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Online Financial Services in the European Internal Market and the Implementation of the E-Commerce Directive in the UK

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1. Introduction

During the late 90's and at the beginning of the new millennium a series of significant developments both at a global and regional level have led the European banking industry into a state of organisational restructuring and revision of established business models and market orientations[1]. European financial institutions have had to respond to increased competitive pressures generated by the liberalisation of the trade in financial services at a global level[2] and the involvement of non-bank financial intermediaries in traditional banking markets[3]. Moreover, they have had to adapt to new market opportunities and risks imposed by the proliferation of advanced technologies in telecommunications and information technology[4] and eventually deal with the wave of change brought about by two closely connected and inter-related political incidents of significant importance for banks and their customers, namely the introduction of the euro as the single European currency [5] and the resuscitation of the political will and commitment at the highest political level for the creation of a fully integrated European market for capital and financial services[6].

1.1 Forces of Change in European Financial Services

More specifically, the introduction of the single European currency has been a major catalyst for market reform across Europe. It has helped European banks to appreciate the need for the formulation of a clear and sound market strategy within the new 'financial order', built upon and around the benefits brought by the elimination of currency risks and the largely stable macroeconomic environment[7]. At political level it has been clearly recognised that, although a single European market has been under construction since 1973, the Union's financial markets remain segmented. As a result, businesses and consumers are deprived of access to financial services beyond their national borders[8]. In recognition of this painful experience and envisioning the new horizons generated by the developments in the monetary and macroeconomic field, the European Council mandated the Commission to put forward a plan for action capable of leading to an integrated European market for financial services and products by the year 2005[9]. The Financial Services Action Plan[10] identifies key areas in national and community legislation in which a prolonged political gridlock has created unacceptable gaps and obstacles and proposes remedial action within set time constrains subject to ongoing monitoring. The key objective is to create a single transaction domain for banking and financial operations free from existing legal and regulatory restrictions.

1.2 The Response of the Banking Industry

Further, in response to the emerging new financial landscape the industry has had to develop appropriate business models, which would cater for increased efficiency and effectiveness of business operations, a sustainable degree of cost rationalisation, economies of scope and scale in pursuit of optimal performance and eventually the achievement of an increased market share[11]. Hence, in view of the set objectives, European credit institutions embarked upon a programme of extensive market consolidation and integration through mergers and acquisitions, demonstrated an appetite for the creation of strategic alliances and commercial partnerships and initiated cost savings through internal reorganisation and streamlining of retail outlets[12]. Most importantly, the lines of production have been enriched with the new concept of multiple channels delivering a wide range of financial services to consumers in response to a widespread demand for increased convenience and efficiency[13]. The next stage of the transformation has seen a cautious strategy of expansion across national borders[14]. Necessarily, cross-border market penetration will yield the benefits brought about by the two key projects, namely the introduction of the euro and the establishment of a single market for capital and financial services.

1.3 A New Parameter on the Table: Any Role for Electronic Commerce?

It is notable that the process of change in European banking has had to develop in parallel with a general context of fundamental transformation of the global trade in products and services prompted by the emergence of the electronic commerce via non-proprietary telecommunications gateways. This transformation was made possible as soon as the plethora of local interconnected computing networks known collectively as the Internet expanded beyond the narrow boundaries of the scientific and academic communities and reached the wider public. Banking institutions in Europe, which had already started redefining their position and setting up the framework for their operations in the light of significant changes, had to deal with an entirely new phenomenon, assess the potential applications of the new capabilities in the provision of banking services and tackle the pivotal issue of bringing their Internet-related aspirations into line with an overall business strategy orientated towards the achievement of two pivotal objectives, namely structural reform and expansion across national borders within a fully integrated European market.

This paper will place at the epicentre of discussion the engagement of credit institutions (incorporated and authorised in jurisdictions within the scope of application of European Community law) in the provision of services across national borders via the Internet. It will try to examine the legal framework within which cross-border internet banking is likely to function. In this context, it is now widely understood that this framework consists of the existing provisions in the field of banking and financial law as well as of the emerging law on the conduct of commercial operations via the Internet. The cornerstone of electronic commerce law at European level appears to be the Electronic Commerce Directive. I do not ignore that to date the impact of the internal market project and the emergence of the internet have had only a minor impact on the development of genuine cross-border internet banking. On the contrary, to the extent that business apathy has something to do with an uncertain and poorly functioning legal framework, I will attempt to provide some explanation for this phenomenon. In addition, I will examine whether the E-Commerce Directive is going to be an adequate remedy.

2. Banking over the Internet

The characteristic contribution of the Internet in the formulation of a radically distinct concept of distant, remote and electronic provision of services lies primarily in the possibility of an integrated customer interaction with the service provider entirely via the openly accessible electronic network. This interaction starts from the very early, initial stage of the contract formation and continues thereafter. Technically it constitutes a series of mutual electronic communications, which are initiated by the customer over the network and culminate in the alteration of the relevant account data stored on the bank's electronic records. In cases where the bank operates exclusively over the Internet, this process is even more obvious. The lack of personal contact between the contracting

parties, the problems associated with the establishment of secure identification procedures and the difficulty in determining the geographical elements and components of an Internet-based commercial relationship are all Internet-specific features[15], which concern banking lawyers, regulators and economists and deserve some closer attention.

2.1 Conceptual Analysis and Operational Characteristics

Internet banking refers to the use of the Internet for the delivery of information and the provision of banking services by credit institutions to customers via a personal computer, a mobile phone, an interactive television or any other intelligent device with network capabilities. The institution can use the Internet as a supplementary channel for the supply of traditional banking services such as the opening of a deposit account or the transfer of funds between different accounts or exploit the interactive capabilities of the medium and develop new electronic services such as the electronic presentment and online payment of bills by the customer over the network[16].

Essentially the Internet can be understood as the global mechanism or the technical infrastructure, which facilitates or rather, enables the transportation of digital information between any two devices connected to the network[17]. Any information, which can take the digital form like text, numerical data, graphics, images, sound or video can be transmitted and received over the Internet. In that sense the Internet is neutral towards the content of the transported information packets, which is technically determined by the ability of the recipient's software to conceive the meaning of the incoming data and the digital capabilities of the sender's hardware, which make feasible the transformation of the content into digital information.

The suitability of the Internet as a commercial environment dedicated to the conduct of banking and financial operations has been attributed to the increasingly intangible and dematerialised character of the services provided by credit institutions[18]. There are indeed circumstances where a particular banking service can be technically analysed into a sequence of communications between the bank and the customer, which starts from the very moment of the initiation of the transaction on the part of the former. The service is requested, administered and finally performed on the basis of the exchange and management of information, a process that can be effectively deployed over the Internet. The exchange of information can be seen in the process of customer identification, the communication of customer mandate, the assessment of the customer's creditworthiness, the agreed terms of the transaction and the transmittal of monetary value in the form of account debit and credit entries[19].

Nonetheless, the Internet is not just an electronic messaging system, which caters for the transporting of data across the global network. It certainly enhances the viability of an online communication between the bank and the customer based on the receipt and transmission of transactional information. Beyond that nonetheless, it permits the remote management and manipulation of financial information and account data by the customer through the utilisation of sophisticated interactive applications. It essentially allows the distant access and control over data stored anywhere on the network, provided that all security and identification procedures have been adhered to[20]. As a consequence, a key component of the central managerial functions and transaction processing operations is being transferred from the institution's headquarters to the customer terminal with regard to the management of a wide range of financial affairs.

2.2 Characteristic Features of Internet Banking Operations

The provision of banking services via the Internet is associated with a number of legally and economically significant operational characteristics, which owe their peculiarity and uniqueness to some of the most exciting aspects of the Internet as an environment used for the conduct of commercial operations.

First, Internet banking services and operations are performed via an openly structured, inherently

decentralised and non-proprietary telecommunications and computer network, which encourages large scale access and wide interaction among millions of individual participants[21]. Within the context of this distributed communications infrastructure, the Internet establishes two-way connectivity between network participants, which outperforms the two-way capabilities of devices like the wired and wireless telephony. The Internet is the only system that enables the simultaneous interaction of an information provider with multiple recipients on a reciprocal basis[22]. The open-network culture of the Internet as a global information and business society contrasts sharply with the controlled and inaccessible electronic platforms that banking institutions developed at an earlier stage in order to provide remote banking services as part of their strategy for the development of alternative delivery channels. Banking institutions and their customers share a space within a largely indeterminable information society, which consists of ever-expanding individual components, whose online activity cannot be monitored. For a business as information reliant and intensive as banking this very nature of the Internet creates significant benefits and opportunities but also highlights key vulnerabilities, risks and concerns for the banking community, their clients and policy makers[23].

Second, a related issue to the distributed and openly decentralised formation of the global network is the potential for anonymity and concealment of the true identity of the participating actors, which is generously granted by the operational parameters of Internet technology[24]. When an Internet user's client software communicates to a particular Web server a request for the delivery of information, the identity of the hosting infrastructure through which the user has Internet access or the particular access device may be identified but the user himself cannot. Equally, an Internet user can make an enquiry about the ownership of a particular server or the identity of the person who owns a Web site through the domain name registry, such an investigation, however, can be really impracticable and the outcome far from indisputable. This aspect of Internet-related commercial operations raises escalating concerns in the context of banking and financial transactions. Legal provisions at national and international level require the establishment of secure and reliable customer identification procedures[25] whereas the supply of readily and timely available information about banking institutions is considered a prerequisite for the maintenance of the banking market in an orderly condition and the establishment of informed consumer confidence[26].

Third, the Internet compromises in an unprecedented manner the accuracy with which the conduct of commercial operations has been traditionally associated for jurisdictional and regulatory purposes with a specific geographical location[27]. Internet technology drastically contributes to the collapse of geographical boundaries in the circulation of information and consequently in the supply of electronic commercial services. The very essence of the Internet as a distributed telecommunications and computer network prescribes the capability of the system resources to transmit and route the requested information via any available link at any particular time. Essentially the transmission and retrieval of information is geographically impossible to trace and determine. Furthermore, it is of significant importance to note that all information resources are available from anywhere on the network. Material stored on a Web server is available to Internet clients regardless of space and time constraints. In addition, there is no connection between a domain name or an Internet address and the actual location of the concerned organisation or of the hosting server[28]. The repercussions for the provision of banking services via the Internet are challenging. Even though the conduct of banking operations is organised, structured and regulated at national or regional level, banking websites are accessible on a global scale. Furthermore, the computer equipment, which stores the necessary financial data and serves the bank's customers, is not necessarily established in the jurisdiction where the institution engages primarily in banking business. Further, Internet technology provides numerous possibilities for the rerouting and reconstruction of the transmitted information. Of course banking institutions can exercise control over the access to their Internet-based services and restrict their provision within the framework of their local clientele, but available system solutions cannot prevent an authorised customer to establish his domicile in an overseas location and remotely benefit from the supplied services on an ongoing basis thereafter.

