COMMISSION INTERPRETATIVE COMMUNICATION

Freedom to provide services and the interest of the general good in the Second Banking Directive

(97/C 209/04)

(Text with EEA relevance)

This Communication is the product of discussions conducted by the Commission on the questions of the freedom to provide services and the interest of the general good in the Second Banking Directive [1].

Not only the Member States (within the Banking Advisory Committee and the Working Group on the Interpretation of the Banking Directives) but also private establishments have been involved in the discussions.

The Commission published, in the *Official Journal of the European Communities* [2], a draft communication which marked the launch of a broad consultation. Following the publication of this Communication, the Commission received numerous contributions from all the circles concerned (Member States, professional associations, credit intitutions, consumer organizations, lawyers, etc.). It also organized hearings with all the parties who had taken part in the written consultation.

The Commission came to realize in the course of this consultation that there was still some uncertainty regarding the interpretation of basic concepts such as freedom to provide services and the interest of the general good. This uncertainty is such as to deter certain credit institutions from exercising the very freedoms which the Second Directive sets out to promote and, consequently, to hamper the free movement of banking services within the European Union.

The Commission therefore deems it desirable to restate in a Communication the principles laid down by the Court of Justice and to set out its position regarding the application of those principles to the specific problems raised by the Second Banking Directive.

Its objective in publishing this Communication is to explain and clarify the Community rules. It provides all the parties concerned — national administrations, traders and consumers — with a reference document defining the legal framework within which, in the view of the Commission, banking activities benefiting from mutual recognition should be pursued.

The interpretations and ideas set out in this Communication, which are confined to problems specifically related to the Second Directive, set out to cover not all possible situations, but merely the most frequent or the most likely.

They are put forward in the light of Community policy regarding the information society, which is aimed at promoting the growth and movement of information society services between Member States and, in particular, electronic commerce [3].

They do not necessarily represent the views of the Member States and should not, in themselves, impose any obligation on them.

Lastly, the do not prejudge the interpretation that the Court of Justice, as the final instance responsible for interpreting the Treaty and secondary legislation, might place on the matters at issue.

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(1) Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ No L 386, 30. 12. 1989, p. 1), as amended by Directive 92/30/EEC (OJ No L 110, 28. 4. 1992, p. 52).

(2) OJ No C 291, 4. 11. 1995, p. 7.

(3) Council Resolution on new policy priorities regarding the information society, adopted on 8 October 1996; Commission Communication to the European Council: 'Putting services to work': CSE(96) 6 final of 27 November 1996; Communication to the European Parliament, the Council of the European Union and the Economic and Social Committee entitled 'Regulatory transparency in the single market for information society services'; Proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (COM(96) 392 final of 30 August 1996; also published in OJ No C 307, 16. 10. 1996, p. 11).

PART ONE

FREEDOM TO PROVIDE SERVICES IN THE SECOND BANKING DIRECTIVE

Part One analyses in turn (A) the results of the consultations on the notification procedure, (B) the difficulties relating to the distinction between the freedom to provide services and the right of establishment and (C) the question of the time when an activity falling within the scope of the freedom to provide services may begin.

A. Notification Procedure

1. *Scope in terms of time*

Article 20 (1) of the Second Banking Directive provides that:

'Any credit institution wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State of the activities on the list in the Annex which it intends to carry on.'

The procedure laid down in Article 20 (1) thus concerns only those credit institutions (and their subsidiaries within the meaning of Article 18 (2)) which intend to conduct for the first time an activity listed in the Annex. Article 23 (2) provides for exemption from notification for credit institutions which provided services before the provisions implementing the Directive came into force.

The Commission considers that, in order to benefit from acquired rights, a credit institution need only have provided a service at least once in the territory of a Member State (in accordance with the line of reasoning set out in section 2 below), regardless of when that was, but it must have carried on this activity lawfully within the territory of the Member State in question. It must also be able to furnish evidence of this previous activity if so requested by the competent authority of the country of origin.

The exemption is, however, restricted to the activity and Member State concerned.

The Commission considers, that the lawful nature of the previous activity should be assessed at the time when this activity was being exercised and not at the time when the Second Directive entered into force. It is irrelevant, therefore, whether the host Member State's legislation changed after the activity was exercised by the credit institution. It is, of course, assumed that the institution complied with the host country's new legislation if it continued to carry on its activities there or that it ceased its activities under the freedom to provide services at that time.

2. *Scope in terms of territory*

(a) Principles

Article 20 (1) of the Second Directive makes implementation of the notification procedure conditional upon the intention to carry on activities *'within the territory of another Member State'*.

It is necessary, therefore, to 'locate' the place of supply of the future banking service in order to determine whether prior notification is required.

Unlike other services, where the place of supply can give rise to no doubts (legal defence, construction of a building, etc.), the banking services listed in the Annex to the Second Directive are difficult to pin down to a specific location. They are also very different from one another and are increasingly provided in an intangible form. The growth of distance services, particularly those using electronic means (Internet, home banking, etc.), will undoubtedly soon result in excessively strict criteria on location becoming obsolete.

The Commission has examined certain possibilities for locating the service (originator of the initiative, customer's place of residence, supplier's place of establishment, place where contracts are signed, etc.) and considers that none could satisfactorily apply to all the activities listed in the Annex.

It considers it necessary to adhere to a simple and flexible interpretation of Article 20 of the Second Directive. Accordingly, in its opinion, only activities carried on *within the territory* of another Member State should be the subject of prior notification. In order to determine where an activity was carried on, the place of provision of what may be termed the 'characteristic performance' of the service, i.e. the essential supply for which payment is due must be determined.

This line of reasoning is aimed merely at establishing whether prior notification is necessary. It does not affect the law or tax system applicable to the banking service concerned.

(b) Application to the Second Directive

A bank may have non-resident customers without necessarily pursuing the activities concerned *within the territory* of the Member States where the customers have their domicile.

Consequently, the fact of temporarily visiting the territory of a Member State to carry on an activity preceding (e.g. survey of property prior to granting a loan) or following (incidental activities) the essential activity does not, in the Commission's view, constitute a situation that is liable in itself to be the subject of prior notification. The same is true of any visits which a credit institution may pay to customers if such visits do not involve the provision of the characteristic performance of the service that is the subject of the contractual relationship.

Furthermore, the Commission considers that the fact of temporarily visiting the territory of a Member State in order to conclude contracts prior to the exercise of a banking activity should not be regarded as exercising the activity itself. Prior notification would not be required in such circumstances.

If, on the other hand, the institution intends to provide the characteristic performance of a banking service by sending a member of its staff or a temporarily authorized intermediary to the territory of another Member State, prior notification should be necessary.

