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Control of securities markets in the European Economic Community

COMMISSION OF THE EUROPEAN COMMUNITIES

**Control of
securities markets in the
European Economic Community**

Report on a comparative law study

submitted by

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Preface

In the preparation of this report I have been able to rely on the support and co-operation of a number of persons, particularly the representatives of the control authorities. They not only provided the basic information or referred me to the available documentation, but also elucidated the significance and relative importance of their national regulations. Furthermore, they gave me valuable data about the actual operation of their control systems and about local usages and current bottlenecks in the implementation of the control systems. I wish to place on record here my thanks for the support, assistance and encouragement which I received from them all.

My thanks go also to Mr. H. Braeckmans and Mr. J. Van Dyck, assistants at the Antwerp University Institution (Universitaire Instelling Antwerpen), who carefully and critically reread the manuscript, and to Miss M.R. Verheghe, who so meticulously typed out - and only too often retyped - the whole work.

E.W.

CHAPTER I

THE FIELD OF INVESTIGATION:

"CONTROL OF SECURITIES MARKETS"

1. This report describes and analyses the different forms in which - and the instruments whereby - control of securities markets is exercised.
2. Among the many meanings which can be attached to the term "control" we are thinking primarily of the methods and techniques which are employed to enforce compliance with a norm or standard, whatever its nature, to exercise supervision with regard to compliance and, finally, to impose sanctions in the event of infringement. No distinction is made in this connection with regard to the legal nature of the rule: both those imposed by the State and those formulated by professional bodies are included in the investigation. Nor is any distinction made according to the objective of the norm in question; this is usually many-sided, complex and lacking in transparency. Both norms for market organization and rules to protect investors, together with instruments of socio-economic policy, and even of monetary policy, are touched upon, although attention is directed primarily towards the two first-mentioned subjects, which directly affect securities business.
3. Control can also mean the whole body of methods, instruments and techniques which are employed in order to intervene in a certain field, organize it according to one's views or dominate it. Rather than being taken to mean the checking of compliance with the norm, and associated sanctions, this connotation of the term "control" calls attention to the phase preceding the checking or testing, i.e. that of the preparation and enactment of these rules. From this point of view the various authorities involved, their powers and influence on the securities markets are studied in the light of statutory or corporative regulations, and in the context of the overall institutional framework. Where they can be

scientifically determined, existing conditions which deviate from the legal regulations are recorded. It is clear that the facts often depart - and in a manner which cannot easily be determined - from the law.

Both forms of control can be subsumed under the wide and neutral term of "intervention", so that the study embraces both the basic organizational intervention by the legislator or public authorities, together with the additional enactment of corporative or professional norms, and the checking activity with a view to the prevention and suppression of abuses.

4. The second guiding point of this report is to be found in the subject matter to which these interventions are directed, namely the securities markets themselves. Any precise definition of this term has been deliberately avoided. This makes it possible to embrace the rather divergent approaches in the various countries with regard to the protection of investors, while it has also allowed phenomena occurring on the fringe of the security sector to be included in the investigation.
5. The ultimate object of the intervention is indicated with the legally neutral term "security". The term is defined pragmatically in order not to impede an accurate understanding of the scope and purpose of the regulations.

Depending on the purport of the regulations, a narrower and a wider concept of the term can be distinguished. In the narrower sense it is understood to mean: the bonds or loan instruments issued by the State, its subordinate authorities or territorial subdivisions; the bonds or loan instruments issued by private undertakings, usually operating in the form of joint-stock companies, together with shares or stockholdings in these companies; and also, usually, certificates representing investment funds. A striking point is that national regulations generally do not take into account the legal form of the security (whether a document of title or not), and that the distinction between securities governed by public or private law is not decisive for all matters. Securities in

the narrower sense of the term are usually issued in large numbers of financially (if not also legally) mutually interchangeable ("fungible") units: as they are thus suited to being dealt in on a stock exchange, they are sometimes also referred to as "marketable securities" or "stock exchange securities".

6. In those countries where securities regulation is not only aimed at the organization of stock exchanges, and at the accompanying rules for companies with securities listed on an exchange, but also seeks to achieve wider purposes of investor protection, the regulatory scope is widened by a technical extension of the term "security". The protection of the law is extended to cover also investment vehicles which in legal terms cannot, or can only with much difficulty of interpretation, be compared with the securities in the ordinary, narrower sense, but which, financially speaking, belong to the field of financial investments. This extension of the scope has existed for a long time in the United States and in Ontario; in the United Kingdom there is a comparable definition, and in Belgium these other investment vehicles were put on an equal footing with securities in 1969. In the Federal Republic of Germany legislation is now under discussion, and the recently published Dutch Investment Institution Bill (Ontwerp van Wet Beleggingsinstellingen) might be applicable to some of these investment media (1).
7. Only securities markets are studied rather than the whole of the securities sector. No attention is paid to the rules on documents of title or concerning involuntary loss of possession of bearer instruments, while the legal status of the rights, including the rules of company law which have a direct bearing on the field of publicly traded securities, is only mentioned incidentally. Attention is concentrated on the place where demand for and supply of securities meet: rules concerning the placing of securities in safe deposit or concerning transfer arrangements or clearing have only a complementary bearing on the conduct of the markets. Readers are referred to specialized studies for an examination of these fields, the importance of which can not be overestimated.

(1) For the United States and Canada, see the term "Investment Contract" in s. 2 (1) Securities Act 1933; cf. a similar provision in the Ontario Securities Act, s. (1) (58) of the draft of the Securities Act 1977 (Bill No. 20). For the United Kingdom s. 14 (3) Prevention of Fraud (Investments) Act 1958; for Belgium Arts. 1 and 2, law of 10 July 1969; for the Federal Republic of Germany see the Entwurf eines Gesetzes über den Vertrieb von Anteilen an Vermögensanlagen, published 19 April 1977; and for the Netherlands see the Bepalingen betreffende beleggingsinstellingen (Wet beleggingsinstellingen) (Provisions concerning investment institutions - Investment Institutions Law), Second Chamber 1977, No. 14664; the Japanese Securities Exchange Law 1948 does not contain any comparable provision.

8. Following the model of the classification adopted in the literature on financial legislation, the investigation in each country is divided according to whether the subject under discussion is the issue or primary market or the secondary market, i.e. the market for securities which have been already issued. This division is relevant, as most regulatory systems adopt a different approach to regulations in the primary market from that applied to the secondary market. Thus the American Securities Act of 1933 is directed to the issue market, while the secondary market, including the stock exchange system, is regulated by the Securities Exchange Act of 1934. A similar division of the subject-matter is also encountered in Belgium, France and Luxembourg, while in other countries stock exchange authorities make attempts to gain hold over issuing activity, which in most of these countries is practically left unregulated.

Reservations can be made with regard to this division into two fields, as it can lead to a disregard of the many essential links existing between the two segments which really belong to the same market. Emphasis on investor protection and more active intervention on issue disclosure can be attributed to the presence of regulation on the primary market only in Belgium.

9. This report is mainly descriptive. An effort was made to describe the different interventions with regard to the securities markets in as complete, accurate and neutral a manner as possible. To clarify certain aspects, elements which constitute the main features of a national regulatory system have been emphasized. The overall picture may however appear somewhat over-streamlined. This method, while respecting the individuality of each regulatory system, reveals relevant points of difference. The points of convergence deserve more attention: they can provide the starting-point for subsequent harmonization.

This report does not contain qualitative judgments of each control system or of the methods of control employed. A qualitative evaluation, tempting though it may be, is difficult to formulate in practice, at least with any adequate degree of scientific accuracy.

On the one hand, there is no relevant yardstick and, on the other hand, application of a possibly acceptable method of evaluation would depend on the full co-operation of all the parties concerned. Consequently this report merely mentions when a certain field is not subject to regulation or - as far as possible - when the regulation is in fact not applied. The quality of the control will therefore not be determined in a value judgment but will emerge from the description of the control itself.

The material has been updated and processed up to the middle of 1977. There are plans for reform in several Member States: in the United Kingdom the Wilson Committee is working, in the Federal Republic of Germany work is still being done on the implementation of some recommendations of the Börsensachverständigenkommission (committee of stock exchange experts), while a new Stock Exchange Law has been under study in the Netherlands for several years. More limited changes are being considered in France and Belgium. As the orientation and state of progress of these reform activities are not yet sufficiently well known, they could not be included in the analysis. It was, however, possible to report certain proposals published at the end of 1977 for the reform of the Italian stock exchange and security system.

CHAPTER II

SYNTHESIS OF THE COMPARATIVE LAW STUDY

SECTION I: THE PRIMARY SECURITIES MARKET

10. The purpose of the examination of the regulations governing the primary securities market is to seek out all forms of intervention in this market, whether by government authorities or by corporative or self-regulating bodies. An initial survey shows that one can divide these interventions into, on the one hand, interventions which can be said to be of a socio-economic nature and permit the pursuit of more or less temporary aims of economic and financial policy and, on the other hand, interventions of a more structural nature which determine what is to be regarded, on the primary market, as desirable, permitted or forbidden.

A. SOCIO-ECONOMIC INTERVENTIONS

11. In practically all countries one finds legislation or regulations which subject dealings on the primary security market to some form of approval or authorization. This is usually crisis legislation dating from one of the two World Wars or from the depression of 1929. The government authorities, as a rule the minister or his representative, have a very large degree of discretion as to whether or not to permit the transaction, so that the legislation can be used for a variety of purposes. One can distinguish four forms of intervention.
12. Several Member States have rules whereby capital flows can be influenced by the government. Not so much the issuing of securities as the raising of capital, in whatever form, constitutes the subject of these regulations. All transactions, irrespective of the currency, the amount, or the identity or nationality of the parties, can be covered by them. The executive power has to authorize or approve the transaction, otherwise the transgressor is subject to penalties and the transaction becomes null and void. Nowadays, and apart from a few exceptions, most capital transactions have been freed from this authorization requirement. This has been done by generally applicable implementation orders, which can however be changed at once and the restrictions immediately reinstated. Both French and British law have

retained the rule whereby all raising of capital, including that effected by the public or private issue of securities, is subject to approval by the competent minister. These laws form part of the reconstruction measures introduced after the Second World War. Nowadays they are practically without any real effect, apart from a few cases specified in administrative provisions. The purpose of the system is similar in Italy, where the establishment of companies and the making of capital increases or issuing of bonds by companies are subject to approval by the competent minister, actually the central bank. This rule still has considerable effect at present, at least for transactions above five hundred million lire.

13. Other Member States operate with an authorization system confined to the public issue of foreign securities. This system can be put to use for various purposes, including the aforementioned channelling of capital flows into productive domestic investment. In Belgium we find a provision, dating back to the First World War, prohibiting the public issue of foreign securities, unless permission is granted by the Minister of Finance: permission can be - and is - refused for a very wide variety of reasons (including those of isolating the national capital market and of protecting investors).
14. A more up-to-date approach to the same question is to be found in the foreign exchange regulations of several Member States. The aforementioned legislation regarding authorization for foreign securities, which was introduced in France and Belgium during the First World War, has remained in existence as an independent provision only in Belgium. In France this instrument was transferred to the foreign exchange regulations when the Foreign Exchange Law was revised in 1966. No comparable rules, applicable to the issue of securities, are to be found either in Italy or in the United Kingdom: the general foreign exchange regulations in these countries lead to a limitation - complete for Italy and considerable for the United

Kingdom - of the purchase of new or already issued foreign securities by residents and of any other securities transaction. The Federal Republic of Germany and the Netherlands pursue for the moment an open policy with regard to foreign securities issues. But here, too, foreign exchange regulations empower the national authorities to intervene at once and provide them with the necessary instruments.

15. A fourth, widespread form of intervention aims at avoiding a situation where-
by new securities issues disturb the domestic capital market equilibrium. These measures do not consist of approvals, but rather of waiting lists, issue calendars, reductions of quantity, or of extensions of the issue period. Some Member States make use of this instrument in a wider perspective: the equilibrium of the capital market can be upset not only by purely quantitative overloading but also by the terms offered. Some Member States therefore exclude "securities of a type that may disturb the equilibrium" (e.g. Belgium) or make recommendations concerning interest rates, issue premiums, life of the securities and redemption terms (e.g. Belgium, the Netherlands, Luxembourg). This intervention often appears to be based on informal consultation between the authorities (central bank) and the banks which are going to place the issue (Netherlands, Federal Republic of Germany, France, but also the United Kingdom). In Italy, Belgium and Luxembourg there is a formal legal basis: in Italy this form of supervision of issues is implicitly incorporated in the aforementioned power of authorization of the Banca d'Italia, while in Belgium and Luxembourg an express provision vests the Banking Commission or "Commissariat au Controle des Banques" with powers for this purpose.
16. To sum up, the interventions of a socio-economic nature are associated mainly with the directing of capital flows, including the sealing-off of the national markets for the purpose of meeting domestic capital requirements. Both the foreign exchange regulations and other instruments are employed. The abolition of these usually very effective barriers to inter-state capital movements forms the subject of draft measures and studies

at the EEC and other levels. These, however, cannot be implemented in the present financial and monetary situation (1). The solution to these problems is a question of political will and expediency. Harmonization of securities regulation would make only a minimal contribution to it.

B. INTERVENTIONS OF A STRUCTURAL NATURE

17. 1. Purpose or purport of the interventions

In most Member States interest attaches more to the normative interventions of a structural nature or tendency than to the application of the aforementioned instruments of economic and financial policy. The general term "structural measures" is used to classify all interventions which exert a lasting influence on the primary security market and are usually designed to regulate the issuing operation within very narrow channels. These measures consist both of measures under public law and, in an ancillary fashion, of self-regulatory or corporative measures.

18. The difference between structural rules and instruments which are employed mainly for purposes of economic and financial policy is not always clear. While the main purpose is perhaps the most relevant criterion for differentiation, one finds that the reasons are often interwoven and that rules which were originally regarded as temporary have developed into instruments of permanent general policy. Thus the public issue of foreign securities was subject to ministerial authorization in France and Belgium during the First World War. After the War the measure was continued in both countries and is now applied in order to preserve the national capital market for domestic issues and, in some cases, in order to protect investors, or even as an instrument of foreign policy. The authorization requirement has in fact grown into a prohibition. The primary securities markets in these countries are structurally characterized by the almost complete absence of new foreign securities issues.

(1) See the first directive, dated 11 May 1960, and the second directive, dated 18 December 1962, concerning the implementation of Art. 67 of the Treaty; a third directive has been published in draft form but has not yet been approved by the Council of Ministers: see also Art. 120 et seq of the Treaty of Accession and Annex I. VII, 3 et seq.

19. While all rules which have the aim or effect of organizing or influencing the primary market can be grouped together as structural measures, it is generally found that most rules have a number of purposes and, conversely, that most purposes are interconnected and are promoted by rules of different kinds.

If one tried to find the lowest common denominator for all these rules, this could probably be formulated as the general objective of the development or promotion of the new issue market, through the imposition of adequate norms for honest, reliable, trust-worthy conduct, not only with a view to avoiding any injury to, but also to protecting and to fostering public confidence, which is the basis of this form of company financing. Under this general heading, one can classify as significant partial objectives: the protection of investors, the adequate organization and functioning of this part of the financial system, but also: the defence of the monopolistic privilege of the financial community, and even: a supervisory insight into the more sensitive aspects of corporate life. This complex of objectives is pursued by means of a rather motley array of instruments. Investor protection - an objective favourably accepted in political terms - is pursued through company law rules, rules for securities transactions, especially the rules that forbid certain transactions or confine them to the recognized securities business. In some Member States the issue of securities itself, sometimes even its legal form, is regulated, and disclosure is developed to become the main form of investor protection. The same instruments are also often designed to achieve other aims, including the successful realization of the public issue itself: disclosure is designed to generate investor confidence in the securities offered; they should not be upset by unusual issue or loan conditions, especially when this would result in disturbing the market; participation by recognized, established intermediaries promotes confidence and increases the attractiveness of the securities offered.

2. Examination of the main forms of intervention

20. It can be deduced from the comparative survey that structural measures which are directed towards the primary securities market can be subdivided into measures which relate to issuers and measures which are concerned with the issuing operation itself.

a) Measures directed towards issuers

21. A direct influence is exercised over the issuer of securities by company law and by the systems of prudential supervision which have been developed in all countries with regard to financial institutions.

1. In connection with the structure of the issuer

22. The rules of company law which directly affect issuers as organizations have been considered only in principle in this report. But this intervention cannot be left unmentioned. It represents the earlier approach in the struggle against abuses in the primary securities market. Thus, in the last century, premium hunting by stags was combated by rules of company law, such as the requirement that shares be fully subscribed or that an adequate minimum amount be paid up, these then being pre-requisites for the validity of the formation of new companies. For similar reasons, the promoters of a company are, according to British company law, required to ensure that the initial capital will be sufficient for the conduct of the undertaking. These rules of company law apply to any formation of a company, or to any issuing of securities, whether the issue be public or private. This approach can only be recalled here as a form of investor protection. Good results could perhaps be achieved nowadays, too, with this approach.

2. Supervision of financial institutions

23. Also immediately directed towards the undertaking, with repercussions on the primary securities market, are the regulations concerning establishment, management and associated prudential control to which institutions in the financial sector in all Member States have to submit themselves (primarily banks and savings banks but also pension funds, investment funds, insurance companies, etc). The financial soundness of these major issuers is an essential consideration in investment decisions. In this type of supervision, the issue of securities itself is not as a rule regulated, but is considered as a taking up of funds on a continuous basis by these intermediaries. Therefore, this form of control can only be touched upon here.

b) Measures directed towards the issuing operation or the securities

24. The interventions which regulate the issuing operation itself are more numerous and more stringent. The following approaches can be distinguished: indication and limitation of the legal or physical persons allowed to issue securities; limitation of the intermediaries employed in the issuing process; sometimes even: regulation of the actual operation; further: limitations with regard to the security: permitted or prohibited securities, and, finally, measures to protect the public.

1. Issuers allowed to make public issues of securities

25. The question of who can or may issue securities has traditionally been dealt with by company law. In addition to bodies incorporated under public law, companies were the legal bodies which put securities on the market. In practically all legislations one finds a type of company which has been made particularly suitable for financing through public securities issues, while other types of company are sometimes expressly excluded from making public issues. Thus under British and Dutch law there is a type of company (public company, open vennootschap) regarded as suitable for the public issuing of shares, while under French, Belgian, Luxembourg and Italian law the société anonyme type of company is designated as suitable for this purpose, while the related type of the private limited liability company is prohibited from issuing either shares or bonds (France, Belgium, for instance).

As financial techniques have developed it has become apparent that this approach is inadequate. Securities representing other securities, or representing a partial entitlement to a common deposit, are publicly issued without a company being involved in the operation. Of more recent date is the offering of participations in other types of company, including common-law companies, partnerships, limited partnerships, or even undertakings without any definite company structure but entailing only a form of co-operation or pooling of assets. To some extent the forms have been developed to evade the protective rules, including the disclosure and company law rules. In other cases the document of title embodies a right of claim. Legislation has not yet caught up with these

developments whereas in most countries of the European Economic Community an extensive set of control measures has been enacted with regard to investment funds, the other, somewhat strange and occasionally exotic investment formulas are regulated in only a few of them. Common action by the Community on this plane might raise serious objections, particularly due to the institutional aspects of regulatory intervention.

2. Intermediaries involved in placing securities

26. The issuer can place its securities itself: it can rely for this purpose on its own publicity, or appeal directly to its customers, or its members, or the public, etc. Recent experience has shown that this approach is rarely successful, and that recourse usually has to be had to banks and other financial institutions for the placing of the issue.

In all the countries of the Community the issuer itself may place its securities, or resort for this purpose to its directors or other representatives. This also applies in the United Kingdom: the sole requirement is that in this case a prospectus, in accordance with company law, should be provided. In Belgium the public issue by the issuer itself is exempt from the generally required compulsory intervention of brokers or banks. This exemption also applies to the resale, by the underwriter, within six months of issue. The most efficient selling technique, namely that involving house-to-house canvassing (démarchage), is forbidden or subject to very strict limitations in several countries (1). This same limitation is in some cases extended to canvassing by banks or by brokers. Administrative practice in countries with official supervision of issues encourages the use of a bank as intermediary, but without making this a requirement for admission to the market.

3. Methods of placing

27. Interventions with regard to the issuing operation can be subdivided according to whether one is considering the methods of placing (underwriting syndicate) or the rights conferred by the securities.

(1) In Belgium (Royal Decree No. 71 of 30 November 1939) and in the Federal Republic of Germany (§ 56, Gewerbeordnung 1900) there is a direct prohibition of canvassing. Indirectly, canvassing is not allowed in Luxembourg (Arts 1 and 2, law of 5 March 1970, and law on establishment of businesses by foreigners, etc) and in the United Kingdom (under the Prevention of Fraud Act). A system of administrative approval exists in France (law of 3 January 1972). There are no prohibiting laws in force in the other Member States.

28. The methods of placing are determined by the banks involved in the issuing. There is rarely any external intervention. The London Stock Exchange requires that underwriting shall be subject to its approval, this mainly to combat premium-hunters, or stags. The Belgian Banking Commission has reported a few cases where, on account of its general duty to protect investors, it has demanded a reduction of underwriting commissions.

4. Rights attaching to the securities

29. Very often one finds interventions with regard to the rights attaching to the securities. As far as shares are concerned, the rights are in principle determined by company law and by the articles of association. Additional requirements are frequently imposed by the control bodies, e.g. to safeguard free negotiability of the securities, or to protect the preemptive rights of existing shareholders. The regulations of the London and Amsterdam Stock Exchanges provide that companies applying for quotation have to put their articles of association in conformity with the guidelines, or the model clauses of the exchange: interesting clauses relate to, e.g. the dismissal of directors without notice, or to the approval by the exchange of any subsequent change, or amendment to the articles of association. Similar actions are taken by the French or Belgian control bodies, but their action is not systematic, nor is it based on any explicit legal ground.

As to bond issues, apart from having to comply with company law, if and where applicable, additional requirements are found in the rules of the London and Amsterdam Exchanges. Special rules have been enacted by the Amsterdam Stock Exchange as to trust certificates, or to certificates of investment funds, which are admitted to the exchange. These rules which come on top of the common law rules, which are generally considered inadequate, are of course only imposed on securities admitted to exchange trading. In fact, issuers contemplating quotation conform not on admission, but on issue itself. Several countries try to influence the financial terms of the securities offered, especially of bonds (interest rate, redemption): whether within the larger framework of the authorization policy (Federal Republic of Germany) or in order to safeguard the equilibrium of capital markets (Belgium, Luxembourg, Netherlands, Italy, United Kingdom) issuers are urged to consult the authorities with regard to interest rates and terms of issue (issue premium, redemption conditions), although the authorities are not entitled to impose conditions.

5. Securities not admitted or advised against

30. With regard to the proposed securities - the actual investment - several forms of intervention can be conceived: certain securities or investments may be prohibited; for others, a qualitative criterion may be introduced; if not, the parties themselves must decide, and the intervention will aim at the provision of ample objective information.
31. One rarely encounters provisions absolutely prohibiting certain securities or investments. In France, company law forbids the issuing, publicly or otherwise, of profit shares (actions de jouissance), and the issuing of lottery loans is subject to legal approval (1). In the United Kingdom it is forbidden to invite joint investment in commodities, merchandise or other assets by means of generally distributed circulars, although joint participation in these investments would be lawful when not offered to the public at large.
32. Qualitative assessment is usually considered to be a form of investor protection which does not lend itself to practical application and which, in addition, entails unforeseeable risks and responsibilities for the control body making the assessment. In fact, however, one does encounter a few forms of a limited quality control: there is no quality-grading of the investment, but the removal from the market of clearly dangerous or exceedingly risky investments. A rudimentary form of qualitative assessment is to be found in Section 795 of the German Civil Code (BGB): when granting permission for the issue of bonds, the authority assesses whether the issuer will normally be able to repay the principal and pay the interest on the loan. In France, Belgium and Luxembourg an informal procedure would be followed: these issuers are urged to refrain from issuing the securities to the public. If they refuse to comply with this urgent recommendation, the control authority could only require them to disclose the appropriate facts in the issue prospectus. In none of the above-mentioned three Member States has use been made of this last resort - which shows the effectiveness of this moral suasion technique. In the United States, on the other hand, the control authority has repeatedly had to apply the disclosure doctrine to the bitter end, and has had to require that the issue prospectus shall include notices which should cause any cautious investor to shudder.

(1) See also Art. 100 of the Belgian Company Law, which subjects the issuing of securities redeemable by the drawing of lots to stringent conditions regarding interest rate and maturity.

Lastly, one can perceive a form of qualitative assessment in the action of the banks participating in issue syndicates, which will not allow their reputation to be associated with dubious investments. It is very difficult to measure the extent of this assessment.

6. The doctrine of information or disclosure

33. Nearly all Member States require the issuer to publish certain data concerning itself, its activities and assets and concerning the rights attaching to the securities. This information obligation is designed to protect investors: if the investors must themselves assess the quality of the investment, then the issuer must provide them with adequate material for this purpose, presenting a coherent, complete and reliable picture of the proposed investment. The information doctrine is the alternative approach to the question of qualitative assessment. Usually, protection of the investor is the only official reason. In fact, issuer-oriented information has several purposes: it is also a promotion instrument for the wide distribution of the company's securities; it may be considered as a reporting technique vis-à-vis the public, with occasional internal effects on its policy; or it is used as an instrument for governance of company behaviour. In view of the extent and scope of this subject, it is analysed in the next section.

C. INCREASED DISCLOSURE ON PUBLIC ISSUE OF SECURITIES

34. The principal form of regulation regarding the primary securities market consists of the additional disclosure imposed upon either the issuer, or the offeror of the securities. This type of disclosure is sometimes extended on a continuous basis and covers the entire existence of the issuer. Disclosure on issue of securities becomes related to this larger disclosure body and is hence deemphasized. In most countries, the public issue of securities remains the ideal occasion for imposing this additional disclosure as a condition for access to the market.

1. The major types of regulation

35. Three approaches regarding disclosure on the issue of securities can be distinguished. A first type, considered rather obsolete, requires the publication of certain items permanently laid down by law. No preventive

supervision is organised as to whether the information disclosed is accurate, complete and not misleading. Remedial control, by way of penal or civil sanctions, exists but it is very seldom used in practice. A second type of regulation is based upon the same approach but here the extent of information to be disclosed is considerably increased, and certain parts of it have to be certified by an expert. In a third regulatory pattern, a general obligation to disclose is imposed, the context of which is defined by an administrative agency that also supervises the adequacy of the information published.

Examples of the first approach are found in France, Belgium and Luxembourg where the law requires, prior to the public offer of the securities, the publication in an official journal, or filing with the court's registrar, of a statutory notification ("notice légale") the content of which has been strictly and invariably defined by law.

The approach of British and Irish company law can be classified as belonging to the second type. The Companies Act prospectus must be drawn up in accordance with an extensive list of data and items which are specified in the Act itself and from which no variations can be made. No external supervision is however provided for. Certain parts of the prospectus have, however, to be certified by an accountant. In both countries this disclosure technique is only used upon the issue of shares in companies; it is sometimes referred to as an obsolete disclosure system.

36. The third and by far most important type of regulation requires extensive disclosure on the public issue, or distribution of securities. The content of the information to be published is not very precisely defined and is supplemented by administrative action, which also supervises the compliance with the disclosure rules and the accuracy of the disclosed information. This approach can be further divided into two variants.

The historically oldest and most widespread approach presents the disclosure duty as a condition for the admission of securities to the Stock Exchange. No supervision is exercised over the public issue of the securities itself. But on admission, the exchange authorities enforce their disclosure requirements. The disclosure is used here less as an

instrument of investor protection than as a filter and promotion technique that benefits the issuer itself and stock exchange trading in general. This approach prevails in the Northern Member States, i.e. the Federal Republic of Germany, Denmark, the Netherlands and, with some minor variations, in the United Kingdom and Ireland. A similar approach is also adopted in Switzerland. In the other Member States, disclosure is obligatory on either the public issue of securities, and/or on the admission of securities to stock exchange quotation; compliance is enforced by public bodies (Belgium, France, Luxembourg). The difference between the two approaches is in part bridged by the action of stock exchange authorities who submit admission of securities to the exchange to the compliance with their disclosure rules before the public issue itself is made. Hence both approaches coincide, although not entirely: the content of the information to be published is fixed by private bodies, which also supervise compliance with their requirements. Moreover, securities for which no application for admission to a stock exchange will be introduced are not submitted to any substantial form of disclosure, nor is any control on their issue exercised.

37. The position in the Eurobond market very closely resembles the last mentioned approach as far as disclosure is concerned. The issue could be made without a prospectus being issued, although this is not customary. Issuers operating on this market are very much concerned about their regulation and about the success of the issue. Therefore they voluntarily publish an issue prospectus in compliance with "internationally accepted standards". Application is usually made for admission of the securities to a stock exchange: London, Luxembourg or Frankfurt are the main centres. The stock exchange authorities and for Luxembourg the public control body impose - although sometimes with a certain flexibility - the same rules as they impose on local issuers. They impose adjustments or additions to the international prospectus but these are most of the time rather slight. Here again, issuers are urged to make the information available at or before the issue of the securities. Ultimately there remains little difference from a pattern that would require disclosure upon the issue itself.

38. Italy present a special pattern: according to recent regulation, which has however not yet been implemented, it would become compulsory to disclose extensive information, but this only upon admission of the securities to a stock exchange. Unlike the pattern prevailing in other countries, the information required will have to be enumerated in an executive order of the public control body that will also supervise compliance with these rules. It is reported that the Italian authorities are considering extending the powers of this control body to the disclosure to be made upon the issue of the securities.

With this reservation one can speak of a Southern regulatory approach characterized by a general disclosure duty imposed, enforced and controlled by a public body, and applied on the issue of the securities or on their admission to a stock exchange. It is also between the control authorities of these countries that cooperation has become established regarding control on the issue of securities that take place in these Member States (France, Luxembourg, Belgium). Only the regulatory approach in these is further dealt with here. The Northern approach (Netherlands, Denmark, Germany, United Kingdom) is discussed later, in connection with the study of the secondary market.