Fourth, the Internet exercises a dramatic impact on the way that banking and financial services are promoted and marketed to the public. World Wide Web material can be stored on the Web server

and organised regardless of its content in a structured manner as a single Internet site, which is accessible on a global scale via the interconnected local and regional networks. Therefore, the consolidation within an integrated point of access of financial information concerning a wide range of banking and financial services is technically viable and creates exciting opportunities for the cross-selling of financial products, despite the lack of harmonisation in the regulatory and supervisory treatment of the different types of financial activity. Thus, the inclusive character of the Internet site as a channel for the delivery of services by credit institutions triggers significant market developments with regard to the engineering of new financial products and the establishment of new business models, which outperform in innovation the content of the regulatory response in this context.

Fifth, the conduct of banking operations via the Internet and the requisite integration of this new business model into the banking institution's internal organisation expands the reliance and dependence of the institution on information technology. The implications for the risk profile of the entire organisation are pivotal. Technology is key and omnipresent across the entire spectrum of functions within the organisation. From the early stage of product conception, through product development, production, marketing, delivery and back-office reconciliation and settlement, the entire banking process relies on the smooth function of sophisticated computer applications and network systems. Therefore, the identification of risks and the design and implementation of sound risk management principles is essentially an absolutely minimum requirement for the conduct of efficient and reliable market operations to the benefit of the institution, the customers and the stability of the financial system[29].

Sixth, the emergence of the Internet as a platform supporting the conduct of banking and other commercial operations has brought about changes in the portfolio of services provided by banking institutions. Even though initially the Internet was primarily seen as a supplementary channel for the delivery of simple account-based information and transaction services, the banking industry soon realised that the expansion of business-to-consumer and business-to-business electronic commerce over the Internet requires a new range of skills, network solutions and professional expertise, which banking institutions are capable of providing due to their significant information technology resources and the recognised status of enhanced credibility in the market place. Services like the establishment of Internet-based financial portals and directories, the verification of identity and the authentication of digital signatures, the development of reliable solutions for the electronic presentment, collection and payment of bills or the assistance in the design and implementation of an electronic commerce strategy for medium-size companies are niche, Internet-driven markets, where credit institutions can successfully engage in[30]. Furthermore, banking institutions have been proactively involved in the establishment of electronic platforms, which facilitate the automation in the flow and management of information associated with the procurement and the distribution of goods at the wholesale business-to-business level, whereas they have launched ambitious projects aiming at the commercial application of Internet-related payment mechanisms described collectively as electronic money or electronic cheques[31].

Finally, the utilisation of the Internet as the access point for the promotion and supply of banking and financial services removes from the relationship between the bank and the customer some key transactional notions, whereas necessarily confers a culture of remote, impersonal and quasi-mechanical interaction between the two parties challenging a number of traditional legal norms. Identification problems apart, the conduct of banking operations over an electronic network inherently reduces the practicability of a negotiation process or the provision of customised financial advice prior to the conclusion of the contract. Furthermore, the electronic transmission to the banking institution of the customer's mandate or his instructions towards the performance and completion of a financial transaction raises concerns as to whether the provision of additional and clarifying information on the part of the customer *a posteriori* is technically possible and as to what extent existing technology can prevent the unauthorised interception and manipulation of the customer communication during the transmission over the network. It can therefore be argued that the conduct of banking and financial operations via the Internet introduces a set of unprecedented

operational characteristics with regard to the function of the relationship between the bank and the customer, which need to be examined carefully during the application of legal principles, which have been designed to regulate a considerably different type of commercial activity[32].

2. 3 Banking Services Available via the Internet

Three important conclusions can be drawn regarding the Internet strategy adopted by credit institutions throughout Europe. First, the large-scale diversification of the portfolio of available services has to be primarily underlined. The key players in the banking market seek to confirm their dominance in the Internet version of traditional banking account operations by setting up interactive sites for the delivery of account services. In parallel, however, they develop an escalating interest in the supply of non-banking investment services, and to a lesser extent insurance services. Finally the commitment of the large banking multinationals in the development of system solutions in the field of electronic commerce has to be particularly noted. Generally the provision of the following services via the Internet has been observed in the Web sites of examined banking organisations.

- Account management and account information services to private as well as corporate customers, such as online opening of deposit accounts, display of account statements and account transaction history, bill payment, transfer of funds between accounts, management of individual as well as standing debit and payment instructions
- Credit card services such as online application procedures, payment services and balance and transaction statements
- Online application procedures for the supply of consumer credit facilities, small business loans and secured house financing.
- Savings and investment products such as online share dealing, online application processing for the purchase of securities and interests in collective investment schemes, information and research on markets and financial operations
- General insurance broking and agency services such as online processing of application forms, online premium calculation, customised instant quotation
- Non-financial electronic commerce operations such as the establishment of financial portals, retail and business-to-business electronic exchanges, certification and authentication services, establishment of mechanisms for the facilitation of electronic procurement and trading, entertainment and leisure Internet services, etc.

3. EC and National Law Before the Implementation of the E-Commerce Directive

The provision of electronic banking services over the Internet by credit institutions authorised to operate across the European Economic Area is governed by an amalgamation of law, which includes banking and financial legislation, electronic commerce law and the general law relating to banking services, such as the law of contracts, advertising, unfair competition, data protection and so forth. In relation to cross-border business from one EU Member State to another, EC law constitutes a primary source of binding rules.

3.1 The Treaty Establishing the European Community

The EC Treaty provides EC banks with the opportunity to set up commercial operations beyond their national market either by way of establishment in the territory of another Member State[33] or by exercising their freedom to provide services across borders[34].

3.1.1 The Concept of Establishment

According to the EC Treaty, the freedom of establishment of corporate entities consists of the right of institutions, which are formed in accordance with the law of a Member State and have their office, central administration or principal place of business within the Community, to set up agencies,

branches or subsidiaries in any other Member State[35]. Furthermore, the constructive intervention of the Court in the *German insurance* case has moved the concept of establishment one step further to include also:

> [A] permanent presence in the Member State in question (...), even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency[36].

In essence, the right of establishment necessarily entails the conscious decision of a corporate body to settle in the recipient country and integrate its activities into the economic life of the host jurisdiction. Thus, the integration of the incoming institution must necessarily involve the " *...actual pursuit of an economic activity through a fixed establishment (...) for an indefinite period*"[37] " *...on a stable and continuous basis*"[38], even though the intensity and the quality of the link with the host legal and economic structures is not identical for all the possible forms of localisation.

3.1.2 The Concept of the Freedom to Provide Services

In addition to the right of establishment, the EC Treaty guarantees the freedom of individuals and corporate bodies established in a Member State to provide services to natural or legal persons established in a different Member State, on a cross-border basis, without necessarily being established within the country of destination[39]. The provider of the service can temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals[40]. Conscious of the fact that behind the laconic EC Treaty provisions on the freedom to provide services, one can identify a set of diverse business models[41], the Court has embarked upon the laborious task of illuminating the "gray areas" of this legal concept.

The distinction has to be made between at least three types of intra- Community provision of services:[42] (i) the service provider moves to another Member State where the service is provided; (ii) the recipient of the service moves to another Member State in order to receive the service[43]; and (iii) neither the service provider nor the receiver move across borders but the service is provided through or with the assistance of modern telecommunications infrastructure[44].

The first hypothesis, which is specifically enshrined in the Treaty, presents close links with the notion of establishment; it entails the departure of the service provider from his Home country and his physical movement and presence towards and within the territory, where the service is to be provided. The penetration, however, of the provider of the service in the recipient jurisdiction needs to be temporary in nature, but, as the Court had the opportunity to stress:

> [T]he fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question"[45].

The confirmation that the temporary provision of services within the territory of the recipient country may use some kind of local infrastructure without that being considered as a fixed establishment for regulatory purposes has raised the question of drawing the line between the two concepts, in the likely case that the incoming organisation establishes itself in the host country not by way of a branch, agency or subsidiary but by setting up an "*office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking*"[46].

The notion of the provision of services can be distinguished from that of the establishment by its

temporary character, which has to be determined *" ... in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity",* [47] whereas the right of establishment presupposes a lasting or permanent presence in the host country. The deliberate choice of the Court to resort to general clauses requiring further elaboration instead of hard-and-fast guidance rules, confirms the preference of the European judiciary to proceed with cautious case-by-case interpretative classification based on the specific circumstances of individual cases. Finally, it must be borne in mind that the temporary nature of the commercial operations in the host country is a necessary requirement for the application of the Treaty chapter on the freedom to provide services and not the freedom of establishment, only when the provider is physically moving towards the host Country. The provision of services on a lasting and permanent basis either without any movement of the parties or when the recipient of the service is moving towards the country of establishment of the provider falls undoubtedly within the scope of the rules on the freedom to provide services[48].

3.1.3 Models for the Cross-Border Provision of Services via the Internet

Credit institutions are likely to engage in cross-border activity over the Internet under one of the following business models:

First, the institution may opt for providing services remotely to customers established in another Member State without using any form of local establishment within the recipient jurisdiction. Because this is a typical example of the third hypothesis, whereby the institution exercises the freedom to provide services at a distance, by means of some type of telecommunications technology, there is no doubt that a similar commercial operation will fall within the scope of the freedom to provide services and not the freedom of establishment. In *Alpine Investments[49]* the Court has manifestly accepted that " ... *Article 59 of the EC Treaty covers services, which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established"[50].* It is necessary, however, to stress that the location of the parties and not the particular communications technology employed in any instance of remote cross-border provision of services is the linking concept between the commercial practice in question and the Treaty chapter on the freedom to provide services. Thus, any technological means of distant communication, which is capable of channelling services from the provider to the recipient of the service on a cross-border basis, suffices to bring the particular operation within the scope of art. 59 of the Treaty[51].

Second, an alternative scenario would be the establishment within the host country of a local branch, which would deliver services to the local clientele. Within this context the incorporation of an Internet strategy can take one of two forms: Either the local branch sets up a Web site for the delivery of services to domestic residents, therefore refraining from providing services beyond the boundaries of the host country or the local branch delivers electronic services both to the local residents and customers established within the territory of a third country.

The credit institution may establish a branch or subsidiary within the territory of the recipient country. In that case, the institution would without doubt exercise the freedom of establishment under both organisational forms[52]. The possibility, however, of benefiting from the recognition of its home country banking authorization, therefore avoiding a duplicate procedure in the host country, has been deliberately reserved for branches and not subsidiaries. In the likely case that Internet services are considered necessary alongside the branch operations in the host country, the Internet platform can be regarded as an indivisible component of the local establishment. Provided that the Internet operations are emphatically confined within the scope of the local branch activities and are expressly reserved for the local clientele, the commercial activity generated by the local establishment of the credit institution in the host country would not demonstrate any transnational element and the Treaty provisions on the freedom of services would not apply[53].

Another possibility for the credit institution would be the establishment within the recipient jurisdiction of a legally dependent branch or a separately incorporated subsidiary , which in turn

would engage in the cross-border provision of services via the Internet to customers established overseas. In this case, the cross-border provision of services would fall within the scope of the free movement of services and not the freedom of establishment.