Conversely, if the service is supplied to a beneficiary who has gone in person, for the purpose of receiving that service, to the Member State where the institution is established, prior notification should not take place. The Commission considers, in fact, that the service is not provided by the credit institution in the territory of another Member State within the meaning of Article 20 of the Second Banking Directive.

Lastly, the provision of distance banking services, for example through the Internet, should not, in the Commission's view, require prior notification, since the supplier cannot be deemed to be pursuing its activities in the customer's territory.

The Commission is aware that this solution will require a case-by-case analysis, which could prove difficult.

It is also aware that, as long as the Court has not ruled on this issue, any credit institution is at liberty to choose, for reasons of legal certainty, to make use of the notification procedures provided for in the Second Directive even if, according to the criteria proposed above, notification may not be necessary.

The fact that certain types of supplies of services do not, according to the Commission, fall within the scope of Article 20 of the Second Directive and, consequently, should not be notified does not mean that such activities are not the subject of mutual recognition and home-country control.

The Commission considers that mutual recognition of the activities contained in the Annex, accompanied by home-country control, is established by Article 18 of the Second Directive. Article 20 is merely a procedural article, of residual scope, which is merely for the use of banks wishing to operate for the first time under the freedom to provide services in another Member State.

3. *Advertising and offers of services*

The Commission considers that the prior existence of advertising or an offer cannot be linked with the need to comply with the notification procedure.

Such a link would be artificial in that no express provision for it is made in the Second Directive. It is not the prior offer of a service to a non-resident but merely the intention to carry on activities within the territory of another Member State that Article 20 makes conditional on notification.

Moreover, canvassing customers from a distance does not necessarily mean that an institution plans to provide services within the territory of another Member State.

Similarly, linking advertising with notification could lead to ridiculous situations in which an institution was required to notify the authorities of all the countries where its advertising might theoretically be received.

The Commission therefore considers that, for the sake of simplicity and in keeping with the Second Directive, all forms of advertising, targeted or otherwise, and all offers of a service made at a distance by any means whatsoever

(e.g. post, fax, electronic mail) should be exempt from the requirement of prior notification. Only if a credit institution plans to carry on its activities *within the territory of the customer's country* under the freedom to provide services (according to the line of reasoning employed in paragraph (a)) will it be obliged to notify.

This view, which concerns only the notification requirement, does not affect the law applicable to the banking service. In accordance with the Rome Convention (4), the existence of a specific invitation or prior advertising may, in the case of contracts concluded with consumers, have an effect on the law applicable to the contract concluded subsequently (5).

4. *Nature of the procedure*

The Commission considers that the notification procedure laid down in the Second Directive pursues a simple objective of exchange of information between supervisory authorities and is not a consumer-protection measure. It should not, in the Commission's view, be considered a procedural condition affecting the validity of a banking contract.

5. *Future of the procedure*

As a result of the debate launched by the draft communication, the Commission realized that many interested parties were in favour of simply abolishing the notification procedure within the context of the freedom to provide services. On the other hand, some contributions stressed how useful the procedure was in checking compliance with the interest of the general good and, in particular, with consumer-protection rules.

Some of those who called for the system to be abolished considered that it was not in line with the Treaty, being a disproportionate restriction on freedom to provide services. Others drew attention to the fact that third-country banks were not covered by it. Others still considered that it was costly and unnecessary and could give rise to legal risks.

In the Commission's view, while the notification procedure should be clarified and simplified, it should be no more than a simple administrative formality permitting the notifier to benefit from considerable advantages.

It considers that the interpretations proposed above would clarify the scope of a procedure which, on account of the very growth of the cross-border supply of banking services, particularly in the context of electronic commerce, is bound to become almost obsolete. The more services are provided without any physical movement, the less the notification will be used.

The Commission could, in due course, envisage proposing the abolition of the procedure altogether in the context of the freedom to provide services.

B. Freedom to provide services and Right of establishment

1. *Freedom to provide services*

(a) Temporary nature

The Treaty stipulates in the third paragraph of Article 60 that a person providing a service may, in order to do so, *'temporarily'* pursue his activity in the State where the service is provided. The Court considered, in a judgment of 30 November 1995 (6), that the temporary nature of the supply of services provided for by this Article:

'is to be determined in the light of its duration, regularity, periodicity and continuity.'

On the basis of this case-law, the Commission considers that, if a banking activity is exercised within a territory in a durable, frequent, regular or continuous manner by a credit institution exercising the freedom to provide services, the question must be asked whether that credit institution can still lawfully be considered to be working temporarily within the meaning of the Treaty. The question also arises whether the credit institution is not attempting to sidestep the rules on establishment by unjustifiably invoking the freedom to provide services.

(4) Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 and brought into force on 1 April 1991 (OJ No L 266, 9. 10. 1980, p. 1). Ratified by all Member States except Sweden, Austria and Finland, who signed the Convention on 29 November 1996 and whose ratification procedures are still under way.

(5) See Part Two of this Communication.

(6) Case C-55/94 *Gebhard* [1995] ECR I-4165.

(b) Preventing circumvention of the rules

The Court has acknowledged that a Member State is entitled to take steps to prevent a service provider whose activity is entirely or mainly directed towards its territory, but who has become established in another Member State in order to circumvent the rules of professional conduct that would apply to him if he were established in the territory of the State where he entirely or mainly pursues his activities, from exercising the freedom to provide services that is enshrined in Article 59 of the Treaty ([7]). It adds that such instances of 'circumvention' may fall within the ambit of the chapter of the Treaty on the right of establishment and not of that on the provision of services.

However, the Commission considers that a situation where a credit institution is frequently approached within its own territory by consumers residing in other Member States could not be held to constitute 'circumvention'.

2. *Right of establishment*

If an undertaking maintains a permanent presence in the Member State in which it provides services, it comes, in principle, under the Treaty provisions on the right of establishment ([8]).

The Court has ruled that:

'A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State comes under the provisions of the chapter relating to the right of establishment and not those of the chapter relating to services ([9]).'

However, in the same judgment, the Court ruled that a person operating under the freedom to provide services may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question without falling within the scope of the right of establishment.

On the basis of this case-law, an employee of a credit institution coming to work within the territory of a Member State in order to carry out a limited number of specific tasks in connection with existing customers could, therefore, have the infrastructure necessary to perform these tasks without the bank being deemed to be 'established' within the meaning laid down by Community law. If, on the other hand, he went beyond the bounds of these specific tasks by using that *'pied-à-terre'* to approach nationals of the host Member State, e.g. to offer them banking services as a branch would do, the bank could fall within the scope of the right of establishment.