2. Supervision of disclosure on issue

39. Supervision on the information to be disclosed on issue of securities to the public has been organized in Belgium, Luxembourg and France. Outside the Community similar controls are to be found in the United States, and also, on the United States model, primarily in Canada and Japan. Marked similarities can be noted in all these cases.
40. Everywhere where there is disclosure control on issue of securities, it has been imposed by statute. Although public issues of securities are usually carried out by or with the assistance of banks or other financial intermediaries, the latter have never been able to formulate and to enforce self-disciplinary rules comparable to the corporative prescriptions of stock exchanges, imposing disclosure on admission of securities. In all these countries the body entrusted with this disclosure control is a government agency, created by law and composed of persons appointed by the government. This organizational pattern is also found in countries which have established a specialized control body for investment funds (1).
41. There seem to be two variants in the powers the law has conferred on the control agencies. In Belgium, and outside the Community, in the United States, Canada and Japan, the field of action of the control agency is very broadly defined and encompasses, apart from the public issue of the traditional shares and bonds, other investment vehicles as well, the rules being applicable both to the initial issue and to any subsequent public offer. Investor protection is the usual explanation for this extensive grant of power. The field of action is much more limited in France and Luxembourg: only shares and bonds are concerned, and in France shares issued for a consideration other than cash are, in principal, excluded. Also the way of defining "securities" or "the public character" of the issue, and lastly the exclusion of the secondary distribution in France, indicate that these statutes rest on another regulatory philosophy.

(1) Including the Bundesaufsichtsamt für das Kreditwesen in the Federal Republic of Germany; cf. the proposed "Foundation" ("Stichting") in the Ontwerp van Nederlandse Wet Beleggingsinstellingen (Netherlands Investment Institutions Bill).

42. Another difference is of historical origin but has far-reaching consequences: only in Belgium and Luxembourg is the action of the control body confined to primary market information. According to the applicable statutes, disclosure is obligatory upon admission of securities to the Stock Exchange, but as admission usually intervenes shortly after public issue, most issuers fall within the exemption for previously publicly issued securities. In other countries, the powers of the control body extend to the secondary market, essentially to the information which has to be regularly published by issuers of securities that are listed on a stock exchange. Differences can be illustrated by comparing the action of the French control authority with that of its Belgian and Luxembourg counterparts.
43. The French control authority possesses extensive powers of control in both the primary and the secondary markets. This very quickly gave rise to an integrated information policy as a result of which the issue information lost in importance in comparison to permanent or continuous information more directly oriented to the secondary market. The public issuing of securities, especially by a company with securities traded on the stock exchange, is a rather occasional event. This shift in policy can be measured by different signs: the issue information is de-emphasized, and becomes part of an integrated, overall information policy; hence exemptions from the prospectus requirement itself are frequently granted and a flexible attitude is adopted as to the content of the prospectus for issuers adhering to the integrated policy. On the other hand, attention is drawn to permanent information, and especially to the so-called occasional information, i.e. relating to facts or events that have a direct bearing upon stock exchange price formation. In comparison to the regulatory pattern in the two other states, where information is published only on public issue or admission to a stock exchange, one could say that this integrated information policy has less directly relevant influence upon the legal position of the market participants, and therefore is less directed towards the protection of investors. This interpretation of the French regulatory system seems the more acceptable when one bears in mind that this legislation has been enacted for providing an instrument of promotion of company financing, essentially by the larger, stock exchange admitted companies. This legislation is furthermore an element of the overall effort, undertaken by the French Government, for facilitating the financing of public or private undertakings. Motives of investor pro-

protection are put forward, but both with regard to the field of application and in respect of information policy the main emphasis does not lie on the protection of investors.

44. Belgian securities regulation presents different characteristics. Historically and socially the Belgian control authority is primarily a body for control and inspection of banks and other deposit taking institutions. It is rather an historical coincidence that the same body was made responsible for the supervision of the public issue of securities. Its field of action has been extended several times by law at the request of the control authority: every time, this action was explicitly based on reasons of investor protection. In order to close loopholes in the original statute, the coverage was broadened, whether in terms of "transactions" submitted to control, or in terms of securities. The action was made more strict, more comprehensive and more efficient; but no change was made to the instruments with which the control body could intervene. The Belgian control authority can intervene only on issue: the issue prospectus is the central instrument for action and is required with undiminished insistence upon each issue of securities, whether the securities are issued by the initial issuer itself or not, or whether the issuer has already previously made public issues and its securities are dealt in on the stock exchange; or whether the securities are created within the framework of a contribution in kind or of a merger. With regard to circulation of information the Belgian control authority, unlike that of France or Luxembourg, has never permitted the use of abbreviated prospectuses. In comparison to the very important permanent or occasional information - virtually absent in Belgium - the prospectus obligation is overemphasized. The policy of the Belgian control body thus seems to be directed more strongly towards investor protection.

45. The Luxembourg legislation greatly resembles the original Belgian law, as formulated before the above-mentioned extensions. In Luxembourg, too, the control body has no authority in connection with permanent or secondary market information. Considerations of investor protection have undoubtedly exercised considerable influence, e.g. in the enactment of legislation on investment funds. In view of the small amount of domestic issuing activity, control is designed to meet the wishes of the Luxembourg authorities to preserve and enhance the position of Luxembourg as an international financial centre. That is why control is usually enforced from as early as the time of issue, despite the fact that the technical point of application is admission of the securities to stock exchange quotation,

while a flexible procedure is established for issues made by issuers of known standing (shorter duration of the procedure, standard prospectus forms, more flexible information obligations for issuers making successive - and also continuous - issues).

46. These differences in overall concept nevertheless cannot conceal the great resemblances which characterize information control in these three Member States. For the rest, this control does not differ essentially from the supervision exercised by the stock exchange authorities in the other Member States over the information to be published on admission of securities.

The procedure for supervision follows a comparable pattern in the three Member States under review here. The supervision is based on criticism and comparison of the draft of the issue prospectus with the data which the issuer has published in other connections. The contents of the prospectus are made clear in France and Luxembourg by means of a standard outline. The control authority reserves the right to call for additional information, but does not very often make use of it. In Belgium no set outline is followed customarily. The draft prospectus is drawn up by the financial department of the banks and supplemented by information drawn from the answers to a questionnaire, which is usually largely tailored to the case in question. In each of the three Member States it is customary, although not legally prescribed, that the issue dossier should be submitted by a local bank. This intervention, as well as the accountants' statements, increase the credibility of the data submitted by the issuer. The control is exercised in dialogue with the bank: contacts with the issuer's directors are made if it has not been possible to reach a satisfactory arrangement with the bank. In Luxembourg, in view of the very nature of the issue activity, more importance attaches to the intervention of a local bank. The existence of previous contacts between the issuer and the control agency the latter's familiarity with the sector to which the issuer belongs, the penetrating nature of additional questions and of possible discussions with directors of the company can result in qualitative differences regarding the required disclosure.

The investigation powers as to the content of the information of both the public and the stock exchange authorities are usually very limited, if not non-existent. Only in France do we find a wide general power of investigation, which, however, is rarely made use of in connection with this form of disclosure. No physical on-the-spot checks are made in any of the three Member States.

The control process culminates in a formal decision by the control authority with regard to the issue prospectus. The legal nature of this decision differs somewhat in the various countries. A similar feature is the requirement that the issue information shall be made available in the form of a brochure, and not by means of an announcement in the press (as required or customary in the Federal Republic of Germany, the United Kingdom and Denmark). The prospectus must be used as an advertising document in canvassing for subscriptions: consequently legal importance is attached to the information contained in it. The control authorities, especially in France, have directed attention to the actual use of the prospectus in the canvassing of subscriptions.

47. Compliance with this legislation is greatly dependent, in each of the three Member States, on the willingness of issuers to notify the control authority of their plans in advance. Non-notification is severely dealt with everywhere. The Belgian and French control authorities have investigatory powers of their own (1). For further investigation and prosecution the control authority has to rely on the co-operation of the public prosecutor, which has not always contributed to the effectiveness of the enforcement. In France there have been no criminal prosecutions nor civil law suits for violation of this statute. In Belgium, and to a smaller extent in Luxembourg, several cases have occurred recently; as a rule the public prosecution has mainly been based on charges of fraud, embezzlement or breach of trust. Violation of the regulations on issue of securities are treated as a technical, hence minor offence. Investors whose interests have suffered appear in some cases to have found no redress

(1) Art. 72, law of 30 June 1975; Art. 5, Order N° 67-833 of 28 September 1967.

under prevailing civil law. In none of these Member States is the control body entitled to appear before the court and present its views.

The control authorities have more extensive means of action against recalcitrant issuers: in Belgium and Luxembourg they can suspend the operation and in France they probably could forbid it outright by refusing their approval. There is also in all cases a publicity sanction. Applications of these measures are extremely rare: issuers prefer to abstain from the operation. No cases are known where a prospectus approved by the control authority has been the subject of a civil law suit on the grounds that it contained incomplete or misleading information. It appears not to be possible to inflict criminal sanctions for this behaviour, except on general criminal law charges as e.g. forgery. In none of these countries there is a general duty for issuers to disclose, in a complete, fair and not misleading manner, all facts that are material to a fully informed investment decision. Belgian and French control authorities have endeavoured to remedy this situation by requiring the directors of the issuer to subscribe a statement according to which they guarantee that the information in the prospectus, for which they declare themselves responsible, is true to the best of their belief and that no material fact has been omitted.

SECTION II: THE SECONDARY SECURITIES MARKET

48. In the financial literature the term secondary securities market is used to signify all transactions in securities which take place after their issue, or after the initial distribution. Both the stock exchange market and the markets outside the stock exchange, or parallel markets, are considered to belong to the secondary securities trade. The line of demarcation from the primary market is unclear in a few respects but these cause little inconvenience for our present purposes. Reference is sometimes also made to a "third market", mainly in the United States where this term is used to denote transactions in large blocks of securities. Owing to their disturbing effect on price formation they cannot as a rule be dealt in via the stock exchange but change hands direct between buyers and sellers, frequently institutional investors.
49. The comparative law study shows that in each of the Member States of the European Economic Community the secondary securities market can be subdivided into two parts. In each Member State there is in operation a stock exchange market, or official market, on which only admitted persons can deal in admitted securities, which gives rise to an official price or quotation which is widely published as the day's price. Stock exchange markets usually have a very elaborate structure: they are based on a clearly delineated organization which can itself issue and enforce rules. In several cases continuous supervision is exercised with regard to compliance with these rules and with regard to the proper operation of the market. Next to it, there are in all Member States one or several unofficial, parallel, "off-the-floor", "over-the counter" markets, where mostly unlisted securities are dealt in. Under one of these headings one can classify all transactions in securities which have not been executed on the stock exchange, and including e.g. trading by broker-dealers from their own portfolio, or by offsetting orders from different clients, or execution with third parties. Considerable differences appear in the organizational pattern governing these markets, ranging from practically absolute absence of rules, to a pattern, which is based on extensive regulation, enforced by a market governing board and distinguishable from the official market only in minor aspects. Generally speaking, the organizational pattern in these markets is less stringent than on the main, official market: no admission procedures for securities, nor

formal price fixing (but there are bid and ask quotes, or target prices). Admission of persons is usually confined to security dealers who also operate on the official market. The Eurobond trade is here also classified as an unofficial securities market.

PART I: THE STOCK EXCHANGE MARKETS

50. All Member States of the European Economic Community have one or more stock exchange markets. These can as a rule be recognised not only by their name but also by the direct or indirect statutory recognition which they enjoy as official markets, or as markets between authorized securities dealers.

Several Member States have more than one stock exchange, but as a rule one of them plays a leading role (1). The plurality of markets has certain structural consequences which, however, are of little importance for this study. The national stock exchange systems are therefore regarded as units with a uniform structure. The Netherlands, Denmark and Luxembourg each have a single national stock exchange.

Irrespective of their legal status, all stock exchanges in the Community have a well-established structure. A uniform basic pattern points to the economic function of the stock exchange organization. It is a meeting place for demand and supply in circumstances which, since they approximate as closely as possible to perfect competition, lead to a price which can be accepted as the value of the commodity dealt in. For this, equality of the market participants is necessary: they appear in their own name and are all subject to the same financial and other requirements. The transactions are standardized: the securities are financially, if not legally, fungible, the terms of trading and execution are uniform, while tardy or non-performance may lead to immediate compulsory execution and settlement by the exchange authorities, or even by the other broker. From these elements in the market, as streamlined and made transparent, a price is formed which reflects the value of the security so accurately that it is referred to by the authorities as "official", or sometimes

(1) E.g. Brussels (Belgium), Milan (Italy), Paris (France), London (United Kingdom and Ireland); only in the Federal Republic of Germany do we find two important stock exchanges: Frankfurt and Düsseldorf.

even as "authentic", this means that everyone can be sure that, at this price, and in the given circumstances, he has paid or received the best price and therefore the fair value. Underlying, as a fundamental element, the stock exchange organization, and to which recent reforms refer expressly, the basis function of stock exchange organization appears to be the stimulation of public confidence in the official securities market, by affording the most refined technique of price-formation. This implies the creation of - sometimes artificial - perfect competition, and refuses free rein to any excessively strong, so-called market disturbing forces.

1. GENERAL ORGANIZATION OF THE STOCK EXCHANGE MARKETS

1. Interventions analysed according to their subject

51. Five decision levels can be distinguished: the authorization in principle to organize a stock exchange, the provision of the basic structure, the issuing of the supplementary stock exchange regulations, the general management of the stock exchange and, lastly, its day-to-day management. Parallel with the line of decision, a control line can be perceived.

- The decision levels

At the base we find the fundamental power to organize or to allow the organization of a stock exchange market. In most Member States this matter is of theoretical importance: the establishment of option exchanges, as recently in Amsterdam, could bring about a change in this.

The decision to establish a stock exchange appears in most Member States to be the subject of a political intervention. The decision has a fundamental effect on the organization of securities business. In smaller countries the law itself organizes the stock exchange (Denmark, Belgium, Luxembourg), while in the other countries it makes the authorization or approval of the political authority obligatory (Belgium, France, Italy, Ireland, Germany and the Netherlands). In several countries the creation of stock exchanges was due to government initiative (Denmark, France). In the United Kingdom the stock exchange is merely "recognized" by the government, this being primarily the condition for the granting of certain privileges (e.g. equivalence of stock exchange and issue prospectuses, no registration requirement for members-securities brokers). The establishment of a new stock exchange between recognized security dealers would not be subject to any permission.

The decision to organize a stock exchange market implies a fundamental choice with regard to the securities business in general and particularly with regard to the place of the stock exchange market in relation to

the other, unofficial markets. The precise terms of this choice are not very clear. We can perhaps record as a few guiding ideas that in most statutory systems privileges are granted to the stock exchange market, as a result of which this market is regarded as being more attractive than others, and especially is thought to ensure a fairer price. These privileges differ from country to country. Thus, statutory rules making it obligatory for transactions in quoted securities to be carried out on the stock exchange are rare (France, indirectly the Netherlands), their absence being as a rule made up for by corporative (United Kingdom) or contract law rules (Germany). Unofficial markets are most of the time not forbidden, not even for quoted securities, but organization of or participation in these markets is greatly hampered (no publication of prices, no participation by recognized brokers). The privileges whereby the stock exchange market is made attractive are mainly of an economic nature: it is the market where the principals expect and obtain the best execution of their orders. One also finds that the statutory organization is primarily designed to protect the status of brokers (e.g. protection of the title, and sometimes of the function), although stock exchange intermediaries have succeeded in only three out of the nine Member States (the Netherlands, France and Germany) in obtaining a legal monopoly for all securities dealings. In some countries the publication of security quotations is reserved to the stock exchange authority or its authorized agents (France, Italy, Luxembourg), while in other countries (the Netherlands, but also the United Kingdom) the corporative rules lead to the same result.

52. The power to formulate the basic structure of the stock exchange system can be subdivided into four sections: the establishment of the governing bodies (public authority and stock exchange bodies) and the assignment of their powers; the issuing of rules concerning the granting of permission to persons to deal on the stock exchange; the issuing of rules regarding admission of securities to official quotation on the stock exchange; and, lastly, designation of transactions allowed to take place on the stock exchange, and rules concerning execution of and settlement for orders. These four sectors are to be found in all national systems. There are considerable differences, not so much in this organizational pattern, but in the legal nature of the rule by which it is established. In most Member States these are rules enacted by the government. In the United Kingdom, and in practice also in the Netherlands, these rules are private, or corporative.

The power to establish the basic structure of the stock exchange system does not in most Member States carry with it the power to issue the complementary stock exchange regulations. In order to enable the system to be adapted to local requirements, but also mainly in order to make it possible for securities dealers to have a say and to participate themselves in the management of the exchange, this power is delegated to subsidiary bodies. Here the interaction between government and corporative interventions becomes more intimate.

53. The application of this set of regulations can be divided into two decision levels, general and the day-by-day management. Application of the generally-valid rules to persons individually, or with regard to companies or issuers applying for admission of their securities to quotation on the stock exchange is entrusted to, and the associated sanctions are imposed by, bodies which must either be regarded as being government authorities or are corporative, being composed of local securities dealers. The regulations generally leave room for a certain exercise of discretion by these bodies. The extent to which use is made of this discretion, and especially the objectives of such use, cannot be determined, owing mainly to lack of information. Unlike the public bodies, the corporative bodies are not subject to any public reporting with regard to the policy pursued by them. Information is available only on the action of the French and, partly, the Belgian, public bodies.

The day-by-day stock exchange management requires active presence during actual trading, mainly with a view to fair price formation. This task entails the application and enforcement by the corporative authorities, of the aforementioned general and complementary regulations. These duties also cover the publication of prices and assistance in the compulsory performance of inexecuted transactions.

- Control

54. Affixed to this governance structure one can distinguish a set of rules relating to the control of governance and which belong to the aforementioned basic legislation. One form of control is the supervision, exercised by the State or its subdivision, on the enactment of the aforementioned complementary regulations and this in accordance with the general rules on administrative supervision. Normally this approach is not followed for the general or daily stock exchange management. Thereto, an official supervisor

(or stock exchange commissioner) is appointed, controlling the activities of the corporative bodies, and sometimes of the members of the corporation, while simultaneously more and more special techniques for supervision are being developed (investigation of and reporting by brokers, supervision on internal control and auditors of brokers, "stockwatch programs" whereby erratic price trends can be traced and transmitted for further analysis). At the same time, stock exchange managing bodies also keep check on the implementation of their own rules. This in fact prevents that a clear control line can be perceived. Rarely used, but to be mentioned in order to be complete, is judicial supervision exercised by imposing criminal or civil sanctions.

2. Interventions analysed according to the body empowered

55. The stock exchange structure is the result of two forces. On the corporative side, one finds the people and interests involved in the securities trade; these people are as a rule organized as a corporation, a united body of persons. Simultaneously, action is taken by the public authorities, who as guardians of the public interest make available the necessary basic framework, or as controllers, supervise compliance with laws and regulations; more recently, public authorities in some countries have been active in restoring and stimulating the role of the exchanges in financial mechanisms. Although both ingredients are to be found in each Member State, there is considerable difference as to their relative proportions, not only from State to State, but also from one field of regulation to another.

Which interventions are to be regarded as action by the public authorities or which are corporative in nature is not always clear. In view of the diversity of national systems, the following approach can be adopted for the purposes of this comparative law study.

2.1 The difference between public and corporative interventions

56. The terms "public" and "corporative intervention" are used here more in a sociological than legal sense. The intention is not only to look into the legal status of the measures in question but also to investigate how for each sector of intervention, power and influence are flowing whether from public or from corporative sources: the intervention will be deemed

to be corporate if its content is determined by members of the corporation. Rather than the usually employed term "self-regulation", we here use the expression "corporative regulation". This term emphasises the specific nature of the legal source, namely the association or group of security dealers connected with a certain stock exchange, who are associated with each other in a corporation in nearly all countries (1).

57. Another reason why the term "self-regulation" is not used is because it can lead to confusion with self-discipline, which can be regarded as a specific form of complying with rules or norms. Here no rules are formulated within a group, non enforced by it on the members. The rules observed are rules of conduct advocated by certain members of a profession, usually organized in an association, as the rules by which they will abide. On violation the sanctions are economic: non-abiding members will be avoided in further commercial contracts, or as a contracting party, but will not be expelled from the association, nor be submitted to any other punishment. Self-discipline characterises the rules of conduct to which the London issuing houses conform: although members of the Issuing Houses Association, the rules of the association do not empower its board of directors to impose sanctions on members violating the rules of conduct. Furthermore, the rules are established by mutual agreement and consultation of the members, whether this is done formally or not, and deal with proper conduct on issue of securities. Self-disciplinary rules may also be found in the covenant subscribed by the German credit institutions, and according to which they will insert within general standard conditions for banking transactions a clause whereby execution of securities orders will as a matter of principle be realised on the stock exchange, unless the client directs otherwise; they further agreed not to avail themselves of the last exception, allowing them to execute "off the floor".

(1) In Luxembourg the corporation takes the form of a limited liability company (société anonyme) with a few additional brokers; in the Federal Republic of Germany the position may differ from stock exchange to stock exchange, but the credit institutions admitted to the stock exchange are not grouped in a separate corporation although they elect the majority of the members of the stock exchange management. The position is different again for the official brokers (Kursmakler).

2.2. Applications of this distinction

58. The two fields where the changing relationship between government and corporative action can be determined with sufficient accuracy are on the one hand the bodies which are concerned with stock exchange management and supervision and on the other hand the stock exchange regulations, including both general implementing measures adopted in execution of the stock exchange law and the rules issued by the corporate and specialised public bodies.

1. The managing and supervisory bodies

59. What are the criteria to be used to classify agencies, involved in management or control of stock exchange markets, as a public or as a corporative body? A formal legal criterion whereby the legal status as an administrative authority is considered decisive, throws little light on the reality of policy and decision-making. At all times corporative interests have been able to induce the State to give their organizational structure a legal character and to help them in the enforcement of the rules, even those of a corporative nature. These bodies continue to represent mainly the corporative interest, while the State confines its supervision to checking that the law has been complied with. A more useful criterion for the present purposes is to take account of the composition of the body. The term corporative body is used here to indicate a body in which the majority of the members belong to the corporation, even if, according to rules of administrative law or precedent, they are considered to be an administrative authority and hence submitted to the rules of decision-making, due process and recourse, characteristic for administrative systems. A similar criterion can be applied to government agencies: their members are as a rule appointed by a decision of the government, and are selected for their personal expertise from circles with different interests and

activities, and at least not only from among stock exchange members. This pooling together of different views is regarded as a guarantee of correct definition of the public interest that these agencies must pursue. They all enjoy a special legal status which guarantees them far-reaching independence vis-à-vis the central and political authorities. These authorities, although they do not exercise any general supervision, have kept some limited power to influence the agencies' conduct. Measures of administrative supervision exist and are limited most of the time to the proper exercise of their delegated regulatory powers. Rights of higher control are as a rule confined to the choice of the members upon their appointment, and even sometimes to the curtailment of the independence of the management with regard to personnel matters or financial resources. This independence has in some Member States been extended even to the last-mentioned matters (Belgium, Luxembourg).

A brief review of the bodies which are involved in the management and supervision of stock exchange markets can make this method of classification more concrete. No mention is made of the supervising minister, nor of other authorities which are themselves the executive government power. This division would look as follows:

- In Belgium the Banking Commission and the Quotation Committee are to be classified as public bodies, and the Stock Exchange Commission as a corporative body: the members of the two first-mentioned bodies are appointed by Royal decree, while the members of the Stock Exchange Commission are elected by the brokers. Only members of the corporation sit on the Stock Exchange Commission, while persons from various circles can be included in the other two bodies. In prevailing case law, all three of these are considered to be administrative authorities.
- In France a similar distinction could be drawn: in the "Commission des opérations de bourse" people from different circles (industrialists, magistrates, bankers) are appointed by government decree: the "Chambre Syndicale de la Compagnie des Agents de Change" consists solely of

elected brokers, members of the corporation. There is some doubt as to whether in French administrative law the "Chambre Syndicale" is to be regarded as an administrative authority.

- In Italy the present situation is more intricate: the "Commissione nazionale per le società e la borsa" is, in accordance with the above-mentioned criteria, a government body; so is the "Deputazione di Borsa", responsible for policy within the exchange, since the members are appointed by an official decree; the corporative bodies are the "Comitato direttivo degli Agenti di Cambio", and the board of the corporation of brokers, both of which bodies are composed solely of elected brokers. The special supervisory instrument consisting of the right of the Minister of Finance to dismiss all the members of the last-mentioned bodies does not detract from this classification.
- In the Federal Republic of Germany both of the "Börsenvorstand" and the "Zulassungsstelle" are corporative bodies, as the members are elected either by and from among the firms permitted to deal on the stock exchange (for the Börsenvorstand) or half from among these firms and half from among representatives of the issuing corporations (Zulassungsstelle). Both bodies enjoy a wide degree of autonomy and the supervision is limited to checking that rules have been complied with. The "Kursmaklerkammer" (Chamber of Official Brokers), too, is a corporative body: although the members are ministerial officials, as are the French or Italian brokers, they form a corporation which they manage themselves, without being subject to any supervision other than that with regard to the legality of their actions. The additional bodies such as the disciplinary or arbitration committees are also corporative in nature and in composition.
- In Denmark management of the stock exchange is entrusted to a board composed of persons appointed by ministerial decree, who represent all the interest groups directly concerned with the stock exchange market;

the members who are securities brokers are only entitled to propose for nomination three out of the twelve members.

- In Luxembourg the "Commissaire au Controle des Banques" is a public official, while the stock exchange and its bodies are governed by private law, entrusted by the State with the organisation of a public service (concession-holding).
- In the Netherlands, the United Kingdom and Ireland, all the bodies are corporative.

2. The stock exchange regulations

60. In nearly all Member States we find, in addition to regulations issued solely by the State executive power, rules or regulations to which the corporative authorities have made an essential contribution, and above all of which they have determined the content. Nevertheless, these rules sometimes appear in the form of decrees issued by the State executive authority. These many and varied measures of administrative supervision cannot conceal the reality: if the State intervenes, as the supervisory authority, only to declare that the action of another authority is executable, or to approve or ratify it, then this act remains that of the subordinate body, whether it be a public or a corporative one. The testing by the State remains confined to the legality of the provision, without any right of initiative or substitution. Sometimes it is accepted that the public interest can have a direct bearing on this control process. In at least one Member State (Italy) the supervising minister plays only a passive role declaring the measure merely executable.
61. Owing to this distinction, the stock exchange regulations in the Member States can be classified as follows:
- In Belgium the stock exchange rules are presented by the Stock Exchange Commission and approved by the King: only the corporative body, and not the state executive power, can exert influence on their content, so that the stock exchange rules can be regarded as corporative regulations. The regulations governing the "Quotation Committee" can be analysed otherwise: despite the fact that this Committee's opinion is sought by the executive, the final enactment decision remains with

the King; these regulations are therefore considered to belong to the sphere public regulations.

- Under Luxembourg law the Stock Exchange Act is implemented by a Grand-Ducal Decree (Grand-Ducal Decree of 22 March 1928), whereby the concession-holding limited liability company "Bourse de Luxembourg" is authorized to issue rules for the internal conduct of the exchange, subject to the approval of the Minister of Finance. The regulations therefore represent a corporative act.
- Under Netherlands law the stock exchange regulations (Beursvoorschriften 1919) represent an implementing decree of the Stock Exchange Act (Beurswet) itself. All other regulations are issued by the "Vereniging voor de effectenhandel" and are not subject to any administrative supervisory measures.
- In France the stock exchange system is governed mainly by government decrees (décrets). On the basis of these the "Règlement général de la Compagnie des Agents de Change" is approved by the corporation itself, adopting the resolution at its general meeting. The regulations are, on the recommendation of the COB, "homologized" by the minister. The rules relating to the internal order of the Compagnie are also adopted by this body itself and in this case approved by the COB. Both sets of regulations meet the criteria for corporative regulations.
The decisions of general scope which the COB can take with regard to the operation of the stock exchanges are public-authority actions of the COB: the opinion of the "Chambre Syndicale" of the Compagnie must be sought, but is not binding, and the decision is submitted for approval to the supervising minister.

- In Italy all regulatory provisions belong to the sphere of public law, irrespective of whether they are issued by the supervising minister or by the political authority (Council of Ministers, President of the Republic) or by CONSOB. Even the local stock exchange regulations are henceforth to be drawn up by CONSOB. The opinion of the corporative local stock exchange bodies must be sought, but is not binding in that, if CONSOB wishes to depart from their opinion, this is possible provided that reasons are given for the departure.
- The German stock exchange legislation contains a rather complicated regulatory system of which only the main lines are mentioned here. The stock exchange regulations are issued by the stock exchange management, with the approval of the supervisory authority. Executive measures, such as the conditions governing transactions in securities (usage) are laid down by the management of the exchange, no supervision being applicable here. Due to the official character of the activities of the official broker ("Kursmakler"), the rules governing his activities are essentially of a public nature. The same prevails as to the Decree relating to the admission of securities to stock exchange negotiations. (Zulassungsbekanntmachung).
- In Denmark most stock exchange regulations are issued by the supervising minister.
- In the United Kingdom and Ireland, only corporative stock exchange regulations apply.

2.3. Comparison of public and corporative interventions

2.3.1. Predominantly corporative interventions

62. While the stock exchange systems of each Member State contain elements of both forms of intervention, the relationship between these varies greatly. In three Member States one can scarcely speak of public intervention at all: these are, in order of decreasing public intervention, the Netherlands, Ireland and the United Kingdom. The State has, admittedly, reserved certain sovereign rights (opening or closing of stock exchanges, recognition of the corporation, etc.), but these instruments are rather unsuitable for the pursuit of any policy regarding security business.

MANAGEMENT AND CONTROL
OF STOCK EXCHANGE MARKETS A SUMMARY.