3.2 Country of Origin vs Country of Destination Control in the Internal Market for Banking Services

Despite the lack of a physical establishment within the territory of another jurisdiction, EEA banks providing services via the internet to customers in other Member States would be unwise to assume that only the law of their "home country" would apply. There are many circumstances in which their cross-border operations would trigger the application of the law of a Member State other than their country of their origin, normally the country in which the customer is habitually resident. The aim of the following sections is two-fold. First, I purport to assess the validity of the rationale underlying the Electronic Commerce Directive, namely that there is uncertainty as to which national rules apply to online services and the extent to which Member States may control services originating from another Member State[54]. Second, I intend to verify the actual success of the principle of country of origin of the Electronic Commerce Directive in bringing about the desirable degree of legal certainty. Put simply, the beneficial effects of the Electronic Commerce Directive as a corrective device cannot be assessed unless the flaws of the antecedent legal environment are exposed.

In effect, this paper is about the application of national law in cross-border situations. The traditional method of conflict of laws- or private international law in civil law systems- is based on the equality of value between the competing legal orders. Conflict of laws methodology, while entirely appropriate in horizontal relationships between private parties, has yet to filter through public regulation of economic activities, in particular the vertical relationships between the state and banks as economic actors. In the wider public law domain, equality of value between different competing jurisdictions in cross-border phenomena concedes to the prior claim of the state to pursue its public policy objectives by applying national law in unilaterally determined circumstances subject to outer limits imposed by public international law and the comity among nations. With regard to online banking activities carried on without a physical establishment in other Member States, the claim of competing legal orders to require compliance with national law is not of equal weight. The country of origin, where the bank is physically established and pursues economic activities, is the apparent anchor of public regulation. The law of other jurisdictions applies *ad hoc*, in circumstances when specific local interests are at stake and, in this respect, country of destination control shall be seen as derogation rather than a norm. The corpus of law, which may be a source of restrictive information and transaction costs within the internal market for online banking services, extends well beyond the scope of traditional banking law. It consists essentially of a diverse set of rules, which transcend the boundaries of the public/private distinction and are unrelated otherwise than in respect of their application to cross-border banking services. Furthermore, how the role of country of destination is presented is directly affected by the purpose of the present exercise. The law of the country of destination is not intended to be looked at as an autonomous source of rights and obligations for EEA banks but merely as a source of obligations for banks operating from within another Member State. For that purpose, there is a specific and significant role for the multilateral nature of conflict of laws but not as the full basis for a plausible model of discussion. From the perspective of the bank, the key question is under which conditions country of origin regulation is supplemented by the application of the rules of another country.

3.2.1 Country of Origin Control Before the E-Commerce Directive

3.2.1.1 The Banking and Financial Services Directives

In implementation of the provisions of the banking and financial services Directives and following the liberalisation of capital movements in 1988[55], the main obstacles to the cross-border provision of banking services have been eliminated under the concerted effects of three key policies set out by the Commission in 1985[56]: first, the harmonisation of national regulatory and supervisory

standards[57]; second, the recognition by Member States of one another's regulatory provisions and supervisory practices[58]; and third, the almost exclusive exercise of legislative and enforcement jurisdiction in prudential matters by the country of origin of the credit institution, both in respect of activities carried on at home and services provided in other Member States[59].

The harmonised prudential standards intend to achieve only the harmonisation, which is necessary and sufficient to secure their mutual recognition by Member States, for the purpose of establishing a single banking licence recognised throughout the Community on the basis of "home country" control [60]. Member States may adopt or maintain more stringent requirements vis-à-vis domestic banks but they are precluded from imposing them on EEA banks operating in their territory under the free movement provisions[61].

3.2.1.2. The Law of Contractual Obligations

Party autonomy in the choice of law and forum and the complementary operation of objective connecting factors, which determine the applicable law in the absence of choice, provide a sound framework for the development of "country of origin" control in matters relating to contractual obligations. Freedom of choice is of vital importance. The market-building effects of conflict of laws are not available in respect of contracts in which party autonomy is not fully enjoyed, notably consumer contracts.

The law governing cross-border contractual obligations is determined according to the provisions of the Rome Convention on the Law Applicable to Contractual Obligations[62] ("the Convention"). The rules of the Convention apply to contractual obligations in any situation involving a choice between the laws of different countries, including cross-border banking services[63].

The Convention reaffirms the freedom of the parties to choose the law applicable to the contract as a fundamental principle of European conflict of laws. A contract concluded between the bank and the customer shall be governed by the law chosen by the parties[64]. The rule applies indistinctly to commercial and consumer contracts, even though wide limitations operate with regard to the latter. The choice of law of the parties will often be express. In the absence of an express choice, a real choice of law may be implied, provided that the chosen law is demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[65].

3.2.2. Pockets of Country of Destination Control

The exclusive legislative and enforcement jurisdiction of the "home country" in the Banking and Investment Services Directives does not extend beyond the harmonised prudential standards. The "host country" has retained wide legislative and enforcement powers, which are less far-reaching in the event of activities carried on by way of cross-border services as opposed to local establishment [66]. In this respect, the Directives implicitly reflect a general principle of public international and Community law, in particular that the regulation of cross-border activities by the country of destination must always be in proportion to the actual connection of the activity with the territory of the "host country" and therefore less intrusive in relation to cross-border services than towards economic activities which take the form of a permanently established place of business within the jurisdiction[67].

3.2.2.1. The Notification Procedure

The provision of cross-border services to customers in other EU Member States must be preceded by the process of notification of the relevant supervisory authorities. The notification procedure pursues a simple objective of exchange of information between supervisory authorities[68]. The bank, which intends to provide services for the first time within the territory of another Member State, shall notify the competent authorities of the "home Member State" of the activities which it intends to carry on [69]. Subsequently, the host authorities have the right to receive the notification from the home

authorities within one month of its receipt by the latter[70]. The failure to notify the required information on time or in the prescribed manner does not affect the validity of contracts entered into in the course of the relevant services but it does trigger administrative measures[71].

3.2.2.2. Provisions Adopted in the Interest of the General Good

The pursuit of banking activities in the "host country" under the passport and in the same manner as in the "home country" should not conflict with legal provisions protecting the "general good" in the host Member State[72]. The latter may take all appropriate measures to prevent or punish irregularities committed within its territory contrary to those provisions[73].

The coercive powers of the "host Member State" are not necessarily limited to the actual pursuit of banking activities. EEA banks may advertise their services in the host country through all available means of communication, but they must comply with any rules in that jurisdiction adopted in the interest of general good governing the form and the content of such advertising[74].

The scope *rationae materiae* of the general good derogation must be understood as referring to the same notion in the Court's case law on the justification of restrictions to free movement[75]. In accordance with their national public policy objectives and regulatory traditions, Member States may adopt mandatory requirements for the purpose of protecting eligible public interests[76]. Insofar as those requirements restrict the freedom of EEA banks to provide services, the discretion of the "host country" is subject to the free movement provisions of the EC Treaty[77]. It is aptly pointed out that the corrective device of the "general good" purports to limit rather than expand the legislative and enforcement jurisdiction of the "host country" in respect of banking services provided therein[78]. The *prima facie* application of national law adopted in the interest of overriding public policy is a matter to be decided by the "host country", either unilaterally or in accordance with international instruments resolving conflicts of laws, subject to the overriding limits drawn by public international law[79]. Vis-à-vis national rules of that kind the normative effect of Art.22(5) of the Banking Directive is negative rather than positive. It operates *ex ante*¸ after the application of the rules in question in the cross-border situation has been confirmed, in order to ensure that ensuing restrictions fulfil the rigorous "general good" conditions developed by the Court[80].

The list of eligible public policy objectives, which may not be of a purely economic nature, e.g. maintaining peace in industrial relations[81] or the protection of revenue of domestic service providers[82], is open-ended. From the numerous motives successfully invoked to date, the protection of the recipients of the service[83], the protection of consumers[84], the protection of creditors and the efficient administration of justice[85], the cohesion of the tax system[86], the compliance with professional ethics[87], the maintenance of the good reputation of the financial sector[88], the fairness of commercial transactions[89] and the prevention of fraud[90] are the most likely to affect the provision of banking services. The protection of investors and depositors has also been recognised as a valid imperative reason for adopting restrictive requirements[91].

In practice, the *a priori* categorisation of legal provisions according to their underlying objectives can be controversial. In most cases, the objective is obvious, e.g. mandatory rules of contract adopted in the interest of consumer protection. On few occasions, the ambiguity is considerable even though eventually the legitimacy of the objective is not actually questioned, e.g. transparency requirements relating to securities trading, which may be regarded as protecting either the interests of investors or the integrity of the market or both. Nevertheless, there can be circumstances where the very justification of the measure could be at stake[92]. In those cases, what the objective actually is and whether the rule is suitable of attaining that objective is a matter to be assessed by the Court irrespective of the claims of the Member State in question[93].

In addition to being controversial, the categorisation appears to be pointless for purposes other than the "general good" test. Each one of the "general good" objectives is served by unrelated legal provisions both as to their position within the public/private law dichotomy and in relation to their

economic functions from the perspective of banking services. The integrity of the financial system, the protection of depositors, investors and consumers and the fairness of commercial transactions as legitimate aims of national law-making institutions permeate national law both horizontally-criminal and administrative law as opposed to private contract and torts law- and vertically-regulation of market access, regulation of market behaviour and regulation of banking and financial products[94]. In turn, horizontal divisions according to the public/private dichotomy operate in each one of the vertical divisions of banking law and the general law relating to banking. Eventually, public policy motivation as an autonomous factor becomes largely extraneous to the question of the *prima facie* application of national law to cross-border banking services, via the internet or otherwise, where consideration is primarily given to the conflict of laws methodology (or lack of it) in conjunction with the content and nature of domestic rules. Of course within the method of conflict of laws the role of overriding public policy as a limitation to party autonomy is significant but its function is entirely different from the "general good" concept. In essence, public policy in the conflict of laws positively requires the application of domestic law to cross-border situations, whereas the notion of "general good" constitutes a corrective device enshrined in the EC Treaty by which burdens on intra-Community trade caused by the application of national.

In short, there are many circumstances in which the bank providing cross-border services via the internet may be subject to the law of the country in which the customer is established despite the lack of physical establishment within that jurisdiction. The private international law of consumer contracts, the private international law of unfair competition, advertising regulations and the financial promotion and the scope of territorial application of public regulation relating to banking and financial services have developed mechanisms by which non-established entities and cross-border services to local residents are brought within the scope of application of national law. The concepts of "targeting" or "activities directed at" the local market almost invariably trigger the application of national law despite the lack of a local presence. Conflict of laws and the jurisprudence on the scope of territorial reach of public law statutes have traditionally relied on connecting factors drafted in plain territorial terms: The place where the contract is concluded, the location where activities are carried on, the market at which advertisements are directed and so forth. It is clear that the development of the internet as a fully-operational channel for the delivery of banking services has found it difficult to fit within a necessarily territorial legal framework for international transactions. This entails two problems for the functioning of the internal market in banking and financial services. First, there is lack of certainty and predictability as to which law applies in a given cross-border service via the internet. Second, clear country of origin regulation has only been achieved in the field of prudential banking regulation and supervision as well as in the domain of contract law to the extent that party autonomy and free choice of law and forum are permitted. Beyond that, certainty and predictability as to the applicable law comes at the heavy price of widespread country of destination control which leads to excessive information and transaction costs for EC banks, reluctance for cross-border trade and eventually market partitioning and internal market failure. In the following section, I will present the impact of the E-Commerce Directive as a remedy to that unsatisfactory state of affairs.