3. *'Grey' area*

It is not always easy to draw the line between the concepts of provision of services and establishment, particularly since, as the case-law of the Court indicates, one may be considered in certain circumstances to be operating in a Member State under the freedom to provide services despite having some kind of infrastructure in that Member State.

Some situations are particularly difficult to classify. This is especially true of:

— recourse to independent intermediaries, and

— electronic machines (ATMs) carrying out banking activities.

(a) Independent intermediaries

The problem lies in determining the extent to which a credit institution having recourse to an independent intermediary in another Member State could be deemed to be pursuing a permanent activity in that Member State.

We are concerned here with intermediaries who drum up business but are not in themselves credit institutions or investment firms, and who are not operating on their own behalf.

In its judgment of 4 December 1986 ([10]), the Court held that:

'an insurance undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, 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 will be the case with an agency.'

([7]) Case 205/84 *Commission v. Germany* [1986] ECR 3755; Case 33/74 *Van Binsbergen* [1974] ECR 1299; Case C-148/91 *Veronica* [1993] EDR I-487; Case C-23/93 *TV 10* [1994] ECR I-4795.

([8]) Case 205/84 *Commission v. Germany;* see note 7.

([9]) Case C-55/94 *Gebhard;* see note 6.

([10]) See note 7.

The Court has therefore acknowledged that an undertaking which uses an intermediary within the territory of another Member State on a permanent basis may, on account of that fact, lose its status as a service provider and fall within the scope of the provisions on the right of establishment.

The Commission, therefore, suggests the following interpretations.

— Intermediaries and freedom to provide services

In the view of the Commission, if a bank uses an intermediary to provide temporarily or from time to time a banking service within the territory of a Member State, it must first give notification within the meaning of Article 20 of the Second Directive.

It considers that if, in a given country, a bank has independent intermediaries whose duties consist solely in seeking customers for it, it cannot be considered to be necessarily intending to carry on its activities, within the meaning of Article 20, in the territory of the Member State in question. Notification would not be required in that case.

On the other hand, in certains circumstances set out below, it may be considered that a bank having one or more intermediaries permanently established in a Member State does in fact come within the rules on the right of establishment.

— Intermediaries and the right of establishment

In its *De Bloos* ruling of 6 October 1976 ([11]), the Court held that:

'One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body.'

It concluded that a sole concessionaire not subject to the control and direction of a company could not be regarded as a branch, agency or establishment.

In its ruling of 18 March 1981 in *Blanckaert & Willems* ([12]), the Court held that:

'An independent commercial agent who merely negotiates business, in as much as his legal status leaves him basically free to arrange his own work and decide what proportion of his time to devote to the interests of the undertaking which he agrees to represent and whom that undertaking may not prevent from representing at the same time several firms competing in the same manufacturing or marketing sector, and who, moreover, merely transmits orders to the parent undertaking without being involved in either their terms or their execution, does not have the character of a branch, agency or other establishment ...'.

In even more pointed terms, in its *Somafer* ruling of 22 November 1978 ([13]), the Court held that:

'The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties, so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.'

On the basis of these precedents, the Commission considers that, for the use of an intermediary to result in a bank possibly falling within the scope of the right of establishment, three criteria must be met at one and the same time:

— the intermediary must have a permanent mandate,

— the intermediary must be subject to the management and control of the credit institution he represents. In order to ascertain whether this condition is met, it is necessary to check whether the intermediary is free to organize his own work and to decide what proportion of his time to devote to the undertaking. A final pointer is whether the intermediary can represent several firms competing to provide the service concerned or whether he is, on the contrary, bound by an exclusive agreement to one credit institution,

— the intermediary must be able to commit the credit institution. A credit institution may be committed via an intermediary even if that intermediary cannot sign contracts. For example, if the intermediary can make a complete offer on behalf of an institution but only

([11]) Case 14/76 [1976] ECR 1497.
([12]) Case 139/80 [1981] ECR 819.
([13]) Case 33/78 [1978] ECR 2183. See also Case C-439/93 *Lloyd's Register of Shipping v. Société Campenon Bernard*, [1995] ECR I-961.

the bank itself has the power to sign the contract, the criterion of commitment may still be met. If the credit institution can reject the proposal submitted by the intermediary and signed by the customer, the criterion of the commitment capacity is not met.

The application of these three criteria requires a detailed examination to be carried out in each specific case.

The fact that an intermediary can cause a bank to fall within the scope of the right of establishment does not, however, mean that the intermediary himself constitutes a branch. Under the Second Directive, a branch is *'a place of business which forms a legally dependent part of a credit institution (...)'*. Since the intermediary is assumed to be independent, he cannot constitute *'part'* of a credit institution. His business will normally be established in the form of a company having its own legal personality.

Finally, if a bank's services are marketed in another Member State through the intermediary of another bank, notification should not, logically speaking, be necessary. The fact that the intermediate bank is itself subject to supervision in the Member State where it is established should offer that Member State sufficient guarantees for it to consider notification unnecessary. If the intermediate bank is acting on its own behalf, notification should not take place, since such a situation does not fall within the scope of the freedom to provide cross-border services.

(b) Electronic machines

This means fixed, ATM-type electronic machines capable of performing the banking activities listed in the Annex to the Second Directive ([14]).

Such machines may be covered by the right of establishment if they fulfil the criteria laid down by the Court of Justice (see above).

For such a machine to be capable of being treated as an establishment, therefore, it would have to have a management, which is by definition impossible unless the Court acknowledges that the concept can encompass not only human management but also electronic management.

However, such a machine is unlikely to be the only place of business of a credit institution in a Member State. It is likely to be attached, in the same country, to a branch or an agency. In that event, the machine is not an entity in its own right as it is covered by the rules governing the establishment to which it is attached.

If the machine does, however, constitute the only presence of a credit institution in a Member State, the Commission takes the view that it may be possible to treat it as a provision of services in the territory of that Member State.

The presence in the host country of a person or company responsible simply for maintaining the machine, equipping it and dealing with any technical problems encountered by users cannot rank as an establishment and does not deprive the credit institution of the right to operate under the freedom to provide services.

The Commission considers, however, that technological developments could, in the future, induce it to review its position.

If such developments were to make it possible for an institution to have only a machine in a given country which could 'act' as a branch, taking actual decisions which would completely obviate the need for the customer to have contact with the parent company, the Commission would be forced to consider an appropriate Community legal framework. The present legal framework in fact rests on mechanism which are still based on a 'human' concept of a branch (for example, the programme of operations must contain the names of those responsible for the management of the branch). It is therefore not possible, under the existing rules, to consider machines as constituting a branch.