	STOCK EXCHANGE REGULATIONS	STOCK EXCHANGE MANAGEMENT				PUBLIC CONTROL					
		general management	market participants	with regard to securities		securities transactions	day-to-day management	Higher supervision	Exchange Commissioner	other forms of general supervision	form of particular supervision
				admission of securities	disclosure						
I. BELGIUM.											
1. corporative body	Proposal	Commission Bourse	Commission Bourse			Commission Bourse	Commission Bourse	on Commission Bourse			
2. public body	(1)			Quotations Committee	Banking Commission			Banking Commission Quotations Committee	Quotations Committee		
3. ministry	Enactment										
II. DENMARK.											
1. corporative									on brokers		
2. public		Exchange Committee	Recommendation	Committee	Committee						
3. ministry	laying down		Appointment						General right of appeal		
III. FRANCE.											
1. corporative	Compagnie	Chambre Syndicale	Chambre Syndicale	Recommendation Ch. Syndicale						sporadically	
2. public		Cob		Cob	Cob			Cob	Cob	regulatory decisions	
3. ministry	approval		Admission								
IV. GERMANY.											
1. corporative	"Träger" (2)	Börs Vorstand	Börs Vorstand	Zulassungsstelle	Zulassungsstelle	Börsen Vorstand Makler Kamm.	Börsen Vorstand Makler Kamm.	Börsen Vorstand Makler Kamm.	legality		
2. public											
3. ministry	approval										
V. IRELAND.											
1. corporative	Stock Exchange	Stock Exchange	Stock Exchange	Stock Exchange	Stock Exchange				closing + Suspension		
2. public											
3. ministry	approval		licensing								
VI. ITALY.											
1. corporative	Recommendation		Order of brokers	Recommendation					All Corp. Bodies	Dismissal	
2. public	Consob			Consob	Consob				Consob	Regulatory Decisions	
3. ministry	Execution		Appointment								
VII. LUXEMBOURG.											
1. corporative	s.a. Bourse	Conseil d'Administ.	Conseil d'Administ.	Conseil d'Administ. + Commission de la Bourse					Conseil + Commiss. B.		
2. public					Comm. Contr. Bq.						
3. ministry	approval							Commis. Contr. Bq.			
VIII. NETHERLANDS.											
1. corporative	Vereniging V/D E.	Vereniging V/D E.	Vereniging V/D F.	Vereniging V/D E.	Vereniging V/D E.						
2. public											
3. ministry				theoretically							
IX. UNITED KINGDOM.											
1. corporative	Stock Exchange	Council	Council (3)	Quotations comm.	Quotations comm.						
2. public											
3. ministry											

(1) 2 sets of rules ; regulation of Quotations Committee adopted on the latter's recommendation by Royal Decree.
(2) Supplementary regulations are issued by the corporative bodies or the Government (eg Maklerordnung).
(3) Without prejudice to the recognition, by law, of authorized security dealers (Prevention of Fraud Act).

The highest degree of this self-management is to be found in the United Kingdom. Despite the fact that - and perhaps because - this is the most important stock exchange in the Community, the government is only involved in stock exchange matters as far as the recognition of an exchange is concerned, which ensues from the reporting obligations to which security dealers are subject. The internal life of the stock exchange is governed entirely by the private rules of the corporation. This is also the case in Ireland, although an old Irish law (of 1799) subjects certain fundamental matters to the approval of the Minister of Finance (establishment or closing of stock exchanges, granting of a broker's licence for government bonds). In the Netherlands, statute imposes more government intervention, but no use of it has been made since a very long time. In practice the corporation governs the entire securities business.

2.3.2. Mixed types of intervention

63. The following analysis applies only to the other countries of the Community. These systems are based on both governmental and corporative action, in proportions that differ from country to country. Although recent changes in the law in Denmark and in Italy have somewhat modified the entire system, one can describe the overall system as one in which the corporative influences and organizations play the leading role, while government intervention is more ancillary.

1. With regard to the legal and regulatory organization

64. A first form of intervention consists in all these countries of the power to provide the stock exchange system with a legal basis and organization. Each of these Member States has an extensive stock exchange legislation - which, for instance, is not the case in the United Kingdom, Ireland or the Netherlands, where the stock exchange law is only of theoretical importance. This basic legislation serves the purpose of organizing the stock exchange system, establishing the structures and designating their management. As an extension we find the requirement, appearing everywhere, of government permission for the establishment of stock exchanges. Linked are varying degrees of privileges for security dealers: e.g. monopoly of using the stock exchanges facilities, price publication, etc. or even monopoly of securities business in general.

65. This basic organization is strongly inspired in all Member States by principles of self-management. A special but important expression of this principle consists in the delegation to the corporative bodies of rule making power - in the form of generally applicable "rules" or "regulations" - of which it is sometimes accepted that they apply, as by-laws of a corporation, not only to members, but to all third parties as well. The delegation is limited in scope and only be made use of in clearly specified fields. Not in a single one of the national systems does this delegation include the right to issue rules relating to the personal status of members, brokers or dealers in securities, save for a limited exception in France or in Germany (1). All matters relating to their personal status are dealt with directly in secondary governmental regulation. Conversely, the rules concerning the actual stock exchange transactions are frequently included within the rule making power: the basic legislation prefers to leave this matter to the professionals. With regard to the admission of securities to a stock exchange quotation and relations with issuers, some striking features will be pointed out later.

66. If the public authorities authorize the corporative stock exchange to issue regulations, they reserve the right to exercise some right of higher supervision. This right can assume varying forms: in Belgium the stock exchange regulations are proposed, and thus determined as to their content, by the corporative stock exchange Commission, but are promulgated by Royal Decree. Similar rules apply with regard to the "règlement général" of the French stock exchanges: here the supervising minister is authorized to ratify, or withhold ratification of, the rules of the stock exchange, acting on the expert advice of the "Commission des opérations de bourse".

(1) For France mention should be made of the obligations contained in the "Règlement d'ordre intérieur", cf. also Art. 21bis, Décret of 7 October 1890 regarding book-keeping and reporting by brokers, and for Germany, the authority - within strictly demarcated maximum limits - to establish the conditions for the admission of brokers: Section 7, Börsengesetz..

With regard to the content of the rules, however, exclusive power lies with the "Compagnie des Agents de change", deliberating in a general meeting of its members, the stockbrokers. Similar rules are to be found in Luxembourg and Germany. In Italy the reform of the stock exchange system (1975) put an end to the regulatory powers of the local stock exchanges. Henceforth all power emanates from the State regulatory agency, the CONSOB. In all Member States the testing by the supervisory authority includes checking that the law has been complied with; whether, in this connection, the public interest, or the interest of the State are also taken into account is not always very clear. It is implicitly accepted in Belgium. In Luxembourg there is an express legal provision to this effect in the stock exchange decree, German law recognizes only testing as to legality. Rule making by corporative bodies is always subject to specific administrative supervision: no cases are known where this supervision is absent.

2. With regard to the management of the stock exchanges

67. The management of the stock exchanges is carried on within this general statutory and regulatory framework. The daily management is directly concerned with day-to-day operation of the exchanges and with trading procedures. In nearly all Member States (with the exception of Denmark) daily management is exercised by a corporative body, whether or not with outside supervision. The general management was previously also carried out by corporative bodies in all Member States. This form of organization is now only to be found in Germany and, to a smaller extent, in Luxembourg, where the public control commission performs important control functions, but only in connexion with the information to be disclosed on admission of securities. In the other countries there are one or more active public agencies: their function often includes the exercise of supervision over the corporative bodies and - in at least two of the Member States - direct involvement in the general management of the stock exchange. In these cases there are also appropriate powers of control. It would therefore seem justifiable to speak of a double organization line: corporative self-management is directed, bound by, stimulated by administrative action of governmental agencies. Numerous gradations are to be found in the way government agencies act with respect to stock exchange functioning and corporative self-management.

The field of action of corporative self-management can be defined as comprising all matters for which the public agencies have not reserved for themselves the right of general or day-to-day management. The two fields are connected and will therefore have to be dealt with together

a) Admission of securities to stock exchange quotation

68. Admission of securities to stock exchange quotation appears to have attracted a great deal of attention from the public authorities in several countries. Associated with this subject is the whole matter of the relationship between the stock exchange world and the business world. This aspect of the stock exchange structure can be placed in a dual perspective. On the one hand, the public agencies play a dominant role in the primary securities markets, in order to achieve there, by imposing essentially disclosure, orderly conduct of business, which must contribute to the climate of confidence which must prevail in connection with the raising of capital. On the other hand, one sees a tendency towards greater objectivity of the decision to admit securities to exchange markets. So, e.g. have many stock exchange systems established more or less independent committees, or bodies, which will have to decide on applications for admission, and on the related disclosure, in an independent, objective way. These bodies or committees are not always public bodies. Thus the admission office for the German stock exchanges can scarcely be classified as a public body as to its composition, and yet is entrusted with this task of objective assessment of admission applications. Even in the London Stock Exchange there is an independent "Quotations Committee". In the Netherlands according to the law, the Minister of Finance admits securities to exchange trading; in practice he always follows the advice of the corporative stock exchange management. A striking point is that in all these countries an attempt is made to remove the relationship between the exchange market and the business world from the corporative sphere of influence.
69. Belgium, France and Italy have set up separate public bodies and have given them power to admit or remove securities from exchange dealings. In Belgium this power is shared: compulsory disclosure is controlled by the Banking Commission, while the admission is granted by the Quotation Committee. In France and Italy both these matters come under the authority

of the central public body. This allocation of power can constitute the starting point for the development of a general public policy with regard to the larger companies whose securities are admitted to quotation on a stock exchange.

b) The personal status of stock exchange securities dealers

70. The personal status of securities dealers on stock exchanges is in most cases of a mixed origin. In France, Italy and Denmark, and in the Federal Republic of Germany with regard to official brokers, appointment and dismissal are by ministerial decree. All other matters are referred to the corporative bodies. They keep watch over compliance with deontological and financial obligations and can impose sanctions. In Belgium and Luxembourg the organization is purely corporative; a comparable situation is that of credit institutions in the Federal Republic of Germany. But in each of these countries, all matters relating to the personal status of stock exchange traders have been systematically kept out of the influence of one of the aforementioned government agencies.⁽¹⁾ In Italy it has even been expressly provided that if the government agency finds irregularities in a broker's behaviour, or violations of his statutory duties, it shall pass the case and its findings to the minister or the corporative disciplinary board, entitled to impose sanctions, without being itself entitled to take action.

c) Stock exchange transactions

71. In the field of stock exchange transactions, corporative organization and supervision are coupled with government supervision. The managing bodies of the stock exchanges are, except in Denmark, corporative bodies. They appoint one or more of their members to be present during the stock exchange session itself, their task relating both to the organization and the supervision of transactions. The public authority confines

(1) There are a few exceptions to this division of powers in France; they can only be explained historically.

itself in this field to supervision, including supervision through the stock exchange commissioner mentioned below. In some countries, primarily France, this supervision is extended to the market behaviour not only of the brokers but also, and mainly, of their principals (insider trading, market manipulation). The last-mentioned matter lies outside the corporate field, so that legislation is considered to be necessary.

Policing in stock exchange matters and the material running of the stock exchange are as a rule corporate business.

72. 3. With regard to rules of control and supervision

The vesting of substantial autonomous powers in subordinate managing bodies is as a rule coupled with certain rights of control with regard to these bodies. The system of administrative supervision which applies with regard to the public agencies is very different from that applying to the corporate bodies.

In Belgium, Luxembourg, France and Italy the right of the government to appoint the members of the public agencies is regarded as an important form of higher supervision. It is not clear whether it also contains the right of dismissal. As a measure of general supervision the government appoints a commissioner with a wide power of control on the activities of some of these independent agencies. This is the form of supervision exercised on the French COB and on the Belgian Quotation Committee. A somewhat different pattern prevails in Denmark, where a public official on the one hand has general control powers on stock exchange functioning while he also supervises stock exchange securities dealers, although here with limited powers.

In several countries the powers of this government commissioner are limited: if he has objections to raise, he can only submit the decision to the same body (France) or to another, similarly corporative body (Belgium, Luxembourg). Sometimes he can resort direct to the supervising minister: the testing will as a rule (for instance in the Federal Republic of Germany) be confined to checking the legality of the matter.

In some countries the independent power of decision of the subordinate agencies is extended still further: in Belgium (Banking Commission) and in Italy (CONSOB) there is no government commissioner supervising the public control agency. The Luxembourg pattern is a special one: the "Commissaire au Contrôle des banques" performs the function personally as a civil servant; it is accepted that he is not subject to the hierarchical authority of the appointing minister.

73. The supervision on the corporative bodies is carried out in all the Member States referred to here, with the exception of France, by the appointment of an official referred to as the government, state or stock exchange commissioner. This official has the task of exercising supervision over all actions of the stock exchange managing bodies: as a rule, he can only oppose actions or decisions, that would violate the law, although in Belgium and in Luxembourg it is accepted that his opposition can also be based on grounds of general interest. These officials' own means of action are as a rule rather limited: in Belgium and Luxembourg the official can only submit the decision to another, also corporative body, while in Italy and Germany he can refer the matter to the public authorities for appropriate action. In Denmark he makes the decision himself. It is difficult to assess the effectiveness of this supervisory instrument.

In view of their limited means of action, it would seem that the aforementioned form of government supervision by appointment of a permanent commissioner can be compared to, but not be placed on the same footing as, instruments of general administrative supervision, existing in the related field of administrative law.

In Italy, lastly, there is a drastic instrument of supervision, which is difficult to use: the entire dismissal of all members of the stock exchange organ (1) with the possible appointment of a trustee.

74. In Member States where government agencies are involved in stock exchange matters, a general right of judicial appeal lies before the general administrative courts (e.g. the Council of State). The independence of these bodies explains the absence of any hierarchical recourse, for instance to the Minister of Finance. In Belgium, however, a special appeal procedure against the decisions of the Quotation Committee brings the matter first before a specific Appeals Board, whose decisions can then in turn be tested as to their legality by the Council of State. In Denmark, the decisions of the Stock Exchange Committee can be reviewed on appeal by the Minister of Trade.

Appeal against the decisions of the corporative bodies is in some Member States governed by administrative law. This is the case with the decisions of the German stock exchange bodies, and with those of the Belgian Stock Exchange Commission. In France and in Italy the question is disputed, but is as a rule answered in the negative. In Luxembourg, too, these decisions are subject to appeal according to the general rules of common law.

(1) This applies both to the "Deputazione di Borsa" and to the "Comitato direttivo". The brokers' Disciplinary Board is also subject to it.

2. THE PERSONS INVOLVED IN STOCK EXCHANGE DEALINGS

75. The flexibility of stock exchange dealings and the safety of executing the transactions, require that not just anyone shall be allowed to deal on the stock exchange, as was in fact the case in the old days on some of the European exchanges. In all the countries of the Community, only admitted persons or enterprises can take part in dealings on the stock exchange.

1. BROKERS' AND MIXED STOCK EXCHANGES

76. A distinction is made between brokers' stock exchanges and mixed stock exchanges. The former do not allow banks, but only stockbroking firms, to deal on the stock exchange, even if these firms receive the great majority of stock exchange orders from the banks. This type of organization is the most frequently met in the European Community. A subsidiary, mainly legal, distinction differentiates the French and Italian stock exchanges, since there the brokers enjoy the status of "ministerial officers", and are, among other things, appointed, or subjected to disciplinary sanctions, by ministerial decree. The British, Belgian, Irish and Danish stock exchanges also admit only stockbroking firms, although in the case of the Danish stock exchange this is done by ministerial decision.

In mixed stock exchanges banks as well as stockbroking firms execute orders on the floor of the exchange. This pattern is met in Germany, the Netherlands and in Luxembourg, where securities business is largely in the hands of the banks. The brokers play an active role on the floor of the exchange itself, whether acting as agents for their clients, or for bringing orders together coming from banks, or by acting as dealers for their own account.

Admission is as a rule confined to a certain stock exchange. Further admissions can be obtained within the same country, but require a new decision. Relaxations, including relaxations with regard to requirements concerning experience and knowledge, or to financial status, are granted. Participation of foreign firms in stock exchange trading occurs more in the countries with mixed stock exchanges, where both foreign banks and local offices of foreign broking firms are involved in the trading,

either directly or through the acquisition of shares in an already admitted bank or broking house. In the countries with brokers' exchanges only nationals are allowed to deal: in France, Belgium and Italy there is a nationality requirement and in Denmark a residence condition, while the nationality requirement in the United Kingdom was lifted a few years ago.

2. GENERAL CONDITIONS FOR ADMISSION

77. The admission conditions are defined in the stock exchange rules. The admission decision is in most countries of a discretionary nature: even if the candidate satisfies the objectively specified conditions, he has no right to be admitted to the stock exchange market. Refusal, the motives for which have not to be disclosed, can be based on either personal or general grounds, including the interest of the market, the excessive number of participants, etc. The arrangement is different in the Federal Republic of Germany, where since the law of 1975 a candidate can claim a right to admission if he fulfils the conditions, and in Italy, where nomination for a vacant place is made by ministerial decision, which must obligatorily designate the first candidate after a competitive examination. In all countries, apart from the Federal Republic of Germany and Luxembourg, the number of persons admitted is declining.

The admission conditions relate to the trustworthiness of the members of the stock exchange, their experience in this line of business, the extent of their offices and their financial position. As an extension of the last-mentioned aspect, requirements regarding book-keeping or rules with regard to internal control are usually imposed. In countries with mixed stock exchanges, no specific requirement is established concerning the financial position of the banks, reference being made instead of the banking control legislation. Losing the banking authorization or ceasing to be a banks entails loss of stock exchange membership.

The requirements as to trustworthiness and experience are made necessary by reason of the usual procedures for carrying out stock exchange transactions which are almost solely on verbal agreements: not only must candidates be familiar with local practices and stock exchange terminology but, and above all, they must stand by their given word. Representatives of banks are, for understandable reasons, also subject to this requirement. Judgment as to the fulfilment of these requirements is usually left to the admitting authority: the latter takes as its basic the statements of referees or sponsors or other information.

78. In countries where the exercise of the profession of stockbroker requires the permission of an administrative authority (i.e. France, Italy, Denmark and, for official brokers -Kursmakler - also the Federal Republic of Germany), the granting of this permission is made dependent on the necessities of the market, including the need for new appointments, or their being economically justified. This is explicitly stated in Denmark, is included in the ministerial decision establishing the roll of brokers in France and Italy, and is inherent in the nature of the activity of official brokers in the Federal Republic of Germany. In other countries establishment is free, a fact which has sometimes been detrimental to the viability of the profession and the possibility of regulative action by the stock exchange authorities.

79. Connected with this is the establishment of a maximum age limit. Rejuvenation of the profession, even from an institutional point of view, is impeded in some countries by the absence of an age limit, while its introduction in other countries is still too recent to have yet become fully effective. No age limit is laid-down in Belgium, Denmark, the United Kingdom and Luxembourg: Italy, France, the Netherlands and - for the official broker - the Federal Republic of Germany have in fact introduced a limit.

3. STRUCTURE AND ORGANIZATION OF FIRMS

80. One rarely encounters rules concerning the organization of the firms,, their personnel, the minimum infrastructure, additional packages of services offered, etc. In the Netherlands the admission board has to be

convinced that the candidate disposes of an "adequate" spread as to clients and as to securities dealt in for account of clients, these being rules which also contribute to the independence of the firm, particularly in relation to certain issuers or to institutional investors. In the United Kingdom a new candidate for membership must have the support of an existing firm. In several countries, participation in the common mechanisms of clearing, transfer or custody of securities, even if not expressly made obligatory (as in the Federal Republic of Germany), is enforced in practice. Common computer facilities are offered in some countries (e.g. France) but are not always accepted by the firms. The appointment of floor delegates, entitled to deal in the name of a member firm, whether as assistant to, or as substitute for a member, is subject in some countries to a maximum limit, this being partly in order to avoid having an excessive number of persons present on the floor (e.g. in Italy).

81. In some regulatory systems one finds rules regarding the legal status in which the securities firms have to carry on. Whether brokers must or can carry on their business as sole trader, or grouped together in partnerships, possibly in limited liability companies, is still answered in widely varying ways. During the past few years a trend has developed whereby less hostility is shown towards the formation of associations, including limited liability companies, while even a prohibition of the sole trader has been introduced in one Member State (United Kingdom). There are many reasons for this development: the prohibition of association led to a multiplicity of individually weak market participants, and to undercapitalization in proportion to present-day dealer and securities advisory functions. In competition with the banks, independent securities dealers who are too weak are usually reduced to the ancillary role of market executants.

In Italy brokers act as independent professionals: their status of ministerial officers is considered to be an obstacle to any form of association among them. In Belgium and Denmark there are both sole dealers and partnerships:

here the broker must remain jointly and severally liable so that all firms have to be carried on either as sole proprietorships, or as unlimited partnerships; in Belgium the limited partnership can also be used.

In all other countries there is freedom as regards the legal form, except that in the United Kingdom and Ireland, in principle, no individual security dealers are now being admitted, but only members of a firm (i.e. the "four eyes" principle); while in Luxembourg practice - although not in law - only limited-liability companies are admitted to trading on the stock exchange. In Germany and the Netherlands individual brokers, or brokers grouped together in partnerships, participate in stock dealings. In both countries the limited-liability company form is permissible; it is not for the time being used by the free brokers in Germany.

In countries with mixed stock exchanges, banks and credit institutions are in addition - and in fact mainly - subject to the banking control regulations.

4. FINANCIAL OBLIGATIONS OF SECURITIES DEALERS

82. The financial obligations imposed on persons or enterprises - other than banks - allowed to operate on the stock exchange assume four forms : the lodging of a deposit, or the provision of a security or guarantee by a local bank; an obligation with regard to their own capital resources; observance of certain liquidity ratios; and additional insurance for certain risks. France has a guarantee system of its own, based on the solidarity of all offices.
83. The guarantee technique is undoubtedly the oldest and is employed in France (FF 2500), Belgium (Bfrs 150 000) and Denmark (DKr 100 000)¹. In the Federal Republic of Germany the guarantee has been updated. In accordance with the local stock exchange regulations, the guarantee can be set at DM 50 000 or DM 200 000, depending on whether the member is acting solely as broker or also for his own account. In most of these cases the guarantee can be provided by way of a bank guarantee commitment.

¹This guarantee is limited to commitments towards other members of the stock exchange.

The guarantee does not only have to be in force at the time of admission but also has to remain effective throughout the whole period of membership. Further control measures, for instance with regard to the adequacy of the guarantee, are not found.

In France and Italy the corporation has established an internal guarantee fund to serve as security for the commitments of the members of the corporation. It is financed by contributions from the members, and is resorted to when a member finds himself in financial difficulties. In Belgium the law has formulated a similar arrangement, but this has not yet come into effect.

84. The imposition of minimum capital requirements constitutes a more modern approach: here candidates for stock exchange membership are required to make a minimum investment in their business; sometimes these funds have to be employed in the way specified by the exchange. Thus, Luxembourg brokers are required to have a capital of Lfrs 10 million; supervision is exercised through the balance sheet. In the Netherlands an initial check must show that there is a capital of at least Fl 50 000, increased to Fl 100 000 for partnerships and corporate bodies. A continuous check is kept on observance of this requirement. In Denmark a capital of Dkr 250 000 must be shown, although a guarantee declaration for the same amount can be accepted as satisfactory. Supervision exists. The same applies on the German stock exchanges: the capital resources are here put by the stock exchange rules at twice the guarantee obligation (i.e. DM 100 000 or DM 400 000 respectively for the pure broker and for the broker acting on his own account), with the requirement that these funds be invested only in liquid assets. The British stock exchange regulations only contain an investment requirement for the directors of firms, organized as limited liability companies; other firms are primarily subject to the minimum liquidity margin requirement. No capital requirements have been imposed in France, Italy and Belgium.
85. A further approach is based on the observance of a compulsory liquidity ratio, coupled with supervision by the corporative control bodies. In France, the corporation imposes a liquidity ratio of 100%, on the basis

of which all funds of third parties must be covered by easily realisable assets. The British approach is different: a comparison of certain assets and liabilities must show a minimum net balance, which is set at £10 000 per member of the firm (max. £200 000). This coefficient takes the middle road between solvency and liquidity requirements. In the Netherlands a similar result is sought by requiring the deposit of all moneys and securities with a third party, a recognised credit institution, thus reducing the corresponding risk for the firm; compliance with this requirement is still optional.

86. In some countries it is customary to cover certain risks inherent in the securities business - such as those in respect of loss, theft, forgery of securities or currency - by insurance. No obligation to do this was found. Only the British regulations provide for a reduction in the liquidity requirement for the risks covered by this insurance. A particular system applies in Denmark.
87. Special mention should be made of the French approach, which consists of regarding all firms of brokers, together with the corporation's own resources, as jointly and severally liable for the professional liabilities of each one of them. The considerable risks which the members run as a result of this system are governed by an extensive control system, managed by the corporation.
88. Participation by banking institutions in securities business rarely leads to additional financial or other obligations: in countries with mixed stock exchanges the stock exchange regulations refer to the capital or other financial requirements resulting from the banking legislation. In Belgium mention should be made of the obligation to constitute a security of Bfrs 300 000 by the pledging of securities, this obligation applying to all banks which wish to accept security orders. In the United Kingdom the banks will be authorized, usually as "exempted dealers", to deal in securities: this does not give rise to any financial obligations. In Luxembourg, bank managers permitted to deal on the stock exchange are required to lodge a guarantee of Lfrs 250 000.

5. CONTROL ON SECURITIES DEALERS

89. The extent of the control over the offices and activities of dealers usually depends on the extent of their financial obligations. Two stages can be distinguished: if the stock exchange regulations contain no financial obligations, or only static ones, then the control is as a rule confined to a right of control whereby an administrative or corporative body is empowered to keep check on compliance with legal, regulatory or ethical rules, a right which includes the power to question the dealer, inspect his books and examine his stock exchange records. This control is intermittent and not obligatory. It is carried out mainly in cases of complaints or after default. The right of control of this type is to be found in all Member States. The authorized control body is the corporative authority in countries tending more towards self-regulation (Netherlands, United Kingdom, Luxembourg, Belgium) or a public agency which may be empowered to investigate together with a corporative body (Federal Republic of Germany, Italy, France). In Denmark action is taken only by the public inspector.
90. Permanent supervision, as a second type of control, is found in all Member States, except in Belgium and in Italy. It is usually exercised by the corporative bodies. Luxembourg presents an intermediate case: Luxembourg brokers, who are not registered banks, are subject to exchange supervision, which is however limited to the maintenance of their stated capital.

This form of permanent control is as a rule organized round three more or less extensively developed methods. Firstly the firms are required to draw up their annual accounts in a uniform manner; sometimes this gives rise to the imposition of additional book-keeping rules. Annual accounts, or in some countries also monthly or half-yearly accounts (United Kingdom), must be filed with the supervisory authority.

91. Measures of internal control are made obligatory or recommended in several countries.

In some countries, exchange rules require the appointment of an accountant as the firm's auditor, irrespective of the firm's form of legal organization (United Kingdom, Denmark; recommendation in the Netherlands). In other countries, especially in France, measures of internal management and control are imposed, and supervision is exercised over their implementation.

92. External control is superimposed on this in most Member States. This includes auditing of the accounts and/or supervision of the development of the firm by an accountant appointed by the corporation or by the corporation's own accountancy services. This organizational pattern is to be found in the Netherlands and France; in the United Kingdom the corporation's administrative services act in conjunction with an independent firm of accountants. For understandable reasons of secrecy, the corporative control authorities are organized as independently as possible of the corporation's management and report to them only when measures have to be taken. In Denmark the control is exercised by the public inspector's own services. In these countries, external control is as a routine matter mainly based on the reports or accounts which the firms have to submit to the corporative control office annually, and sometimes also half-yearly or monthly (in the United Kingdom). The control in France is coupled with an at least annual inspection, which also includes a physical check on the security portfolio and gold holdings. In the other countries the reports, especially the annual accounts, serve as an instrument for monitoring the state of individual firms, without an investigation being undertaken as a matter of routine.

6. IMPOSITION OF SANCTIONS

93. Supervision of fulfilment of these obligations and imposition of sanctions is found to be of a corporative disciplinary nature in all countries. The sanction consists of - apart from reprimand, reproach or censure - primarily suspension or striking-off. In most countries (including the Netherlands and the United Kingdom), striking-off puts an end to the right to deal in securities, except in the form of an advisory activity. In France, Italy and Denmark the appointing minister is empowered to impose these more severe sanctions. In practice the corporation plays a supplementary part in these countries, too.

Other sanctions or means of coercion are rarely encountered. In France it is possible, in addition to disciplinary penalties, to require

payment of a fine of a penal or compensatory nature. In Germany mention should be made of the broker operating for his own account, who, if he no longer meets the reinforced capital requirement applicable to this activity is thenceforth allowed to act only as a broker, i.e. only on behalf of others. Trusteeship of firms which have run into difficulties is not organized, but does in fact appear to be resorted to.

In countries with mixed stock exchanges the banks which are allowed to trade on the stock exchange are in principle subject to the disciplinary supervision of the stock exchange authority, and could possibly be struck off. If, on the other hand, the banks are not authorized to trade on the stock exchange, they do not appear to be subject to any special supervision with regard to their securities business.

One seldom hears any mention of the number of cases when sanctions have been imposed. It would appear that there are not very many.

7. THE ANCILLARY PROFESSIONS

94. In most countries security orders are collected or prepared by persons who do not enjoy the status of recognized securities dealers. They are referred to as "remisiers" or "courtiers" (half-commission men or intermediate brokers) when, as commission agents or brokers, they transmit orders for stock exchange transactions to exchange brokers. All sorts of portfolio managers and investment consultants frequently exert a decisive influence on stock exchange orders. In the countries where their activity is not forbidden they are usually outside the scope of any legal or regulatory provisions. In the past abuses have developed from the activities of these ancillary participants in securities business.