4. The E-Commerce Directive and the Principle of Country of Origin in Relation to Banking Services via the Internet

In the preceding section, I demonstrated that the law relating to banks and their services is subject to an unwelcoming degree of uncertainty with regard to its scope of application to cross-border banking services via the internet. For EEA banks, the uncertainty is detrimental and, in many cases, is eventually resolved at the expense of "home country" and to the benefit of "country of destination" control. In that context, the "country of origin" principle of the E-Commerce Directive (hereinafter the Directive) has been advertised as a successful and effective remedy but its precise remedial effects on the flaws of the antecedent legal framework have yet to be unveiled.

The origins of the Directive can be traced back in a Commission's Communication issued in 1997

[95]. The Communication set out a framework for action at Community level for the purpose of encouraging the vigorous growth of electronic commerce. In that statement, the coordination of national policies and the creation of a favourable legal environment were rightly identified as necessary prerequisites for the attainment of the set objective[96]. The framework for action was endorsed at the highest political level in 1999[97] and reaffirmed on many occasions thereafter[98].

From the numerous components of that project, the Directive constitutes the principal response to the dysfunction of the law relating to electronic commerce within the internal market. Its objective is to stimulate and safeguard cross-border electronic transactions between the Member States, which are hampered by a number of legal obstacles arising from existing divergences in legislation and from the legal uncertainty as to which national rules apply and under which circumstances[99].

To attain this objective, the Directive puts forward two basic policies, which may be broadly seen as versions of the traditional and tested approach of Community law towards the integration of European markets. First, the obstacles caused by the divergence of national law are addressed by the harmonisation of key aspects of the law relating to electronic commerce. In parallel, "country of origin" control as a mandatory model for allocation of legislative and enforcement jurisdiction between Member States is established. The aim is to eradicate the restrictive effects of legal uncertainty and therefore contribute to the full enjoyment of the economic freedoms set out in the EC Treaty. Put simply, to achieve legal certainty and unrestricted electronic commerce between parties established in different Member States, such activities should in principle be subject to the law of the Member State in which the provider of goods or services is established[100].

The "country of origin" rule is set out in Art.3 in the following terms:

Art.3(1). Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.
Art.3(2). Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

The precise effects of the arguably laconic and unclear provisions of the "internal market" clause, as Art.3 is also known, have been intensely debated. The aim of the present chapter is to clarify the ambiguities of Art.3 in the light of national measures implementing the Directive and examine its effects on the provision of banking services via the internet[101]
It is hoped that the extent to which the E-Commerce Directive remedies the failure of conflict of private and public laws, as presented in the preceding chapter, to provide the basis for legal certainty or broader "home country control" will then become apparent.

4.1 Scope of the "Country of Origin Rule"

The "country of origin" rule does not apply to the entire corpus of law relating to cross-border electronic commerce in general or internet banking in particular. Despite the fact that electronic commerce is the theme of the Directive[102], the term does not appear in the "internal market" clause. Instead, Art.3 has been drafted in carefully chosen terms of art: The "country of origin" rule applies to activities that the Directive technically defines as "information society services" (hereinafter ISS) and only within the scope of the "coordinated field". Further, its outer limits are dictated by the scope of application of the Directive and the exceptions thereof as well as the general derogations set out in the Annex.

The term "information society" in the EC context dates back to 1994. It was initially used in the *Bangemann Recommendations to the European Council* [103] for the development of coordinated European policies towards information networks. In that paper, the "information society" was defined as the emerging new world, shaped by technological progress which enables the processing, storage, retrieval and communication of information and human intelligence in whatever form it may

take-oral, written or visual- unconstrained by distance, time and volume[104].

For the purposes of the "country of origin" rule, the concept of "information society services" (ISS) is defined by Art.2(a) of the Directive as "*...services within the meaning of Art.1(2) of Directive 98/34/EC as amended by Directive 98/48/EC*". According to the source definition, ISS are services in the sense of the EC Treaty[105], normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

The "coordinated field" designates the scope of application the "country of origin" rule on cross-border ISS. In analogy to the principle of "home country control" in the Banking Directive, which only covers the prudential standards listed therein, the "country of origin" clause applies to ISS within the limits of the "coordinated field". The "coordinated field" is defined as the requirements laid down in Member States' legal systems applicable to ISS providers or ISS, *regardless of whether they are of a general nature or specifically designed for them*[106].

The obvious remark about the nature of the "coordinated field" is that it consists of rules of national law. Those rules share a common characteristic: they apply to ISS, as defined in the Directive, or to providers of ISS. The Directive provides guidance on the properties of the "coordinated field" by setting out categories of national provisions falling therein.

First, the "coordinated field" covers requirements with which the service provider has to comply *before* the commencement of the activity. It encompasses initial conditions of entry into the relevant industry[107], including requirements concerning qualifications, authorisation or notification. In the light of Art.4 of the Directive, which precludes Member States from making the performance of economic activities in the information society subject to prior authorisation or other requirement having equivalent effect, the "coordinated field" is necessarily limited to authorisation or notification requirements of a general nature, applicable to the underlying economic activity, regardless of the means by which the activity is carried on. The law of prudential banking regulation and supervision, either purely domestic or in implementation of EC Directives or other international instruments, falls within that category.

Second, it encompasses requirements relating to the actual pursuit of the activity of providing ISS, such as:

- rules applicable to *advertising*[108], including the format, content, fairness and control of advertising and promotional information, which (1) may relate either to the underlying services, e.g. rules on consumer credit advertisements, (2) may be of a general nature, e.g. the law of unfair advertising and competition or (3) apply specifically to communications made via the internet,
- rules regulating the *behaviour*[109] of the service provider, such as conduct of business rules in relation to banking and, in particular, investment services, e.g. pre-contractual disclosure of information to investors, depositors or consumers[110].
- requirements regarding the *quality* or *content*[111] of the service, and
- the law of *contracts*[112] to the extent that it applies to ISS, regardless of whether it is of a general nature or specifically applicable to online electronic contracts. Within that category one may list (1) the law relating to the *pre-contractual* stage, e.g. disclosure of information, misrepresentation, *culpa in contrahendo*, etc, (2) the law relating to the *formation* of contracts, e.g. offer, acceptance and formalities, especially the requirement of a written contract, the use of electronic signatures and the validity of contracts concluded online and (3) the law relating to the *performance* of contractual obligations, whether it is of a general nature or specifically applicable to consumer contracts. With regard to the law relating to the performance of banking contracts, it appears expedient to make a distinction between the rules, which determine *how* a contract is to be performed, e.g. the requirement of good faith or business efficacy, interpretation, impossibility or withholding of performance and the fairness of contractual terms, and the mandatory rules determining *what* the obligations to be performed

shall be, such as mandatory rules which preclude party autonomy in determining the rights and obligations of the parties, e.g. the prohibition of remunerating bank deposits by way of interest. Rules of that kind effectively shape the banking service into a "legal product" packaged in the form of a contractual relationship and therefore they may also be classified under (iii) as requirements regarding the *content* of the service.

Finally, the "coordinated field" covers requirements concerning the liability of the service provider, which may be either contractual or tortious. Non-contractual liability may relate either to the advertising stage, e.g. liability in tort for misleading advertising, passing-off etc, or to the pre-contractual stage, e.g. liability for misrepresentation or *culpa in contrahendo*.

The "coordinated field" does not cover requirements which apply to services "not provided by electronic means"[113]. The derogation refers to national rules which cannot reasonably apply to services provided at a distance by electronic means (*objective* criterion) as well as rules which *in concreto* refer to a non-electronic aspect of the service, notwithstanding the application of the Directive in some other respect (*subjective* criterion)[114]. What matters is whether the rule applies to activities which are *actually* as opposed to *potentially* carried on by electronic means.

4.2 The Effects of the "Country of Origin" Rule

The "internal market" clause has been drafted in accordance with the archetypal paradigm of EC Directives as framework rules addressed to Member States, binding only as to the result to be achieved but leaving to the national authorities the choice of form and methods. It shall not go unnoticed that unlike other internal market Directives and indeed the remainder of the E-Commerce Directive, which set out sufficiently precise rules, the "internal market" clause can only be understood as a mandatory requirement imposing obligations on Member States, the precise effects of which cannot be appreciated in isolation from implementing legislation and out of the national legal context. If read carefully, Art.3 is revealing. It does not designate the applicable law in an abstract form, operating as *lex specialis* vis-à-vis existing conflict of laws. It imposes specific obligations on Member States in their respective capacities as country of origin or country of destination, which have to be implemented by whatever methods Member States consider appropriate. In my view, the "internal market" clause constitutes a mandatory rule of Community law, which requires implementation within its scope of application and, in appropriate circumstances, overrides –invariably- substantive and conflicts rules alike.

(i) Art.3(1)

The first obligation imposed on Member States is to ensure that the ISS provided by service providers established on their territories comply with the national provisions applicable in the Member State in question which fall within the coordinated field. Contrary to what the "restriction theory" suggests, the concept of "national provisions applicable the Member State in question" refers to substantive rules and does not include conflict of laws, which could designate the law of another Member State in a potentially endless process of *renvoi[115]*. The "internal market" clause purports to eradicate restrictions relating to legal uncertainty as to the application of national law. That objective is served by requiring Member States in their capacity as "countries of origin" to ensure that firms established therein comply with national law. The obligation is addressed indistinctly to Member States and must be invariably implemented by national law-making, executive and judicial authorities[116].

In the event that, in private litigation in the courts of the country of origin, national conflicts rules designate a different applicable law, they should be set aside. Domestic law should apply instead. The Directive may not add to or amend existing rules of private international law but it certainly affects them. Furthermore, should outgoing cross-border services fall outside the scope of territorial application of domestic public regulation and criminal law, the spatial reach of domestic rules shall be extended accordingly to encompass activities having effects in other jurisdictions.