4. *Simultaneous exercise of the freedom to provide services and the right of establishment*

The Commission considers that there is nothing in the Treaty, Directives or case-law to prevent a credit institution from carrying on its activities under the freedom to provide services and, at the same time, through some form of establishment (branch or subsidiary), even if the same activities are involved.

The institution must, however, be able clearly to connect the activity to one of the two forms of operation. This connection is important from both a tax and a regulatory point of view ([15]). It should be ensured that an institution

([14]) It does not mean individual, mobile data-processing equipment which can provide or receive distance banking services, e.g. through the Internet.

([15]) Consideration may, for example, be given to the importance of the connection for the purposes of determining the deposit-guarantee scheme.

is not able 'artificially' to connect its activities to the arrangements governing freedom to provide services as a way of sidestepping the legal and tax framework which would apply if the same activity were considered to be carried on by a branch or by any other form of establishment ([16]).

5. *Control by the host Member State of the conditions for granting a passport*

The Commission interprets a recent ruling by the Court of Justice ([17]) to mean that the host country may not carry out checks to determine whether a credit institution intending to operate in its territory under the freedom to provide services or through a branch met the standard conditions for granting the single licence in its home country. Such checks may be carried out by the home Member State alone. It is on the responsibility of the home country that the single licence is granted, and the host country cannot question the granting of such a licence.

If the host country has reason to doubt that the standard conditions have been met, it may have recourse to Article 170 of the Treaty or request the Commission to take action against the home Member State for failing to meet its obligations pursuant to Article 169 of the Treaty.

6. *Miscellaneous*

In the Commission's opinion, it would very likely be contrary to Community law for a credit institution which has carried on its business under the freedom to provide services within the territory of a Member State for a given length of time to be forced by the Member State to become established as a pre-requisite for the continued pursuit of its activities.

It also considers that the freedom to provide services may be exercised by a branch *vis-à-vis* a third Member State. In such a situation, it is necessary for the branch's home Member State to have sent notification (Article 20) to that third Member State (provided, of course, the conditions for notification are met).

([16]) See footnote 7.

([17]) See the judgment delivered by the Court on 10 September 1996 on a similar issue in Case C-11/95 *Commission v. Belgium* [1996] ECR I-4115. The Court ruled that the receiving Member State was not authorized to monitor the application of the law of the originating Member State applying to television broadcasts and to ensure compliance with Council Directive 89/552/EEC (known as the 'TV without frontiers', Directive; OJ No L 298, 17. 10. 1989, p. 23).

C. **Commencement of the provision of services**

The problem lies in the interpretation of Article 20 (2) of the Second Banking Directive, which merely lays down that:

'The competent authorities of the home Member State shall, within one month of receipt of the notification mentioned in paragraph 1, send that notification to the competent authorities of the host Member State.'

Consequently, the procedure to be followed prior to exercising the freedom to provide services differs from that applicable to the establishment of a branch, in that, for the latter arrangement, Article 19 (5) provides for the *'receipt'* by the branch of a *'communication'* from the competent authorities of the host Member State or, failing that, the absence of any such communication for a period of two months as a pre-requisite for the branch to commence its activities.

This triangular relationship is not provided for in the context of the freedom to provide services, for which there is a more flexible set of arrangements deliberately provided for by the Community legislature so as not to create obstacles which did not exist under the previous arrangements.

A credit institution should therefore be able to commence its activites under the freedom to provide services as soon as it has notified its intention to its own supervisory authorities, which, under Article 20 (2), have one month in which to send that notification to the supervisory authorities of the host country.

In the Commission's opinion, where the host Member State requires, as a prerequisite to commencement of any activity relating to the provision of services in its territory (a procedure envisaged for the establishment of a branch), that an acknowledgement of receipt of the notification sent by the country of origin be issued, this constitutes an infringement of the Second Directive.

PART TWO

THE GENERAL GOOD IN THE SECOND BANKING DIRECTIVE

Part two examines in turn the question of (A) notification of rules adopted in the interest of the general good, (B) problems connected with the application of rules adopted in the interest of the general good and (C) private international law.

A. **Notification of rules adopted in the interest of the general good**

In the view of the Commission, it is difficult to infer from the wording of Article 19 (4) of the Second

Directive that there is any obligation on the host country to inform a credit institution wishing to set up a branch in its territory of the conditions to be fulfilled in the interest of the general good. The term *'if necessary'* indicates that Member States may exercise their discretion in this connection.

Nevertheless, the Commission considers that, in keeping with the spirit of the Second Directive, a credit institution which has let it be known, via its supervisory authority, that it wishes to set up a branch and would like to find out about the general-good rules applicable in the host country should be able to obtain the information it is seeking from that Member State.

Where the Member State responds favourably to the credit institution's request, it should, in the Commission's opinion, be bound only by an obligation as to result. That is to say that it cannot be required to communicate all its legislation relating to the interest of the general good (only legislation applicable to banking activities) and, in any event, a text which was not communicated could still be fully relied on against the credit institution. It is inconceivable that the application of a legal provision within the territory of the Member State which adopted it should be ruled out on the ground that a prior administrative formality has not been carried out.

The Commission agrees that the optional nature of notification by the host Member State of its general-good rules may constitute an obstacle to the exercise of the right of establishment. How can a credit institution know rules it has to observe if a Member State refuses to notify it of those rules? This situation was, moreover, almost unanimously deplored during the consultations which the Commission recently conducted with the banking sector.

The Commission will make every attempt to remedy this situation.

B. Application of rules adopted in the interest of the general good

The main purpose of the Second Banking Directive is to enable authorized credit institutions in a Member State to supply, throughout the European Union, all or some of the banking activities listed in the Annex, either by the establishment of a branch or under the freedom to provide services, on condition that such activities are covered by the authorization (Article 18).

Community law has not, however, harmonized the content of banking activities, with a few exceptions such as some aspects of consumer credit ([18]).

It is likely, therefore, that a credit institution wishing to carry on its activities in another Member State will be confronted with different rules applicable both to the service itself and to the conditions in which it may be offered and marketed. It suffices, for example, to think of the variety of national rules applicable to loans.

The sixteenth recital of the Second Directive reads:

'... the Member States must ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State, as long as the latter do not conflict with legal provisions protecting the general good in the host Member State'.

It should be pointed out that, since the recitals to a directive have legal value as an aid to interpretation, they shed light for the reader on the intentions of the Community legislature ([19]).

