hand and another undertaking unconnected with the concentration on the other. As with the recent case law on collective dominant position under Article 86, it is necessary for the Commission to show, if necessarily prospectively, that the jointly dominant undertakings "together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market".[47] This it failed to show, and the decision in issue was annulled. But doubtless emboldened by the question of principle being settled, the Commission will return to the creation or strengthening of collective dominance or oligopoly with vigour.

As to the application of the Merger Regulation generally, the number of notifications has risen steadily—110, 131 and 172 in 1995, 1996 and 1997 respectively—and the Commission has now considered about 700 concentrations under the Regulation. In the period under consideration it opened phase 2 proceedings—which it is required to do where it entertains "serious doubts" as to the compatibility of a concentration with the common market[48]—in 26 cases, allowed 14 to proceed only if conditions were complied with, and prohibited six, bringing the total since the Regulation entered into force to eight. Three of the six were referrals under the Dutch clause, two from the Netherlands and one from Finland. (With the entry into force of the new Dutch *Mededingingswet* in January 1998, Denmark, Luxembourg and Finland remain the only member States without national merger regulation control.)

ROBERT LANE*

IV. INSURANCE AND BANKING

A. The New Legislative Landscape: Consolidation and Recommendations

The internal financial market is still far from its completion. Parts of the financial market and certain financial institutions are not yet covered by implementing directives. In areas that are covered by directives, transposition by member States has not removed important practical barriers to cross-border establishment and provision of services. An interesting feature of the current developments in the EC regulation of financial markets is the Commission's use of "Communications" to implement Treaty freedoms and so to remedy the situation where the member States have blocked proposals for a directive or where unacceptable barriers remain after their transposition.

The incomplete structure of the internal financial market is illustrated in a recent judgment of the European Court of Justice, *France* v. *Commission*.[1] It concerned an attempt by the Commission to complete the structure of the internal financial market in an area where the normal legislative procedure had failed.

47. Para.221.
48. Reg. 4064/89, Art.6(1)(c).

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1. *French Republic* v. *Commission of the European Communities* [1997] E.C.R. I–1627.

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The framework of the Internal Market Directives is put to the test in many of the judgments of the Court. The compromises reached in the legislative process are tested against the case law on the Treaty freedoms. The Court continues to give effect to the Treaty provisions in accordance with that law, and interprets directives in a way which is consistent with it.[2] This process is about to begin in the area of financial market regulation.

The legislative landscape of EC financial market regulation is about to undergo radical change as a consequence of simplification and consolidation. In 1997 the Commission proposed a consolidated Banking Directive incorporating all seven basic directives and 12 amending directives. Similar consolidations are under preparation for the directives on insurance and investment services. Together with the new Commission Communications this will change the legislative landscape and the accessibility and relative importance of the sources of law.

B. Banking

The rejection by the Court of Justice[3] of the German challenge[4] to the Directive on Deposit Guarantee Schemes[5] was the final stage in a long political and legal process. The Directive was adopted on the basis of the first and third sentences of Article 57(2) and in accordance with the procedure referred to in Article 189b of the EC Treaty. In the Council Germany had voted against its adoption.

Germany submitted that the Directive had the wrong legal basis and that there had been a breach of the obligation to state reasons as required by Article 190 of the EC Treaty. In particular, it claimed that the Community legislature had not set out the grounds justifying the Directive's compatibility with the principle of subsidiarity. The Court rejected the claim. It relied on certain rather general statements in the recitals in the preamble to the Directive, for instance where the Parliament and the Council stated that "consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable" and that it was "indispensable to ensure a harmonised minimum level of deposit protection wherever deposits are located in the Community". An express reference to the principle of subsidiarity was not required.

Germany also claimed that the Court should annul certain provisions of the Directive as being contrary to the principle of proportionality, as going beyond its Treaty base in Article 57(2), or as going against the principle of home country control.[6]

2. *KO* v. *De Agostini and TV-Shop* [1997] E.C.R. I-3843 illustrates how the ECJ relies directly on its own case law on the Treaty freedoms in the interpretation of a directive and does not dwell unnecessarily on the actual provisions of the directive in question or their history. In the same direction, see *Germany* v. *European Parliament and Council*, *infra* n.3.

3. *Germany* v. *European Parliament and Council* [1997] E.C.R. I-2405.