(ii) Art.3(2)

The obligation imposed on Member States vis-à-vis incoming ISS provided by firms established elsewhere is different. Member States are required to ensure compliance neither with their own domestic law nor with the provisions applicable in the Member State of origin. They are merely required not to restrict the freedom to provide ISS from another Member State. The concept of restriction shall be understood in the light of Art.49 EC[117]. It covers both discriminatory and indistinctly applicable measures, regardless of intensity, which are likely to impede, prohibit or make less attractive the provision of services within the country of destination as compared to services provided by the EEA firm in the country of its origin. It shall not be presumed however that the inherent uncertainty relating to the "restriction test" in Art.49 EC obstructs the intended effects of Art.3(2). The obligation imposed on the country of destination must be examined in the light of the simultaneous obligation imposed on the "country of origin". Taken together, Arts.3(1) & 3(2) effectively result in far greater certainty regarding the verdict on the restrictive effects of the law of the country of destination than it would have been the case under a pure "restriction test" in accordance with the requirements of Art.49 EC[118].

The extra-territorial effect of the law of the country of origin in implementation of Art.3(1) constitutes the yardstick by which the requirements of the country of destination shall be measured. Without saying so explicitly, the Directive requires the revision of the scope of territorial application of public law and regulation vis-à-vis incoming ISS. Any regulatory requirement imposed on firms established in other Member States, will add to the regulatory burden that the firm is subject to in the country of origin. To extend the scope of application of domestic law to services supplied to other Member States in implementation of Art.3(1) without simultaneously curtailing it vis-à-vis incoming services provided by firms in other Member States is not an option. The proper implementation of Art.3 entails the correction of the spatial application of public law and regulation in appropriate circumstances, so as to achieve the full application of the "coordinated field" to outgoing ISS and full deregulation of incoming ISS within the same limits, without prejudice to the exceptional powers set out in Art.3(4)[119].

The correction exercise is not available with regard to rules of private law. The Directive neither amends existing rules of private international law nor affects the international jurisdiction of courts under the Brussels Regulation. The courts of the country of destination are not required to dispense with the domestic rules of private international law and indistinctly apply the law of the country of origin. They have however a responsibility under Art.3(2) to ensure that the freedom of the firm to provide ISS is not restricted. For that reason, the court will determine the applicable law in accordance with the private international law of the forum and subsequently carry out the "restriction test" *ad hoc* in each individual case.

4.3 The General Derogations

The first derogation is unsurprising. The "internal market" clause does not apply to the freedom of the parties to choose the law applicable to their contract[120]. In accordance with the principle of party autonomy, the contract between the bank and the customer may be subject to the law of a Member State other than the country of origin. The Directive does not affect the law of the Member States, in particular the Rome Convention, which establishes the autonomy of the parties as a fundamental principle of the private international law of contracts. It is clear that in situations where free choice of law is a valid option, the argument for mandatory "country of origin" regulation is particularly weak and, in fact, could impede rather than safeguard cross-border trade. Of course, the substantive rules of the law designated by the choice of the parties are subject to the "restriction test" enshrined in Art.49 EC.

Further, the "country of origin" rule does not affect the law applicable to contractual obligations relating to consumer contracts[121]. Accordingly, it cannot have the result of depriving the

consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence[122]. Those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract [123]. The derogation relates to conflicts rules relating to consumer contracts predating the Directive. The law governing consumer contracts shall be determined in accordance with the Rome Convention in all respects, including material and formal validity, interpretation, performance and, in the light of the 56th Recital, pre-contractual disclosure of information on the essential elements of the content of the contract, which have a determining influence on the decision to contract.

Finally, it is expedient to stress that the concept "contractual obligations concerning consumer contracts" does not refer to any particular type of substantive rules. The interpretation of the precise scope of consumer protection rules set out in the Rome Convention is outside the scope of the Directive. For example, whether the more protective rules of the consumer's country of residence, which override the otherwise applicable law, may be of a general nature or specifically applicable to consumer contracts, is still an open and controversial question within and across different Member States[124]. By excluding the private international law of consumer contracts from the legal certainty associated with "country of origin" control, the drafters of the Directive made a conscious decision to prolong the uncertainties and ambiguities of the pre-existing legal framework, to which the Directive has not been intended to respond.

4.4 Implementation of the Directive in the United Kingdom

In the UK, the implementation of the "country of origin" rule has been effected by two legal instruments: the Electronic Commerce (EC Directive) Regulations 2002[125] (hereafter the "General Regulations") and the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002[126] (hereafter the "Financial Services Regulations"). It is essential to determine at the outset the scope of application of the two instruments, especially with regard to the provision of banking services.

The "General Regulations" shall be regarded as the principal instrument of implementation. The "Regulations" transpose into domestic law the "internal market" clause vis-à-vis ISS and in relation to the "coordinated field" by direct reference to the definitions made by the Directive[127]. The scope of application of the "Financial Services Regulations" is narrower. The "Regulations" are solely concerned with the implementation of the "internal market" clause in the field of financial services, specifically in relation to the FISMA 2000, the statutory instruments made thereunder and the rules issued by the FSA in exercise of its law-making powers. Within their scope of application, the "Financial Services Regulations" constitute *lex specialis* and take precedence over the "General Regulations" [128]. Issues which are outside the scope of the special rules fall by default within the scope of the general rules.

4.4.1. Financial Services Regulations" and the Rules of the FSA[129]

The position of incoming EEA firms vis-à-vis the FISMA 2000 and the FSA Handbook is determined by Regulation 3(4) of the "Financial Services Regulations". Rules made by the FSA for the regulation and supervision of regulated activities do not apply to EEA firms carrying on "incoming electronic commerce activities", unless they impose consumer contract requirements or relate to the permissibility of unsolicited commercial communications by electronic mail. Incoming electronic commerce activities are ISS provided to persons in the UK by firms established in other Member States, which would be regulated activities under FISMA 2000*[130]* but for the implementing legislation[131]. The activities of accepting of deposits[132], dealing in investments [133] and sending on behalf of another person dematerialised instructions relating to securities[134] fall within the scope of application of the Regulations but not lending, which does not constitute a regulated activity for the purposes of the FISMA 2000.

The key instrument issued by the FSA in further implementation of Regulation 3(4) is the *Electronic Commerce Directive Instrument 2002*, which is now an integrated part of the FSA Handbook (*ECO*). ECO provides that incoming EEA firms must comply with the laws of the country of origin and not the rules of the UK, where the client is located. The "country of origin" rule is subject to derogations, which are *exclusively* set out in the *close-ended* list of ECO 1.1.10R[135]. In addition to the market abuse regime[136], which UK authorities have consistently regarded as being outside the scope of the "coordinated field" [137] and rules setting out the decision making[138] and enforcement policy[139] of the FSA, incoming EEA firms providing services within the scope of the present study are solely subject to a limited number of pre-contractual information requirements [140]. It is notable that the FSA, in a seminal demonstration of proper understanding of the internal market progress, has indicated that it is even prepared to abolish those information duties altogether as soon as other Member States implement the Distance Marketing of Consumer Financial Services Directive, which sets out a comprehensive list of information requirements[141]. If that were to happen, EEA banks providing regulated services to UK customers would be entirely beyond the reach of UK financial services law, with the exception of the emergency powers of Art.3(4).

The corpus of information duties which incoming EEA firms are required to observe corresponds to the general derogation relating to contractual obligations concerning consumer contracts. Although key aspects of the FSA Handbook, in particular conduct of business rules, affect the relationship between firms and consumer customers by imposing conduct duties on the former, the FSA has rightly considered inappropriate to impose rules of that kind to incoming firms on the basis of the foregoing derogation. The FSA rules of conduct relate to the vertical relationship between the public authority and the private party and their violation is not actionable as a breach of contract. Their private law aspects are limited to the recognition of an action in tort for breach of statutory duty, which may be brought in appropriate circumstances by aggrieved customers[142].

With regard to UK banks providing "outgoing services" to customers in other Member States, the full implementation of Art.3(1) of the Directive did not require ECO to restate the scope of territorial application of the entire Handbook. The vast majority of UK rules relating to prudential banking regulation and supervision[143], money laundering[144] and conduct of investment business[145] apply, either in implementation of EC Directives or by virtue of national policy, to banks established and authorised within the jurisdiction regardless of whether they provide services therein or to customers in other Member States. It was therefore sufficient to extend the scope of application of only those requirements, which under the law pre-dating the Directive did not apply to services provided to customers in other Member States, in particular rules relating to advertising and financial promotion[146]. The second function of ECO in relation to UK banks has been to implement the information requirements set out by Arts.5, 6, 10 and 11 of the Directive[147], which must be imposed by each Member State on ISS providers established therein.

4.4.2. The "General Regulations"

The contribution of the "Financial Services Regulations" to the implementation of the "internal market" clause in the UK is limited to the application of the FISMA 2000 and the instruments and rules enacted thereunder. With regard to the remainder of English law, which may or may not relate to activities regulated under the FISMA 2000, the "country of origin" rule is implemented by the "General Regulations".

In implementation of Art.3(1) of the Directive, any requirement which falls within the "coordinated field" shall apply to the provision of an ISS by a service provider established in the UK irrespective of whether that ISS is provided within the jurisdiction or in another Member State. Regulation 4(2) stipulates that an enforcement authority with responsibility in relation to any of those requirements shall ensure that the provision of an ISS provider established in the UK complies with that requirement and any power, remedy or procedure for taking enforcement action shall be available to secure compliance. The rule is yet another indication that the requirements which must be observed by firms established in the UK are of a substantive as opposed to conflicts nature. Without prejudice

to contractual party autonomy, the law applicable to contractual obligations concerning consumer contracts and the law relating to unsolicited e-mails, UK banks are subject to UK rules of substance, including the standards harmonised by the E-Commerce Directive, both for ISS provided at home and ISS supplied to recipients in other Member States. The scope of territorial application of regulatory requirements of a public law nature is enhanced and rules of private international law, other than those for which the derogations apply, are set aside insofar as they designate the law of another Member State in the circumstances covered by the "internal market" clause.

Art.3(2) of the Directive is implemented by Regulation 4(3). Without prejudice to the general derogations, any UK requirement shall not be applied to the provision of an ISS by a service provider established in a Member State other than the UK where its application would restrict the freedom to provide ISS to a person in the United Kingdom from that Member State[148]. In the light of the full compatibility of the Directive with EC harmonisation instruments and the dynamic character of the "coordinated field", requirements established by Community acts in the field of public health and consumer interests do not constitute restrictions for the purposes of the Regulation [149].

In the light of the foregoing observations as to the concerted effects of Arts. 3(1) and (2), it must be understood that the "restriction test" in Regulation 4(3) is not subject to the technical refinements and uncertainties normally associated with Art.49 EC. Following the implementation of Art.3(1) by other Member States in their capacity as "countries of origin", Regulation 4(3) leads in effect to "country of origin" regulation, without adding on the existing rules of private international law[150].

An unusual feature of the UK rules is Regulation 3(2), which provides that the "General Regulations" shall not apply in relation to any Act passed on or after the date these regulations are made or in exercise of a power to legislate after that date. What is meant is that the Regulations do not have *prospective effect*. UK legislation adopted after the 30th of July 2002 must provide *ad hoc* for its consistency with the Directive, particularly the "internal market" clause.