The Commission considers that a credit institution operating in the context of mutual recognition could, therefore, be forced to bring its services into line with the legislation of the host country only if the measures relied on against it are in the interest of the general good, whether it is acting via a branch or under the freedom to provide services.

This approach is, moreover, confirmed by the Court of Justice, which has ruled that only the general-good rules can restrict or hinder the exercise of the two fundamental freedoms, namely the freedom to provide services ([20]) and the freedom of establishment ([21]).

Consequently, a credit institution would be entitled to challenge, by means of a legal or administrative procedure or a complaint to the Commission, the legitimacy, with regard to Community law, of a national legal norm that is imposed upon it.

([18]) Directive 87/102/EEC of 22. 12. 1986, OJ No L 42, 12. 2. 1987, p. 48; Directive 90/88/EEC of 22. 2. 1990, OJ No L 61, 10. 3. 1990, p. 14.

([19]) See in particular Case 76/72 *Michel* [1973] ECR 457.

([20]) Case C-76/90 *Säger v. Dennemeyer* [1991] ECR I-4221. See the analysis contained in the Commission interpretative communication concerning the free movement of services across frontiers, OJ No C 334, 9. 12. 1993, p. 3.

([21]) Case C-55/94 *Gebhard;* see note 6. See also judgment in Case C-19/92 *Kraus* [1993] I-1663.

However, the Second Banking Directive does not contain any definition of the 'general good'. The reason for this is that, in non-harmonized areas, the level of general good involved depends on the assessment of the Member States and can vary substantially from one country to another according to national traditions and the objectives of the Member States.

Similarly, the Second Directive does not specify within what limits and under what conditions the host Member State may impose its general-good rules upon a Community credit institution.

It is necessary, therefore, to refer to the relevant case-law of the Court of Justice.

1. *Definition of the general good*

It is the Court of Justice which originated this concept. It has consistently held that:

'Taking into account the particular nature of certain services to be provide (. . .), specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good (. . .).' ([22])

However, the Court has never given a definition of the general good, preferring to maintain its progressive nature. It has expressed its opinion, in individual cases, on the possibility of deeming a given national measure to be aimed at achieving an imperative objective serving the general good and has specified the line or reasoning to be followed in determining whether such a measure may be enforced by one Member State against a trader from another Member State who is operating within the territory of the first in accordance with the basic freedoms provided for by the Treaty.

The Court has, however, provided much clarification regarding the measures which can be considered to be aimed at achieving an imperative objective in the general good.

Accorddingly, it has consistently held that such measures must not have been subject of prior Community harmonization ([23]).

Through its case-law, the Court has specified the areas which may be considered to be in the general good. National rules adopted in one of these areas may still, therefore, under certain circumstances outlined below, be enforced against a Community trader.

The Court has so far recognized the following objectives as being imperative reasons in the general good ([24]):

— protection of the recipient of services ([25]), protection of workers ([26]), including social protection ([27]), consumer protection ([28]), preservation of the good reputation of the national financial sector ([29]), prevention of fraud ([30]), social order ([31]), protection of intellectual property ([32]), cultural policy ([33]), preservation of the national historical and artistic heritage ([34]), cohesion of the tax system ([35]), road safety ([36]), protection of creditors ([37]) and protection of the proper administration of justice ([38]).

The list is open-ended and the Court reserves the right to add to it at any time.

Most of these areas can involve banking activity. For example, a national measure aimed at protecting recipients of banking services may, if it does not come within the scope of a harmonized area, be relied upon for reasons relating to the general good by a Member State *vis-à-vis* a Community credit institution

([22]) Joined Cases 110 and 111/78 *Van Wesemael* [1979] ECR 35.

([23]) Case 52/79 *Debauve* [1980] ECR 833; Case 205/84; see note 7; Case 353/89 *Mediawet* [1991] ECR I-4069.

([24]) To this list must be added *a fortiori* the provisions of Article 56, i.e. public policy, public security and public health. 'Mandatory requirements', which are recognized by the Court in its case-law on the free movement of goods (protection of the environment, fairness of commercial transactions) can probably also be invoked in connection with services.

([25]) Joined Cases 110/78 and 111/78 *Van Wesemael;* see note 22.

([26]) Case 279/80 *Webb* [1981] ECR 3305.

([27]) Case C-272/94 *Guiot* [1996] ECR I-1905.

([28]) Case 205/84 *Commission v. Germany;* see note 7.

([29]) Case C-384/93 *Alpine Investments BV* [1995] ECR I-1141.

([30]) Case C-275/92 *Schindler* [1994] ECR I-1039.

([31]) *Ibid.*

([32]) Case 62/79 *Coditel* [1980] ECR 881.

([33]) Case C-353/89 *Mediawet;* see note 23.

([34]) Case C-180/89 *Commission v. Italy* [1991] ECR 709.

([35]) Case C-204/90, judgment of 28 January 1992, *Bachmann* [1992] ECR 249.

([36]) Case C-55/93, *van Schaik* [1994] ECR I-4837.

([37]) Judgment delivered on 12 December 1996 in Case C-3/95 *Reisebüro Broede* v. *Gerd Sandker* (not yet reported).

([38]) *Ibid.*

operating within its territory in the context of mutual recognition. For this rule to be enforceable, some additional conditions must, however, be met.

2. *General-good 'tests'*

In its case-law, the Court has held that:

'National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain.' ([39])

It has consistently held that a rule relating to the public interest is enforceable against a person providing services only if *'that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established'* ([40]).

3. *Procedures for applying the tests*

If a host Member State imposes on a credit institution a national measure which does not derive from Community harmonization and which, in the view of the credit institution, constitutes a restriction on the freedom to provide services, that institution may question the Member State's right to do so if the measure does not meet the six criteria laid down: non-discrimination, absence of prior harmonization, existence of an imperative reason relating to the interest of the general good, non-duplication, necessity and proportionality.

Such a restriction could relate to the service itself or to the conditions on which it is offered, such as relevant advertising ([41]).

In order to challenge a national measure which constitutes a restriction (e.g. a clause that must be included in every contract and is different from or unknown in the normal practice of the home Member State) that it considers unjustified, a credit institution must normally have recourse to legal procedures or inform the Commission by, for example, lodging a complaint.

In practice, various possibilities are open to it:

— in order to avoid any potential conflict, it may obviously bring all aspects of its services into line with the rules of the host country,

— if, however, it offers banking services which do not correspond exactly to the mandatory provisions of the host country, proceedings will probably be brought against it by the national authorities or one of its customers. It will then have to put forward arguments based on Community law to a tribunal or national authority in order to establish that the rule which the Member State intends to enforce against it does not comply with the conditions laid down by the Court of Justice. It will be the task of the national courts to assess the validity of the parties' arguments, possibly after referring the matter to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty,

— it can at any time inform the Commission, which may, if it considers the restrictions to be unjustified, initiate proceedings against the Member State concerned for failing to meet its obligations, in accordance with Article 169. In this case, it will be up to the Commission to provide proof of the alleged failure ([42]). In the final resort, it will be the task of the Court of Justice to decide whether or not the national measure in question passes the general-good tests.

