 24 janvier 1984, J.O., Art. 7; 1984 G.P. at 170; Règlement du Comité de la Réglementation Bancaire No. 86-21 du 24 novembre 1986 relatif aux activités non bancaires.

15. Règlement du Comité de la Réglementation Bancaire No. 86-21 du 24 novembre 1986 relatif aux activités non bancaires. The statute authorizes banks to act as brokers or agents and provide any services that "constitute an extension of the bank's operations." Services may be offered as long as they are "not incompatible with the standards of the banking profession, notably the maintenance of the establishment's reputation and the protection of depositors' interests."

16. Loi du 24 janvier 1984, J.O., Art. 6; 1984 G.P. at 170.

17. Règlement du Comité de la Réglementation Bancaire No. 90-06 du 20 juin 1990 relatif aux participations dans le capital d'entreprises.

18. See *id.*

credit institution cannot invest more than fifteen percent of its capital in a single commercial firm, and the total amount of all the holdings of the same credit institution in industrial or commercial firms may not exceed sixty percent of its capital.<sup>19</sup>

The second way in which the relationship between credit institutions and industrial firms work is through industrial firm investments in credit institutions.<sup>20</sup> In France, there are numerous credit institutions that have been created or bought by large industrial or commercial groups, such as PECHINEY, RE-NAULT, PEUGEOT, THOMSON, ALCATEL-ALSTHOM.<sup>21</sup> The French law sets no limitations on who can invest in credit institutions. But it is still clear that these kinds of credit institutions are subject to the same rules and conditions as any other credit institution, and in particular, they must be authorized by the Credit Institutions Committee. When the authorization is issued, the Committee verifies that the executives of a credit institution have enough experience and sufficient abilities in the banking and financial fields — industrial knowledge alone does not suffice. The Committee also confirms that these executives are not just "simple nominees" from the parent, but that they have true decision-making powers.<sup>22</sup>

In addition to approving the initial investment by a commercial company in a credit institution, the Credit Institutions Committee must approve any changes in ownership.<sup>23</sup> Moreover, the management, operations, and record keeping of that particular credit institution will be supervised by the Banking Commission just like any other credit institution.

In summary, credit institutions that have been authorized to conduct banking activities in France can operate a securities business. Note that a credit institution cannot be a member of the Stock Exchange because membership is reserved for the monopoly of brokerage firms; however, a credit institution can conduct this business indirectly because it can hold all the capital of a brokerage firm.

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19. *See id.*, Art. 2.

20. Comité des établissements de crédit, Rapport au conseil national du crédit, Les banques de groupe 101 (1989).

21. *Id.* at 103.

22. *Id.* at 110.

23. Règlement du Comité de la Réglementation Bancaire No. 90-11 du 25 juillet 1990 relatif aux modifications de situation des établissements de crédit et des maisons de titres.

In addition, a credit institution can sell insurance products. Again, note that a credit institution cannot create an insurance product because this is reserved to the monopoly of insurance companies; however, a credit institution can conduct this business indirectly because it can hold all the capital of an insurance company.<sup>24</sup> Finally, a credit institution can have holdings in industrial firms.

Isn't this universal banking? How can this system be explained?

### *B. Factors Which Led to the Development of the French Banking System*

The main factors leading to the development of the French banking system relate to the historical traditions of France's government and the economic justifications for universal banking. Historically, there are a few specific examples where banking activities were separated but these were rare and lasted for a very short time. Economically, there are many arguments in favor of universal banking that are not hard to find. Undoubtedly, there are also some risks but these risks can be surely avoided by appropriate measures.

Many of our French banks were founded in the nineteenth century, such as Crédit Lyonnais in 1863 or Société Générale in 1864.<sup>25</sup> At that time, no regulation limited the freedom that prevailed in this field. There was not only freedom in the creation, but also freedom in the functioning of a credit institution.