4.4.3. The Case-by-Case Derogation

The Directive has provided for an "escape clause" in Art.3(4) in cases where a Member State in its capacity as the country of destination of ISS is concerned with the impact of incoming activities on national public policy interests. Provided that a number of "policy" and "procedural" conditions are satisfied, the country of destination may take measures to restrict incoming ISS in derogation from the requirements of the "internal market" clause.

In addition to public health and national security, the restrictive measures shall be necessary for either the protection of consumers and investors or public policy, including the prevention, investigation, detection and prosecution of criminal offences, the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons. The measure must be taken against a *given* information society service which prejudices one of the eligible objectives or which presents a serious and grave risk of prejudice to those objectives[151]. It is important to underline that Art.3(4) cannot provide a general basis upon which the country of destination may justify the consistent imposition on incoming providers of national rules, as soon as those rules satisfy the foregoing objectives *in abstracto*. It must be seen as a "case-by-case" derogation, which enables exceptional and *ad hoc* measures to be taken against *individual* providers, the services of which prejudice or threaten to prejudice those objectives[152]. Finally, the measure must be proportionate to those objectives[153].

The procedural requirements for the valid exercise of the powers inferred on the country of destination by Art.3(4) confirm that the measures in question may only be taken in appropriate individual cases and not generally against incoming ISS. Prior to taking the measures in question, the Member State must ask the country of origin to take measures which would satisfy the interests

which need protection. Thereafter, it may only act if no measures were taken or they were inadequate, after notifying the Commission and the Member State of origin of the intention to take such measures.

In case of urgency, Member States may derogate from the foregoing conditions and the measures shall be notified in the shortest possible time to the Commission and to the Member State of origin, indicating the reasons for which the Member State considers that there is urgency. In any case, the Commission may examine the compatibility of the notified measures with Community law and, if found incompatible, it may ask the Member State in question to refrain from taking any of the proposed measures or urgently to put an end to the measures in question.

In most cases, *ad hoc* measures will be taken by public supervisory authorities. As far as national courts are concerned, their role is two-fold. First, they may be called to provide judicial protection to incoming ISS vis-à-vis individual measures taken by public authorities exercising their Art.3(4) powers. The provider may argue that the required conditions have not been satisfied and request a judicial review. Second, in private litigation one of the parties may argue that a specific provision of the applicable law falls within the "internal market" clause, whereas the opponent may counter-argue that the rule ought to apply exceptionally on the basis of Art.3(4). There are three reasons why the emergency powers of Art.3(4) are indeed available to courts.First, the provision is addressed to the Member States, including national courts. Second, in specific circumstances, particularly in criminal proceedings, the court may have the view that the policy conditions are fulfilled. Even if the competent supervisory authority has failed to intervene, the power should be available at the judicial stage. Finally, the procedural conditions of prior consultation and notification have been intended to apply without prejudice to court proceedings[154], which *a contrario* demonstrates the courts could invoke Art.3(4) in appropriate circumstances without being required to stay proceedings and notify the country of origin and the Commission. Of course Member States may opt for implementing Art.3 (4) only in relation to supervisory authorities at the exclusion of courts.

In the UK, the residual powers of the FSA under Art.3(4) are set out in the "Financial Services Regulations". The Regulations are the clearest indication yet of the full implications of Art.3(4). If the policy and procedural conditions are met, the FSA may direct that an incoming firm may no longer carry on a specified ISS or may only carry it on subject to specified requirements which would normally not apply to incoming ISS providers. The direction must be in writing and must include a statement that it may be referred to judicial review by the aggrieved firm. The contravention of an imposed specified requirement does not make a person guilty of an offence, or make any transaction void or unenforceable[155] but it is actionable at the suit of a person who suffers loss as a result of the contravention[156]. The FSA has published its enforcement policy in relation to Art.3(4), which is worthy of careful attention[157].

On obtaining information concerning possible financial crime facilitated through or involving an incoming ISS provider, or detriment to UK markets or recipients caused by the activities of an incoming provider, the FSA would contact the relevant EEA regulator of the incoming institution. The FSA would expect the relevant EEA regulator to consider the matter, investigate it where appropriate and keep the FSA informed about what action, if any, was being taken. The FSA may not need to be involved further if the action by the relevant EEA regulator addresses the concerns of the FSA. There may be however circumstances in which the *FSA* will need to use that power, e.g. when one of the policy conditions are met or the relevant EEA regulator has not taken or is unable to take action or it appears that action against the wrongdoing would be taken by the FSA more effectively. The question of whether the *FSA* shall prevent or prohibit the *incoming electronic commerce activity*, or make it subject to certain requirements (for example, compliance with specified *rules*), will depend on the overall circumstance of the case. A non-exhaustive list of factors to be considered would include the extent of loss incurred by UK customers, the extent of risk that money laundering or other financial crime may be committed, the impact that a full prohibition would have on UK customers and the risk that the activity present to the financial system and the confidence to the financial system.

Another interesting feature of the "Financial Services Regulations" is that the concept of public policy as one of the eligible policy conditions which may trigger the application of Art.3(4) restrictions has been interpreted as including the full list of regulatory objectives of the FSA, namely market confidence, public awareness, the protection of consumers and the reduction of financial crime[158]. With the exception of consumer protection, which is a valid justification in its own right, and arguably the reduction of financial crime, it is nevertheless questionable whether market confidence and raising public awareness on the operation of the financial system accords with the narrow interpretation of the concept of public policy as genuine and serious threats undermining the fundamental interests of society.

Overall, the careful drafting of the Regulations and the high degree of transparency surrounding the enforcement policy of the FSA successfully implement the inherently discretionary 3(4) process and some of its most debated aspects.

In relation to the remainder of UK supervisory Authorities, e.g., Office of Fair Trading for consumer credit, Art.3(4) is implemented by the "General Regulations". The UK rules restate Art.3(4) in its entirety[159]. In addition, it is confirmed that the notion of "enforcement authorities", to which Regulation 5 is addressed, may indeed encompass courts in exceptional circumstances. In the event that an enforcement authority with responsibility in relation to the requirement in question is not party to the proceedings, a court may, on the application of any person or of its own motion, apply any requirement which would otherwise not apply by virtue of application of the principle of country of origin in respect of a given ISS, provided that the policy conditions are met[160]. The procedural requirements do not apply to court proceedings.

5. Conclusion

5.1 General Observations

In the preceding sections I examined the implementation of the "country of origin" rule in relation to EEA banks and their internet-based services. I tried to explore the extent to which legal uncertainty or the instances of application of the law of the country of destination will be reversed by virtue of the Directive. Before examining the outcome of that exercise, it is expedient to make some general observations.

First, the approach of the UK authorities, which dealt with financial services in a separate implementation process, has obvious advantages over the continental option of a "general clause". As a result, EEA banks offering services to UK customers know precisely the extent to which the FSA Handbook and the FISMA 2000 apply to their cross-border activities. In contrast, UK firms offering similar services to customers in France or Germany are still subject to a certain degree of uncertainty, even though it is unlikely that regulatory requirements of the country of destination will pass the admittedly stringent "restriction test" of Arts.3(1) and (2) taken together.

Second, the "consumer contracts" derogation is indeed wide. It is appreciated that it diminishes commensurately the added value of the Directive. In particular, it preserves the legal uncertainty caused by the many open questions relating to the scope of application and the effects of the consumer protection rules of the Rome Convention. Further, it preserves the actual transaction costs caused by differences in the underlying substantive rules. Despite the largely justified criticism, it must nevertheless be understood that politically the revision of the *status quo* was virtually unachievable and, for many, undesirable.

Finally, the frequency with which the case-by-case derogation of Art.3(4) will be used remains unclear. With the exception of the FSA, national banking and securities regulators have yet to publish their approach. In that respect, the transparency of the FSA's enforcement policy and its preference to a restrictive interpretation of Art.3(4), as it is actually required, must be commended.

EEA banks offering ISS to UK customers may safely assume that their activities will not attract an *ad hoc* restriction, provided that they duly comply with "country of origin" rules, including provisions implementing EC instruments. What the mutual treatment of UK banks will be remains to be seen.

5.2 The Theses

1. The "internal market" clause has negligible effects on the law governing the banking contract. It merely applies to non-consumer contracts in which the parties have not chosen the applicable law. In that case, the contract shall be governed, in accordance with the criterion of the "characteristic performance", by the law of the place of the "principal place of business" of the bank. Or alternatively, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business e.g. a branch, the applicable law will be that of the country where that place of business is situated. Clearly in the case of EEA banks providing ISS from within the "home Member State", the place of establishment for the purposes of both the Rome Convention and the "internal market" shall be located in a single jurisdiction.

2. In contrast with the private international law of contracts, the impact of the "internal market" clause on the private law relating to non-contractual liability for misleading advertising, unfair trading and inaccurate statements is substantial. It is probably the domain where, with the exception of the permissibility of unsolicited e-mails, the concerted effects of Arts. 3(1) & 3(2) lead to virtually exclusive country of origin regulation[161]. A claim brought against the bank in the courts of the "country of origin" shall be litigated in accordance with domestic law, even if the forum normally applies the "market effects" doctrine or a variation thereof to designate the applicable law in cross-border non-contractual liability. Of course, nothing in the Directive precludes a private party, e.g. a customer or a competitor, to bring a claim in tort in the courts of the country of destination, the jurisdiction of which under the Brussels Regulation is not affected. The action shall be heard by the court seized, without it being possible to refer the litigated matter to the courts of the "country of origin". It will therefore be the responsibility of the court in the country of destination to ensure that the freedom of the bank is not restricted for reasons falling within the coordinated field.

3. The protection against unfair competition and misleading or untruthful advertising is frequently entrusted, particularly in the UK, to public law and regulation. It is beyond doubt that the scope of territorial application of national legislation shall be corrected in line with the requirements of the Directive, either directly, by appropriate amendments, such as the FSA amendment of the financial promotion regime, or indirectly, by public authorities declining to enforce national standards against incoming firms and extending their supervision to services provided by domestic institutions across borders

4. The institutional structure of EC banking regulation and supervision is not affected by the "country of origin" rule. The "home Member State" continues to be the principal anchor of public regulation and supervision and the primary recipient of notification by credit institutions authorised therein, which wish to provide services within the territory of other Member States.

5. With regard to the law of contractual obligations concerning consumer contracts the Directive preserves the largely unsatisfactory "status quo" ante. It is hoped that new initiatives in the field of consumer contract law, including the Distance Marketing of Consumer Financial Services Directive and the new Consumer Credit Directive, will contribute to the abolition of restrictions caused by legal plurality within the European internal market.

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[1] See generally International Monetary Fund, A.Belaisch *et al*, *Euro-Area Banking at the Crossroads*, Working Paper 28, Washington DC, 2001; Bank for International Settlements, W.White, *The Coming Transformation of Continental European Banking*, Working Paper 54, June 1998.

[2] See P.Sauve and J.Gillespie, *Financial Services and the GATS 2000 Round*, OECD Brookings Wharton Papers on Financial Services 2000, 423-452, Washington DC, 2000; G.Hufbauen and T.Warren, *The Globalisation of Services: What Has Happened and What Are the Implications*, pp 14-18, Institute for International Economics, Washington DC, October 1999.