Let us see how these six texts could be applied in practice by the Commission or a judge.

— **Is the measure discriminatory?**

In its case-law, the Court has consistently defined discrimination as:

'the application of different rules to comparable situations or the application of the same rule to different situations' ([43]).

([39]) Case C-55/94 *Gebhard;* see note 6.

([40]) Case C-76/90, *Säger v. Dennemeyer;* see note 20.

([41]) Article 21 (11) of the Second Banking Directive provides that *'Nothing in this Article shall prevent credit institutions with head offices in other Member States from advertising their services through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good'.*

([42]) Case C-157/91 *Commission v. Netherlands* [1992] ECR I-5899.

([43]) See most recently Case C-107/94 *Asscher* [1996] ECR I-3089.

Consequently, the Commission considers that, if a Member State imposes on a Community credit institution measures which it does not impose or imposes more advantageously on its own credit institutions, there will be discrimination.

If the restriction in question is discriminatory, it can, according to the case-law of the Court, be justified only on the grounds set out in Article 56 of the Treaty (public policy, public security and public health), subject to compliance with the principle of proportionality ([44]).

The concept of public policy must, according to the Court, be understood in a very restrictive sense. Accordingly, the Court has consistently held that economic objectives cannot constitute public-policy grounds within the meaning of Article 56 of the Treaty ([45]).

According to the Court, *'recourse by a national authority to the concept of public policy pre-supposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society'* ([46]).

It is difficult to see what measures could satisfy this condition of a serious threat to society in the field of banking. It is reasonable to believe, therefore, that discriminatory measures are unlikely to be justified in the banking sector.

— Does the measure fall within the scope of a harmonized area?

The Commission considers that the Harmonization Directives define the minimum level of the general good within the Community. In its opinion, this means that a Member State could not use the general good as justification for imposing on a Community credit institution operating in its territory in the context of mutual recognition stricter rules than those laid down in the Directives.

This is true of the harmonized rules concerning the taking-up of the business and the conditions for pursuing it (own funds, minimum capital, deposit guarantee, large exposures, cover for lending and market risks, etc.).

It is also true of the harmonized rules concerning certain specific banking activities, such as those on consumer credit (indication of the annual percentage rate of charge, right of the consumer to discharge his obligations in advance of the scheduled date, etc.) ([47]).

Lastly, it is the case with harmonized rules concerning certain horizontal aspects of contracts (unfair terms ([48])) and certain conditions relating to the contractual environment (contracts negotiated away from business premises ([49]), misleading advertising ([50]).

Where these harmonized rules constitute minimum provisions, however, a Member State is free to impose on its own credit institutions stricter rules than those laid down in the Directives. Reverse discrimination is not, in theory, contrary to Community law. The Court has in fact consistently ruled that it is not contrary to the principle of non-discrimination enshrined in Community law for a Member State to treat its own nationals less favourably than other Community nationals ([51]).

Should a Member State impose, for reasons which it deems to be of general good, a level of consumer protection stricter than the one set by a minimal Community provision on a Community credit institution operating on its territory, the proportionality test would, in any event, have to be satisfied.

— Does the measure have a general-good objective?

Where there is no harmonization, the Commission considers that, as the Court has consistently ruled, the restrictions imposed by a Member State are compatible with the Treaty only *'if it is established that in the field of activity concerned there are imperative reasons relating to the public interest* (. . .)' ([52]).

If the rule does not fall within the scope of a harmonized area, it is necessary to examine whether it comes under one of the areas which the Court has to date con-

([44]) See most recently Case C-17/92 *Federación de Distribuidores Cinematográficos* [1993] ECR I-2239.

([45]) Case 352/85 *Bond van Adverteerders* [1988] ECR 2085.

([46]) Case 30/77 *Bouchereau* [1977] ECR 1999.

([47]) Directives 87/102/EEC and 90/88/EEC; see note 18.

([48]) Directive 93/13/EEC of 5 April 1993, OJ No L 95, 21. 4. 1993, p. 29.

([49]) Directive 85/577/EEC of 20 December 1985, OJ No L 372, 31. 12. 1985, p. 31.

([50]) Directive 84/450/EEC of 10 September 1984, OJ No L 250, 19. 9. 1984, p. 17.

([51]) Case 332/90 *Steen* [1992] ECR I-341; Joined Cases C-29/94 to C-35/94 *Aubertin and others* [1995] ECR I-301. See also the judgment of 12 December 1996 in Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 making the use of minimum provisions conditional upon compliance with the Treaty.

([52]) Case 205/84 *Commission v. Germany;* see note 7.

sidered as falling within the scope of the interest of the general good (e.g. consumer protection). If this is so, the first criterion is met, but the line of reasoning must be pursued. If this is not so, one can merely speculate as to whether the Court would recognize the area concerned as coming under the interest of the general good. It must be borne in mind that the Court has ongoing case-law and that it reserves the right to add new areas to the existing list on the basis of individual cases.

— Is the interest of the general good not already safeguarded in the country of origin?

It is necessary to examine in this connection whether the credit institution is not already subject to similar or comparable provisions aimed at safeguarding the same interest under the legislation of its Member State of origin.

Under the Second Banking Directive, this criterion could be important, particularly for the purpose of assessing the compatibility of the measures imposed by the host State in exercising its residual powers.

For example, it is necessary to examine in the context of this 'test', the extent to which certain controls required by the host State might already be carried out in the country of origin, the extent to which accounting, supervisory, statistical or financial information might already be communicated to the competent authority of the country of origin, etc.

— Is the measure capable of guaranteeing that the objective will be met?

Even if a measure is presented by a host State as defending an objective conducive to the general good, one may ask whether it is really necessary in order to protect that interest.

There may be instances where a measure is not objectively necessary or is not suited to protecting the interest.

The Court of Justice assesses such circumstances and has held in certain judgments that a given rule that was justified by the host country on grounds of consumer protection was not in the end likely to provide such protection.

For example, the Court has held that, since information is one of the principal requirements of consumer protection, a Member State which imposes rules which ultimately restrict consumers' access to certain kinds of information cannot justify those rules on grounds of consumer protection ([53]).

([53]) Case C-362/88 GB-INNO-BM [1990] ECR I-667.