The present approach as regards regulations differs fairly considerably. In France the passing-on of stock exchange orders, as well as portfolio management, is subject to some measures of investor protection. In the United Kingdom, some investment consultants and intermediate brokers could come within the scope of the Prevention of Fraud (Investments) Act: they then have to apply for registration in one of the lists of authorized security dealers. There are many exceptions to this rule.

It was recently proposed that suitable rules be drawn up for investment consultants¹. In Belgium and the Netherlands only securities brokerage is reserved to the recognized securities business: investment advisory services or portfolio management are offered absolutely freely, in spite of an ambiguous Belgian legal provision². In Luxembourg the question is solved by the application of the Order controlling the opening of new businesses, while in Germany problems have arisen both with portfolio managers or consultants and with sellers of securities from their own portfolios. In Italy there is complete freedom.

¹See § 6, Amendments to the Prevention of Fraud (Investments) Act 1958, a consultative document, July 1977, HMSO, Cmnd 6893.

²Art. 2, Royal Decree of 12 November 1969.

3. INTERVENTIONS WITH REGARD TO THE SECURITIES

95. Under this heading are grouped the rules which, on the one hand, govern the admission of securities to stock exchange quotation and, on the other hand, indicate the obligations resting on issuers whose securities, mostly shares, are accepted for stock exchange trading. The field of investigation is confined to securities, issued by private bodies: in all countries, except the United Kingdom, securities issued by the State, and as a rule also securities guaranteed by the central government, are admitted ipso jure to stock exchange trading without specific conditions having to be fulfilled or any decision being required for this purpose. Nor are they bound by permanent stock exchange regulations. Other securities, on the other hand, are admitted only if an appropriate application is submitted to the competent authority in accordance with the general terms of admission.

1. THE BODIES ENTRUSTED WITH THESE INTERVENTIONS

96. An important policy measure with regard to the securities and stock exchange system consists of the conferring of management or regulatory powers on a certain body or agency. In the present field, the bodies listed below intervene:

- Belgium: Noteringscomité - Comité de la Cote - (quotation committee)
- Denmark: stock exchange management
- Federal Republic of Germany: Zulassungsstelle (Admission Office)
- France: Commission des Opérations de Bourse (COB)
- Ireland: see United Kingdom
- Italy: Commissione nazionale per le società e la borsa (CONSOB)
- Luxembourg: stock exchange management, by delegation: the stock exchange commission.
- Netherlands: stock exchange management, through its "bureau"
- United Kingdom: stock exchange management (the Council of the Stock Exchange), through its Quotations Committee.

97. The power of deciding which securities may or may not, or must or must not, be admitted to stock exchange trading, was formerly usually exercised by the corporative body. The principle of the self-management of stock exchanges meant that other interests, including primarily that of the issuers concerned, or the general interest, were not taken into account in decision-making. This arrangement still applies undiminished in the United Kingdom, and in practice also in the Netherlands and, less clearly, in Luxembourg. One sees that in these countries too, however, an effort is made to ensure that admission decisions are based on a neutral and objective analysis of the securities. In practice this trend means that wide decision and investigation powers are entrusted to a body, independent from the corporation's management, such as: an internal admission committee, or even the exchange's own administrative staff. In the United Kingdom, admission decisions are taken by the Quotations Committee, while in Luxembourg, securities are admitted by the Commission of the Stock Exchange, a deputy body for the management. In the Netherlands, the Bureau of the Vereniging, i.e. the permanent administrative staff of the Association, exercise large powers of decision with regard to applications for admission. Structurally in all these cases only corporative interests are involved, but in practice an effort is made to separate this subject-matter from general stock exchange management.

Another step in the development is to be found in Belgium and the Federal Republic of Germany. The decision is dissociated from the corporative interests, and the issuers (as for the German Admission Offices) or other interests (as is permitted by Belgian legislation) can also make their voice heard together with that of the representatives of the corporation.

A third form of this trend of making the admission decision more objective consists in taking away this matter from corporative interests and entrusting it to a public agency: in France the COB, in Italy CONSOB, in Denmark the managing committee of the stock exchange, here analysed as a government body. The admission decision no longer meets the often quite legitimate desires of the securities dealers nor the more company-oriented interests of the issuers, but becomes a definite instrument of government policy whereby an issuer and its securities change status and develop into mainstays of market confidence. In Denmark the law expressly states that admission is granted if the managing committee is of the opinion that this is in the general interest. The French COB has also exercised its powers in this spirit, and has made explicit statements to this effect.

The Italian CONSOB is entitled to use its powers in the same way.

A striking feature is the emphasis laid in these countries on the -in practice unusable - instrument of compulsory quotation, euphemistically referred to as "the officially sponsored quotation", which is unknown to the British and Netherlands authorities: how should a private association be able to change the status of the company in such a radical way¹?

98. These structural differences in the stock exchange organization do not prevent their governing bodies from being able to pursue similar objectives. Indications of this are found both in the general admission conditions and in the practice rules, which have resulted from their implementation. In all countries one finds that the admission decision is taken in the light of two questions. Firstly: are there sufficient securities to maintain the depth of the market, and thus to promote proper price formation? Secondly: will proper operation of the market not be disturbed by abnormal events, conditions or decisions departing from usual company practice? While the first question relates more to technical market conditions, the second has to do with the structure and behaviour of the issuer itself. Under this last mentioned heading one can group interventions relating to information and disclosure (continuous information - special events disclosure), the imposition of a certain, more refined good faith in company life (protection of minority shareholders; preemptive rights; control on articles of association and on all amendments thereto, etc.), and more recently, the adoption of codes of conduct, especially in the fields of mergers and take-overs. From these sometimes scattered interventions is gradually emerging a new type of company, i.e. the open company with shares quoted on the stock exchange, the official market. As in several Member States, the same rules apply to these companies as to the closed, or private companies, or as to the non-quoted companies, it seems more precise to speak of the "stock exchange status" governing these open companies. It should be borne in mind that these companies, and their directors, are bound to a higher, reinforced and more refined duty of good faith and have to be concerned, not only about events directly relating to the company, but also about its repercussion on the market and, in general, about trade in the company's shares. In consequence, companies are considered to be bound, not only as far as their own shares are concerned, but also with regard to the market in general,

¹Compulsory quotation could be used for just this reason in Luxembourg before the entry into force of the prospectus obligation in 1965; it had no consequences for the issuer.

to refrain from any market disturbing or disturbing conduct, but to the contrary, to endeavour to stimulate general market confidence. What this stock exchange status, and the corresponding rules imply, will be discussed later¹. The stock exchange authorities administer this body of rules: in this respect no distinction has to be made between systems strongly inspired by principles of public law (mainly France and Italy) and Member States where private organizations dominate the stock exchange. The last-mentioned systems (Netherlands, United Kingdom), too, conscious of the general importance of confidence in the stock exchange market, have developed, and vigorously imposed, forms which are just as far-reaching if not more radical than those which have been developed in the afore-mentioned systems with a primarily public-law structure. In the countries which occupy an intermediate position (Belgium, Luxembourg, Germany, Denmark) this aspect of stock exchange policy receives less emphasis, or only a very subsidiary degree of attention.

2. THE INTERVENTIONS

99. The interventions with regard to the securities admitted to stock exchange quotation can usefully be subdivided according to whether they take place at the time of the admission or are imposed as a permanent system on companies which have securities on the stock exchange. The first-mentioned interventions are to be found in all Member States: they form the subject of the admission decision itself, which means that supervision of their observance is established, and that sanctioning will usually consist of a refusal of the admission.

2.1 Admission to stock exchange quotation

2.1.1. Conditions of admission

100. In each of the Member States we find generally formulated admission conditions. The degree of flexibility in their application differs considerably. In the German view the conditions must be precisely formulated and admission, once the conditions have been complied with, is an enforceable right. In the British approach, strict general conditions

¹ See Section 105.

are imposed: in the absence of relaxations in their application, the requirements recently had to be reduced in order to avoid impeding too greatly the accession of new companies. In Belgium, Luxembourg and to a certain extent also Denmark, the pre-fixed admission conditions are kept to a minimum and are supplemented by the discretionary appreciation of the admission bureau. The same wide freedom of discretion is to be found in France, and in Italy, where CONSOB has not yet issued any rules in this field. In France, the COB has additionally issued a few directives on the subject, but it would appear that the COB has retained its wide discretion in their application, and would not be prevented from departing from the rules it set itself. Only in a few countries are the admission requirements expressly based on considerations of protection of the market and of its regular functioning. As far as bonds are concerned - including Euro-bonds - admission to stock exchange trading does not always seem to be a guarantee that stock exchange markets and prices will be representative.

Admission requirements can be divided into three categories. The aim of the first is to ensure orderly dealings. For this purpose, supervision is exercised over the form and presentation of the securities as documents of title, the validity of the issue of the securities is checked (primarily in France, because of the severe sanctions imposed), trading in the securities on the stock exchange before the end of the issue period is forbidden, and trading in shares which are not fully paid-up, or are subject to transfer restrictions, is limited. A second set of rules is aimed at admitting only those securities in which the depth of the market can be safeguarded. The third condition relates to disclosure of information.

101. In nearly all the Member States (Italy is the exception) a company wishing the exchange trading privilege must provide and disclose extensive, checked documentation concerning itself, its management, its

activities, accounts, etc. In several countries this disclosure duty would overlap with the one on issue of the securities, so that only the chronologically earliest form is made compulsory (France, Belgium, Luxembourg); In other countries this is the only type of financial disclosure: in practice however, it is already imposed on the issue of the securities itself (United Kingdom, Netherlands, Denmark) or exchange authorities strongly recommend the release of this information previously to the issue (Federal Republic of Germany). The information to be published on admission to stock exchange quotation performs a wider function than the issue disclosure, which is mainly designed to protect the contracting parties. Here it provides the stock exchange authority with an instrument for examining the issuer as a whole, this examination being based, at least in France, on a special audit which is described as much more penetrating as the one required on issuance of the securities. In Belgium and Luxembourg, where the issue disclosure is separated from the stock exchange disclosure, the stock exchange authorities make little use of this instrument, even for their own analysis, and rely on the data presented in the issue prospectus. The admission decision always entails a qualitative assessment of the suitability of the securities for stock exchange trading; in some countries this assessment can be more correctly described as a negative test than as a quality label¹. Unlike the issue prospectus, which in most countries is distributed in the form of a brochure and is supplied to subscribers or buyers (Belgium, France, Luxembourg, but also the Netherlands), the stock exchange prospectus is published in Germany and the United Kingdom in one or more newspapers, and sent to the known shareholders, if any. This difference in the method of publicity is symptomatic of the purpose for which this disclosure was made compulsory. In a nutshell, one could say that investor protection inspires more the former type of disclosure, where exchange admission disclosure is more oriented towards stating the suitability of the securities for exchange trading.

¹See, inter alia, Section 32 above.

2.1.2. The admission procedure

102. The admission procedure is initiated, in practically all Member States, by a locally recognized security dealer. In the United Kingdom and the Netherlands this must be a member of the association. Even after the securities have been admitted, he will act as a permanent contact between the stock exchange authorities and the issuer. The usefulness of this institution has often been emphasized, as an efficient method of keeping watch on the obligations of companies towards the market. In Germany and Luxembourg the application must be presented by banks authorized to deal on the stock exchange. They serve as the contact for the processing of the application, but do not appear to act as a permanent link. The investigation procedure is very similar to that followed in other countries on the issue of securities. The procedure is carried out mainly in writing, supplemented by talks with the afore-mentioned financial intermediary, and sometimes with the management of the company itself. In France a special audit of the accounts is required, supplemented by direct contacts between the control authority and the issuer or its advisers.
103. Only in the Federal Republic of Germany can an application for admission which fulfils the legal conditions not be refused¹. In the event of refusal, reasons must be given. In the other countries the decision is discretionary and a refusal - at least according to present rules - does not need to be justified by explicit reasons. Everywhere, it is true, a right of appeal against a refusal decision is organized. This appeal is governed by general administrative law in France and Italy (Appeal to the Council of State), while in Belgium an administrative board belonging to the stock exchange structure is entitled to review the decision in all its aspects.

¹As the admission conditions have not yet been laid down by the control authority in Italy, any comparison here would be premature.

No formal right of appeal (other than in respect of negligence) exists in the United Kingdom and in the Netherlands against decisions of refusal by the stock exchange authorities. Decisions to refuse an application are extremely rare: the issuers are as a rule persuaded to abstain from pursuing their application. Case law in connection with refusals of admission is almost non-existent.

2.1.3. Suspension or striking-off

104. Together with the power of admission we can also discuss the power of suspension or striking-off. The authority which grants the admission is as a rule also empowered to supervise compliance with the permanent requirements for maintenance of the quotation privilege. It can suspend a security or strike it off from the exchange list (delisting). In Germany, however, it is not the admission office (Zulassungsstelle) but the managing board of the exchange (Börsenvorstand) that is entitled to delist a security. In France only the Chambre Syndicale, as the managing body of the stock exchange, can suspend trading; striking-off or transfer to another stock exchange is decided upon by the COB.

The power of suspension is usually conferred in very wide terms, such as, for instance, the taking of measures necessary in order to protect the public (Germany) or found necessary to safeguard the general interest (Belgium). The right of suspension is often used as a preparatory measure for delisting, or in order to avoid excessively unbalanced price formation, for instance if the issuer or his sector of business is affected by extraordinary events. Temporary suspension of quotation, or of publication of quotations, can also be used as a sanction in conjunction with public censure.

The striking-off of a security is not only the result of natural circumstances which put an end to the life of the security (merger, redemption of bonds, etc.). Delisting is used in France as an instrument for revising and improving the stock exchange list: the threat of delisting,

together with persuasion and inducement often appeared to be sufficient to convince the issuer properly to fulfil the obligations resulting from the stock exchange rules. The usefulness of delisting as a sanction is limited, as it affects the market more than the issuer. There are few applications in countries other than France.

2.2. Obligations imposed on companies whose securities are admitted to stock exchange quotation

2.2.1. Development towards "stock exchange status"

105. It is found that, according to the laws, regulations or customs of each of the Member States, admission to stock exchange quotation of company securities is an important turning point in the life of the issuing company. In some countries (i.a. Belgium, and partly in France) recourse to the savings of the public at large is also regarded as such a turning point, but most frequently it is admission to stock exchange quotation that is the key event (France, Italy; naturally also in the United Kingdom, the Netherlands and the Federal Republic of Germany). By obtaining this admission the issuer undertakes to comply with the whole body of rules and obligations grouped together for our present purpose under the collective name of "stock exchange status". Prior to its admission to stock exchange trading the issuer could as a rule lead a closed existence, with limited public accountability, this being usually clearly confined to a group of more or less known shareholders. After admission of its securities to stock exchange quotation, on the other hand, the issuer must conduct its business publicly and is bound to comply with extensive disclosure requirements. The purpose of this compulsory disclosure is to prevent alienation from its shareholder public. It also expresses the greater corporate responsibility of these as a rule larger undertakings, not only in relation to the financial markets but often also in relation to the community as a whole.

In addition to disclosure, there appears to have developed a tendency these last years to impose upon the issuers rules of behaviour for their corporate conduct: there are codes of conduct, especially in the take-over field, the guidelines against abuse of inside information, or the European Code of Conduct, as the overall European standard. Although also serving as the point of reference for determining the field of application of these provisions, the extension of the negotiability of these securities points towards the underlying motives for this set of rules. As a consequence of their stock exchange quotation these securities become available for public confidence, the element supporting the whole securities business. The proper operation of this system is incompatible with forms of behaviour which, initially touching upon one security only, but later with repercussions throughout the entire securities business, would be liable to impair this confidence. This is why we can group under the overall heading of the "stock exchange status" of a company and its securities, a complex of standards or of actually accepted lines of conduct designed to establish, to promote and to maintain this confidence.

2.2.2. Elements of the "stock exchange status"

106. The rules which are thus laid down can be grouped in three categories. The purpose of the lowest is to ensure compliance with the legal claims of the security-holders: organization of a financial service in the town where the stock exchange is situated, compulsory replacement of damaged securities, indication of a person responsible for registration of transfers, etc. These minimum obligations are to be found in all Member States. They do not call for any further comment, except that their enforcement sometimes creates problems.
107. The second level, which also historically developed after the first, comprises a set of information, reporting and disclosure rules which either are imposed only on companies admitted to exchange trading of their securities, or apply to them with more strictness and detail. The annual information, with the associated obligatory audit by an announcement, is a requirement which applies in nearly all Member States¹. Several Member States (France, the Netherlands, the United Kingdom) also require the release

¹Only in Luxembourg does this audit not have to be carried out by professional accountants.

of half-yearly or quarterly information, although this disclosure is not subject to the auditing requirement¹. It is clear that these information and disclosure rules perform varying functions, one of which is their role in the internal life of the company (voting procedure, rendering of accounts to shareholders). As far as stock exchange matters are concerned, their function is essentially to contribute to the transparency of the markets.

108. Several countries have refined these information obligations and have supplemented them by other requirements directly oriented to the correct functioning of the exchange system. The term "occasional information" is used to denote disclosures to be made about recurrent or special price-influencing events within the company, and which would not otherwise be reflected in the above-mentioned continuous information. The imposition of the last-mentioned duty to disclose assumes that the management of these companies have a responsibility towards the exchange market in this respect. Recommendations to abide by this "duty" to publish occasional information have been based by the exchange authorities on the need to promote public confidence in the proper functioning of the exchange as a securities market and to prevent prices from fluctuating erratically in view of the true state of the affairs of the company owing to incomplete information. Confidence in the exchange markets is strengthened in several countries by the imposition of rules which may or may not be legally enforceable concerning the behaviour of directors of companies, of controlling shareholders and of third parties. In the United States there are several rules imposing legal sanctions against manipulation of the market: "rule 10b-5" has become notorious in this connection, while some recent anti-bribery measures can also be attributed to the desire to maintain confidence in the company's directors. In the countries of the EEC developments in this field are still in a state of flux, and the approach is less legalized. Thus one Member State has introduced legislation concerning abuse of inside information (France), and plans are being studied in several other countries (viz. Belgium,

¹ For a summary, see Section 110 below.

United Kingdom), while the same problems are being approached in some countries by means of a code of behaviour (United Kingdom, Germany, Netherlands), which does not prevent the simultaneous development of formal legislation (United Kingdom). There is a similar trend with regard to take-over bids, which had originally aroused great indignation, being regarded as raids on another company. Until now, solutions in this field are not of a legally formalized nature, the process of crystallisation of the rules concerning behaviour which was previously often regarded as improper still being in full evolution. Hence the appearance of all kinds of codes of conduct; such as the City Code on Take-overs and Mergers, the Netherlands mergers code and the informal guidelines of the Belgian Banking Commission. The French approach is more legally formalized, but, side by side with the regulations, considerable scope for discretion is left to the control bodies. In Italy too, generally framed powers have been entrusted to CONSOB; no cases of implementation are yet known.

Similar in type are the German "Händler- und Beraterregeln" whereby the credit institutions and their staff impose rules of conduct on themselves for the difficult conflict of interests which results from their simultaneous activity as consultants and stock exchange brokers, on the one hand, and security speculators for their own account, on the other. Although this conflict of interest, albeit in different terms, also occurs in the other Member States, suitable regulations regarding it have rarely been formulated. Some legal rules (for instance the prohibition of own-account trading which is imposed on Italian brokers) indicate that the problem has long been recognized.

Less formalized, but representative of the stock market oriented duties of directors of companies, are the recommendation of the French control authority concerning the study of the shareholding public, the organization of a more active dialogue with the shareholders, including a dialogue outside the formal framework of the annual general meeting, and in general the encouragement of all initiatives which help to promote

the interest of the public and its confidence in the company.

2.2.3. Comparative summary of legislation

109. There are still considerable differences among the Member States regarding the content of the rules belonging to this "stock exchange status" and regarding associated forms of control. Several Member States have introduced or recommended extended information obligations. Some of these obligations form the subject of proposals for directives of the European Community¹.

More restraint is shown in imposing supplementary codes of behaviour on companies and their managements. At Community level a recommendation of the European Commission was recently published, while rules are being prepared or planned in specialized fields².

a. Extended disclosure

110. In each Member State companies whose securities are dealt in on an exchange, are bound to publish annual accounts, usually after having submitted these to an external audit. Half-yearly disclosure rules are imposed as a statutory requirement in France and in Italy; they form part of the agreement which companies seeking quotation have to subscribe in the United Kingdom and in the Netherlands, while a widely followed recommendation in the Federal Republic of Germany and a recent recommendation in Belgium also deal with the same subject. Neither Luxembourg nor Denmark have a similar obligation. The proposed admission directive, submitted by the European

¹ - Proposal for a directive and Council recommendation concerning the prospectus to be published when securities are admitted to official stock exchange quotation; ("Prospectus directive") OJ C 131 of 13 December 1972.

- Proposal for a directive coordinating the conditions for the admission of securities to official stock exchange quotation ("Admission directive") OJ C 56 of 10 March 1976.

² Recommendation of the Commission dated 25 July 1977, OJ L 212 of 20 August 1977; for a first comment see C. Lempereur, Le Code de conduite européen concernant les transactions relatives aux valeurs mobilières, R.D.I.D.C., 1978; by the same author: Des règles européennes de bonne conduite sur les transactions en valeurs mobilières, to be published in "Banque".

Commission to the Council on 12 January 1976, mentions among the obligations of companies whose securities are officially quoted "4, Continuing information - the company must periodically, and half-yearly at least, make available to the public sufficient information to enable the public to evaluate the financial position of the company and the general progress of its business,"¹. A similar rule of conduct was incorporated in the Recommendation for a European Code of Conduct of 25 July 1977².

Only rarely does one come across the obligation to publish certain key data (above all: sales) on a quarterly basis. Only in France is this made obligatory as a statutory provision. In the other countries there can be said to be an actual practice, without any obligation. The recommendation of the European Commission for a code of conduct does not contain any explicit reference to the publication of quarterly data³.

Supervision of strict and timely compliance with these pre-established disclosure requirements is exercised systematically in France by the COB, while one can assume that the Italian CONSOB holds a similar right of control. In both countries the control agency is entitled to check whether the information disclosed is true, complete and not misleading through the use of its special inspection powers, expressly laid down in the statute itself. Enforcement and sanctioning would in both countries be preceded by conciliatory consultation and might result in penal sanctions: applications are known in France. Civil remedies, the existence of which can be accepted in this connection, have not been called upon.

¹ See Annex III, point 4 of the proposed Admission directive.

² Supplementary principle N° 12, Recommended Code of Conduct.

³ But according to supplementary principle N° 12 the half-yearly information requirement is a minimum.

In the United Kingdom and the Netherlands the stock exchange authority keeps a check on compliance with the disclosure rules voluntarily subscribed by the issuers. The action of the stock exchange authorities with respect to investigation or sanctioning is more limited in these countries as these bodies do not dispose of the instruments that belong to public agencies: suspension or delisting, possibly with publication of the reasons, are sanctions which are resorted to only after all possibilities of consultation, mainly via the exchange member who maintains contact with the issuer, have been exhausted.

111. The financial community shows an active interest for occasional information relating to price-sensitive special events. In the United Kingdom and in the Netherlands, disclosure, although varying in content and scope, is imposed in the listing agreement; in Denmark, disclosure is made compulsory by statute but is limited to dividend announcements or to other decisions of major importance. In France the control agency has published fairly detailed guidelines concerning occasional information, but there appears to be no legally enforceable disclosure requirement. In Belgium there is a vague general recommendation. Neither Luxembourg nor the German or Italian stock exchanges provide any guidelines on the subject. Both the above-mentioned proposed Admission directive and the Recommendation concerning a European Code of Conduct which the Commission of the European Community submitted to the Member States contain general provisions on this subject¹.

b. Rules of Behaviour

112. In several Member States it appears that companies with securities on the stock exchange, their directors and even their staff members are obliged to comply with additional rules of behaviour, especially with regard to their attitude to and behaviour on the exchange market. Some of these rules cover a wider range of people. This is the case with the general prohibition against any price manipulation through fraudulent or dishonest means, rule which is criminally sanctioned in most countries.

¹Annex III point 5 "Additional information" of the proposed Admission directive. See supplementary principles 12 and 13 of the European Code of Conduct.

The same can be said about the prohibition of insider trading. For a further analysis of these topics, the reader is referred to the comparative law analysis of stock exchange transactions¹.

113. In several countries rules governing "take-over bids" have come into being in order to police these sometimes wild and always market-disturbing actions along acceptable lines. As a rule, these regulations are mainly directed towards companies. They deal with the procedures to be followed, and with information to be disclosed. In some countries, much emphasis is laid on exact and honest price setting, or whether all market participants, both those canvassed and the others, will be placed on an equal footing. There is a widespread tendency for keeping these rules extremely flexible. They are not laid down in advance: some major principles are announced which will subsequently be elaborated from case to case by the bodies entrusted with special jurisdictional powers. A striking point in these rules is the absence of any assessment of the take-over as a change in the industrial or commercial structure.
114. In Belgium, France, the Netherlands and the United Kingdom, the respective control authorities endeavour to avoid a situation whereby certain decisions of the company upset the equality of all holders of securities of the same class. In these countries, and although by different means, preemptive rights on issue of new shares have to be respected. A parallel can be drawn with regard to the sale of controlling shares, although here the differences are considerably greater. This concern of the control authorities for equality can also be observed with regard to other, more nationally conditioned matters (for instance, in Belgium, the rules concerning

¹ See Sections 123 et seq. below.

the unification of shares, or concerning valuation in the case of mergers).

In France the COB has, on a couple of occasions, indicated, as the basis for its action, the broad duty of fairness to which company directors are held in connection with their attitude towards the market in the company's securities. This standard of conduct has been used as a guideline for defining directors' duties to inform the market about special, price-sensitive events (occasional information).

In France too, one should mention the various initiatives taken by companies under the influence of the control agency, and aimed at strengthening or reviving internal company life, essentially the links between the company and its shareholders. Although the COB uses its information and disclosure policy as its primary tool for achieving this objective, it has on several occasions strongly recommended the adoption of other measures, such as: measures in order to make shareholders' meetings more lively and more interesting; spreading of the period in which major companies hold their annual general meeting; tracing shareholders, etc.

115. At Community level the efforts being made in this connection in some Member States are encouraged and recommended as a general line of behaviour for the whole Community. In the Recommendation concerning a European Code of Conduct relating to transactions in transferable securities we find, among the general principles, the general duty of fairness resting on the directors of companies¹, and also, in the special principles, the prohibition against price manipulation by fraudulent means² and the obligation regarding equal treatment both as regards the information published by the company³ and as regards the treatment of its shareholders⁴. Special mention should be made of the obligation to treat shareholders

¹ General principle N° 4

² Supplementary principle N° 7

³ Supplementary principle N° 15

⁴ Supplementary principle N° 16

fairly with regard to the transfer of controlling shares¹.

c. Forms of regulation and supervision

116. According to the regulatory technique that has been used, the rules of information and of conduct can be classified in several categories. In a given legal order, rules of different categories always coexist.

Several rules are of statutory origin. Others are imposed by the stock exchange authorities, by way of an agreement which the issuers must enter into when applying for admission to the stock exchange. More difficult to define are the rules, very frequent in this field, which the issuers impose upon themselves, either spontaneously or under the pressure of recommendations from professional organizations or from the public authorities.

This multiplicity of rules reflects a process of increasing awareness which is still in full swing. Both issuers and authorities feel that the credibility of private business is bound up to a considerable extent with compliance with requirements regarding information and disclosure bona fide management and proper conduct.

The Western European approach contrasts sharply with the North American way of dealing with the same matters by express legislation, implementing regulation and administrative action. The rules are strictly enforced by official action. The censure of the investing public is particularly active, and very frequently takes the form of legal proceedings.

117. The enactment of rules by law or statute is found in practically all Member States in the field of annual accounts and reports, with their associated auditing. In countries with a legalistic tendency, half-yearly information (France, Denmark) or even quarterly reporting (France) is governed by law. The implementation of the last mentioned provisions appears to have caused, at least in France, considerable difficulties, not only with regard to public circulation of the information, but also to the precise content of these required disclosures. Furthermore, this body of law is part of the company law and is not included in the stock exchange

¹ Supplementary principles N°s 17 and 18.

system, and this detracts from its flexibility and force.

118. The stock exchange system of nearly all Member States makes use of the conventional technique: here the issuer must agree to respect certain rules, as a condition for admission to the exchange. In several countries this technique is used only in order to incorporate obligations already appearing in laws or regulations (e.g. Luxembourg, Belgium, France). Only an extensive investigation of local administrative law can clarify whether it would be possible to extend this technique to further obligations not included in the law.

The stock exchanges organized on the basis of private law (primarily: the Netherlands and United Kingdom) have to rely entirely on this conventional approach, in which they have gathered a great amount of experience. For the less controversial fields, issuers have also agreed to co-operate. In these countries, therefore, a stock exchange code of practice or body of rules has grown up which in many respects is more far-reaching than anything that could have been achieved by legislation. By using this conventional technique stock exchange authorities have not only been able to impose disclosures (e.g. half-yearly and on special events) but also certain rules concerning the issuer's legal organization, or the framing of the issue operation itself. So in London, amendments to the articles of association of the company, and the (many) circulars to shareholders have to be submitted in advance to the approval of the exchange authority. There also happens to be a comparable provision in Italian law: only the company's most important decisions (annual reports, amendments to the Articles of Association, mergers, bond issues) have to be notified to the control authority in advance. The authority does not have the right to approve or reject the decision: it can only call for additional information.

The stock exchange, as a contracting party, exercises supervision over the observance of these conventional rules. Its possibilities of imposing sanctions are confined to stock exchange business: suspension of quotation, suspension of trading, removal of the security from stock exchange trading. In addition use can be made - with caution¹ - of public censure, or securities subsequently issued can be refused. These sanctions are rarely resorted to: the stock exchange authorities prefer to employ the sanctions as a way of exerting pressure within the framework of their suasion and recommendation approach.