If some institutions were specialized in certain transactions, this was by strategic choice and not by legal obligation. Certainly, several institutions were created by the initiative of the government so that the general interests and needs of the public could be fulfilled — for example, the "Banque de France" in 1806,<sup>26</sup> the "Caisse des Dépôts et Consignations" in 1816,<sup>27</sup> or

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24. See Pierre Michaud, *Les aspects juridiques de la distribution des produits d'assurance par les banques*, BANQUE & DROIT (janvier/fevrier 1990); *Les conglomerats financiers: Un défi posé aux autorités de tutelle*, BULLETIN DE LA COMMISSION BANCAIRE No. 5, novembre 1991, 41; COMITÉ DES ÉTABLISSEMENTS DE CRÉDIT, RAPPORT ANNUEL AU CONSEIL NATIONAL DU CRÉDIT, BANQUE ET ASSURANCE 117 (1990); COMITÉ DES ÉTABLISSEMENTS DU CRÉDIT, RAPPORT ANNUEL AU CONSEIL NATIONAL DU CRÉDIT, LES CONGLOMÉRALS FINANCIERS, 167 (1991).

25. JOSEPH HAMEL ET AL., *TRAITÉ DE DROIT COMMERCIAL* 640 (12th ed. 1966).

26. *Id.* at 639.

27. *Id.* at 661.



still the *Crédit Foncier de France* in 1862.<sup>28</sup> But these government initiatives were limited. The concept of commercial and industrial freedom that was proclaimed in 1791<sup>29</sup> extended to banking activities just like any other commercial activity.

The first half of the twentieth century witnessed a gradual restriction on banking freedom. The Law of June 19, 1930, prohibited individuals who had been convicted of certain fraudulent schemes from entering the banking profession.<sup>30</sup> However, it served only to remove the dishonest and not to diminish the idea of freedom. In 1941, the control of the creation and of the functioning of banks was established according to regulations that often required approval by an industry association. These reforms of 1941 were also based on state intervention. At this time, the specialization of activities was established: a distinction was made between commercial banks and investment banks.<sup>31</sup> Finally, the Law of December 2, 1945, marked another step in the direction of specialization of banking activities. This law prohibited a commercial bank from engaging in investment banking operations and vice versa.<sup>32</sup>

Some reforms in 1966 and 1967 marked the return of more freedom, and reduced the requirements for separation between commercial banking and investment banking from the Laws of 1941 and 1945.<sup>33</sup> Another important force in the liberalization of banking operations was the Law of February 11, 1982, which nationalized thirty-nine banks.<sup>34</sup> This law implemented the eco-

28. *Id.* at 640.

29. *Id.* at 19, citing *Loi des 2-17 mars 1791*, suspension de tous les droits d'aides, de toutes les maîtrises et jurandes et établissement de droits de patents [Law suspending [royal] prerogatives such as receiving revenue, heading the executive and judiciary, and having rights over patents].

30. *Loi du 19 juin 1930*, Interdiction de l'exercice de la profession de banquier aux individus frappés de certaines condamnations et aux faillis non réhabilités.

31. *Loi du 13 juin 1941* relative la réglementation et à l'organisation de la profession bancaire, *Dalloz Analytique, Législation* [D.A.L.] 333 (1941); *Loi du 13 juin 1941* relative à la réglementation et à l'organisation des professions se rattachant à la profession, D.A.L. 337.

32. *Loi du 2 décembre 1945* relative à la nationalisation de la Banque de France et des grandes banques et à l'organisation du crédit, *Dalloz, Législation* [D.L.] 320 (1945).

33. *E.g.*, *Décret du 25 janvier 1966* portant modification de certaines dispositions de la réglementation bancaire, *Dalloz-Sirey, Législation* [D.S.L.] 88 (1945); *Décret du 25 janvier 1966* portant modification des décrets du 28 mai 1946 fixant les règles fondamentales de fonctionnement des banques de dépôts nationalisées et des banques de dépôts du secteur libre, D.S.L. 92.

34. *Loi No. 82-155 du 11 février 1982* relative aux nationalisations, J.O. 566; *Bulletin législatif Dalloz* [B.L.D.] 91 (1982).

nomie and ideological policy of the Socialist Government, which was designed in part to advance the interest of small and medium sized companies. This law had nothing to do with specialization; on the contrary, the Socialist Government simultaneously proposed a law to remove any division between the activities. This proposal resulted in the Law of January 24, 1984, which removed the division between commercial banks and investment banks and adopted the principle of universal banking that France has today.<sup>35</sup>

History shows that forced specialization by lawmakers has been short lived in France; if certain unsteadiness became specialized, it was by choice and not by legal constraints. Universal banking has been considered to be the best system by French lawmakers. How can this be explained? Legally, the justification for universal banking is explained by the fundamental principle of our law, which is freedom of business and industry. But economically, how can such a system be justified?