The Court, therefore, carefully examines the measure presented to it in order to ascertain whether it actually benefits the consumer ([54]) and whether the Member State imposing it is not underestimating the consumer's ability to judge for himself ([55]). In this way, it checks whether certain measures, under cover of consumer protection, are not actually aimed at achieving less worthy objectives connected with the protection of the national market.

— Does the measure not go beyond what is necessary to achieve the objective pursued?

Finally, it is necessary to ask whether there are not less restrictive means of achieving the general-good objective pursued. This involves the application of the legal principle of the appropriateness of the response in relation to the risk.

The Court systematically examines whether the Member State did not have at its disposal measures with a less restrictive effect on trade ([56]). In the context of such an examination, the Court may deduce from a comparative analysis of the legislation of the other Member States that less restrictive consumer protection measures exist ([57]). However, the Court has also ruled that *'the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law'* ([58]).

Where a national measure constituting a restriction on a credit institution benefiting from mutual recognition is justified by the host State on the ground that it protects the recipient of the service, it is essential, in checking whether the proportionality test is satisfied, to question the actual need to protect the recipient.

([54]) See also judgment in Case C-240/95 *Schmit* [1996] ECR I-3179.

([55]) See in particular Case C-470/93 *Mars* [1995] ECR I-1923. In this judgment, the Court had recourse to the concept of 'circumspect consumers'.

([56]) See most recently Case C-101/94 *Commission v. Italy ('SIM')* [1996] ECR 2691. See also Case C-384/93 *Alpine Investments;* see note 29.

([57]) Case C-129/91 *Yves Rocher* [1993] ECR I-2361.

([58]) Case C-384/93 *Alpine Investments;* see note 29.

The Court held, in its judgment of 4 December 1986, *Commission v. Germany,* that *'there may be cases where, because of the nature of the risk insured and of the party seeking insurance, there is no need to protect the latter by the application of the mandatory rules of his national law'* ([59]). The scope of this ruling naturally goes beyond the field of insurance.

It is necessary, therefore, to give consideration, in each individual case, to the need for protection of the recipient of the banking service offered in the context of mutual recognition by examining the nature of the service and the level of sophistication of the recipient.

The Commission considers that Member States should, in imposing their general-good rules, make a distinction according to whether or not services are supplied to circumspect recipients. In other words, in order to respect the principle of proportionality, they should take account of the degree of vulnerability of the persons they are setting out to protect.

European Parliament and Council Directive 94/19/EC on deposit guarantees and, in particular, the possible exclusions for which it provides, may be taken as a basis for determining whether a recipient is circumspect ([60]). The logic underlying these possible exclusions is in fact the same as that being defended in the present communication. As a guide, it may be considered that credit institutions, financial institutions, insurance undertakings, central and other government authorities, Ucits, pension funds and companies within the meaning of point 14 of Annex I to Directive 94/19/EC ([61]) are customers of a nature or size such that they are in a position to recognize the risks they are incurring and to commit themselves in full knowledge of the facts.

For example, business transactions of the type listed in the Annex, when carried out between professionals in the financial sector, should not be the subject of particular general-good rules imposed by the host Member State. The proportionality test would be especially difficult to satisfy in such cases.

Finally, it is necessary in certain cases to determine whether the service is supplied under the freedom to provide services or by a branch.

An assessment of the proportionality of a restriction may in fact differ depending on the mode of operation.

Accordingly, a restriction could more readily be considered to be proportionate in the case of an operator working permanently within a territory than in the case of the same operator working only temporarily.

The Court has recognized this difference by imposing a less restrictive and more 'lightweight' legal framework for suppliers of services operating in a temporary capacity than for established suppliers.

It has consistently held that a Member State:

'may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services' ([62]).

The Court has also held that restrictions on the freedom to provide services are even less acceptable in cases where the service is supplied *'without its being necessary for the person providing it to visit the territory of the Member State where it is provided'* ([63]). This clarification is particularly relevant to banking services, which are increasingly supplied without physical movement on the part of the supplier.

The Court has likewise consistently held that it does not follow from the third paragraph of Article 60 of the Treaty that:

'all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States' ([64]).

([59]) Case 205/84 *Commission v. Germany;* see note 7.

([60]) Directive of 30 May 1994, OJ No L 135, 31. 5. 1994, p. 5.

([61]) Companies comprising more than 50 people with a balance-sheet total of at least ECU 2 500 000 and a net turnover of at least ECU 5 000 000. Council Directive 94/8/EC of 21 March 1994, OJ No L 82, 25. 3. 1994, p. 33.

([62]) Case C-76/90 *Säger;* see note 20. See also Case C-198/89 *Commission v. Greece* [1991] ECR I-727.

([63]) Case C-76/90 *Säger;* see note 20.

([64]) Case 205/84 *Commission v. Germany;* see note 7. See also the judgment of 17 December 1981, Case 279/80 *Webb;* see note 26.

Thus, depending on the circumstances, the same restriction applied in the interest of the general good could be adjudged proportionate in respect of a branch but disproportionate in respect of a temporary provider of services. The Commission considers, for example, that a Member State which imposes certain formalities on credit institutions (controls, registration, costs, communication of information, etc.) for reasons that purport to be in the general good should take account of the mode of operation chosen by the credit institution carrying on activities within its territory under mutual-recognition arrangements.

However, this distinction cannot be applied to consumer-protection rules (provided, of course, that they have satisfied the other tests). The level of consumer protection required must be identical, whether the service is supplied under the freedom to provide services or by way of establishment. It would be unacceptable for a consumer to be less well protected according to whether he received a service from a non-established undertaking or an established undertaking.

It may be necessary, however, to take account of the circumstances in which the service was requested. There may be situations in which the consumer has deliberately avoided the protection afforded him by his national law, particularly where he requests a service from a non-established bank without having first been canvassed in any way by that bank.

C. **Interest of the general good and private international law**

1. *Principles*

An examination of the compatibility with Community law of a national rule justified on general-good grounds may be carried out where a legal discrepancy caused by an absence of harmonization creates an obstacle to the movement of banking services.

Any national rule must be compatible with Community law irrespective of the area in which it falls. In a judgment delivered on 21 March 1972, the Court ruled that:

'The effectiveness of Community law cannot vary according to the various branches of national law which it may affect' ([65]).

([65]) Case 82/71 *SAIL* [1972] ECR 119. See also Case 20/92 *Hubbard* [1993] ECR I-3777.

Where necessary, Community law takes precedence, therefore, over national private law provisions.

The Court has accordingly had to check the compatibility with Community law of national provisions of civil law ([66]) and civil procedure ([67]).