119. A comparable conventional basis can be indicated for the many codes of behaviour which in the last few years, both in financial and other fields, have come into being in several countries and also internationally. Financial codes of conduct are subscribed to not only by the securities business, or by the issuers, but also by all undertakings or institutions which have an interest in the efficient, orderly and undisturbed operation of the stock exchange markets². The rules contained in these codes are usually - still - not amenable to legal or conventional juridical formulation: either there is still too much controversy about them in the business community concerned or the principles of the rules are accepted but their applications and contours are still too unclear. Consequently they are formulated in general and very vague terms and supplemented by more detailed "rules of practice", precedents, etc. In the take-over codes much emphasis is laid on procedure. The imposition of sanctions is entrusted to a professional body appointed for this purpose. The authority and powers of this body are difficult to compare: thus the authority of the

¹ It is accepted that the statutes on libel and slander would limit the freedom of action of the stock exchange authorities. This point has not been investigated in countries with public control bodies.

² Thus the City Code on Take-overs and Mergers is subscribed to and sanctioned by practically the whole London financial community; the same applies to the German recommendations on insider trading, and partly to the Netherlands merger code, in view of the composition of the Socio-Economic Council (Sociaal-Economische Raad).

German "Prüfungskommission" with regard to insider trading is confined to the mere factual establishment of an infringement. The British Take-over Panel, on the other hand, systematically tracks down violations of the Take-over Code, actively participates in the investigation and processing of the cases and can itself even impose limited sanctions - in fact primarily public censure . Further sanctioning is entrusted to the professional organizations or companies which have subscribed to the principles of the code and related jurisdiction of the Panel¹.

120. In countries where public agencies are more intensively involved in policing the securities business, less recourse is had to codes of conduct, but the same or similar subjects are dealt with in the recommendations of these agencies. Good examples of this alternative approach are found in Belgium (policing of take-over bids by means of recommendations and directives of the Banking Commission, condemnation of insider trading) and also in Luxembourg (recommendations, and subsequently legislation, concerning investments funds), in France (policy concerning the annual report - "plaquette" - or with regard to occasional information, etc.) and in the Federal Republic of Germany (recommendation for half-yearly disclosures, issued by the industrial and trade associations). Although stock exchange authorities also make use of the recommendation as policing-technique, it would seem that the public agencies involved in this field more systematically and more intensively prefer this instrument for implementing their policy.

A factor which has been little investigated and is difficult to pin down is the self-discipline of issuers, who, without any obligation but possibly under external pressure from, for instance, the stock exchange or public bodies, have developed a certain standard of behaviour for themselves and

¹ According to recent reports, there are now plans in London too for imposing rules in connection with insider trading by having them accepted by the employees of the companies involved; this approach has been followed in Germany.

consistently and deliberately comply with it. Examples can undoubtedly be found in all sectors: we may mention here the spontaneous publication of consolidated financial statements, the release of interim or occasional information which in many countries is not obligatory, and even the the introduction of rules internally in a company regarding trading in the company's own shares by its employees.

121. The sanctioning of last-mentioned voluntarily observed rules is generally limited.

In France - but presumably not in Italy¹ - the public agency can investigate whether the voluntarily published information is accurate and true. If this is found not to be the case, then the same sanctions can apply as for false or misleading compulsory disclosures. But the public agency is not entitled to enforce the duty to disclose itself. It can only proceed by recommendation or persuasion. No distinction must be made between information published spontaneously and information published in compliance with a recommendation. The government body's recommendations do not carry any legal sanctions. It can only show its authority, its disapproval, and sometimes publish the name of defaulting issuers. Sanctions at common, civil or criminal law, although probably applicable, are very uncommon.

If rules of behaviour are imposed by professional associations, their violation could be sanctioned according to the rules of the association. No applications are known.

¹ Cf. Art. 3(c), end, Law N° 216 of 7 June 1974.

4. THE TRANSACTIONS CARRIED OUT ON THE STOCK EXCHANGE

I. SECURITY TRADING ON THE STOCK EXCHANGE

122. The oldest form of intervention, widespread in all Member States, has as its object the organization of trading in securities on the floor of the stock exchange itself. Considerations of "transparency", safety and flexibility require that trading on the exchange takes place in accordance with the most uniform possible conditions, so that the price reflects as perfectly as possible the state of the market, or of supply and demand on the stock exchange. The legal conditions regarding the execution of orders on the stock exchange, the rules of execution, price formation, the changing of prices and permitted price fluctuations, as well as subsequent settlement procedures of executed orders, form the very core of stock exchange regulation. Careful supervision of compliance with these rules by the stock exchange authority constitutes the necessary complement in each Member State.
123. The power to issue rules governing the trade on the floor of the exchange belongs, nearly in all Member States, to the professional or corporative interests. In several Member States, however, statutes have been enacted dealing with certain specific transactions: so, forward transactions have been declared legal in France and in Belgium, if certain conditions for their execution have been met, essentially as to the necessity to constitute a cover. Composition, percentages or interest rates of this cover are fixed by administrative order, which can be considered to be an instrument of financial policy. The core of the intervention lies as a rule not with the legislator but with the stock exchange management, which lays down the conditions for stock exchange trading in a sovereign manner (United Kingdom, Netherlands, Denmark), or can exercise this power subject to administrative supervision (Belgium, France, Luxembourg). The German arrangement is more complex: most of these rules are issued by the stock exchange management in its basic ordinance, which is subject to the approval by the political authority of the Federal State ("Land"). This ordinance authorizes the exchange management to enact incidental rules or "customs" ("usancen") relating to stock exchange transactions. Additionally the Federal Minister can prescribe uniform rules regarding the method of quotation. The Italian legislation, on the other hand, contains a much stronger element of State involvement in this field: both the recording of the legal conditions governing transactions and the fixing of quotation rules lie within the

authority of CONSOB and must be rendered executable by ministerial decree.

124. In all Member States much importance is attached to strict compliance with the above-mentioned rules and supervision of such compliance has been established. As a rule this supervision is corporative in nature. It forms part of the general function of the stock exchange management entrusted to the corporative bodies. This is not only the case in the Netherlands or in the United Kingdom but also in Member States with active state intervention in stock exchange matters, such as France and Italy and also in Belgium and Luxembourg. The supervision is exercised by a member of the stock exchange management board, who has to be present on the floor when prices are fixed, or sometimes contributes to it himself; disputes among brokers are settled by him on the spot. As a representative of the stock exchange, he is answerable to the management. Unsettled disputes between market participants can be referred by him to the management of the exchange, or, more commonly, to a specialized section of it. The German stock exchange system clearly displays considerable differences here, as price determination is entrusted to a ministerial officer (the "Kursmakler"), who does not belong to the group of securities dealers. Supervision is exercised by a separate corporation of which these ministerial officers form part. These differences are more legal than material in nature, so that with regard to supervision over price determination, a far-reaching convergence in the national approaches, in favour of corporative control, can be found.

125. In some Member States this permanent supervision by a representative of the stock exchange management is supplemented by additional powers of control on the part of the State or the management. In the case of the German stock exchanges the government commissioners have the right to be present at the establishment of the price, as this is done by the official broker, and thereto he can control compliance with the applicable law or regulations, and compel the official brokers to produce their order books and other records. Similar rules are in force in Luxembourg and in Italy. Additional supervision is sometimes organized by the stock exchange management: this is the case in Belgium, where a Quotations Committee, composed of members of the Stock Exchange Commission, has the task, among other things, of monitoring compliance with the rules concerning price determination. The

management of the German stock exchanges is, by virtue of the decree on the official brokers, entitled to exercise powers of supervision, together with the government commissioner, the Official Brokers' Chamber and the Land authorities. In the Netherlands the stock exchange authority delegates matters concerning quotations to the Quotations Committee and contraventions with regard to quotations to the Quotations Disciplinary Committee. No similar forms of supervision are to be found in the United Kingdom, this being due largely to the method of price formation in use there.

II. REGULATION OF STOCK EXCHANGE ORDERS

126. In several Member States we find, in addition to the rules concerning the execution of the orders on the floor of the exchange itself, a more or less extensive set of rules relating to the giving of orders for securities. We can group here on the one hand the rules which make it obligatory to execute security orders on the stock exchange and on the other hand the rules whereby certain security orders are forbidden both to insiders and to consultants with conflicting interests. By affecting the structure of the trade in securities, these rules have a direct influence on stock exchange trading, on the depth of the market and on the transparency of stock exchange business.

1. Delimitation of the stock exchange market

127. The attitude of the Member States with regard to the obligatory inclusion of all transactions in quoted securities in the official or published price formation differs fairly considerably. The importance of this objective cannot be investigated here: it can be assumed that the stock exchange price is only representative of the value of a security if it reflects not only supply and demand as they exist at a given moment but also the totality of dealings in this security. Settlement outside the exchange, whether or not through offsetting of orders, or on the exchange but without the transaction being included in the price determination, are not compatible with this objective.
128. Italy, Denmark and Luxembourg do not have any obligation requiring security orders to be brought to the exchange floor for execution. The banks

frequently appear as the counterparty for their customers, or endeavour to carry out orders which they have not been able to offset internally with other banks, but without the intervention of the stock exchange. The stock exchange market collects smaller orders, or functions as a residual market for orders that have not been executed otherwise.

129. In Germany a similar situation existed prior to 1968. Since then the banks have undertaken to bring the regular securities business to the exchanges. This undertaking can be qualified as a form of self-discipline, whereby the banks accepted to modify their general contract forms for bank transactions. It is assumed that most orders reach the stock exchange: but this does not yet mean that they are included in the official price determination. On the stock exchange there is a choice between direct execution between banks, with or without the intervention of an unofficial broker, and execution with the co-operation of the official brokers. Only the transactions which take place with the intervention of an official broker are taken into account in the official price determination. No statistical data are available concerning the different forms of execution.

130. In Belgium and France, security dealers have a monopoly. This legal monopoly has been very stringently and closely formulated in France: all security transactions must be carried out through an exchange broker. Execution on the stock exchange is the rule for quoted securities. True, quoted securities can also be directly transferred outside the stock exchange, but for this it is necessary to have the permission of the corporative authority¹, which as a rule is only granted for large blocks, or for transactions on special conditions. All other transactions go to the stock exchange and are included in its official price determination. Apart from transactions under special circumstances, such as transfers of blocks, there are only limited exceptions to the last-mentioned rule: for offsetting on the stock exchange ("application") or for security brokers or banks to

¹ In France; there is no similar rule in force in Belgium: the intervention of an exchange broker or bank and compliance with the formalities laid down by law are sufficient.

act as counterparty ("contrepartie"), in which cases special rules linking these transactions to the official price have to be followed¹.

The Belgian monopoly with regard to trading in securities is much less stringent. In principle all security transactions are subject to the intervention of an exchange broker or banker, but there is no obligation, even for quoted securities, for the transaction to be brought into the stock exchange. Reference to the latest quoted price is obligatory, however. Although all stock exchange orders have to be brought into the stock exchange and offsetting outside the stock exchange is forbidden, security transactions can also be carried out directly with a counterparty, e.g. with a bank acting as principal. For the time being, this way of executing orders applies only to bonds, as Belgian banks - generally speaking - are not allowed to hold shares in other companies. On the stock exchange itself all transactions are in principle included in the price formation, but execution before or after the "call" at a different price is possible.

131. The Netherlands and United Kingdom stock exchanges are entirely governed by private law: they cannot require individuals to bring security orders to its floor. In the Netherlands the trade is predominantly channelled into the stock exchange market as a result of two rules. Firstly, legislation has made the mediation of a member of the stock exchange generally obligatory for all security transactions. Secondly, the stock exchange regulations require members to carry out all transactions on the exchange, apart from a few important exceptions. In the United Kingdom this legal support is lacking: only the rules of the corporation, and the attraction exerted by an efficient stock market, explain why the great majority of transactions in quoted securities are carried out on the stock exchange.
132. The tendency to concentrate security dealings on the stock exchange manifests itself most markedly in countries with a more developed stock exchange system: as the relative importance of the securities business increases,

¹ Règlement général de la Compagnie des Agents de Change, Arts 107 et seq., 162 et seq.

and more radically affects public confidence, forces come into being which encourage, possibly by means of coercion, concentration on the stock exchange. The legal nature of these rules, and especially the distinction between legal or corporative rules, appears to be of little interest here. In several countries the controversy about this subject is still very active: not until 1968 did the German banks agree to carry out the majority of the transactions on the stock exchange, while in the United Kingdom there is growing discussion about the place of parallel markets, which are even being mentioned as an alternative organization model for the London stock exchange market. In the Netherlands it is proposed, by means of an amendment to the regulations governing security dealings, to subject the execution of transactions outside the stock exchange to stricter and individually supervised rules. In Belgium, lastly, there is some uneasiness about the increasing undermining of stock exchange business by the banks.

2. Behaviour of the principals

133. A subsequent step in the organization of the stock exchange markets does not affect the actual conduct of stock exchange dealings but is directed towards the principals. These must not behave in a manner which can be liable to undermine confidence in the market.
134. The first interventions in this field date from the previous century, when massive speculation, mainly in food, regularly caused prices to rocket. This was combated not by any curtailment of the freedom of dealing on the market but merely by prohibiting the use of fraudulent means. The spreading of misleading information for price manipulation was sometimes punished separately. This general interdiction, usually incorporated in the penal code, was also declared to be applicable to the securities markets, but applications in this field have remained very limited.

135. Free competition on the stock exchange market suffered a sharp setback at the end of the 1960s when take-over bids for shares started to be made, as a method of acquiring companies. The resultant conflicts led to a fundamental disruption of stock exchange life and of confidence in the stock exchange. The competent authorities took the quickest possible action to ensure that these transactions would take place, whether on the stock exchange or not, in such circumstances as to safeguard transparency of the market through full disclosure, while the promoters of the bid had to treat all shareholders equally. In the United Kingdom and the Netherlands these matters were settled by self-regulation; a statutory approach was chosen in France, Belgium and Italy. In the Netherlands, and to a limited extent in France and Belgium, the approach is not only a matter of stock exchange technique: the interests of the undertakings affected by the merger or take-over bid are, above all in the Netherlands, assessed from a wide socio-economic point of view.
136. The attitude of the Member States concerning the abuse of inside information differs fairly widely. In the United Kingdom the question is dealt with in the regulations governing take-over bid: the basis lies in the support given by the professional groups of the City, administered by a self-regulating body, without any express powers of investigation or sanction. These professional groups have stated that they are willing to participate in detecting violations of the rules, and to curb contraventions as a matter of internal discipline, possibly by suspension or expulsion of the offending member. There is said to be a wide consensus about giving at least some legal backing to this prohibition.

In the Federal Republic of Germany we find in the Recommendations on Insider Trading ("Insider-Empfehlungen") - and also in the Rules for Dealers and Consultants ("Händler- und Beraterregeln") - an equally self-regulating

approach, which, however, is supported not only by the professional organizations in the financial sector but also by those associations grouping the major German industrial or commercial enterprises. Here again the code of behaviour is applied by a voluntary committee: if a violation has been established, the offending party is referred, for further action, to the professional association, or to his employer. Very serious violations can lead to public censure. Few applications of these rules are known up to the present.

France has enacted legislation on insider trading which is administratively applied by the COB. Cases of application are rather rare here, too, although some court judgments have attracted considerable public attention.

Lastly, mention should be made of the recommendations of the Banking Commission in Belgium, which in some cases has censured insider trading without being legally empowered to impose sanctions. Legislation is said to be in course of preparation in Belgium and, according to some reports, also in Italy.

137. Special mention should also be made of the "Händler- und Beraterregeln" whereby German banks undertake not to place their own interests above those of their customers for whom they are acting on the stock exchange, or whom they are assisting as advisers. Application of these rules runs parallel with that of the "Insider-Empfehlungen"; no cases of application are known up to the present. Although the approach reflected in these rules can be said to be typically German, it should be noted that the conflict of interests in which investment consultants are placed when they also operate for their own account occurs in all countries and is governed only by common law. In Italy brokers are under the obligation to abstain from any security transactions for their own account, but this

does not apply to the banks or other intermediaries. Unlike the negative approach represented by the German attitude, mention should be made of the American rule, known as the "suitability rule", whereby the security dealer may only recommend securities which are suitable for the client and whose suitability he has investigated. Acting with conflicting interests is strongly condemned, and repressed.

PART II: THE PARALLEL SECURITIES MARKETS

All security transactions which are not carried out on the stock exchange can be classified under the overall heading of "parallel" or "unofficial markets". This expression covers a great variety of submarkets, methods of trading, etc.

I. STRUCTURED MARKETS

A first category of "parallel securities markets" is still closely akin to the stock exchange market itself. These are the markets where more or less regular dealings take place mainly in securities not yet admitted to stock exchange quotation. The major points of difference from the official market therefore lie in the admission conditions for the securities and in the techniques of price formation, which is often based on a much smaller volume than on the exchange market itself. For the sake of clarity these markets are summarized below:

- In Belgium: the daily or twice-weekly auctions in unquoted securities held by the stock exchange authority.
- In the Federal Republic of Germany: the "geregelter Freiverkehr" (regulated free market) brought into existence by the local security firms, run as a private organization by a "Freiverkehrsausschuss" (free market committee).
- In France: the "marché hors cote" (off-the-list-market) organized by the Chambre Syndicale and reflected in a "relevé quotidien de valeurs non admises à la cote" (daily list of securities not admitted to a quotation).
- In Italy: the "mercato ristretto" (restricted market) established by the law of 23 February 1977 with its own managing body ("comitato del mercato ristretto").
- In Luxembourg and the Netherlands, auctions can be organized by the stock exchange management. This practice has largely fallen into disuse.

The organizational pattern of these markets is based directly on that of the main exchange market. The intermediaries operating are the same as in the exchange market. In Belgium, France and Italy these are the same brokers, while in the Federal Republic of Germany the official brokers and unofficial brokers are particularly active here as intermediaries between the banks

which bring the orders to the market. Securities can, at least in Belgium and France, be dealt in on this market without following any admission procedure, nor has any decision to be taken. Neither is any disclosure organized, although stock exchange authorities in practice recommend some form of disclosure. In France, foreign securities may only be dealt in on this market if the Minister of Finance has at some time given his permission. This does not apply to Belgium, where in practice few foreign securities are traded outside the stock exchange.

In the other two Member States an admission procedure has to be followed: in the Federal Republic of Germany, this procedure is much simpler than for admission to the exchange itself (less stringent requirements, no prospectus requirement). In Italy the "mercato ristretto" does not appear to have got off the ground yet because the admission requirements are for the moment at least as stringent as for the stock exchange market itself. A check on fulfilment of these requirements is kept in the Federal Republic of Germany by the "Freiverkehrsausschuss", and in Italy by CONSOB. The procedures for security trading are closely modelled on those of the official market: in France and Italy the rules are identical, while in Belgium securities are sold by the "call" procedure; in Germany market-makers operate within bid and ask prices. In each of these countries prices (in Germany in the form of buying and selling rates) are published, often in an annex to the official price list. Actually this section of the market appears in many respects to enjoy the same legal protection as the stock exchange market itself: e.g. rules as to compulsory execution against a defaulting party, use of confirmation slips and their value as instruments of evidence, etc.

The function of this market is usually described as being a preparation for admission to official trading. But several other functions can be distinguished, including the organization of a market without the co-operation or against the will of the issuer, or for securities not suitable for mass trading (for instance, medium-term notes in Belgium, lottery bonds), compulsory sales for the settlement of inheritances, or of trustee property of guardians, etc.

II. PARALLEL MARKETS WITH LITTLE OR NO STRUCTURE

In most Member States there are other more or less structured markets, the significance and extent of which appear difficult to assess.

1. The secondary Eurobond trade

139. The secondary trade in Eurobonds is the natural consequence of the issuing activity in these securities. Initially established mainly to stabilize prices in the post-issue period, this market appears in recent years to have developed and grown considerably. Little precise data is available concerning the secondary Eurobond market: this is the result both of its recent blossoming and of the international and exclusively interbank nature of the market. As this trade does not belong exclusively to any of the national security-dealing systems, some information about it is given below.

The trade relates to Eurobonds. Without attempting to define the term Eurobonds, one can indicate that it refers to bonds issued by public bodies (States, international institutions, public enterprises, provinces, municipalities) or private borrowers, outside their national legal order, and denominated in a currency which is freely chosen but is often an internationally accepted currency or currency formula. As far as their duration is concerned, both long-term securities (bonds, debentures) and medium-term ("notes") or short-term securities (CDs, certificates of deposit) are encountered. These securities are always bearer securities but circulate mainly in the form of book-keeping entries with clearing organizations. Shares are not dealt in on this market: only a few Japanese shares have been floated here in the form of bearer certificates specially designed for this purpose; however, as a further development of this market it is expected that shares will become more frequent, both at issue and in the secondary trade.

The trade in Eurobonds takes place between major banks and specialized banking concerns. The London merchant bankers, the European branches or subsidiaries

of American banks, the major Swiss banks, the larger German, Belgian and Dutch banks and their Luxembourg subsidiaries, together with some stockbroking firms, can be said to constitute the core of the market. But there are no admission conditions or territorial limitations, so that the volume of realised securities business and not the legal status is considered to be the decisive factor for entering this market. Between banks, the trade takes place in the name of the bank and often for the own account: unlike on the stock exchange market, commission business is not preponderant here. As a result of this method of dealing, so-called "market-makers" or "market-holders" have come to the fore: they systematically buy and sell securities for their own account. Usually they are also in close contact with owners of large portfolios of the securities in question. They play a preponderant role on the market, where they are generally regarded as being prepared to act as the counterparty for the usual quantities. As a result of this activity they publish price lists showing bid and ask prices. The normal market price can be set within the limits of these prices. From the strictly legal point of view, these price lists are not binding. Furthermore they do not provide any guarantee that no negotiations will take place outside the indicated range. For instance, price reductions for large orders frequently occur.

This trade cannot be clearly located geographically. It is predominantly conducted by means of telecommunications, a larger or smaller number of individual contacts being made for each transaction. Principals give orders from all over the world. The transactions are as a rule executed through the intermediary of one of the two accepted clearing organizations, Euroclear and Cedel.

140. This trade takes place for the most part outside the ambit of any national regulatory system. The markedly international character and high degree of potential volatility of this business explain the reluctance of national authorities to intervene by imposing regulations. The spontaneous tendency to move towards areas with the least degree of regulation leads to a certain legal vacuum.

Nevertheless, this market has several points of contact with the national regulatory systems. A first very important point is derived from the rule, existing in all Member States (except for Italy), whereby only recognized or registered securities dealers are allowed to trade in securities. As a

rule Eurobonds are not as yet an investment instrument for the general public: obstacles of foreign exchange legislation, unfamiliarity with the medium, etc. have the effect of causing this market to be generally confined to professionals or to more sophisticated investors.

A second point of connection is more technical in nature. Very often prudential financial regulation, or the applicable trust deed, or other similar rules prevent institutional investors from investing in unquoted securities. Therefore quotation on a stock exchange is practically always sought for Eurobonds what makes them suitable for the investment institutions. The Stock Exchanges of Luxembourg, Frankfurt and London appear to have included many of these securities in their quotation lists. In the other European stock exchanges Eurobonds are encountered only sporadically (Amsterdam, Brussels) or not at all (for instance Paris, Milan, Copenhagen). Admission to a stock exchange quotation does not, however, go along with extensive trading on the exchange: although no figures are known, stock exchange dealings in Luxembourg are estimated at ten per cent of the overall turnover in these securities of the Luxembourg banks. Actually only small transactions (so-called odd lots) are carried out here, while the other transactions are arranged direct between the banks. No numerical data are to hand for the other stock exchanges. In London the market operates primarily between merchant banks: as these are not members of the stock exchange association, there is no obligation for these transactions to be carried out on the stock exchange.

Upon admission to exchange quotation, the exchange authorities apply the same rules as for any other bond issue. There appear to be no substantial relaxations of the admission conditions or of the supervision. There is merely less strict supervision about the wide distribution of the securities among investors and of the circulation of the prospectus, which has to be prepared and submitted for examination in any case. The customary prospectus for Eurobond issues largely complies with the American practice and is supplemented by the competent control authority's own requirements.

Apart from what precedes, the Eurobond trade is not regulated. An important effort towards self-regulation is being made by the "Association of International Bond Dealers" (A.I.B.D.) established in Zurich, of which all banks active in this business are members. According to the statutes of this

association its aim is to "provide a basis for joint examination and discussion of questions relating to the international securities markets and to issue rules which will govern their functions" and also "to establish and maintain a close liaison between the primary and secondary markets in international securities"¹. The association has formulated an extensive set of rules and recommendations concerning trading in Eurobonds. These rules govern, among other things, the legal framing of the transactions. From this point of view these rules are comparable to a traditional set of regulations for securities transactions (interpretation of the orders, minimum quantities, non-standard conditions, confirmation notes, payment and delivery, execution, etc.). As far as market management is concerned, the only rule worthy of special mention here, is the rule whereby secondary market transactions are discouraged prior to the signing of the underwriting distribution agreements or on an "if, as and when issued" basis - a rule which is also to be found in American securities regulation².

2. The telephone markets

141. In nearly all Member States, transactions outside the stock exchange, even in quoted securities, are carried out without the brokers having to meet physically on an exchange floor. As these dealings mainly take place by telephone, they can be referred to as "the telephone markets".

a. Telephone dealings in quoted securities

142. In several countries quoted securities are dealt in outside the stock exchange. Only in France is this severely restricted and control exercised by the corporation. In the Netherlands the same basic rule applies, but there are many departures from it: before- and after-hours dealings of brokers are used as means of arbitrage for international Dutch securities. In Belgium the banks appear to deal in quoted bonds from their own portfolios.

¹ Own translation of Art. 2(2) and (3) of the statutes of the A.I.B.D.

² Recommendation in Rule 161 of the A.I.B.D.

The Belgian brokers, on the other hand, are in principle obliged to carry out the transactions on the stock exchange. The last-mentioned principle applies in the United Kingdom, and it is assumed that practically all transactions in quoted securities take place on the stock exchange. An exception is made for large blocks, as their execution in the market would have a disturbing effect. Another exception was already mentioned and relates to Eurobonds. These transactions are effected outside the exchange, by or with the assistance of merchant banks. In the Federal Republic of Germany the current securities business has also to be brought to the exchange: how much business is diverted from the floor is unknown.

In Luxembourg, Denmark and Italy there is no obligation at all to carry out the dealings on the stock exchange. The stock exchange market is merely a subdivision of the overall interbank market.

143. In all Member States, block transactions can be executed outside the exchange, with the assistance of a securities dealer. In France, the corporation has to give its approval for these transactions, while certain conditions apply in the Netherlands and the United Kingdom. In Belgium the law generally allows transfers outside the stock exchange, while in Germany block transactions are considered to be an acceptable departure from general contract conditions which the banks have undertaken to observe. Only in London have special facilities been organized for the execution of these transactions.

b. Telephone dealings in unquoted securities

144. Except in France, where unquoted securities are dealt in through brokers in a structured "hors cote" (outside the stock exchange) market, there appear to be limited organized markets in unquoted securities in only two Member States.

In the Netherlands two stock exchange member firms organize a market in so-called "unlisted securities" ("incourante fondsen"), most of which have a rather thin market. The corporation of securities brokers has granted, in fact, a monopoly to these two member firms, authorizing them - and no other firms - to publish price lists for these securities. On this basis these firms have set up a specialized trade, and offer to investors the

the related services and facilities, such as documentation concerning the issuers, centralization of orders, finding of potential buyers, quotation list, etc. In principle they act as mere intermediaries between buyers and sellers, limiting themselves to bring the parties together.

In the United Kingdom there has been a similar phenomenon for about the last four years. Here a firm of "licensed dealers", without the cooperation of the Stock Exchange, has organized a so-called "over-the-counter market" in 15 securities of 12 companies. This firm, too, makes its services available to the public and provides, among other things, information about the issuers, the trend of quotations, etc. There is a prospect of extension of its activity to the primary market. The firm also acts as a mere intermediary.

145. In the other Member States security dealers also act as market-makers in unquoted securities. This is the case with a few free brokers in Frankfurt and a few brokers in Brussels. But they do not specially advertise this part of their business. No statistical data about this business are known. The same applies to transactions in unquoted securities, for which brokers have not given any assistance, or in which they merely registered the pre-existing transfer between the parties. These transactions are of a more exceptional nature (for instance transfer of a controlling block) or are considered not to belong to the ordinary securities business (e.g. transfer of shares between institutional investors, for which it is only required in France that a security dealer shall act as intermediary).

CHAPTER III

THE MAJOR SYSTEMS OF SECURITIES REGULATION IN THE EEC

146. If one looks at the different systems of securities regulation in each of the nine European Member States, it appears that one can distinguish three organizational patterns. As a relevant criterion for this classification, it is proposed to weigh corporative influence and intervention against State or public action. According to this criterion, Europe would be divided geographically. This division conceals however more profound differences. On the one hand, one finds a Northern European pattern, as found in the United Kingdom, in Ireland and the Netherlands, and on the other hand, and in sharp contrast, a French and Italian pattern with the emphasis on State control. Between the two there is a transitional area consisting of Belgium, Luxembourg and the Federal Republic of Germany. This division is not fortuitous: it is to be found in several fields of social organization and human behaviour. Some speak here of the Protestant, Germanic north, as against the Catholic Romance south.

1. THE NORTHERN PATTERN OF SECURITIES REGULATION

147. In the northern European countries, securities regulation is essentially stock exchange regulation. This pattern is marked by an organization which is mainly based on private law, whereby rules are framed or imposed by making use primarily of the technique of the law of associations and of the law of contract. The State holds itself completely aloof, but respects the private organization and sometimes gives it some privileges. Pressure is, however, being exerted from several quarters in favour of more official supervision and action. The private stock exchange system has resisted these attacks by various means including further extension of its private-law organization and control, and by incorporation into its private body of rules of norms which in other countries had to be imposed by State action. Owing partly to the fact that these are the most important securities markets in the European Community, the whole regulatory machinery in these countries cannot be said to be any less comprehensive or less incisive than the regulatory patterns which are to be found in the southern countries where the organization and rules are established primarily by the State.