4. See "Current Developments" (1994) 43 I.C.L.Q. 731, and "Current Developments" (1994) 45 I.C.L.Q. 233.

5. (1994) O.J. L135/5.

6. See Lomnicka, "The Single European Passport in Financial Services", in Rider and Andenas (Eds), *Developments in European Company Law* (1997), p.181.

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The test for the proportionality review is limited to manifest incorrectness or where the disadvantages for certain economic operators are wholly disproportionate to the advantages otherwise offered. It was clear that Germany could not succeed on this test.

The Court then held that it had not been proved that the Community legislature works on the principle of home State supervision in the sphere of banking law with the intention of systematically subordinating all other rules in that sphere to that principle. Second, since it is not a principle laid down by the Treaty, the Community legislature could depart from it, provided that it did not infringe the legitimate expectations of the persons concerned. Since it had not yet acted in regard to the guarantee of deposits, no such legitimate expectations could exist.

The outcome of the case seemed rather clear from the outset. The German government may have had internal political reasons for continuing by legal steps the political battle that had been lost in the Council.

The Court of Justice most recently had the opportunity to consider the purpose and effect of the First Banking Directive[7] in *Parodi*.[8]

In 1984, the de Bary Bank, in the Netherlands, made a mortgage loan to SCI Parodi, in France. The de Bary Bank was authorised in the Netherlands, but not in France. In 1990 SCI Parodi brought an action in France against the de Bary Bank for a declaration that the loan be declared void on the grounds that, when it made the loan, the de Bary Bank was not authorised as required by the French law on the activity and supervision of credit institutions.

The Cour de cassation referred the question whether national legislation requiring authorisation for the supply of banking services, where the bank concerned was already established and authorised in another member State, was precluded by Articles 59 and 61(2) of the EC Treaty.

The Court of Justice held that this was precluded unless the authorisation was required of every person pursuing such an activity in the member State, was justified on grounds of public interest, such as consumer protection, and was objectively necessary to ensure compliance with the rules applicable in the banking sector and to protect the interests which those rules were intended to safeguard, and the result could not be achieved by less restrictive rules.

The judgment is of interest as it makes clear the extent to which the purpose of the 1977 Directive was to impose obligations on member States in order to guarantee the protection of savers from the risks of dealing with institutions that did not meet the minimum conditions for authorisation. The extension of this may be the conferral of rights upon savers.[9]

7. First Directive 77/780/EEC of 12 Dec. 1977 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (1977) O.J. L322/30.

8. *Société Civile Immobilière Parodi* v. *Banque H. Albert de Bary et Cie* [1997] E.C.R. I-3899.

9. The purpose of the First Banking Directive was an issue in *Three Rivers DC* v. *Bank of England No. 3* [1996] 2 All E.R. 558. The Bank of England argued before Mr Justice Clarke that the purpose, or at least the primary purpose of the 1977 Directive was not the protection of depositors. That submission was rejected by Mr Justice Clarke, correctly as the judgment in *Parodi* has made clear. His ruling that the duties imposed by the Directive could not give rise to rights for depositors, however, is not good Community law. This question may end up before the ECJ.

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In 1997 the Commission adopted the "Commission interpretative communication—Freedom to provide services and the general good in the Second Banking Directive".[10] Already in 1995 it had issued a draft Communication[11] for consultation. The draft was issued in response to initiatives in several member States to require notification under the Directive not only of services that were provided for the first time. Certain member States also seemed to define broadly the services provisions so that more new activities would require notification. Finally, establishment was in the process of being formulated so broadly as to cover what could be categorised as services with less stringent requirements.

In the Banking Communication, the Commission goes through the different issues, invoking the relevant case law, including, of course, both *Commission* v. *Germany*[12] and the important *Säger* v. *Dennemeyer*[13] which applied the *Cassis* jurisprudence to services as the Commission had advocated in *Commission* v. *Germany*.

Such a Communication is not without precedent. The 1980 Communication[14] after *Cassis de Dijon*[15] is well known.

C. *Pension Funds*

France v. *Commission*[16] concerns an attempt by the Commission to legislate on its own—to give effect to the Treaty freedoms in order to complete the structure of the internal financial market—in an area where the normal legislative procedure had failed.[17]

Member States blocked the adoption of the last financial institutions directive, on pension funds, proposed by the Commission in 1991.[18] To the usual issues needing to be resolved in the context of the other financial institutions directives there was here added the fact that most member States had limits on the freedom to invest in foreign assets, in order to secure that the investments were made in domestic securities. The Commission did not propose full freedom. In its last revised proposal it limited member States' competence so that they could require that up to 60 per cent be invested in domestic assets.