[3] See S.Cecchetti, “The Future of Financial Intermediation and Regulation: An Overview”, Federal Reserve Bank of New York, *[1999] Current Issues in Economics and Finance, Vol. 5, Nr.8, 1-6, 2.*

[4] See Group of Ten, *Report on Consolidation in the Financial Sector*, pp 71-72, January 2001.

[5] See European Central Bank, *The Euro: Integrating Financial Services*, Frankfurt am Main, August 2000.

[6] See, e.g., Cardiff European Council, Presidency Conclusions, Pt.17, Document 00150/98, 15/16.06.1998.

[7] See William White, supra note 1.

[8] See Commission of the European Union, *Financial Services: Building a Framework for Action*, Communication to the Council and the European Parliament, p. 1, COM (1998) 625, 28.10.1998.

[9] See Presidency Conclusions, supra note 6.

[10] Commission of the European Union, *Financial Services: Implementing the Framework for Financial Markets: Action Plan*, Communication to the Council and the European Parliament, COM (1999) 232, 11.05.1999.

[11] See Group of 10, Chapter II, *Fundamental Causes of Consolidation*, supra note 4.

[12] See generally European Central Bank, *Mergers and Acquisitions Involving the EU Banking Industry-Facts and Implications*, Frankfurt am Main, December 2000; European Central Bank, *Annual Report 2000*, pp 121-124, Frankfurt am Main, 2001.

[13] See European Central Bank, *The Effects of Technology on European Banking Systems*, Frankfurt am Main, July 1999; H.Steenis, JP Morgan European Banks Equity Research Group, *European Banking: Online Finance Europe*, London, September 2000; J.Norton, *International Banking Law in the 21st Century*, p.22, Centre for Commercial Law Studies, February 1999.

[14] See OECD Committee of Financial Markets, “Cross-Border Financial Services: Economics and Regulation”, *Financial Market Trends No 75, 23-60, March 2000.*

[15] See generally E.Stevens, *The Internet as a Financial Services Distribution Channel*, Lafferty Publications, Dublin, 1997.

[16] See K.Frust *et al*, “Who Offers Internet Banking”, p. 30, Special Studies on Technology and Banking, *19 [2000] Quarterly Journal 29-48,US Comptroller of the Currency, Washington DC.*

[17] According to the US Federal Networking Council the following definition reflects in an accurate manner the common understanding of the term Internet: "The Internet refers to the global information system that -- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and

related infrastructure described herein. See Federal Networking Council, Resolution, Definition of "Internet", 24.10.1995, available at < http://www.itrd.gov/fnc/Internet_res.html>.
[18] See, e.g., JP Morgan, *Electronic Finance: Architecting the Open E-Finance Network*, Introduction, Research Report, New York, July 2000.
[19] See E.Katz and T.Claypoole, "Willie Sutton Is on the Internet: Bank Security in a Shared Risk Environment", pp 191-192, *5 [2001] North Carolina Banking Institute 167-231.*
[20] See E.Katsh, "Law in a Digital World: Computer Networks and Cyberspace", pp 444-448, *38 [1993] Villanova Law Review 403-485.*
[21] See generally E.Katsh, "Cybertime, Cyberspace and Cyberlaw", *1995 Journal of Online Law Art. 1.*
[22] See E.Katz and T.Claypoole, pp.178-186, supra note 19.
[23] See Price Waterhouse Coopers, *Protect and Survive- Regulation of Electronic Commerce in the Financial Services* Industry, pp 19-29, Report, London, July 2000.
[24] G.Trubow, "Regulating Transactions of the Internet", pp 834-835, *24 [1998] Ohio Northern University Law Review 831-841*; C.Reed, *Internet Law: Texts and Materials*, pp 119-147, Butterworths, 2000
[25] See Financial Action Task Force Against Money-Laundering, *The Forty Recommendations*, Recommendation No 10, Organisation for Economic Cooperation and Development, Paris, 1990.
[26] See Basel Committee for Banking Supervision, *Core Principles for Effective Banking Supervision*, Basel, 1997
[27] The volume of the international bibliography on the subject is enormous. See, e.g., D.Rice, Exploring Legal Boundaries in Cybersecurities: What Law Controls in the Issuance and Trading of Securities on the Internet, pp 8-13, *6th Interim Report for the International Law Association*, London, July 2000; American Bar Association, "Achieving Legal and Business Order in Cyberspace, A Report on Global Jurisdiction Issues Created by the Internet", *2000 Business Lawyer 1806-1946.*
[28] See D.Johnson & D.Post, "Law and Borders: The Rise of Law in Cyberspace", pp 1371-1372, *48 [1996] Stanford Law Review 1367-1402.*
[29] See Basel Committee on Banking Supervision, supra note 26.
[30] See Morgan Stanley Dean Witter, *The Internet and Financial Services*, pp 9-32, Market Report, New York, August 1999.
[31] See Bank for International Settlements, Committee on Payment and Settlement Systems, *Survey of Electronic Money Developments*, Basel, May 2000.
[32] See, e.g., P.Nitschke & L.Griggs, "Banking on the Internet- Reformulation of the Old or Adoption of the New?", *7 [1996] Journal of Law and Information Science 223-236.*
[33] See EC Treaty, art.43 (ex art. 52).
[34] Ibid, arts. 49 (ex art. 59) & 50 (ex art. 60).
[35] See EC Treaty, art. 43 para.1 (ex art. 52); Case 81/87, *Ex p. Daily Mail and General Trust plc* [1988] E.C.R. 5483, 5511, para.17.
[36] See Case 205/84 *Commission v Germany* [1986] E.C.R. 3766, para. 21; Cf Opinion of Advocate General Misscho in Case 221/89 *Factortame* [1991] E.C.R. I-3946, point 51.
[37] See Case C-221/89, *Factortame* [1991] E.C.R. I-2905, para. 20.
[38] See Case C-55/94 *Reinhard Gebhard* [1995] E.C.R. I- 4165, para 25.
[39] See EC Treaty, art. 49 (ex art. 59), para.1.
[40] Ibid, art. 50 (ex art.60), para. 3.
[41] See Cf Case C-113/89 *Rush Portuguesa* [1990] E.C.R. I-1417, para.16.
[42] See, e.g., European Commission, Commission Interpretative Communication, *Freedom to Provide Services and the General Good in the Insurance Sector*, 2000, O.J. (C 43) 3; J.Waouters, "Conflict of Laws and the Single Market for Financial Services (Part I)", *1997 Maastricht Journal of European Law, 161, 199-201.*
[43] See Joined Cases 286/82 & 26/83, *Luisi and Carbone*, 1984 ECR 377.
[44] See, e.g., Case-384/93 *Alpine Investments BV v Minister van Financien*, [1995] E.C.R. I-1141.
[45] See Gebhard, para.27, supra note 38.
[46] Ibid
[47] Gebhard, para. 25, supra note 38

[48] See Case 56/96, VT 4 Ltd v Vlaamse Gemeenschap, E.C.R. I-3143, para.21.
[49] Supra note 52.
[50] Ibid, para. 22.
[51] See Commission Interpretative Communication, supra note 42, pag. 21 (the fax, the press and the Internet as platforms for the cross- border provision of services); Alpine Investments, supra note 44 (the telephone as a means of distant provision of services); Case 23/93 TV 10 *SA v Commissariaat voor de Media* [1994] E.C.R. I 4795, Case 11/95 *Commission v Belgium* [1996] E.C.R. I4115 (cable network operators as a means of distant provision of services).
[52] See EC Treaty, Art. 43 (ex art. 52) para. 1.
[53] Cf. Joined Cases 225/95, 226/95 and 227/95, Anestis *Kapasakalis, Dimitris Skiathitis and Antonis Kougiagkas v Greek State*, [1998] E.C.R. I-4239, para.22.
[54] See Electronic Commerce Directive, Preamble, 5th Recital.
[55] See Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] O.J. (L 178) pp 5-18
[56] See generally G.Zavvos, "Banking Integration and 1992: Legal Issues and Policy Implications" *[1990] Harv.Int'l.L.J. 463-506*; A.Corcoran and T.L.Hart, "The Regulation of Cross-Border Financial Services in the EU Internal Market" *8 Colum.J.Europ.L. 221-292 (2001)*
[57] See generally M.Gruson, Convergence of Bank Prudential Supervision Standards and Practices within the European Union, Institute of International Banking, Finance & Development Law, London, 1999.
[58] See generally P.Griffin, "The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services" *[2001] Colum.J.Europ.L. 337-353*; E.Lomnicka, *The Single European Passport in Financial Services*, pp 181-201, in Barry A.K.Rider et al (Eds.) *Developments in European Company Law*, vol.I, Kluwer Law International, London, 1997; W.Warner, "Mutual Recognition and Cross-Border Financial Services in the European Community" *[1992] Law & Cont.Probs. 7-27.*
[59] See E.Lomnicka, "The Home Country Control Principle in the Financial Services Directives and the Case-Law" *[2000] Europ.Bus.L.R. 324-336*; U.Schneider, "Finanzadienstleistungen im EG-Binnenmarkt: Sitzland-oder Gastlandrecht" *44 WM 165-172 (1990).*
[60] See Banking Directive, Preamble, 7th Recital.
[61] 12th Recital; Marc Dassesse et al, (Eds.) *EC Banking Law*, pp 28-29, LLP (2nd Ed.), London, 1994.
[62] See the consolidated version in O.J. [1998] C 27 pp 34-53, 26th of January 1998.
[63] Art.1(1).
[64] Art.3(1).
[65] See Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, p. 15 , 1980 OJ (C 282) pp 1-50.
[66] See Banking Directive, Art.27 (monetary policy of the host country); After the assumption of responsibility by the ECB with regard to the monetary policy of the "in" Member States, the provision may only be relied upon by the "out" Member States. In practice, reserve requirements and restrictions on interest rates, the main instruments of monetary policy, apply only to branches established in the territory of the "out" Member State and not EEA banks providing services at a distance. See, The UK Cash Ratio Deposits (Eligible Liabilities) Order 1998, SI 1998/1130; Christine Rossini, "Cross-Border Banking in the EC: Host Country Powers under the Second Banking Directive" 4 ERPL 571-590 (1995), pp 580-582.
[67] See Case C-294/89 *Commission v France* [1991] ECR I-3591 para. 28;Case C-205/84 *Commission v Germany* [1986] ECR 3755 para.26; Case C-279/80 *Webb* [1981] ECR 3305 para.16.
[68] Cf Case C-193/94 *Skanavi* [1996] ECR I-943.
[69] See Banking Directive, Art.21(1); Financial Services and Markets Act 2000, Sch.III, ss 14 & 20.
[70] See Banking Directive, Art.21(2).
[71] See European Commission, *Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive*, p.8, Interpretative Communication, SEC(97) 1193 final; Marc Dassesse, "The European Commission's Interpretative Communication on Freedom of Services and the General Good Under the Second Banking Directive" *[1997] Yearbook of International Financial*