As a result of the private-law basis, matters which are governed in other countries by generally imposed public regulations are here included either in associative rules or in commitments which can probably be characterized as private contract law arrangements. This approach also influences the emphasis which is laid on certain matters rather than on others. We thus find that in both countries the rules concerning membership, as regards both its acquisition and maintenance, receive special attention. The reliability of the stock exchange system depends to an appreciable extent on the reliability of the members of the association, including their reliability as regards compliance with the association's regulations and as regards correct execution of stock exchange transactions. The annual renewal of membership of the (United Kingdom and Ireland) Stock Exchange, or the extensiveness of the regulations and controls regarding the solvency and financial position of the members, can be mentioned as examples. The stringency of these rules contrasts sharply with the controls in Belgium, Luxembourg and even Italy, which are confined to mere access of the candidate to the market. The associative basis also pervades the decision by which securities are admitted to the market: a member of the association has to support the application, whereby he testifies the correctness of the submitted information. One could analyse the admission decision as declaring the security eligible for trade among members, so that one could hold the association liable for the reputability of the proposed investment and whether good delivery of the securities can be made (e.g. as to their material form). In both countries the stock exchange authorities' action appears not only to affect the field of information and disclosure but in addition to impose very far-reaching rules of organization and behaviour on issuers. Although this is done on a contractual basis, the issuer's freedom is here sometimes appreciably restricted. This policing effort, which has not reached a comparable development in the other countries, can be attributed to the same, above-mentioned philosophy, namely that the association has to secure the smoothness of its members' securities dealings, by, inter alia, full disclosure of all relevant information to all market participants, or by expelling securities that would disrupt the market. The market organization reflects this concern: in both countries we find the institution, not existing in any other country, of the jobber or "hoekman". The market-regulating action of these operators is experienced as a favourable

contribution to orderly functioning of the market, and is therefore deliberately sought. The battle against market-distorting started earlier in these countries than in others; the result however may be different in form: examples are rules against corporate "raiding" ("overval") or even on take-over, insider trading, etc. It seems significant that cases of market manipulation are investigated, in London, on a systematic basis.

148. The private-law basis confines the regulations to stock exchange dealings, and does not cover the whole security system. Although the issue of securities is not supervised, this absence has in both countries been largely compensated for. The stock exchange authorities make admission of the securities contingent upon the submission of the issuer to their control as early as the time of issue. The same question arises with regard to the people involved in the securities business: the association's supervision does not extend to all participants in securities affairs: this is the case with investment consultants in the Netherlands, and with securities dealers of all kinds in the United Kingdom, who are subject only to the rather loose supervision of the Department of Trade. The association's powers of investigation, inspection and imposition of sanctions are rather limited. Criticism has been levelled against these restrictions and also against the secret and discretionary manner in which these powers are used. The judicial authorities appear to have been very reluctant, and perhaps not entitled, to intervene in these affairs of the corporation.

This completely private form of organization also means that the stock exchange system is largely tailored to the interests of the association and its members. These interests are viewed broadly and are understood to include the functioning of the securities market as an efficient, flexible market, assuring fair and reliable price-formation. Institutionally at least, the general interest is not included. The stock exchange authority is fully aware of its responsibility to the public at large, without this inducing it to make structural adjustments or undertake purposeful efforts to promote the public interest. Primarily with respect to the exchanges' function in the overall securities business, and in company life, especially with regard to the role of the exchange in financing industry, this mainly associative structure of the exchange managements appears to have given rise to certain criticisms. It is precisely action with regard to the admission of securities and the related policy towards these companies, that has prompted state intervention in some other Member States.

Finally, there is no supervision on the precise content which these exchange managements have given to their pursuit of the public interest. There are, it is true, unofficial contacts with interested authorities, for instance with the Bank of England in London. The need for written justification to the general public of policy decisions (for instance by means of annual reports) is felt, and has partly been translated into action in the Netherlands.

2. THE CENTRAL EUROPEAN REGULATORY PATTERN

149. The central European pattern of securities regulation is to be found in the Federal Republic of Germany and, with some differences, also in Belgium and Luxembourg. It is also encountered in Austria and Switzerland. It consists of a limited intermixture of official and corporative intervention, the public authority confining itself to making available the required legal, technical (1) and corporative frameworks and delegating the management of the stock markets, either by law or de facto, to corporative bodies. The public authority itself does not participate in the management but reserves the right to keep a check on the exercise of these powers by the corporative bodies. This check is as a rule confined to legality, or refers to a vague general public interest. No references to any official policy with regard to securities are found. Furthermore the public authority only keeps check on decisions and does not maintain a watch over the overall behaviour and above all not over what the corporations refrain from doing. The corporative bodies do not appear to be required anywhere to account for their policy as a whole, for instance in an annual report, either to the public authority or to public opinion. Furthermore the public authority cannot give any instructions to the corporative bodies or induce them to take action. For this it would have to have recourse to changes of the statute. Only if there is a danger of general confidence in the stock exchange or the securities system being shaken, for instance by a big crisis,

¹ For instance by lifting the prohibition on forward transactions, or by enacting statutes enabling securities transfers to be cleared by book entries, etc.

can the State intervene and close the stock exchanges. As the largest borrower of capital and the authority responsible for monetary policy, it thereby safeguards the public interest. The delegation of the right of management to corporative bodies seems to have greatly weakened the public authorities' further interest in the stock exchange system, even on the plane of control. The absence of any administrative control bureaucracy of any dimension and the rarity of its interventions can be pointed to here as external indications.

150. Belgium and Luxembourg call for special mention here. In both countries the official control agency, which supervises disclosure on issue of securities or on their admission to stock exchange quotation, has extended its authority over certain aspects of their securities markets, more particularly over those directly related to the "stock exchange status" of quoted companies, their conduct and other duties. The action is informal and based more on persuasion and prestige than on legal powers. The Belgian Banking Commission has been more active in this field than its Luxembourg sister institution: it deals with questions such as the transfer of controlling shares, or the regulation of take-overs, etc., fields of action in which not so much the exchange's mechanisms and its functioning, as the consequences in company law retain its attention. Other fields of action deal with shareholders' preemptive rights, the publication of annual reports, particularly containing consolidated financial statements, etc. This general company law oriented tendency links up with one of the features of the southern European organization pattern, which is analysed below. The action here remains informal, however, and rarely affects stock exchange behaviour itself, nor the behaviour of brokers or other persons concerned with the securities trade.

151. The corporative bodies govern the stock exchange system mainly in accordance with corporative requirements and interests. We thus find quite strict, sometimes discretionary (1) admission rules for new members of the corporation, but little attention is paid to the permanent conditions of membership,

¹ Since the revision of the German Stock Exchange Law in 1975, admission of security dealers to trading on the stock exchange is a legal right for anyone who meets the conditions laid down. This is not the case in the other countries dealt with here.

including the financial obligations. Considerable interest is taken in the technical operation of the market (price determination), while much less interest is shown in the behaviour of the principals (no stock-exchange-oriented regulations concerning take-over bids, insider trading or other types of manipulation; hesitation with regard to suspension of dealings, no permanent stock watch programmes for detecting abnormal price movements). The concentration of all transactions in quoted securities on the exchange market is not felt to be a fundamental requirement. The German banks only gave way on this point under very heavy pressure from the Government. In Belgium, too, the rule had to be laid down by law. Lastly, there is the whole area of the relations between the exchange management and the companies whose securities are quoted: this relationship is confined to the admission decision, with its corresponding disclosure; it does not extend to a follow-up on a permanent basis. In some countries issuers are put under pressure to enlarge disclosure of material information to yearly or half-yearly reports. This pressure does not come from the stock exchange bodies but from the public authorities (Banking Commission) or from the industrial associations (Germany). Although there is concern among the stock exchange leaders about the exchange's proper place in the overall financial system, few sign of this spirit is to be found in the way the corporations have developed the stock exchange system.

3. THE SOUTHERN EUROPEAN ORGANIZATION PATTERN

152. The southern European organization pattern (France and Italy) has grown up from a stock exchange system which once was comparable to the above described central-European pattern. The stock exchange management was entrusted to the corporation, but the State, worrying about its financial needs, reserved to itself certain powers of intervention with regard to appointment or dismissal of brokers. In practice, in these countries, too, the corporation managed the entire stock exchange functioning. Only with the laws of 1967, in France, and of 1974, in Italy, was government intervention further extended. Certain parts of securities regulation were withdrawn from corporative decision making, and non-corporative supervision was introduced on stock exchange

business. Although the stock exchange system in the two countries displays great similarities, points of difference seem to indicate a higher degree of State intervention in Italy than in France. This tendency can be deduced from the texts of the statutes. Whether this tendency will be confirmed in their application, cannot yet be said, as the Italian control agency has so far only partly carried out its tasks.

153. The general organization pattern is introduced by legislation. At the same time authority is vested in the subsidiary bodies, both public and corporative.
154. The corporation is composed of the brokers, who are obliged to be members. The brokers are appointed by the political authority, the Minister of Finance, whose free right of appointment is as a rule restricted. The minister is entitled to exercise some powers of higher supervision over these, his ministerial officers: only the minister and not the corporation can impose the stricter disciplinary measures (suspension, dismissal) which put an end to the official mandate. Actual control over brokers - over compliance with the requirements for their appointment or with their financial obligations - is exercised not by the minister but by the corporation, which informs the minister and proposes any sanctions.
155. The corporation itself is not subject to State supervision. Nor are there any measures of higher supervision. The powers which are vested in the corporation and which are exercised by the latter mainly through the issuing of the stock exchange regulations are much wider in France than in Italy. In both cases we find that they cover all "personal" matters, such as supervision of the brokers, or of their financial and other obligations, disciplinary investigations, etc. In France, the corporation is also entitled to ensure the general management of the official market, including its organization, the type of transactions suitable to exchange dealing; opening and closing times, etc. This power also involves the day-to-day running of the exchange market. In Italy this last-mentioned field was primarily reserved to a corporative body while the Government reserved innumerable aspects of stock exchange management for the public body mentioned below.

156. A second line of organization was added hereto, in France in 1967 and in Italy in 1974-1975. This change forms part of a more extensive renewal of the legal machinery for promoting business financing. With regard to financing through securities issue, a similar course was taken in both countries. The new policy was entrusted to a newly established public agency, in France the Commission des opérations de bourse (COB) and in Italy the Commissione nazionale per le società e la borsa (CONSOB). These agencies are, firstly, independent in relation to the central State authority: apart from appointing the members of the commission, the minister does not exercise any appreciable general supervision. Special supervisory rights apply with regard to their regulatory decisions. Secondly, these agencies are composed of persons from different circles. The formulation of an independent policy attuned to the general interest is left to the interplay of forces resulting from the individual interests and views of each of the members of these commissions. These agencies have a dual function: they are not merely control bodies but also have powers of action, including action with regard to the admission of securities and to general market organization. The Government thus appears to have extended its duty of safeguarding public confidence into an active policy with regard to the securities system, with a further view towards promoting business financing.
157. The allocation of powers was in both countries effected by a decree with force of law: clear instructions concerning the exercise of the powers were not always provided, so that these agencies are empowered to decide upon their own policy in the fields of securities regulation assigned to them.

The powers of these agencies can in the first place be defined negatively. The matters which affect brokers personally as well as corporative matters which have no immediate repercussion on the operation of the exchange markets were unchanged and thus continue to come under the jurisdiction of the corporation and the ministry. This status quo is all the more surprising as in both countries the brokers have for a long time been

regarded as "ministerial officers" and therefore already belong to the public sphere. The phenomenon cannot be explained by the balance of power alone: the legislators judged that an intervention with regard to the personal status of brokers was not appropriate for the attainment of their aims. For the achievement of these the public body was given powers in two other fields, mentioned below.

158. The most important field of action, assigned to the newly established public agencies, is found to concern, in both countries, the relationship between the stock exchange market and the business world. In France, the new issue market formed a necessary part of the COB's powers, while in Italy there are plans to extend CONSOB's powers to securities issues. In both countries the central core of the new agencies' powers lies in the admission of securities to quotation, or their removal from official trading. The right to admit securities includes the fixing of conditions for their admission; in Italy these conditions will have to be laid down in a regulatory decision by CONSOB. In both countries, the agency is also entitled to impose admission of securities to the official market: although in practice difficult to use, it seems indicative of the underlying philosophy that this power has been conferred to these agencies. As a complement to their admission power, the control agencies in both countries are empowered to supervise the information which is published by the issuers of securities, whether obligatorily or voluntarily. The agency cannot, however, impose new forms of disclosure. It can co-ordinate and extend existing forms of disclosure in order to make the entire system more meaningful. The statute has granted only limited means of action to realise an overall disclosure policy: the French COB mainly relies on persuasion, on motivating of issuers for the new disclosure approach, while trying at the same time to obtain their understanding and co-operation. Companies applying for admission to quotation are made aware of the important significance and of the further implications of the advocated disclosure policy and are encouraged to expand it as fully as possible. Issue disclosure excepted, there is no prior control on the other forms of information: the control agency would seem above all to be the survey and analysis center of the larger, quoted companies, that keeps in touch with them and would, if necessary, correct any attitude or lines of conduct felt to be wrong. In several cases the public authority appears to have gone

beyond the field of information. Recommendations are made to the companies with regard to their conduct, particularly those aspects of it which can have direct impact on the financial markets. Mention may be made here of the French agency's action with regard to occasional information, or its recommendations to revitalize the role of the shareholders may be cited as examples along with the campaign for greater public awareness of the damaging effects of insider trading, or market manipulations. From this still incompletely differentiated set of rules there could one day be developed a code of conduct, regulating quoted companies' behaviour and duties with respect to the broad and moving body of present and future shareholders, and the financial public at large.

159. In addition to their powers with regard to issuers, both the French and the Italian control agencies appear to dispose of considerable action and control instruments in connection with exchange transactions. Thus the French control agency, in this case along with the corporative authorities, has been empowered to impose generally applicable measures with respect to the functioning of the exchange markets. This statute enabled the COB to adopt rules designed to keep the behaviour of principals for exchange transactions within certain reasonable bounds (mainly in the field of take-over bids, but also in that of the sale of controlling shares or block transactions). The Italian CONSOB has very considerable powers to regulate stock exchange dealings: it can regulate the types of transactions and their legal characteristics, work out local stock exchange ordinances, etc. The public agency is not concerned with actual stock exchange dealings: the organization of these is left to corporatively organized bodies, possibly, as in Italy, possessing the right to keep check on compliance with the rules regarding price determination. But in addition a new field of control has been opened up for government action. This function could be described as keeping watch over the honesty of stock exchange dealings. Its purpose, directly linked to enhancing the transparency of securities markets, is to prevent public confidence from being shaken or undermined by market manipulation, such as have occurred in the past, by detecting and sanctioning insider trading, or by restraining the manoeuvres of the contestants in take-over battles. In France this task is regarded as part of the COB's general function of

keeping watch over the "proper functioning of the exchange markets". In the first years, implementation of this mandate related mainly to take-over bids, a field in which both the Compagnie des Agents de Change and the COB took regulatory action. More recently attention has been directed towards cases of insider trading brought to light by the COB as part of its general task of market surveillance. Abnormal looking price variations are systematically tracked down, and if no acceptable explanation is found, are further investigated. In France, there is no general interdiction of market manipulation (comp. the American Rule 10 b-5): only in cases of insider trading has the COB been active to investigate and to send offenders to the judicial authorities. In other cases, action was confined to a recommendation.

In Italy, too, a first step has been taken in this direction: here CONSOB is empowered to examine the regularity of stock exchange transactions and of the methods of financing of security transactions not only at the brokers' offices, but also at all banks and other financial intermediaries, as well as at companies, or enterprises whose shares or securities are quoted on an exchange. The right of investigation expressly includes government organizations. As yet there are no general provisions in force in Italy prohibiting market manipulation or insider trading.

160. The southern European system has been radically changed in the quite recent past. Powers, mainly with regard to admission of securities, have been taken away from the corporative bodies and entrusted to a newly established public body. Implicitly this public body is given a general function of stimulating not so much the stock exchange system as the relations between companies and the investing public. Mainly using disclosure as instrument for their action, these agencies make an effort to create an atmosphere of trust and mutual understanding on the basis of which the investing public's interest in the companies, and in providing those companies with risk-capital, is to be fostered. The public body is acting here not only as the censor but also as the animator of the securities system. The control powers with regard to stock exchange transactions are governed by the same philosophy: the moral soundness of security dealings on the stock exchange must be guaranteed and market-distorting factors must be excluded, because

this is the prerequisite for the restoration of public confidence. For this it is necessary to ensure that stock exchange trading shall take place not only flexibly, quickly, efficiently and "transparently" but also in a manner which is sufficiently moral and conducive to confidence; manipulation, "raiding" and insider trading are calculated to undermine confidence. In both sectors where powers are conferred, the fostering of public confidence is the primary aim of government policy. This is understandable if one bears in mind the fact that in both cases the reform of the stock exchange system was carried out in order to stimulate business financing, especially by the provision of risk capital. This form of credit-granting, like any other, requires confidence on the part of those providing the capital. The use of the Government's authority to promote confidence has long been an element of the State's financial policy. The field of application and the means employed, on the other hand, are new.

CHAPTER IV

HARMONIZATION PROPOSALS

1. REASONS FOR THE FORMULATION OF A TWO-PART PROPOSAL

161. The present state of the European securities market could be schematically presented as follows. On the one hand there are a number of national submarkets which mainly serve as a secondary market, usually for shares of national companies. These markets as a rule have an individual cast: rules of national securities regulation form the basis of local, national methods of negotiation and price formation, of local requirements for persons and securities, etc. The partitioning between the national submarkets is due largely to foreign exchange or monetary measures. Even in the absence of these the bridges between them are narrow and only usable to a limited extent. Arbitrage appears to have been revived for some time now under the influence of telecommunications. Nevertheless, there cannot be said to be any wide, unified securities market: lack of transparency, unfamiliarity with other markets or pure absence of interest contribute to this fragmentation. Here again there are many nuances: some markets operate in contact with others, while others function in a more self-contained way (examples are Italy and Denmark).

Above these national submarkets there extends the extremely important international securities market. Its Eurobond sector is undoubtedly the most important: as an issue market it is bigger than any one of the national issue markets and it is also assumed - despite the lack of statistical data - that the scale of secondary trading puts most national markets in its shade. The extensive financing facilities found here by States and by government or private undertakings, the flexible procedures

and, altogether, the efficiency of the issue practice have induced many an issuer and banker, irrespective of where they are located in the world, to choose this market in preference to their national capital market. The residents of several Member States can freely, or subject to certain limitations, invest in these securities, the attractiveness of which is enhanced by the de facto freedom from personal income tax levied on the interest coupons. Despite certain links with the system of securities regulation of some of the Member States, this market is not subject to any control regulations. This does not, under normal circumstances, make its operation any less safe.

162. With this de facto situation as the starting point, an attempt will now be made to indicate the sectors in which the present systems of regulation can be harmonized. It may be expected that these harmonization activities will remove the obstacles which at present still bar the way to interstate security dealings. But we must look further. In addition to the removal of the obstacles, we must examine what measures can contribute to more efficient, safe and above all intensive interstate securities transactions. Ultimately the question must be posed whether we ought not rather to strive to achieve an integrated European securities market which covers the whole Community and in which anyone meeting the generally applicable conditions can participate .
163. The angle of approach chosen here is that of securities regulation, from which the various interventions relating to securities have been analysed. That several other kinds of measure represent a serious obstacle to interstate security dealings needs no proof. Foreign exchange regulations sometimes have the effect of directly restricting interstate trading. But tax

rules, or regulations and practices concerning transfer of securities by book transfers or clearing of transactions, and even purely technical regulations (the printing of the certificates) can produce rigidities, distortions and sometimes serious hindrances to integration of securities markets.

These subjects have had to be disregarded here, even though they are of essential importance for the integration of securities markets. All that can be done here is to express the hope that, in parallel with the studies and harmonization activities on the structural plane studied here, continued efforts will be made - or action initiated if necessary - to remove these hindrances to trading in securities.

164. The harmonization of the structural rules concerning the securities markets ultimately serves to expand the financing possibilities of public authorities and business undertakings. The making available of more and as a rule cheaper capital can be regarded as a condition for economic prosperity.

Harmonization therefore aims at removing the obstacles which prevent or impede access to the capital or securities markets. Access to the capital markets must be possible in all Member States in similar or at least non-competition-distorting circumstances. And the lenders of money, the investors, in all Member States must enjoy the same kinds of safeguards.

In fact the harmonization process plays a more radical role: it leads to a levelling of the national systems of regulations, not always - as people are sometimes inclined to assert - at the level of least regulation.

Furthermore it contributes towards the development, in policy-making circles among others, of a more all-embracing view with regard to the function and organization of security markets.

165. Up to the present the European Community has usually looked at harmonization with regard to securities regulation from the above-mentioned point of view. This approach has given rise to the proposals for directives concerning the prospectus to be published in connection with the admission of securities to a stock exchange quotation, or concerning conditions for admission of securities to stock exchange quotation. The recommendation of a European Code of Conduct for security transactions must not be left unmentioned here, nor the activities planned or now in progress concerning canvassing, continuous information, insider trading, etc.

In the present state of development of the European Community this approach is undoubtedly the one most legally justifiable and, above all, is probably the most realistic and feasible. For these reasons this is the line of thinking that will be followed and developed here. In the following sections (Nos. 168 to 201) an indication will be given of some fields of securities regulation, which in the light of the comparative law analysis, could be considered for further efforts towards convergence. Some fields may appear to be of more immediate interest for the liberalisation of inter-state securities trading. Nevertheless, an overall effort for the harmonization of the whole system remains, since all fields are inter-dependent, the only sound approach.

166. By both design and method, harmonization of national regulations is essentially a limited approach. It tends to be very much concerned with detail, aiming at regulating all points down to the smallest particulars,

and this greatly impedes and slows down the decision-making process. Furthermore, it is in fact only possible to harmonize in those fields where most, and above all the most influential, Member States have themselves either taken regulatory action or at least have favoured self-regulatory action. Harmonization can therefore hardly ever have a renewing effect: it remains bound to the paths which some or several of the Member States have taken, without being capable of developing individual, new views of its own. Lastly, harmonization always takes place in a limited sector of the whole system, which is not conducive to coherence and sometimes causes the inter-relationships to be lost sight of.

It would therefore appear to be useful, in the light of the comparative survey of legislation, to take a look at the whole system and formulate a few ideas capable of inspiring future development and initiatives concerning the organization of securities markets.

As a starting point of this line of reasoning we find the doubt as to the integrating power of harmonization. Integration of the markets cannot take place before the removal of the various structural, fiscal, foreign exchange and other obstacles. Whether this means that integration will actually take place can be doubted. Will an additional effort not have to be made in order to promote foreign securities among the investors and their advisers in each of the Member States? Even if all markets were freely accessible, will the mutual comparability of securities from different Member States be impeded by innumerable factors, including, for instance, market techniques or book-keeping methods, etc? If integration is to come about on its own force, the question arises as to in what circumstances and according to what rules this process is to take place. Will a supra-national equity market grow up in addition to the present Eurobond market? Some people are of the opinion that it is best to leave the markets to the inherent forces which govern them. Others believe that

it is better to follow the developments very closely and to get hold on them, and monitor the creation of the new market.

167. In the light of these developments, two series of proposals are formulated in the following sections. A first series concerns the fields in which harmonization activities can be undertaken in the near future. The second series of proposals should be regarded primarily as a discussion basis, as a long-term model. The two series of proposals can be considered separately. Actually they are intended to be complementary: partial harmonization in no way prevents the coming into existence of integrated trading, but in fact contributes to it. But integrated trading can be brought about separately from harmonization in the sub-areas mentioned below, and would without doubt greatly simplify harmonization.

2. PROPOSALS FOR THE HARMONIZATION OF NATIONAL RULES CONCERNING
DEALINGS IN SECURITIES

The harmonization proposals relate to the most important sectors of regulation and control of securities. Although from many points of view there are close interconnections between the various proposals, it is preferable to consider each one separately.

2.1 DISCLOSURE ON ISSUE OF SECURITIES

168. In the majority of the Member States there is no disclosure required on the public issue of securities. Only in three of the nine Member States is supervision exercised with regard to the issue information provided to investors. In these countries the protection of investors on subscription appears to be more fully organized.

In the present state of affairs an undeniable need for issue disclosure can be felt, above all in those countries where issue control takes effect only upon admission of the securities to a stock exchange quotation. This need is all the greater because the securities concerned as a rule are not proposed for exchange trading, or would not qualify anyway, whether for lack of quality or for other reasons.

It does not appear desirable to require all Member States to introduce information control on issue. The differences in the regulatory tradition between the two groups of Member States are too great for such a radical interference with the regulatory system to be regarded as a practicable proposal. Moreover, for most transactions, disclosure on admission to quotation seems to be of equal quality as would be required on issue. The institutional implications of the organization of information control on issue are considerable, and are usually rejected as undesirable in these Member States.

In order to ensure that investors in all Member States shall enjoy equal safeguards, it should be proposed that national legislators introduce a general disclosure requirement on public issue or offering of shares or bonds applying to the issuers or whoever offers those securities for sale. Secondary distribution is mentioned in this connection for clarity's sake: the fact that the securities have already existed for some time in no way changes the need for protection of investors. With regard to its content the information to be disclosed should be permanently defined in the statute, or in a decree, and should be distinctly greater in extent than the "statutory notification" (notice légale"), to be published in Belgium or France. No external supervision is exercised with regard to the accuracy of this information. The issuer and its managers should be expressly required to certify that the information printed is true and not misleading. The financial statements should have to be certified by an auditor or accountant. This data should have to be published by means of a brochure supplied to investors: this is an essential condition for the application of any sanctions, as described below.

The arrangement proposed here is inspired by the British system.

The co-ordination with the present disclosures, required on stock exchange admission, is also inspired by the British example. Issuers who are held to general financial disclosure on admission to exchange quotation, would be exempted from the legal disclosure requirement; the same rule would apply when in special cases, the exchange authorities do not require full disclosure. In order to qualify for the exemptions, however, it would be required, in accordance with present practice, that supervision is exercised by the exchange authorities on this information, and that the information be available not later than the time of issue.

This approach avoids any institutional innovation which could stand in the way of effective protection of investors. It deprives issuers of the possibility of gaining an advantage by not applying for admission to a stock exchange quotation. It can be considered as an effective instrument for investor protection, since the most dangerous securities issues shun daylight.

This reform does not require any radical amendment of the present law. Depending on the standpoint adopted, it may be thought sufficient to adapt the existing company law (Germany, Netherlands, Denmark, Italy) or to introduce a general separate rule applicable to all public issues of securities (for instance also applicable to issues of bonds by foundations, non-profit-making associations, state enterprises, etc.). It should be possible to define the field of application by means of a concept of "distribution of shares or bonds among the public", possibly to be further refined by an implementing measure. As to the content of the disclosure requirement, it could be described by an enumeration to be taken either from the annexes to the prospectus directive, or from the list appended to the British Companies Act.

169. The comparative law survey shows that the legislator has intervened, or is considering taking action, in several Member States in order to introduce measures of investor protection in connection with the public issuing of investment instruments which are not covered by the classical definition of shares or bonds suitable for stock exchange trading. Two approaches could be followed for regulating these investments: if documents of title are publicly offered for sale, then the protective measures should apply irrespective of the nature of the rights conferred (membership, claims, or any other right). The other line of thinking is to make all investment

schemes where the participating investors expect to derive an advantage from joint management subject to supervision.

In several Member States the need is already being felt to subject these forms of investment, which can seriously compete with the traditional capital market, to some form of investor-protecting intervention. It may sound paradoxical to say that in this sector, where the need for investor protection is most keenly felt, it would appear premature to propose common measures. The explanation of this attitude lies in the unusually complicated questions of definition and legislative technique. It is not clear whether disclosure can be regarded as sufficiently adequate as a device for investor protection, or whether the control body would not have to be given the power - incidentally difficult and very delicate to handle - of forbidding dubious investments. Lastly, institutional aspects would arise in countries which have not introduced information control on issue. Up to the present none of the Member States appears to have managed to establish a satisfactory regulatory scheme in this particular field of investor protection. In the United States, however, these investments are subject to the general supervision of the control authority, which has in most cases resulted in effective protection of investors.

2.2 PROSPECTUS LIABILITIES

170. Several Member States have express legal provisions with regard to the responsibility of issuers in respect of incorrect, incomplete or misleading information distributed in connection with the issue and sale of securities. This responsibility is as a rule referred to as prospectus liability. Unlike in the United States, these provisions have remained a dead letter in Europe. In some cases, indeed, the judicial authorities appear to have denied that issue disclosures have any bearing upon the issuers' liability.

These differences from the North American legal tradition are attributable to several factors. It is often asserted that the permissibility in the United States of agreements between lawyer and client concerning the sharing of the proceeds of legal action (contingent fee) provides the incentive for the innumerable lawsuits in this field. The stricter rules with regard to financial liability and a general legal tradition are likewise to blame for the decay of prospectus liability in Western Europe. In some countries, including in Germany in the mutual fund field, more effective rules have been introduced. It is proposed that uniform remedial rules should be formulated, applicable in the whole Community, sanctioning the distribution of incorrect, incomplete or misleading issue information.

The following principles could be followed:

1. The burden of proof on the investor must be lightened, particularly with regard to causation. The fact that the information was incorrect, incomplete or misleading will be sufficient grounds for

applications, without its being necessary to prove that the incorrect, incomplete or misleading information formed the basis of the investment decision. It must, however, be proved that the investor had received the prospectus at the time of the investment decision, irrespective of whether he had read it or not.

2. The benefit of special remedies is confined to investors who have subscribed for or purchased securities within the issue. It would inure to sellers of securities, or to those investors who have not bought in view of the information contained in the prospectus. To these cases, common law would remain applicable.
3. The remedy would be confined to restitution, whereby the investor has to surrender his certificate against reimbursement of the money invested; damages have not to be proved, but are assumed.
4. A short limitation period, for instance six months, should be established.