It may be stated that most contractual rules falling within the scope of civil law or procedural law (means of extinguishing obligations, limitation periods, expiry, invalidity, etc.) are unlikely to constitute barriers to the trade in banking services.

However, banking contracts do contain provisions, usually of a mandatory nature, which may well constitute rules on contractual obligations, but actually affect trade. Let us take, for example, a clause preventing any variation in a rate or relating to early repayment. The effects of such provisions may constitute a restriction if they oblige a bank to alter a service to bring it into line with the legislation of the country in which it is marketed.

The Commission considers that such provisions cannot escape the controls laid down by Community law simply on the ground that they fall within the scope of the law on contractual obligations.

In this context, a judge may be required to examine the compatibility with Community law of the results achieved by applying the rules on the choice of law governing contractual obligations contained in private international legal instruments, particularly the Rome Convention ([68]).

Such choice-of-law rules do not, however, constitute restrictions in themselves. It is not, in principle, the mechanism for designating the law applicable which constitutes a barrier but the result to which it leads under substantive law ([69]).

([66]) Case C-168/91 *Konstantinidis* [1993] ECR I-1191; Case C-339/89 *Alsthom Atlantique* [1991] ECR I-107; judgment of 13 October 1993, Case C-93/92 *Motorradcenter* [1993] ECR I-5009.

([67]) See in this connection Case C-398/92 *Mund & Fester* [1994] ECR I-467; Case C-43/95 *Data Delecta Aktiebolag* [1996] ECR I-4661; Case C-177/94 *Perfili* [1996] ECR I-161; see also Case 20/92 *Hubbard;* see note 65.

([68]) See note 4.

([69]) See, however, Case C-214/94 *Boukhalfa* [1996] ECR I-2253.

2. *Link with the Rome Convention*

This Convention establishes the principle of contractual freedom, which is common to all Member States.

The parties to a banking contract may, therefore, freely choose the law which is to govern the contract and the obligations which they mutually undertake to fulfil. This may be the law of the home country, the host country or even a third country, whether or not a Member of the European Union.

The Convention lays down that, where no choice is expressed by the parties, the law applicable is that of the country with which the contract is most closely connected. Under the Convention, this is presumed to be the country where the party who is to effect the performance has his habitual residence or principal or secondary place of business, depending on whether the performance is to be effected by the parent company or a branch.

In the case of a contract concluded with a consumer ([70]), the Convention lays down that, where the parties do not express a choice, the law applicable is that of the country of the consumer if the contract is entered into in one of the following sets of circumstances (Article 5):

— the contract was preceded by a specific invitation addressed to the consumer in his country and he had taken in that country all the steps necessary on his part for the conclusion of the contract,

— the other party or his agent received the consumer's order in that country.

Where, however, the parties have chosen the law governing the contract, this choice must not deprive the consumer of the protection afforded him by the mandatory rules ([71]) of the law of the country in which he has his habitual residence if one of the sets of circumstances described above is found to prevail.

In addition, under the Convention, the *'mandatory rules'* (Article 7) and *'public policy'* (Article 16) ([72]) of Member States may be applied at the choice of the parties or, in the absence of an express choice, according to the relevant rules contained in the Convention.

On the basis of the Rome Convention, a banking contract concluded with a consumer must, therefore, observe at least the mandatory rules of the law of the consumer's country if the consumer was first canvassed in the consumer's country or if the order for the service was received there.

If, on the other hand, the banking contract is concluded not with a consumer (contract concluded between a bank and a customer acting in the course of his business), the contract will be governed by the law chosen by the parties and, in the absence of an express choice, by the law of the country where the bank has its principal or secondary place of business.

3. *Precedence of Community law*

The Commission considers that a further level of reasoning must be added to that deriving from the application of the Rome Convention.

Thus, in accordance with the principle of the precedence of Community law, the provisions of substantive law applicable to a banking service pursuant to the choice-of-law rules laid down in the Rome Convention (it being possible for freedom of choice to be overridden by mandatory rules, mandatory requirements and public policy) may, if they constitute a restriction, be examined in the light of the general good.

Two possible situations may be envisaged ([73])

(a) Banking services supplied by a branch

Article 4 of the Rome Convention lays down that the law applicable in the absence of a choice by the parties is

([70]) Contract carried out for a purpose outside his trade or profession.

([71]) Provisions which cannot be derogated from by contract.

([72]) This concept must be understood here within its meaning under national law and private international law, which is not necessarily the meaning conferred upon it by the Court of Justice; for the latter, it is a non-economic concept, implying a serious threat to society.

([73]) The Court of Justice will be responsible for interpreting the Rome Convention, particularly with a view to guaranteeing an interpretation that is compatible with Community law. However, it is not yet empowered to do so since the two protocols vesting such powers in the Court (89/128/EEC and 89/129/EEC) have not yet entered into force since not all the Member States which ratified the Rome Convention have ratified protocol 89/129/EEC.

that of the country in which the principal place of business is situated or, if the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. The Convention therefore implies that, where a service is supplied by a bank branch, the law of the country where the branch is situated is presumed to prevail in the absence of a choice by the parties concerned (74).

In accordance with the principle of the precedence of Community law, the Commission considers that, where the legal provisions of the country of the branch constitute a restriction, they may be put to the general-good test and, if necessary, overruled.

(b) Banking services supplied to consumers under the freedom to provide services

According to the principle of the precedence of Community law, the application by a consumer's country of residence of its *'mandatory rules'*, *'mandatory requirements'* and *'public policy'* provisions to contracts entered into by the consumer may also be put to the general-good test if a restriction results.

It is necessary, therefore, to extend the line of reasoning developed on the basis of the Rome Convention and to question whether, for example, the *'mandatory rules'* which the consumer's country intends to enforce satisfy the general-good tests. Since they are adopted with a view to protecting the consumer, there is a strong chance that these provisions of substantive law will pass the general-good test. The Court has in fact recognized that consumer protection is a general-good objective which justifies restrictions on fundamental freedoms. It cannot be assumed, however, that they will pass the general-good test in every case. It has been seen above that national rules which purport to have been adopted for reasons of consumer protection may be subjected to review by the Court and possibly 'disqualified' if they are, for example, unnecessary or disproportionate.

In the context of the single market, therefore, this additional level of reasoning is essential in order to ascertain whether, in the absence of harmonization, national measures are not being maintained, in the guise of consumer-protection measures, merely in order to restrict or to prevent banking services which are different or unfamiliar from gaining entry to national territory.

(74) Under normal circumstances, however, the parties to a banking contract would choose which law to apply.