and Economic Law 45-63; Eric Ducoulombier "La Communication Interprétative de la Commission Européenne Relative à Deuxième Directive Bancaire" *[1998] Revue de la Banque 147-151.*
[72] See Banking Directive, Preamble, 17th Recital.
[73] Art.22(5).
[74] Art.22(11).
[75] See Sir Leon Brittan, Answer to Question 916/89, European Parliament, OJ 1990 C139,14; M.Tison, *Unravelling the General Good Exception: The Case of Financial Services*, p.352 in Mads Andenas & Wulf-Henning Roth (Eds.), *Services and Free Movement in EU Law*, OUP,2002; Walter van Gerven, "The Second Banking Directive and the Case Law of the Court of Justice" *10 YEL 57-70 (1990)*; Marc Dassesse et al (Eds.) para. 4.39, supra note 61; European Commission, 17-18, supra note 71.
[76] See, e.g., Case C-355/98 Commission v. Belgium [2000] ECR I-1221 para.37; Case C-58/98 Corsten [2000] ECR I-0000 para.35;Case C-106/91 Ramrath [1992] ECR I-3351 para.29;Case C-76/90 Säger [1991] ECR I-4221 para.15;Case C-198/89 Tourist Guides Greece [1991] ECR I-727 paras.18-19;Case C-180/89 Tourist Guides Italy [1991] ECR I-709 paras. 17-18;Case C-154/89 Tourist Guides France [1991] ECR I-659 paras.14-15;Case C-205/84 Commission v Germany [1986] ECR 3755 para.27;Case C-252/83 Commission v Denmark [1986] ECR 3713 para.17.
[77] M.Björkland, "The Scope of the General Good Notion in the Second Banking Directive According to Recent Case-Law" *[1998]EBLR 227-243*; Marc Dassesse et al (Eds.), pp 41-47, supra note 61.
[78] See N.Moloney, *EC Securities Regulation*, p.396, OUP, 2002.
[79] Opinion of Economic and Social Committee (ESC) OJ C318/42 of 12th December 1988 1.6.3.1/1.6.3.3
[80] See European Commission, pp19-25, supra note 71.
[81] See Case C-398/95 SETTG [1997] ECR I-3091 para.29.
[82] See Case C-288/89 Mediawet I [1991] ECR I-4007 para.29.
[83] See Joined Cases 110/78 and 111/78 Van Wesemael [1979] ECR 35 para.28.
[84] See Case 220/83 Commission v France [1986] ECR 3663.
[85] See Case C-3/95 Reisebüro Broede [1996] ECR I-6511 para. 36.
[86] See Case C-264/96 ICI [1998] ECR I-0000 para.29.
[87] See Case C-288/89 Mediawet I [1991] ECR I-4007 para.14.
[88] See Case C-384/93 Alpine Investments [1995] ECR I-1141 para.44.
[89] See Case- 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR-679.
[90] See Case C-275/92 Schindler [1994] ECR I-1039.
[91] See Case C-101/94 Commission v Italy [1996] ECR I-2691; Case C-205/84 Commission v Germany [1986] ECR 3755;N.Moloney, *Investor Protection and the Treaty: An Uneasy Relationship*, pp 28-29 in Guido Ferrarini et al (Eds.) *Capital Markets in the Age of the Euro*, Kluwer Law International, The Hague, 2002.
[92] The classic example is the French ban on interest-bearing current accounts. Even though historically the rule has been intended to constitute an indirect subsidy to the French banking industry, it was officially justified on monetary policy grounds. After the introduction of the euro and the extension of the rule to bank accounts denominated in euros, it became apparent that the strikingly unconvincing justification could no longer be sustained. Currently the official position consists of a vague reference to the protection of the "general good" in general and consumer protection in particular! See generally J.Ferry, "Le "ni-ni" à l' Epreuve de Maastricht" *[1999] Banque et Droit 65, 17-21.*
[93] See, e.g., Case C-362/88 GB-INNO-BM [1990] I-667.
[94] See Michel Tison, pp 350-364, supra note 75; Niahm Moloney, 572-577, supra note 78; C.Bougrault, *La Libre Prestation de Services et la Protection du Consommateur Dans le Cadre de la Vente à Distance de Services Financiers*, 25-28, Diss., University of Paris, Sorbonne V, November 1998.
[95] See European Commission, A European Initiative on Electronic Commerce, 15th of April 1997, COM (97) 157.
[96] Ibid, pp 12-19.

[97] See Cologne European Council, Presidency Conclusions, para.16, 04.06.1999, Statement 150/99.
[98] See generally A.L.Tarruella, "A European Community Regulatory Framework for Electronic Commerce" 38 CMLR 1337-1384 (2001), 1337-1340.
[99] See Directive, Preamble, 5th, 6th & 8th Recitals.
[100] 22nd Recital.
[101] See also C.Reed, "Managing Regulatory Jurisdiction: Cross-Border Online Financial Services and the European Union Single Market for Information Society Services" 38Hous.L.Rev.1003 (2001).
[102] See the short title and the 2nd,3rd, 4th, 7th,10th,13th,58th,60th and 62nd Recitals. The term "electronic commerce" appears fourteen times in total.
[103] See Europe and the Global Information Society, Recommendations to the European Council, Brussels, 26/05/1994 available at < http://europa.eu.int/ISPO/docs/basics/docs/bangemann.pdf>.
[104] Ibid,p.3.
[105] See Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 Amending Directive 98/34/EC Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 19th Recital, [1998] OJ (L 217) pp 18-26; E-Commerce Directive, 6th and 18th Recitals; F.Maennel, Die E-Commerce Richtlinie des Europäischen Gemeinschaft, 34-35 in D.Ehlers et al (Eds.) Rechtsfragen des Electronic Commerce, OVS, 2001, Cologne.
[106] See Directive, Art.2(h).
[107] Art.2(h)(i).
[108] Ibid & 21st Recital.
[109] Ibid.
[110] See N.Moloney, "The Regulation of Investment Services in the Single Market: The Emergence of a New Regulatory Landscape" *3 EBOLR 293-336 (2002)*, at.327;G.Spindler, "Internationale Kapitalmarktangebote und Dienstleistungen im Internet" 55 WM 1689-1701 (2001), 1699-1700.
[111] Supra note 108.
[112] Ibid.
[113] 2(h)(ii).
[114] See also European Commission, Explanatory Memorandum, p.15, Proposal for the E-Commerce Directive, COM(1998) 586 final.
[115] See A.P.Vallelersundi, (Rapporteur), European Parliament, Committee on Legal Affairs and the Internal Market, Recommendation for Second Reading on the Council Common Position for Adopting the E-Commerce Directive, p.11, 12.04.2000, EP 285.973;Council of the European Union¸Legal Services Department, Report 11190/99, 22.09.1999 (unpublished); M.Krogmann, Report of the Technology and Economy Committee, German Bundestag¸ Draft Bill on the Implementation of the Directive, p.17, 07.11.2001, BT-Drucks 14/7345; A.Cruquenaire & C.Lazaro, La Loi Applicable Aux Contrats Conclus via Internet, 271-280, in Le Commerce Electronique : Un Nouveau Mode de Contracter, Proceedings, Conference, Faculty of Law, University of Liege, 19.04.2001, ASBL, Liege, 2001; R.d.Bottini, "La Directive Commerce Electronique du Juin 2000" *[2001] Rev.Mar.Com.Un.Eur. 368-373, pp370-371.*
[116] See Case C-96/81 Commission v. Netherlands [1982] ECR 1791; Case C- 14/83 Von Colson [1984] ECR 1891; Case C-103/88 Costanzo [1989] ECR 1839; See generally Sacha Prechal, Directives in European Community Law, pp61-85, Clarendon Press, Oxford, 1995.
[117] See, e.g., European Commission, p.21, supra note 114.
[118] See G.Spindler, "Das Gesetz zum Elektronischer Geschäftsverkehr-Verantwortlichkeit der Diensteanbieter und Herkunftslandprinzip" 55 NJW 921-927 (2002), p926.
[119] See A.L.Tarruella, p1348-1355, supra note 98.
[120] See Directive, Art.3(3) & Annex.
[121] Ibid.
[122] 55th Recital.
[123] 56th Recital.
[124] See supra ch.4.
[125] SI 2002/2013.

[126] SI 2002/1775.
[127] See Reg.2(1).
[128] See "Financial Services Regulations", Reg.19, as amended by SI 2002/2015.
[129] See also R.Tym, "Implementation of the Electronic Commerce Directive-Effect on Provision of Financial Services within the UK" *[2002] BJIBFL 285-29*
[130] See FISMA 2000, s.22; What type of service constitutes a regulated activity is further elaborated in Schedule II of the Act and, in more detail, in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 as amended.
[131] See Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2002, SI 2002/1776.
[132] See FISMA 2000, sch. II (4); FISMA (Regulated Activities) Order 2001, Arts. 5 & 74.
[133] Ibid, sch II (2); ibid, ch. 5.
[134] Ibid, sch. II (9); ibid, ch.9,
[135] See ECO 1.1.2 G & 1.1.6R.
[136] FSA Handbook MAR 1.
[137] See HM Treasury Second Consultation Document, Part I, para. 1.6, March 2002.
[138] FSA Handbook DEC.
[139] FSA Handbook ENF.
[140] See FSA Handbook, ECO 1.2.
[141] See FSA, Implementation of the Distance Marketing Directive, para.3(13), Discussion Paper, March 2003.
[142] See FISMA 2000,s.150.
[143] See FISMA 2000, s.418; AUTH 2(4)(3)R (Authorisation manual); IPRU (Prudential Sourcebook for Banks; SUP (Supervision Manual).
[144] See FSA Handbook, ML 1.1.5.
[145] Ibid, COB 1.4.2.
[146] ECO 2.2R.
[147] ECO 2.3.
[148] Regulation 4(3).
[149] Regulation 4(5).
[150] See M.Turner & M.Tranor, "E-Commerce Directive: UK Implementation" 18 CLSR 396-403 (2002).
[151] Art.3(4)(a)(ii).
[152] See European Commission, Explanatory Memorandum, p.32, supra note 114.
[153] Art.3(4)(a)(iii).
[154] See Directive, Art.3(4)(b).
[155] Reg. 6(5).
[156] Reg. 6(6).
[157] See FSA Handbook, ENF 19.4.2G- 19.4.6G.
[158] Reg. 7(a)(i).
[159] See General Regulations, Reg.5.
[160] Ibid, Reg.5(2).
[161] See also A.Thünken, "Multistate Advertising Over the Internet and the Private International Law of Unfair Competition" *51 ICLQ 909-942 (2002),* pp939-942; A.Halfmeier, "Vom Cassislikör zur E-Commerce-Richtlinie: Auf dem Weg zu Einem Europäischen Mediendeliktsrecht" *[2001] ZEup 837-868, pp863-864.*