First, universal banking guarantees competition of our banks on the international level by allowing healthy competition between the credit institutions. Nowadays, specialization is viewed as detrimental to free competition. Similarly, universal banking encourages industrial development by mobilizing customer deposits into this activity.

Second, universal banking allows banks to diversify their risks. For example, if at a certain moment the lending activity generates low profits for a bank, the bank can enhance profitability by diversifying its activities and, in particular, by engaging in securities transactions, and vice versa. Every bank can choose the activities that it wants to engage in; it is the executive's decision, guided by the bank's own strategy. The legislator respects this freedom.

It is interesting to note that it was under the Socialist Government that the Law of 1984, which formally established universal banking, was adopted. The legal and economic arguments in favor of universal banking could not be withstood. But how can the risks inherent in this structure be addressed?

The most significant arguments against universal banking arise from the potential risks to depositors and conflicts of interest that it generates. These risks certainly exist but the selected

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35. Loi No. 84-46 du 24 janvier 1984 relative à l'activité et au contrôle des établissements de crédit, J.O., Art. 5; 1984 G.P. at 170.

remedy in France is not to abolish universal banking — it offers too many advantages. Instead, we have chosen to limit the risks by appropriate measures.

In order to protect depositors, French regulations (according to European requirements) control the ratio of solvency (capital/credit risk), which cannot be less than eight percent<sup>36</sup> — the ratio of liquidity<sup>37</sup> and the capital<sup>38</sup> of credit institutions. The Banking Commission assures vigilant supervision of the conditions in which the banking activity is conducted. This inspection is especially directed toward the accounts of credit institutions, even on a consolidated basis. These inspections are frequent, very precise, and are conducted by highly qualified individuals.<sup>39</sup> If any factors are found to be threatening to the depositors during an inspection, the Banking Commission has the power to force credit institutions to take adequate measures. If necessary, the institution's operating authorization can be revoked.<sup>40</sup> This control system, which is practically permanent, functions well; bankruptcy of credit institutions is extremely rare in France.

To avoid conflicts of interest, especially between the banking and securities activities, many studies have been conducted,<sup>41</sup> and guidelines have been established.<sup>42</sup> Bank and stock exchange professionals are aware that market credibility cannot exist without integrity. The inspections exist so that conflicts of interest may be avoided in the regulatory procedures.<sup>43</sup> The

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36. Règlement du Comité de la Réglementation Bancaire No. 91-05 du 15 février 1991 relatif au ratio de solvabilité; Instruction de la Commission Bancaire No. 91-02 du 22 mars 1991 relatif au calcul du ratio de solvabilité.

37. Règlement du Comité de la Réglementation Bancaire No. 88-01 du 22 février 1988 modifié par les règlements No. 90-02 du février 1990 et No. 90-04 du 23 février 1990 relatif à la liquidité; Instruction de la Commission Bancaire No. 88-03 du 22 avril 1988 relatif à la liquidité.

38. Règlement du Comité de la Réglementation Bancaire No. 90-02 du 23 février 1990 modifiée par les règlements No. 91-05 du 15 février 1991 et No. 92-02 du 27 janvier 1992 relatif aux fonds propres; Instruction de la Commission Bancaire No. 90-01 du 1er avril 1990 modifié par l'Instruction No. 91-02 du 22 mars 1991 relatif au calcul des fonds propres.

39. Loi du 24 janvier 1984, J.O., Arts. 37-41.

40. Loi du 24 janvier 1984, J.O., Arts. 42-46.

41. Such as Report "Brac de la Perriere" (1988), Report "Pfeiffer" (1990) and Report "de la Serre" (1991).

42. Such as Guidelines of the Mutual Funds Association, 1990.

43. *E.g.*, Règlement du Comité de la Réglementation Bancaire No. 90-12 du 25 juillet 1990 relatif à l'hordatage des ordres; Règlement du Comité de la Réglementation Bancaire No. 90-08 du 25 juillet 1990 relatif au contrôle interne.