2.3 THE STATUS OF THE INTERMEDIARIES

171. The intermediaries involved in securities dealings can be subdivided according to whether they enjoy the status of a bank or credit institution, are registered as brokers or belong to a residual category which is referred to as the "ancillary professions". The latter usually just bring orders to banks or brokers.

2.3.1 The banks

172. The legal position of banks in the securities business is in most countries not only a question of stock exchange regulations. In countries where the banks have no direct access to the stock exchange market (Belgium, France, Italy, Denmark, United Kingdom and Ireland) they sometimes have to apply for special permits, or licences, in order to be allowed to enter the securities business. In the Member States where this permit or licence is required, no significant additional obligation ensues. In the Federal Republic of Germany, Luxembourg and the Netherlands the banks themselves are authorized to deal on the stock exchange. In these countries they have to fulfil the general conditions for admission. As the banks, under the banking control rules, are already subject to extensive financial obligations, the stock exchange regulations in some cases confine themselves to referring to the banking control rules and to compliance with them. Additional regulations applying specifically to stock exchange dealings are usually limited and apply mainly to the admission of the banks' representatives on the floor of the exchange. It can be assumed that for all these reasons, the present legal status of the banks with regard to their securities business is generally satisfactory. As to the banks activities in connection with securities, whether as dealers or as commission agents, it ought to be laid down that they, as the brokers, are subject to appropriate disciplinary sanctions if they, or their employees, behave improperly, including acting contrary to their clients' interests.

The question could be raised whether in all Member States the banks should have direct access to the exchange markets. In the majority of the Member States, this is not the rule at present, although one must bear in mind that the rule is sometimes evaded by participation in the capital of brokerages. In the present state of development of the securities markets in Europe, this question does not need to be dealt with at Community level. It is far from clear whether the coordination of the regulatory systems in this field would have any appreciable influence on intra-Community securities dealings. Moreover, such action would run counter to the long-established structures and traditions in the majority of the Member States. Harmonization efforts in this field are doomed to failure.

Consideration should be given, however, to the question of how the relationship between the banks and brokers could or should develop in the longer term. So long as measures to strengthen the financial and economic position of brokers have not been fully implemented, the organization of competition between the two sectors would appear likely to bring about too unequal a struggle, which can only lead to domination by the banks. But the abolition of the monopolies makes sense if competition between the two sectors can be organized by equivalent and effective - albeit different - means. Maintaining the existing monopolies can be regarded as a transitional stage from which, in the interests of the operation of the securities market, the next step will not be taken until it has been made certain that the two sectors

can compete with each other under conditions of economic equality.

2.3.2 Brokers

173. Unlike the position concerning banks, the status of brokers is solely or mainly determined in the stock exchange legislation or regulations. There are considerable differences among the Member States, so that harmonization appears necessary. Harmonization ought furthermore appreciably to strengthen the status of this category of intermediaries in order to ensure their continued long-term existence in the market as strong and solvent market participants who, together with the banks, ensure the carrying out of securities dealings.

Four sectors have to be considered for harmonization: financial or solvency requirements, strengthening of the firms, internal auditing, external control. Most Member States already have regulations containing a well-developed framework for brokers' activities; it is chiefly in Belgium and in Italy that rulemaking has lagged behind. The following proposals can be implemented both in a corporative system and within a primarily public framework. The question, whether an external, particularly governmental control would not be required on the corporation, its activities and its exercise of supervisory powers, cannot be dealt with in this context and furthermore must not be allowed to stand in the way of the realization of the following proposals.

a. Rules regarding the solvency of firms

174. In all countries firms of securities agents or brokers run solvency risks of varying extent. Even in countries where brokers are never allowed to deal for their own account, the delay in the settlement of the transaction creates an unavoidable solvency risk. As they are parties responsible for public

confidence in securities transactions, it appears to be a minimum requirement for their activity that they should be obliged to meet certain solvency requirements. Fulfilment of these requirements can limit the solvency risk in international securities dealings, especially within the Community. In most Member States a start has already been made in this field: only in Belgium and Italy do the existing instruments still remain unused.

The imposition and enforcement of a solvency requirement is a matter which affects brokers personally. It is, in accordance with the overall organization, a matter of corporative concern. In several Member States the corporation has been empowered by law to establish this requirement. This choice lies with the Member States, and does not appear to call for any regulation by the Community.

At Community level the choice can be left open between one or more of the following simple solvency requirements:

1. A net capital requirement for which a minimum of about 30 000 units of account best meets the current practice; the rule would apply for each broker authorized to deal on the exchange. Utilization of this capital in assets that are easily realizable and free of all encumbrance appears to be desirable.
2. A guarantee system whereby a third party, recognized as solvent, would take over the afore-mentioned solvency obligation up to a certain amount. This third party could be either a collective guarantee fund of brokers or a bank, an insurance company, etc. The same minimum amount as for capital can be adopted here.
3. The (French) solidarity system, which is partly a variant of

the guarantee system, whereby a collective minimum solvency requirement would have to be complied with, this being equal to a minimum sum multiplied by the number of members.

4. The possibility must be created of introducing more refined rules, whereby the risk which can be involved in these undertakings can be more precisely determined and suitable solvency obligations imposed.

The solvency obligation should be of a permanent nature: it is the absolute minimum without which the firm, unless specially authorized to do so by the corporation, cannot continue to operate. It should be required that compliance with this obligation be proved at least once per year to the corporation by means of a balance sheet certified by the firm's accountant.

b. The internal organization of firms

1. Measures of internal control

175. Under present law all firms are already required to keep ordinary business accounts, without any uniform presentation or book-keeping rules being imposed by the corporation. It would appear to be an important principle of proper internal organization of the firm that, irrespective of the legal form in which it is run, an independent accountant or auditor should be entrusted by the broker with the task of checking the books and compliance with the above-discussed minimum solvency requirements. Furthermore, this accountant, who closely follows the firm's operation, would be empowered to exercise general supervision over the regularity of the transactions. Difficulties with regard to profitability, or risk concentration,

and of course, solvency questions, should be detected by the accountant and, if necessary, reported to the corporative authority. The accountant serves here as the contact between the broker and the corporative control.

As an alternative arrangement to the appointment of an accountant, it could be laid down that the corporation's services can themselves assume these tasks, provided that their terms of reference are identical.

2. Association obligation

176. A special requirement regarding the internal organization would be the interdiction of sole traders and the obligation to carry out the securities business with other people, whether in the form of a partnership or of a company, limited or not. The reason for this obligation is connected with the additional expectations and obligations with which brokers will have to comply in the future. The development of more extensive trading calls for stronger market parties: the association form can provide the manpower for this purpose, while the particular possibility of using the limited liability company structure for securities dealings could result in a considerable increase in financial capacity. The last-mentioned requirement also points to the increasing activity of dealers, trading for their own account, in which field they are in direct competition with the banks. Possible objections based on an alleged reduction of brokers' responsibility and on the effect thereof on their behaviour could be met by maintaining the unlimited liability of the broker, titular of the office or member of the association or company as far as stock exchange commitments are concerned. The requirement that the

profession be exercised in associative form will offer new possibilities for the rendering of services, especially in the sometimes neglected field of financial analysis and investment advice. Modernization of the profession by the training of young members can, in larger offices based on association, be better extended and the profession thus made more attractive also for persons who are not traditionally involved in the securities business. The association requirement is also doubtless inspired by the "four-eyes" principle: the danger of going off the rails is reduced when policy decisions have to be tested against the opinion of fellow associates. As a transitional measure, this obligation can be waived for firms which at least meet the solvency requirement.

c. Corporative control

177. Within the corporative organization, a control office with an independent status would be set up. In the Member States where the corporation itself acts as the firm's auditor this additional step may be dispensed with.

The control service would not as a rule operate actively at the broker's office: it would receive the accountant's reports, check these and suggest lines of action to the accountant if necessary. The accountant could be asked for additional reports on data which were relevant for the supervision.

The control service would take action if the position of a firm were jeopardized, for example if the solvency ratio was endangered or if the firm was exposed to considerable risks. It would then get in touch with the accountant in order to re-establish balance.

If this did not appear to be possible, or if the broker refused to take the necessary action, the control service could request the corporation to take preventive measures or to impose sanctions for infringements. This action might include the provision of additional capital or of guarantees, the suspension of certain parts of the broker's activities and, possibly, even the obligatory appointment of a permanent supervisor , e.g. a delegate of the corporation with rights of control over the firm's business. These additional means of action must be regarded rather as refinements of the present somewhat rudimentary and purely repressive system of disciplinary sanctions. But the control service should be able to take direct action in a firm and carry out inspections and question persons if there is reasonable doubt about the accuracy of statements, whether made by the accountant or by the broker himself.

d. Regulation of the ancillary activities and recognition of "financial advisers" as a regulated profession

178. Abuses which have often severely shaken the confidence of investors were found in several Member States to be due to certain advisory practices engaged in by persons who do not enjoy the legal status of recognized security dealers but present themselves as investment consultants, portfolio managers, etc. Conversely there is a need, in certain - not necessarily the most well-to-do - strata of the population for serious and above all independent financial advice. Only banks and brokers offer this advice free of charge. Experience has shown that this advisory activity often leads to a conflict of interests which is not always solved in the manner most favourable to the investor. Consequently the action taken against

unqualified investment advisers should be coupled with measures to promote the offer of sound, independent financial advice.

The field of application of possible regulations could be fixed for the activity of advisers, of portfolio managers, and of "remisiers" or intermediate brokers for securities orders. The activity of recognized intermediaries (banks, brokers; canvassers, where permitted, etc.) would not be subjected to any additional requirements. Advice provided by the issuer itself for its own securities would also be exempted, provided that a regular issue prospectus (as described in section 168 above) had been published. Persons or businesses recommending or offering securities for acquisition, even from their own portfolios, would fall under either the issue regulations, or the rules governing "financial advisers".

Except in France, there is no full set of rules applicable to financial advisers in any of the Member States. Consequently the action can be confined, in a first stage, to simple general control rules:

- a. Obligatory registration with the stock exchange authorities, or with the ministry; the title "financial adviser", or the like, would be protected and be reserved to these persons.
- b. Proof of honesty (no convictions) and of independence, including independence from banks and brokers.
- c. Securities orders, whether on national or on foreign markets, may only be executed with the intervention of a resident bank or broker.
- d. As to portfolio management, all securities and liquid funds under management should have to be deposited with a broker or bank and cannot be disposed of unless with the latter's signature. If substantial losses show up in the portfolio under management, the bank or broker would be requested to inform the investor thereof.

- e. The above-mentioned control authorities should be able to request general data - without mentioning names of individual investors - in order to obtain an idea of the activities of these advisers: on-the-spot checks should be possible if there are serious suspicions that the advisory activity is not being carried out properly, or that the adviser has given incorrect or incomplete information to the control authority.
- f. Disciplinary power should be vested in the above-mentioned authorities.
- g. Except on isolated occasions, the giving of investment advice for securities should not be permitted, except by recognized "financial advisers" or by the recognized intermediaries for security dealings.

The investment advisers operating in banks or with brokers are not subject to any specific discipline in this respect. Their employees, however, should be held to comply with the requirements of independence, objectivity and good faith which can be expected of professional advisers or administrators. As a minimum rule they should be obliged to undertake to act only in the interests of the investor, their principal, and to refrain from any advice or intervention in the event a conflict of interests would arise. Disciplinary sanctions should be introduced, also for banks and brokers.

2.4 POLICY WITH REGARD TO ISSUERS OF SECURITIES

179. It seems to be fairly generally accepted that issuers, particularly companies which rely on the confidence of the public for their financial means, are bound by more stringent rules of conduct and more incisive disclosure requirements towards this public. From the comparative law study three sets of rules could be distilled in this connection: most widely accepted are disclosure rules, which take effect either on issue or on admission to stock exchange trading, and which in several Member States are extended on a permanent basis to those securities that are admitted to exchange quotation (annual, half-yearly, quarterly and occasional information). Less widely accepted are the rules of behaviour which are imposed on issuers, primarily on admission of the securities to a stock exchange quotation (adaptation of articles of association, uniform issue conditions, respect of preemptive rights of existing shareholders with regard to subsequent share issues, etc.). Still in course of development are the rules governing the market behaviour of the companies, their directors and major stockholders: these are the regulations concerning market manipulation, the codes on take-over and mergers, the guidelines to prevent insider trading, the special fiduciary duties on transfer of controlling shares, etc.

2.4.1 A new purpose-oriented overall disclosure policy

180. With regard to financial disclosure, considerable efforts are being made at Community level to achieve some degree of harmonization between the various national systems: the directives on the harmonization of company law (in particular the directive on annual accounts (N° 4), the prospectus directive (N° 6) and the directive concerning the admission of securities) together with the European Code of Conduct should be specially recalled here. It is assumed that these Community measures have been accepted by all Member States.

181. It can be stated that in most Member States the disclosure policy has grown up from one or more, usually separate, statutory or corporate sets of rules, which have been expanded and developed at the instigation of the control authorities. One rarely comes across any questions about the general purposes of this disclosure policy, its effectiveness, the dissemination of the information and its impact on the investors. Only in France does the control authority appear to have repeatedly shown concern about the relative ineffectiveness of financial information. It is thus not surprising that some people have had serious doubts about the actual significance of this disclosure system. In many cases the doubt is justified: frequently the information misses its target, or does not achieve its purpose. Its contents are often either unintelligible to the investor or meaningless to him.

Without our wishing to cast doubt on the usefulness of financial disclosure itself, it is proposed that an investigation should be carried out as to what means can be employed in order to make the financial disclosure system more effective, taking into account the purposes for which it could be used. It is desirable that a new, overall disclosure policy should be defined at the Community level. Although it has not been the purpose of the present study to analyse the national disclosure systems and their underlying policy objectives, it is beyond doubt that this important control device cannot be disregarded altogether in this context. Therefore, a few guidelines for the development of a more effective disclosure policy are indicated. Their further elaboration can be recommended, within an overall study of present information and disclosure techniques and practices.

It is usually very doubtful whether the present forms of disclosure achieve their declared purpose. A clearly identifiable example is provided by the prospectus, which, as a sales document, has a more precisely defined purpose. It is usually assumed that the prospectus

is designed to inform investors so as to enable them to make a well-founded investment decision. A prospectus rarely in fact corresponds to this description, so that the investor always has to have recourse to his financial adviser. Investors do not read the prospectus, so the financial intermediaries save themselves the expense of forwarding it to them. The prospectus is falling into disuse: it now only serves to provide information to the financial advisers. But for them its contents are often inadequate. The adviser in fact has to obtain data concerning, for instance, the business sector in which the issuer is operating, its competitive position, the risks in its sector, etc. from other sources or from his own general knowledge. The same applies to stock-exchange-oriented data: the position and trend of the security offered can only be assessed in comparison with other securities. This data is not contained in prospectuses.

182. Before indicating the forms, contents and instruments of the financial disclosure system it would appear useful to analyse the differing, complicated and often inter-related purposes for which financial information is disclosed. It has been mentioned earlier that the maintenance of public confidence in the securities system can be considered to be the overriding aim while investor protection, monitoring of company law and practice, sales promotion, or transparency of market operations could be classified among the subsidiary aims. Room should be made for the disclosure system being adapted to this varied set of objectives, and this as to its content, its extent, the readability and the distribution of the information released. The issue prospectus, the purpose of which is to induce the investor to purchase the securities, must also in fact enable him to make the decision. In addition, a more sophisticated, less easily readable and more detailed disclosure document can be made available to the financial community, essentially the investment advisers. The same approach could be extended to the other types of financial disclosure. It can be presumed that an overall readjustment between the different types of disclosure will give rise to a deemphasis of issue or prospectus information, and to an expansion of annual, and essentially of stock-exchange-oriented information (quarterly and occasional information). This shift is in line with

the reality of the investment decisions which are continually being made by the participants in the market.

183. The provision of financial information must also be reinvestigated from an overall point of view. In the present state of affairs the approaches differ: disclosure is used as sales information (prospectus), as a reporting technique in internal company relations (annual reports) or as stock-market-oriented investment information (e.g. quarterly and above all occasional information). The prospectus, which contains an overall picture of the issuer, is useful mainly at the time of the initial issue of the securities or of their initial admission to a stock exchange quotation. After this admission has taken place, disclosure should be aimed to present not a sales document, but a "general survey" of the issuer, published from time to time (for instance, three-yearly) in which the whole of the longer-term trend can be outlined. Subsequent issues of securities do not need to be accompanied by more information than that which directly relates to the issue operation, while reference can be made to the "general survey" and the annual reports for other data. The annual reports should be required to present a complete, fair and accurate picture of the year under review. Apart from their reporting function in accordance with company law, annual reports could also be used for promotion or publicity purposes in connection with investment decisions, for instance by inclusion of data relevant to portfolio management (such as: inclusion of certain

ratios, or even of comparisons with other securities , etc.). This means assigning to the annual report a function which is already attributed to that document, but which has not always been logically developed to its full extent. The permanent and occasional information is pre-eminently market-oriented: all material information and data since the last annual report which has some bearing upon stock exchange prices should be released. This includes of course, quarterly data about sales and profits.

184. The practical impact of the provision of information deserves special attention. The establishment is proposed of one or more central information banks, accessible to the public, in which all financial information would be stored. These information banks should be capable of distributing the information, for instance on microfiches and, for the market-oriented information, by telex, etc. Furthermore issuers would be urged to ascertain more precisely the identity of the holders of their securities, especially of their shareholders, in order to establish a permanent dialogue with them, in which financial information is one of the languages to be used. Finally, issuers would be required to report to the control authorities about the actual distribution of their financial disclosures.
185. The whole of the information and disclosure regulations, thus reformulated, would be bundled together into a "code on information to be published by companies whose securities are quoted on the stock exchange". The various, at present disparate, information rules should thus be grouped together and harmonized with each other. As a general principle the requirement could be introduced that all data capable of materially influencing the assessment of the security or the exchange transactions must be published.
186. In the present regulatory approach only issue or admission prospectuses are subject to preventive supervision. It is proposed that this supervision be retained, on the understanding that the contents of the prospectuses of companies whose securities are

quoted on the stock exchange could be appreciably reduced. Furthermore, the preventive supervision should be systematically extended to the "general survey" which is to be published from time to time.

To submit the other types of information to preventive supervision seems impracticable. Therefore, it would seem sufficient that the control authorities be entitled to intervene when necessary and to check the fairness and accuracy of the information already disclosed. This intervention could take place whether ipso jure or on complaint.

Extending disclosure supervision will also create the need for appropriate investigation and control powers. For in this field, unlike in the case of preventive supervision, no decision or authorisation would be required of the control authorities. Two instruments could be used. Firstly, the control bodies should be entitled to require, from the issuer, all information which they deem necessary for their own purposes of testing the fairness, completeness or accuracy of information published. In principle this data would not be published nor communicated unless necessary for the rectification of the published information, found to be untrue, incomplete or inaccurate. Furthermore, the control bodies should be empowered to delegate independent inspectors, entitled to examine all books, records and documents and to investigate whether data published is true, accurate and complete. Inspection orders should not be issued on a routine basis, but only if serious suspicions exist as to the truth, fairness or accuracy of the information published. The same rule would apply in cases where the issuer refuses to give information to the control authorities. Only if the suspicion is confirmed will the independent expert report his findings to the control authority.

187. As to sanctioning, it is recommended that control authorities dispose of a wide array of flexible instruments. Under present regulations they can only - apart from refusing the issue or admission to quotation - suspend exchange trading, stop quotations, or the publication thereof, or strike off a security altogether. It should be expressly stated that control bodies have the right to publish rectifications, or, if applicable, to censure an issuer if it has been ascertained from control investigations, that untrue, false, incomplete or misleading information has been published, the release of which could have had some impact on the exchange market. Another technique for action and enforcement of the disclosure policy could consist in the compulsory appointment of an official, within the company itself, who would be responsible for all matters of financial information, and who would dispose of general powers of inquiry and inspection, and could act as the permanent interlocutor of the control authority. In case of repeated infringements, this person could be declared "non grata" by the authority.

It would seem premature, in the present stage of legal and technical developments, to propose radical adjustments with regard to civil remedies for violation of the permanent disclosure rules. Unlike prospectus liability, causal relationship between the false or misleading information and the damage caused is much more difficult to determine in the present field. Therefore it is proposed to maintain civil liability according to the rules of common law.

A more active role, however, should be assigned to the control authorities in the enforcement field, by allowing them, on the one hand to appear in court in common law cases and to expose their views,

and on the other hand, to authorize the judicial authorities to obtain their opinion on the false, fraudulent or misleading nature of the disclosure under review.

188. The implementation of the foregoing proposals will probably entail amendment of existing legislation in some countries. It should be investigated to what extent this amendment of the law can be confined to a general declaration of principle, such as, for instance, that issuers must inform the market on an annual, half-yearly and occasional basis of all data and facts which are of importance for the development of the market. This declaration of principle could be further implemented by conventional arrangements concluded between the stock exchange authorities and the issuers. The flexibility of the approach could, however, give rise to legal objections, at least in some Member States.

189. It seems realistic not to impose the rules discussed above in the same way on all companies. It should be possible, depending on whether the companies concerned are of European, national or local importance, to adapt the rules to the potential scale of circulation of their securities. Provided that the markets on which securities of each of these categories are traded are also adequately differentiated, there can be little objection to relaxations for smaller issuers. Issuers of European standing, on the other hand, ought to be subjected to the full disclosure standards. One would conclude by drawing attention to the fact that only few new disclosure rules are being proposed, but more efficient ones, that will be better conceived.

2.4.2 Rules of behaviour for issuers

190. In several Member States the interventions with regard to companies whose securities are quoted on the stock exchange not only relate to the information to be distributed but increasing attention is being paid to the manner in which the issuer is organized (including examination of the articles of association) or in which the transaction is being structured (for instance standard issue conditions). This approach is often used for investment funds.

Some of the subjects referred to here are, or should be, regulated by company law, which is in the process of being harmonized under the influence of the Community. This is the case with, among other things, the recognition of the preemptive right of existing shareholders laid down in Art. 29 of the 2nd Directive concerning company law. In other fields draft directives are under consideration, or will be prepared later, e.g. with regard to issue conditions of bonds, or of other instruments of indebtedness. For this reason, it does not seem necessary, for the time being, to propose specific action with regard to issuers whose securities are admitted to exchange trading.

191. Whether other rules of behaviour should be harmonized, and more particularly whether the attitude of issuers and of their managers vis-à-vis the exchange markets ought at present to be made the subject of Community measures, is a question which cannot be answered in the affirmative in view of the great diversity of modes of behaviour in each of the Member States. Community action can only be - and is being - considered with regard to regulation of take-over bids. Although steps are being taken in some countries to revive and strengthen the relationships between issuers and their shareholders, it does not appear possible, other than by means of a general

recommendation, to call upon issuers to look after the interests of the holders of securities and treat them in a fair and equal manner. The introduction of a legally binding duty to this effect would represent, from the point of view of the present development of legislation in most Member States, an innovation which would be too far-reaching and thus difficult to put into effect.

2.5. THE INSTITUTIONAL ASPECTS

192. In the past the institutional aspects of the harmonization and integration process attracted attention mainly with regard to the question whether, in a united Europe, there would also be a need for a managing and control body, placed at the top of the securities system. Reference was made for this purpose to the American Securities and Exchange Commission. This development was also mentioned in the Segré Report, and recommended for further study.

Several countries have rejected this organizational model more or less rigorously. Primarily Member States where the securities system is governed mainly by corporative or professional interests have shown great concern about administrative and bureaucratic intervention. In the United Kingdom these problems are part of the regularly recurring demand for more governmental control over the very powerful London financial world. As is known, this question is also being investigated by the Wilson Committee.

The European context is fundamentally different from that of North America. Securities in general play a much more modest role. This is mainly the case on the national primary markets, where the government and the financial intermediaries dominate the borrowing of capital, so that little room is left for the - public or private - industrial and commercial issuers. The secondary markets, and mainly the traditional stock exchange markets, play a much smaller part than in the United States, while the attention of investors and issuers is directed more and more towards the Eurobond markets. The importance of the last-mentioned phenomenon for the American securities system is as yet very slight.

The institutional framework of the western European securities system is based on a body of rules, different from country to country, each having its own, specific managing or control bodies. This difference is accentuated by fundamental discrepancies in the legal status of the control bodies, a state of affairs which, in the present regulatory scheme, can have far-reaching consequences on their elaboration of future policies or action. As could be gathered from the comparative law survey, these differences of legal status, especially with regard to their qualification as a public agency, or as a corporative or professional body, are not due to chance or to historical circumstances but are the expression of the fundamental characteristics of the securities regulatory system, of which they form part. To a certain extent, one could also trace back these differences to the overall socio-economic systems of the societies in question. There would be very little point in striving to achieve uniformity in the limited field of the management and control of securities markets which we are studying here unless a similar development was observable in the overall social system.

From the comparative law survey it could also be inferred that the above-mentioned bodies are as a rule amply equipped with instruments for stock exchange management and supervision of brokers. In some countries this is also the case in other fields, including the stock-exchange-related company sector, the new issue market and the parallel securities markets. With regard to implementation, too, there appear - save for a few exceptions - to be no obvious qualitative differences: the distinction between public agencies and corporative bodies results in certain differences as to approach, but not with regard to the seriousness or thoroughness of the supervision. Where one does find appreciable differences, they seem to be connected with the relative extent or importance of the stock exchanges and of the

securities system in the national financial structure, rather than with the legal status of the body in question.

193. For all these reasons it appears desirable to keep the existing managing and control bodies, and on no account to replace them with a superimposed control body of the type of the American S.E.C. On the other hand, it is worth recommending that the existing bodies be expanded, be provided with the necessary means of intervention and action wherever this is not yet the case and be employed for the pursuit of a common policy, or at least of a policy which is not contradictory or liable to produce distortions between the national markets.

The establishment is proposed of a Consultative Body at Community level which would permanently map out the joint policy of the national managing and control bodies. Its aim must be not only the harmonization of national practices but also integration of the whole or part of the securities markets of the Member States. This body should be composed of representatives of the national managing and control bodies under the chairmanship of the European Commission, which should also provide the Secretariat. Joint measures decided upon in this body would be carried out in the most appropriate manner: in many cases an adaptation of the corporative regulations or even of the administrative practices would be sufficient. Only if necessary would the European Commission be invited to impose rules by way of a directive or in any other manner considered suitable.

The Consultative Body would be authorized to formulate the joint policy, the implementation of which would be entrusted to the national bodies. But, just as the European Commission at present keeps check on the execution of Community measures, it should be proposed that

a report be made to the Consultative Body concerning the implementation of the joint policy and that an examination be carried out in order to establish that national measures of implementation are in accordance with the jointly formulated policy. This control function implies periodical reporting, for instance in order to give notification of all individual and general decisions and to state the reasons for which they were taken. Difficulties concerning cases of implementation should be discussed jointly and the remedies to any shortcomings sought. All Member States should, however, refrain from changes in their national securities system, unless the Consultative Body had been requested in advance to formulate a common policy on the subject. If, after a certain length of time, the Consultative Body did not appear to be prepared or able to state its opinion, then the Member State would resume its free right of decision.

It is not the intention to equip the Consultative Body with rights of investigation and sanction. If certain problems require further investigation, it would seem advisable that a joint set of terms of reference be issued without this having to be coupled with on-the-spot inspections or checks. The imposition of sanctions can remain organized as at present: if the joint policy has been incorporated in a directive, then compliance could be called for by the European Commission in accordance with the Treaty. It would be useful to lay down that the Commission should issue a report every year on the findings and decisions made by the Consultative Body.

194. Without prejudice to the permanent reporting to the Consultative Body, all national managing and control bodies should be required to publish

an annual report in which, in addition to giving numerical and individual data to be specified later, they should state and explain all policy decisions, whether or not mentioning persons by name. This reporting could help to justify and legitimize the managing and control functions of the national bodies and would be conducive to greater objectivity in decision-making. Under present practice most managing and control bodies already publish more or less comprehensive annual reports, the value of which as public relations instruments depends on the completeness of their contents. This practice must be encouraged by calling upon the national authorities to publish complete and objective reports, supported by reasons, on their activities and decisions.

This justifying of all decisions should be extended to the individual plane in order to give all parties adequate legal protection against the decisions of the bodies referred to here, even if these decisions are of a purely private nature. To this end, individual decisions should be supported by reasons. As to litigious matters, rules of due process, offering sufficient protection to the aggrieved party, should be observed. A right of appeal against the decisions of these bodies would lie and would be governed by the general principles of each national legal system.

2.6. THE PARALLEL SECURITIES MARKETS

It is useful to divide these markets into three submarkets, the parallel market in securities officially quoted in the same Member State, the market in unquoted securities and, lastly, the Eurobond market.

1. The parallel markets in quoted securities

195. Several Member States accept that even officially quoted securities can be simultaneously dealt in outside the stock exchange, whether on the same or on different conditions. This leads to the emptying of the exchange market and undermines the significance of exchange quotation. All parties engaging professionally in securities dealings should therefore be required to bring usual transactions in quoted securities into the stock exchange market. This obligation should be imposed only on securities dealers: it is a matter for the national legislator to judge whether to require that all transfers of securities shall be effected via a stockbroker or to allow certain transactions, for instance between institutional investors or in large blocks of securities, to be carried out directly between buyers and sellers. There would also be exempted from obligatory execution on the stock exchange those transactions which fall outside normal stock exchange business, including before-hours and after-hours securities trading, which are resorted to in some countries mainly for purposes of arbitrage with foreign markets with different business hours, or for trading in blocks of securities. The bulk of the business - normal security dealings - should have to continue to take place on the stock exchange. In addition, for the execution of orders in the parallel markets, both securities dealers and persons who are not members of the stock exchange should be required to inform the stock exchange authority of the conditions on which

these off-the-floor transactions were effected such as their price, number of securities transferred, and the reasons for execution off-the-floor. The stock exchange authorities would be entitled to decide whether these parallel prices have to be communicated to the participants in the exchange markets. This communication would, as a rule, be effected for prices on the before- and after-hours markets, while an individual appreciation would be required for other cases, such as transfers of blocks, account having to be taken for these cases by special rules affecting these transactions or applicable to transfers of controlling shares. Foreign securities which are not quoted in the country in which they are being traded should be excluded from the arrangement.