When certain member States, in particular France, pressed for further concessions, the Commission withdrew its proposal. In 1994 it issued a Communication containing the provisions of its last draft directive.[19]

The Communication appeared as the Commission's interpretation of the Treaty. There are no references to specific cases. However, it is precise in laying

10. (1997) O.J. C209/6.
11. Draft Commission Communication: Freedom to provide services and the interest of the general good in the Second Banking Directive (1995) O.J. C291. Earlier drafts had for some time circulated.
12. [1986] E.C.R. 3755.
13. [1991] E.C.R. I–4221.
14. (1980) O.J. C256/2, noted by Gormley (1981) 6 E.L.Rev. 454.
15. *Rewe-Zentrale* v. *Bundesmonopol für Branntwein* [1979] E.C.R. 649.
16. *French Republic* v. *Commission of the European Communities* [1997] E.C.R. I–1627.
17. See "Current Developments" (1994) 45 I.C.L.Q. 234.
18. (1991) O.J. C312/3.
19. Commission Communication on the freedom of management and investment of funds held by institutions for retirement provisions. Communication on an internal market for pension funds (1994) O.J. C360/7.

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down transitional provisions, etc., and differs clearly from the way in which the Court of Justice would apply the Treaty. It even includes administrative provisions, for instance about member States designating a competent authority for certain functions. Here the formulation is that "it is desirable that each Member State" does this. There are provisions about entry into force of certain of the provisions, saying that the provisions do not have any effect on circumstances before the adoption of the Communication.

In *France* v. *Commission* the Court annulled the Commission Communication on pension funds.[20] It held that the Commission lacked the necessary competence to adopt the Communication. However, the Court did not say that interpretative communications are *ultra vires*. The Commission can issue communications that make *explicit* the obligations arising for member States under the relevant Treaty provisions. Furthermore, the Court did not limit the competence to issue communications about the Commission's exercise of its own discretion.

The judgment in *France* v. *Commission* emphasises that the internal market in financial services, the internal financial market, does not yet include pension funds. There is no directive implementing the right to provide services and the right of establishment. Direct effect and negative harmonisation, which are there to rely upon in the meantime, do not provide a sufficient alternative to implementation through secondary legislation in the form of a directive.

D. Insurance

The Commission also adopted the "Draft Commission interpretative communication—Freedom to provide services and the general good in the insurance sector",[21] in 1997. This Draft has most of the elements of the Banking Communication. Insurance regulation has, however, traditionally contained more detailed rules for the conduct of business designed for the protection of the insured. In the Insurance Draft this is reflected in extensive conflict of laws provisions which have no counterpart in the Banking Communication.

Criminal proceedings against Rafael Ruiz Bernàldes,[22] an Article 177 reference on the protection of injured persons by compulsory motor insurance, provided the Court with the opportunity to continue the gradual erosion of the limitations on the direct effect of directives. The Court reconfirmed in *Faccini Dori*[23] that a directive which has not been transposed into domestic law cannot be relied upon against private parties (horizontal direct effect) in the way that it can be relied upon against the State or emanations of the State. In *Bernàldes* the Seville Provincial Court as court of appeal indicated that it would overturn the court of first instance that had relied on the Spanish legislation. The Seville court held that Spanish law must be interpreted in accordance with the First Motor Insurance Directive[24] and it referred certain questions as to the interpretation of the Motor Insurance Directives. The European Court held that "Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or

20. *French Republic, supra* n.16.
21. (1997) O.J. C365/7.
22. [1997] E.C.R. I-1829.
23. [1994] E.C.R. I-3325.
24. (1971) O.J. L103/1.

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contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle" (paragraph 20). This provides victims with remedies based on a directive against private insurance companies even when this is contrary to express provisions of domestic legislation. This is horizontal direct effect. Of course, the insurance companies have a particular position under the scheme of compulsory motor insurance. Perhaps the restriction of horizontal direct effect is not so universal any longer. It has become necessary to go beneath the surface and look more closely at the parties involved and the remedies sought.

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