"Commission des Opérations de Bourse" acts as a supervisor in cooperation with the Banking Commission and the "Conseil des Bourses de Valeurs." Everyone understands the importance of respecting these guidelines and, rather than abolishing the universal banking system, they prefer to locate the dishonest and punish them.<sup>44</sup>

### III. THE EVOLUTION TOWARD UNIVERSAL BANKING IN THE EUROPEAN COMMUNITY

The objective of the EC is the creation of an internal market for banking and financial services. With this goal in mind, several Directives have been enacted: the Directive of April 17, 1989, on the capital of credit institutions;<sup>45</sup> the Directive of December 18, 1989, on a solvency ratio for credit institutions;<sup>46</sup> and, the Second Directive of December 15, 1989, on the coordination of laws, regulations and administrative provisions related to entry into and conducting the business of credit institutions and amending the First Directive of December 12, 1977.<sup>47</sup> This Second Banking Directive can be regarded as the basic law for banking activities in the EC. It is not the goal of this paper to analyze in detail the European banking and financial legislation. Rather, the following section will demonstrate that this legislation represents a trend toward the universal banking system.

#### A. *The Second Banking Directive (December 15, 1989)*

The fundamental principle behind the Second Banking Directive is the mutual recognition of the national banking licenses issued by the Member States of the EC. But before acknowledging this mutual recognition, it was necessary to harmonize certain prudential standards for the credit institutions authorized in a Member State.

##### 1. Minimum Harmonization

First, this minimum harmonization deals with conditions for authorization of entry into the business of credit institutions. In

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44. *Id.*

45. Council Directive 89/229, 1989 O.J. (L 124) at 16.

46. Council Directive 89/647, 1989 O.J. (L 386) at 14.

47. Council Directive 89/646, 1989 O.J. (L 386) at 1. See Blanche Sousi-Roubi, *La Proposition de Deuxième Directive de Coordination Bancaire*, in *REVUE DE DROIT BANCAIRE ET DE LA BOURSE*, No. 9, 158, (septembre/octobre 1988).

all of the Member States of the EC, the appropriate authorities must not grant authorization if the initial capital is less than the ECU five million, except for limited purposes of credit institutions to which an initial capital cannot be less than the ECU one million.<sup>48</sup>

Before an authorization is granted, the appropriate authorities in each Member State of the EC must be informed of the names of shareholders or members, whether direct or indirect, natural or legal persons that have qualifying holdings (which means ten percent or more of the capital), and of the amounts of those holdings. The authorization must be refused if, taking into account the need to ensure the sound and prudent management of a credit institution, the appropriated authorities are not satisfied as to the suitability of the shareholders or members.<sup>49</sup> The French banking regulation is in accordance with all these conditions.

Minimum harmonization also deals with the conditions governing conduct of the business of credit institutions. The capital of a credit institution may not fall below the amount of initial capital. However, the statute further specifies that the amount of capital cannot fall below "the amount of initial capital required pursuant to Article 4 at the time of its authorization," (i.e. over ECU five million (Art 4 § 1) or ECU one million in special cases (Art. 4 § 2)). The capital is defined in the Directive of April 17, 1989, which has been strongly influenced by the work of the Basle Committee on Banking Supervision.<sup>50</sup> In addition, if somebody proposes to acquire, directly or indirectly, qualifying holdings in a credit institution, he first must inform the appropriate authorities, who can oppose such a plan if they are not satisfied as to his suitability.<sup>51</sup>

No credit institution may have a qualifying holding, the amount of which exceeds fifteen percent of its capital, and the total amount of a credit institution's qualifying holdings may not exceed sixty percent of its capital. These limits are not applied if the holding is related to another credit institution or an insurance company.<sup>52</sup> The French banking regulation, mentioned previously, is in accordance with all these conditions.

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48. Council Directive 89/646, art. 4, 1989 O.J. (L 386) at 4.

49. *Id.* art. 5.

50. Council Directive 89/299, art. 2, 1989 O.J. (L 124) at 17.

51. Council Directive 89/646, art. 5, 1989 O.J. (L 386) at 4.

52. Council Directive 89/646, art. 12, 1989 O.J. (L 386) at 7.

Finally, there is an acknowledged principle that prudential supervision is the responsibility of the appropriate authorities of the home Member State; this is called "Home Country Control."<sup>53</sup> Because of this minimum harmonization existing in the twelve Member States of the EC, it is possible to acknowledge mutual recognition of the authorizations.

## 2. Mutual Recognition of Authorization: the "Single License"

The Second Banking Directive allows credit institutions authorized in a Member State to operate in the eleven other Member States without additional authorization. This is why the authorization of the home Member State is called the "Single License" or sometimes the "European Passport." With it, a credit institution may conduct its activities anywhere in the EC covered by its authorization and listed by the Directive in an Annex.<sup>54</sup> It appears that this comprehensive list of banking activities is influenced by the universal banking model.