The proposed arrangement entails - especially for Italy and Denmark - a change in the present procedures. The modification required will be less radical in the United Kingdom, and also in the Netherlands, where a comparable arrangement is already in force.

Observance of the above-mentioned rules would be exercised and sanctions would be imposed in accordance with the principle governing each national regulatory system, i.e. by the corporation or by the general rules of law.

2. The market in unquoted securities

196. Although in all Member States markets in unquoted securities are useful, primarily as an introductory market or in order to create a certain degree of competition with the stock exchange market through the provision of alternative forms of trading, their actual importance differs greatly.

The importance of these markets will increase as they will become better organized. They may prove to be suitable for accommodating those innumerable securities which exchange authorities would like to remove from the official quotation as offering insufficient depth for guaranteeing normal price formation.

In most countries access to these markets is limited to recognized securities dealers. Only in the United Kingdom, Denmark and Italy,

and to a smaller extent in the Federal Republic of Germany (1), do persons who are neither subject to the corporative rules of control nor recognized as banks appear on these markets. The professional requirements and guarantees, imposed on these intermediaries, and the supervision to which they are subjected are very limited, if not non-existent. It is desirable that there should be developed here an arrangement comparable to that applying to the members of the stock exchange, it being understood that it is to be left to the national authorities alone to answer the question whether or not they should be placed under the jurisdiction of the stock exchange authorities. If the answer appears to be in the negative, the national legislator would introduce alternative control mechanisms, for instance by encouraging the establishment of a parallel professional association or by exercising the supervision directly itself or entrusting it to a public body. As the extent of this market will as a rule remain much more limited, obligations similar in nature but less severe can be imposed.

Persons or undertakings who present themselves as market-makers for certain securities traded on these parallel markets should have to undertake regularly to publish quotation or price lists showing bid and ask quotes which can be assumed to indicate the highest and the lowest prices at which actual transactions have taken place. All other persons should be forbidden to publish, post up or generally make known quotations or prices.

(1) Namely those trading for their own account.

Market-makers should in addition have to place at the disposal of the public an information dossier containing all the information that they have been able to collect about the issuers and the securities in which they are making a market. As mentioned earlier, it should be possible to require these issuers to provide information, the extent of it depending on the intensity of the trading.

3. The market in Eurobonds

197. The questions of regulation and control in the Eurobond market arise in an entirely different manner from how they appear in the national context. For direct regulations especially designed for this market are in fact purely voluntary in nature. It has been repeatedly emphasized that to burden the Eurobond market with regulations and controls would probably only lead to a shifting of the trade. Even now this market spontaneously seeks out the countries with the least regulation, this being particularly true in the field of taxation. Nor could one expect to derive much benefit, for the solution of questions connected with the secondary Eurobond market, from a generalized obligatory inclusion of these securities in the official trade on one of the national stock exchanges. Although this provides some guarantees with regard to the admission information, it does not appear to have led anywhere to the channelling of the transactions into the stock exchange market.

The participants in this market all have the status of recognized banks or securities dealers. Reference can therefore be made to the proposals put forward earlier (sections 171 et seq) for reinforcing the status of securities dealers. This also applies to the duties and codes of behaviour which should be imposed on dealers in this market.

Up to the present dealing in this market has been mainly centralized in bonds, both ordinary and convertible. The quality of the borrowers

is scrupulously investigated by the underwriting issuing houses or banks: only States, international organizations and internationally known public or private undertakings gain access to this market. Cases of default or bankruptcy have been extremely rare in the past, which is not always the case in the national capital markets.

The information which is made available by the issuers at the time of issue or shortly thereafter is, looked at as a whole, not inferior to the issue information usually published in the Member States. Supervision over this information is in most cases exercised by the national authorities, either at the time of the issue itself (Luxembourg) or in connection with the admission of the securities to a stock exchange quotation (Federal Republic of Germany, United Kingdom). The dissemination of the issue information is as a rule limited, this being due partly to the method of distribution employed, but is also largely contributed to by the negative attitude of several Member States with regard to publicity about these securities. Without wishing to give an answer to the question whether a Member State should allow publicity for these securities, it seems indispensable that, if a State allows investors to purchase them, it must also enable them to be provided with proper information.

198. The information on the Eurobond market is as a rule confined to issue information. In some cases, the drawing lists or the redemption reports are also published. One may ask oneself whether increased provision of information concerning the issuer should not be organized and whether the Luxembourg or German stock exchange authorities which are already involved in this field should not be requested to encourage initiatives for increased permanent financial information by Eurobond issuers. This question is particularly relevant for issuers of convertible bonds: investors are as a rule dependent for information

on the stock exchanges where the share into which the bond can be converted is dealt in. As the Eurobond market appears to be developing towards more intensive use of telecommunications and electronic data-processing, it should be possible for these aids to be employed in order to ensure permanent provision of information.

199. The lack of transparency of secondary trading in Eurobonds is one of the most urgent problems in this market. The absence of structured price formation greatly undermines the significance attributable to the bid and offer prices at present being published. The scarcity of information concerning prices realized and volumes changing hands prevents investors from gaining an idea of how the financial intermediary has performed his function. The methods of dealing, such as execution from dealers' own portfolios, or dealers acting as commission agents, or as brokers, differ greatly, mainly in the relations between the investors and the financial intermediaries; as a result, equal participation in this market is greatly impaired.

It is desirable that the banks or financial intermediaries which perform the function of market-makers on the Eurobond market should publish data concerning the transactions effected through them. The bid and ask prices published should - as is now already the case to a great extent - have to correspond to the price at which the intermediary, for a normal quantity, is bound to do business. These data should at least have to relate to the prices realized, which means that most

transactions will have taken place at this price. The volume of transactions should also be published, preferably per transaction, or failing this in total, so that the depth of the market could be assessed. Although no obligation to carry out the transactions via the market-makers, or to subject these to a uniform system of price formation is proposed, it seems appropriate for the transparency of the market that all transactions which are not concluded in accordance with the above-mentioned rules should be reported and that all participants in the market should be able to gain knowledge of the conditions on which these transactions were effected.

200. The international nature of the Eurobond market precludes the external imposition of rules on the market participants or the issuers. Recognition of this reality does not mean that no recommendations can be made to the participants in the markets, who, as the overwhelming majority of them are resident in one of the Member States, can also be bound to observe certain modes of conduct.

With regard to issuers, disclosure requirements could be imposed as a permanent undertaking which the issuer has to enter into on admission of the security to a stock exchange quotation. For the enforcement of this undertaking - which will only rarely be necessary - an attempt can be made to devise more appropriate sanctions than suspension or delisting of the security, for instance by requesting a guarantee of the bank that introduced the application of exchange quotation.

With regard to security dealers, the national - public or corporative - rules should organize the above-mentioned minimum transaction information by introducing, as a general rule applicable both to Eurobonds and other unquoted securities, that published bid and ask prices shall be binding, while market-makers shall have to publish their prices

and volumes; securities dealt in outside this market should have to be reported to the market-makers, mentioning prices and quantities; these transactions, too, should have to be published.

201. The two above-mentioned measures solve only some of the problems of the Eurobond markets. Questions concerning the timing of issues, the creation of more flexible delivery and clearing mechanisms, the control of the secondary market, possible questions of a monetary nature, etc., have to be left, in the present state of development and structure, to market forces. Presumably the increasing tendency to self-organization and thus regulation of this market will lead to an appreciable improvement. The Eurex project can offer a valid alternative in this respect between regulated stock exchange trading and the present unstructured market. It is desirable that representatives of these self-regulating organizations should also participate in the search for better common rules for securities transactions.

3. THE FORMATION OF AN INTEGRATED EUROPEAN SECURITIES TRADING SYSTEM

202. Side by side with the implementation of the above-mentioned harmonization measures, it is necessary to activate thinking about the structure of future European securities trading. The following proposal for the establishment of a securities trade selectively spanning the whole of Europe can be used as a discussion basis. The proposal is the outcome of a number of observations.

203. In the present organization pattern we find several submarkets for securities which are more or less clearly separated from each other. These markets are sometimes interwoven : admission of securities to stock exchange trading in several Member States appears to have been an indication, at the beginning of the 1970s, of this interpenetration. Other points of contact lie predominantly in the hands of a few securities dealers specializing in arbitrage. One cannot contend that this has led to the creation of an integrated market. True, the foreign securities markets are accessible in many Member States without any very great obstacles. Comparability of markets and securities are, however, in fact impeded by innumerable factors, including local differences with regard to method of quotation or dealing, differences in the provision of information, or shortcomings with regard to telecommunications, etc. The different submarkets can be compared with communicating vessels: they react, sometimes with a certain delay, to each other's behaviour. This communication cannot alter the fact that each of the vessels individually is limited.

The merging-together of the national securities markets could considerably improve the depth of the market, offer greater possibilities of execution, especially for larger, mainly institutional orders, and increase the flexibility and the representativeness of price formation. The making

available of a more perfected market mechanism could help to expand the financing possibilities of public authorities and private businesses, by pooling together a sufficiently large volume of financial resources. Lastly, this market should be able to offer valid alternatives to the big financial markets developing outside the EEC.

204. A second observation relates to the differentiation between securities, already present in most Member States, whereby securities are subjected to other rules according to the extent of their distribution among investors. One could consider to distinguish three sets of rules. Outside the stock exchange, in local markets with a greater or lesser degree of transparency, are traded securities with limited distribution and reduced turn-over, usually issued by smaller businesses, or by firms of local importance. Disclosure or market conduct rules imposed on these issuers are usually minimal. A second category consists of securities quoted on the stock exchange. Here considerable obligations are often imposed on their issuers, mainly by way of disclosure. Rarely is any account taken of the differences in size and ability to assume burdens of the different types of issuers. These requirements are as a rule formulated mainly in the light of the third category, the larger issuers whose securities are quoted on two or more stock exchanges in different Member States and who, in view of their size and the wide distribution of their securities, can be required to comply with the most stringent or comprehensive rules regard disclosure or exchange conduct. For these issuers there simultaneously arises a burdensome superimposition of national requirements. It would appear desirable to extend this distinction between these three categories of issuers in the field of securities transactions and to subject each category to different - and above all appropriate - conditions with regard to transactions and publicity. It is thus desirable that securities with a small turnover and of only

Local importance should not be retained in stock exchange trading, partly in order to prevent the public from thus being misled that a genuine price-formation for these securities has developed. Differentiation also appears to be possible in matters of disclosure: securities whose distribution and significance is only local should on the one hand be brought out of the information vacuum in which they are at present in many Member States without being required to observe the discipline which has been created primarily for the larger issuers.

The following discussion about an integrated European trade in securities can relate only to securities which are at present already internationally distributed, that is, which are as a rule admitted to a stock exchange quotation in several Member States. For other securities, namely those with a national or local distribution, a pattern of organization inspired by the above-mentioned harmonization proposals can be devised.

205. A third observation relates to the schemes being developed or considered in several Member States, for the automation of important parts of the securities trade through use of electronic devices. The automation process has already taken place to a great extent with regard to clearing and book transfers of securities; not without great difficulty and with varying degrees of success, bridges have been built between the different clearing and security-transfer systems. In some Member States active use is made of telecommunication techniques for purposes of arbitrage (for instance in the Federal Republic of Germany), and price information is also transmitted in this way on the Eurobond market. A start does not yet appear to have been made, at least within the national context, on the taking of the last step. In several Member States more or less fully formulated plans are in existence for re-organizing trading itself, and even price formation, by means of telecommunications and information processing. It seems a predictable development that the physical presence of the securities dealers will become less and less necessary for the execution of securities transactions. Perhaps their presence will only continue to be required for securities of local importance.

A double consideration can be inferred. Firstly, that it would be regrettable if individual systems of computerized securities trading, which were not, or not easily, compatible were to be developed in each of the Member States. Arbitrage between automated security trading systems does not appear to be a desirable aim. It is therefore proposed that consultation should take place between the competent stock exchange authorities in order to ensure at least mutual compatibility of the automated securities trading systems that seem likely to be developed in the near future. In a subsequent phase consideration should be given to the integration of the national systems of securities trading, at least for those securities that are internationally traded .

206. It should be possible to develop an "Integrated European Securities Trading System" along the following lines.

1. CENTRALIZATION OF SECURITIES ORDERS

This proposal is based on the idea that as many orders as possible for a certain security should be brought together. The depth of the market and the accuracy of price-formation require maximum centralization. The orders from the various Member States should therefore be transmitted by telecommunications to a centrally situated computer. How the price formation is to take place within this computer is a matter which should be referred for technical investigation. One can think of market-makers who would establish successive prices, or of a system of single prices, whereby all buying and selling orders are matched at a given moment, and all orders executed at one single price. Combinations of the two systems remain conceivable, incorporation action by the financial intermediaries in the overall price-formation process.

In connection with automated trading, clearing and security-transfer facilities should be provided. It should also be possible for telecommunications and information-processing to be employed in order to transmit financial information, including market reports ("occasional information"), basic data and ratios concerning the issuer, etc.

2. THE SECURITIES

207. The integrated trading systems should only be open to securities with considerable or potential international distribution. One may think first of all of the securities of international or supranational organizations, the foreign debt of governments or public organizations, of multinational enterprises, etc. In a first stage objective access criteria should be worked out, for instance quotation on several national stock exchanges, issue in several Member States, etc. The securities which are not eligible for this integrated trading system would continue to be dealt in on the national stock exchanges or on the parallel securities markets.

Admission of a security to the integrated trading should have to be preceded by admission to stock exchange trading in one of the Member States. For issuers established in the EEC, the location of the issuer's head office could be adopted as the criterion. For international organizations or issuers not belonging to the Community, a special rule would have to be devised.

The national stock exchange authority which received the application for admission to stock exchange trading, and possibly to integrated trading, would be responsible for the admission application and the subsequently applicable stock exchange rules. Admission conditions, publicity requirements, stock exchange rules, etc. should be laid down uniformly for the whole Community but administered by the national control authorities, whether corporative or public in nature. The considerable set of permanent information and behaviour rules, which each stock exchange now imposes on the major issuers whose securities are quoted on its floor, would be combined into one single set of rules, forming the European stock exchange status, the enforcement of which, along with possible sanctioning would be entrusted to the national control authorities. Room can therefore be allowed for the differing national approaches: the more legalistic line, the administrative method of application or the conventional

approach can be regarded as equivalent methods of regulation.

3. THE ADMITTED SECURITIES DEALERS

208. It is not the intention to intervene in the national systems and traditions regarding the designation of the persons or enterprises, eligible for admission to securities trading. More particularly, it does not appear necessary to propose changes with regard to the participation of banks in securities transactions: reference is made in this respect to the national legislation. It is proposed, however, that the personal status of brokers, and, where necessary, of banks, should be strengthened in accordance with the lines set forth earlier for the national markets.

It is proposed to admit as securities dealers in the integrated European securities trading system those undertakings or persons who, firstly, are authorized under their national legislation to execute orders for securities and, secondly, meet the additional safety requirements which would be necessary in this wider market.

At a later stage consideration could be given to the question whether this rule could be extended to undertakings which under present legislation are not allowed to execute securities orders but are permitted to receive them or carry them out, where appropriate, by offsetting or by trading with professional colleagues.

A few examples may throw further light on this approach. If, for instance, under French law only brokers may execute orders, this will mean that here only brokers will be able to participate in the integrated system. French banks would be excluded from direct participation and, as previously, would pass their orders to French brokers or other participants in the market. If French banks were to be allowed also to pass their securities orders to, for instance, foreign market

participants, this would presumably have to be coupled with the obligation that they should transmit securities orders of French origin to French brokers. Where, as is the case in Denmark or Italy, the majority of the transactions are effected outside the stock exchange, this could possibly remain the practice.

Additional admission requirements to the integrated European Securities Market System may be necessary to ensure that only sufficiently financially reliable market participants enter the system. Among these requirements are to be mentioned: sufficient financial resources, internal organization, rules of internal and external control, etc.

The admission conditions should be objectively defined and, where complied with, should automatically confer a right to participation. Determination of compliance with the conditions, and with the permanent operation requirements should remain entrusted to the national exchange authorities, among which close contact would have to be realized in order to ensure uniform, correct and proper performance of this task. The national stock exchange authorities should continue to exercise disciplinary supervision, including supervision to prevent infringements of the rules of the integrated trading system. As all market participants and the control authorities have mutual trust that each control body will exercise its control powers with equal conscience and precision, to the benefit of all participants, it seems necessary that this exercise of control power should be subject to some scrutiny and criticism (see N° 214).

4. THE TRANSACTIONS

209. Stock exchange managing and control bodies would be invited to consult each other on the point of determining which transactions will be allowed in the integrated trading systems, and what rules will be applicable: cash, forward, options, price fixing rules, restrictions on price fluctuations, etc. In principle, dealings should take place only in set minimum quantities (round lots), so that for small orders

will have to be carried out on the national exchange on which the shares are quoted, unless suitable execution mechanisms can be provided.

As on all the national markets, a body should be established to look after the central management of the market and to be responsible for, among other things, the proper operation of the whole system, the regularity of execution of business, etc. The powers of this body should be limited to what is done by the present commissioner or delegate for quotation. This task could be entrusted, e.g. to delegates of the national stock exchange bodies, or of the Committee which is mentioned below.

Although still premature in the present state of development of the Community, it should be considered to carry on trading in a single unit of account, possibly even in a European currency, which could also be used as an instrument for payment. Pending this, trading can be done and settlement effected in the currency in which the security is denominated or in the issuer's national currency.

Whether all transactions in securities admitted to this trading system should obligatorily be brought to the system and executed through it, can in the present state of regulation be left to the national legislation. If the national legislation permits execution of securities orders outside the stock exchange or by offsetting, execution of orders coming from this Member State could be effected outside the system. However, it does appear important that all transactions in securities admitted to the system, but executed outside the system, be reported, mentioning price and quantity. Should it be found that execution outside the system assumes considerable proportions, consultation should take place concerning the causes of this development.

Although this is still vigorously disputed in several countries, it seems desirable that rules for combating unsound market practices

(manipulation, insider trading) should be enacted and, at least as far as transactions on this market are concerned, declared generally applicable.

5. THE INSTITUTIONAL ASPECTS

210. It does not seem feasible to establish an organization as important as the integrated market which has just been outlined without this having more or less radical institutional consequences. It is proposed that reliance should be placed as far as possible on the existing governing and control bodies, irrespective of whether they belong to the public or the corporative sphere. As the market should embrace the entire Community, the rules to be applied by these national authorities should be centrally formulated. The distinction between the two decision levels is already inherent in the present operation of the Community. The general policy lines are formulated jointly, while their application and the imposition of sanctions are entrusted to the national authorities. More flexible procedures for Community decision-making and legislation are indispensable for the development of this organization pattern.

The execution of the centrally formulated norm, or its application, are national matters to be organized by the Member States in the manner which they consider most appropriate. This means that several Member States can choose to incorporate the norm itself in almost identical terms in their national regulations or to adapt to it their administrative practices. Application of the norm in individual cases will also be entrusted to the national control authorities. Thus security dealers would be admitted and controlled in accordance with their national regulations, supplemented by the European requirements. The body responsible for control and sanctions would remain the national one, as a rule the corporative authority. A similar line

of argument applies for the admission of securities to integrated trading: the application would be submitted to the national authorities, who would exercise control as regards the prospectus and compliance with the information and other obligations to be entered into. The imposition of sanctions would also be entrusted to the national bodies.

211. If the integrated market is to accept the leading securities of every national stock exchange market, all Member States and all participants will have a parallel interest in the maintenance of sufficiently high standards with regard to market participants, the admission and continued eligibility of securities, and the regularity of trading. The admission of securities or the carrying out of transactions liable to undermine general confidence in the integrated market must be avoided. Procedures should be established to prevent or detect cases of preferential treatment, excessive flexibility or neglect in supervision on the part of one of the national control bodies. It is not sufficient to formulate norms on a Community basis; the Member States also have a common interest in the effective and uniform application and interpretation of the norms.
212. It is proposed that a Managing Committee should be established with powers on the one hand to establish the common norm and on the other hand to keep check on compliance with this norm by the national authorities. The Managing Committee should be acting attached to the European Commission. It would not have the right to impose sanctions on its own but thereto would have to resort to the Commission.
213. The normative powers of the Committee would embrace the entire operation of the integrated European securities trading system. The norms would be directed to the national authorities, who would incorporate them in the most appropriate manner in their regulations or practices. The norms would not have the force of a directive: recourse could be had to the issuing of formal directives for matters which do not only touch the participating stock exchange authorities.

214. The power of investigation would be an extension of the European Commission's present power to examine whether the Member States have fulfilled their obligations under the Treaty. Three means to this end can be envisaged:

- a. The national bodies would systematically report all decisions to the Committee, giving the reasons, the statement of which would be made generally compulsory; the Committee could if appropriate demand additional information and interview employees of the national bodies.
- b. Exceptionally, and if the Committee had serious and specific suspicions that the information supplied was incomplete or incorrect, it should be able to order an on-the-spot investigation in order to find out whether the Community norms were being properly complied with.
- c. Legally subordinate bodies, or other national agencies, should also be able to request the Committee to investigate whether the Community norm was being properly applied in a specific matter; within the framework the Committee could deliver an opinion on factual matters, which could be referred to in legal proceedings, whether before national or Community bodies.

The Committee would not have the right to impose sanctions if it discovered specific infringements. It should in such cases be able to announce its decision and notify the European Commission of the infringement.

It is not necessary at this point to express an opinion as to the place of the Committee within the Community system. It is clear, however, that it should not be composed solely of persons representing the national securities markets but that representatives of the overriding general interest should also be able to codetermine the working of the Committee.

Lastly, a few concluding thoughts. It is not intended that the organization of the integrated European security market should duplicate the

efforts now being made to organize a secondary market in Eurobonds. These are two separate and distinct problems: the market envisaged here is intended primarily to serve as an instrument for widening the financing possibilities of European enterprises and is therefore concerned mainly with dealings in equities.

It is not altogether clear why the integrated trading system envisaged here could not be brought into being within the framework of a co-operation agreement between the national stock exchange and control bodies.

It is proposed that the Commission of the European Communities should consult the Member States with regard to the creation of new forms of organization of securities markets designed to meet capital financing requirements.

B I B L I O G R A P H Y A N D D O C U M E N T A T I O N

1. GENERAL, INTERNATIONAL AND COMPARATIVE

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TABLE OF CONTENTS

	<u>Page</u>
Preface	3
 <u>CHAPTER I</u> <u>THE FIELD OF INVESTIGATION</u> <u>CONTROL OF SECURITIES MARKETS</u>	
	5
 <u>CHAPTER II</u> <u>SYNTHESIS OF THE COMPARATIVE LAW STUDY</u>	
<u>SECTION I : THE PRIMARY SECURITIES MARKET</u>	11
A. Socio-economic interventions	11
B. Interventions of a structural nature	14
1. Purpose or purport of the interventions	14
2. Examination of the main forms of intervention	15
a) Measures directed towards issuers	16
1. In connection with the structure of the issuer (company law)	16
2. Supervision of financial institutions	16
b) Measures directed towards the issuing operation or the securities	17
1. Issuers allowed to make public issues of securities	17
2. Intermediaries involved in placing securities	18

3. Methods of placing	18
4. Rights attaching to the securities	19
5. Securities not admitted or advised against	20
6. The doctrine of information or disclosure	21
C. Increased disclosure on public issue of securities	21
1. The major types of regulation	21
2. Supervision of disclosure on issue	25
<u>SECTION II : THE SECONDARY SECURITIES MARKET</u>	31
<u>PART I : THE STOCK EXCHANGE MARKETS</u>	32
1. <u>GENERAL ORGANIZATION OF THE STOCK EXCHANGE MARKETS</u>	33
1. Interventions analysed according to their subject	33
- The decision levels	33
- Control	35
2. Interventions analysed according to the body empowered	36
2.1. The difference between public and corporative interventions	36
2.2. Applications of this distinction	38
1. The managing and supervisory bodies	38
2. The stock exchange regulations	41
2.3. Comparison of public and corporative interventions	43
2.3.1. Predominantly corporative interventions	43
2.3.2. Mixed types of intervention	46

1.	With regard to the legal and regulatory organization	46
2.	With regard to management of the stock exchanges	48
a)	Admission of securities to stock exchange quotation	49
b)	The personal status of stock exchange securities dealers	50
c)	Stock exchange transactions	50
3.	With regard to rules of control and supervision	51
2.	<u>THE PERSONS INVOLVED IN STOCK EXCHANGE DEALINGS</u>	54
1.	Brokers' and mixed stock exchanges	54
2.	General conditions for admission	55
3.	Structure and organization of firms	56
4.	Financial obligations of securities dealers	58
5.	Control on securities dealers	61
6.	Imposition of sanctions	62
7.	The ancillary professions	63
3.	<u>INTERVENTIONS WITH REGARD TO THE SECURITIES</u>	65
1.	The bodies entrusted with these interventions	65
2.	The interventions	68
2.1.	Admission to stock exchange quotation	68
2.1.1.	Conditions of admission	68
2.1.2.	The admission procedure	71
2.1.3.	Suspension or striking-off	72
2.2.	Obligations imposed on companies whose securities are admitted to stock exchange quotation	73
2.2.1.	Development towards "stock exchange status"	73

2.2.2.	Elements of the "stock exchange status"	74
2.2.3.	Comparative summary of legislation	77
	a. Extended disclosure	77
	b. Rules of behaviour	79
	c. Forms of regulation and supervision	82
4.	<u>THE TRANSACTIONS CARRIED OUT ON THE STOCK EXCHANGE</u>	87
	I. SECURITY TRADING ON THE STOCK EXCHANGE	87
	II. REGULATION OF STOCK EXCHANGE ORDERS	89
	1. Delimitation of the stock exchange market	89
	2. Behaviour of the principals	92
	<u>PART II : THE PARALLEL SECURITIES MARKETS</u>	96
	I. STRUCTURED MARKETS	96
	II. PARALLEL MARKETS WITH LITTLE OR NO STRUCTURE	98
	1. The secondary Eurobond trade	98
	2. The telephone markets	101
	a. Telephone dealings in quoted securities	101
	b. Telephone dealings in unquoted securities	102
	<u>CHAPTER III</u>	
	<u>THE MAJOR SYSTEMS OF SECURITIES REGULATION IN THE EEC</u>	
1.	THE NORTHERN PATTERN OF SECURITIES REGULATION	105
2.	THE CENTRAL EUROPEAN REGULATORY PATTERN	108

3. THE SOUTHERN EUROPEAN ORGANIZATION PATTERN	110
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CHAPTER IV

HARMONIZATION PROPOSALS

1. REASONS FOR THE FORMULATION OF A TWO-PART PROPOSAL	117
2. PROPOSALS FOR THE HARMONIZATION OF NATIONAL RULES CONCERNING DEALINGS IN SECURITIES	123
2.1. Disclosure on issue of securities	123
2.2. Prospectus liabilities	127
2.3. The status of the intermediaries	129
2.3.1. The banks	129
2.3.2. Brokers	131
a. Rules regarding the solvency of firms	131
b. The internal organization of firms	133
1. Measures of internal control	133
2. Association obligation	134
c. Corporative control	135
d. Regulation of the ancillary activities and recognition of "financial advisers" as a regulated profession	136
2.4. Policy with regard to issuers of securities	139
2.4.1. A new purpose-oriented overall disclosure policy	139
2.4.2. Rules of behaviour for issuers	147

2.5. The institutional aspects	149
2.6. The parallel securities markets	154
1. The parallel markets in quoted securities	154
2. The market in unquoted securities	155
3. The market in Eurobonds	157
3. THE FORMATION OF AN INTEGRATED EUROPEAN SECURITIES TRADING SYSTEM	162
1. Centralization of securities orders	165
2. The securities	166
3. The admitted securities dealers	167
4. The transactions	168
5. The institutional aspects	170
Bibliography and documentation	175
Table of contents	209

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European Communities – Commission

Control of securities markets in the European Economic Community

*Report on a comparative law study submitted by Prof. Dr. E. Wymeersch,
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In this study the control of securities markets in its different forms is examined, described and compared. Control is here understood to mean both the socio-economic interventions and the interventions of a structural nature whereby securities markets are organized and managed. Control also embraces checking whether or not rules have been complied with, and sanctions to be imposed.

Methodologically, the division between primary and secondary securities markets was retained. In the former market we find, in addition to socio-economic interventions (issues calendar, foreign exchange legislation, etc), mainly structural measures relating to disclosure and the provision of information. The secondary market is divided into the stock exchange markets or official markets and the other markets, which are referred to as parallel markets. The structure of the interventions with regard to the stock exchange markets is examined from four points of view: the organizational rules (including the managing, controlling and supervisory bodies); the rules regarding the persons admitted (policy with regard to dealers in securities); the rules regarding the admission of securities (policy with regard to issuers); and, lastly, rules concerning the organization of stock exchange dealings. The parallel markets are sketched in broad outline.

The present study contains a synthesis of the comparative law study of the regulatory systems of the nine Member States. The national reports, which were devoted to each of the nine Member States will presumably be published later. In this synthesis attention is drawn to the similarities with regard to interventions to be found in several Member States. As with organization charts which overlap, one can deduce from these the fields which lend themselves best to harmonization because the present approximation already reflects fundamental agreement.

The report contains two sets of proposals regarding harmonization of interventions. In a first set an indication is given of the subsidiary fields which, in accordance with the above mentioned approximation, already appear suitable for harmonization. The second proposal relates to the formation of an integrated trade in securities intended to embrace all the Member States.

The study was made by Prof. E. Wymeersch, of the Universitaire Instelling Antwerpen, and contains only the author's views. The Commission is nevertheless of the opinion that it can make a significant contribution to the achievement of some of the aims which the Commission is pursuing with regard to securities markets.

The subject-matter was updated to mid-1977.

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