53. See Dr. Klaus Kohler, *European Banker Remarks*, in *EUROPEAN BANKS IN THE UNITED STATES, AMERICAN BANKS IN EUROPE: EQUAL TREATMENT OR PROTECTIONISM?* 16 (Centre Interprofessionnel de Recherches en Droit Bancaire & Institutue of International Bankers eds., 1992) [hereinafter *EQUAL TREATMENT OR PROTECTIONISM?*].

54. The following fourteen activities are listed in this annex of the Second Directive:

- 1) Acceptance of deposits and other repayable funds from the public.
- 2) Lending (including inter alia: consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions including forfeiting).
- 3) Financial leasing.
- 4) Money transmission services.
- 5) Issuing and administering means of payment (e.g. credit cards, travellers' checks and bankers' drafts).
- 6) Guarantees and commitments.
- 7) Trading for own account or for account of customers in:
  - a) money market instruments (checks, bills, CDS, etc.);
  - b) foreign exchange;
  - c) financial futures and options;
  - d) exchange and interest rate instruments;
  - e) transferable securities.
- 8) Participation in share issues and the provision of services related to such issues.
- 9) Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.
- 10) Money brokering.
- 11) Portfolio management and advice.
- 12) Safekeeping and administration of securities.
- 13) Credit reference services.
- 14) Safe custody services.

### B. *Universal Banking Model*

As of January 1st, 1993, all of the above listed activities may be carried on by any authorized credit institution within the EC provided that such activities are covered by the authorization in the home Member State. Thus, this authorization is very important as it defines the extent of the single license. This is true for both the European banks and the subsidiaries of foreign banks, including the American banks.

Article 18 of the Second Banking Directive proclaims the freedom of establishment and the freedom to provide services: any credit institution authorized in a Member State of the EC can establish a branch in the other Member States or offer services cross-border between one Member State and the others. This will be possible in 1993 without authorization of the host Member State, but only with notice to the home Member State.<sup>55</sup>

Through branches or by offering services, a credit institution can carry on all its authorized activities even within a host Member State where some of these activities are not authorized for credit institutions. So, if the authorization has been issued by a Member State of the EC where universal banking is the system (such as Germany or France), this authorization will permit the credit institution to conduct universal banking anywhere in the EC, even in Member States where universal banking is not permitted.<sup>56</sup>

Here the benefits of a universal banking authorization are clear. And that is not all. The right is not only extended to the EC Member States, but will soon be extended to the seven countries of the European Free Trade Area (EFTA) — Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

This all applies to the European banks, as well as to subsidiaries of any foreign banks, including American banks. Any foreign bank which forms a subsidiary in the EC will have the right to open branches across the EC and to offer services across borders. American banks that set up subsidiaries in the EC will find that the subsidiary will get the same treatment as EC banks.

Indeed, the Treaty of Rome guarantees that right; this is a constitutional guarantee of national treatment.<sup>57</sup> As of January

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55. Council Directive 89/646, art. 18, 1989 O.J. (L 386) at 9.

56. *Id.*

57. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298

1, 1993, the foreign bank subsidiaries will benefit from the single license in the EC and in the EFTA too, just like domestic EC banks. An American bank subsidiary authorized in France can carry on universal banking in France as well as in any other Member State of the EC or EFTA.<sup>58</sup> It is important to emphasize that the single license will be a right for all foreign bank subsidiaries that are established in the EC *before* or *after* January 1, 1993.

#### CONCLUSION

The European banking system is based on universal banking; the issue has not been a subject of debate because it has proven itself. European bank failures are very rare. The security of depositors is assured by definite rules and by their strict enforcement. Banks all over the world, including American banks, benefit in Europe from this universal banking system.

By establishing European subsidiaries, American banks can take advantage of universal banking through the single license that will be available everywhere in Europe. Europe is showing the way. Can you resist this temptation?

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U.N.T.S. 11.

58. For a discussion of national treatment, see the reports of Henri Fayt, Jeanne Roslanowick, John Walsh, Dr. Klaus Kohler, Guy Clesca, Ian Wilkinson and Jean-Louis Butsch *in*, *EQUAL TREATMENT OR PROTECTIONISM?*, *supra* note 53.



