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**Southern Extension of the EC and
Financial Services - Final Report**

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IMPRESSUM

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Preliminary Remarks

The design of this study was developed in a time when the then EEC and now EC or European Union had adopted the Single Act in 1987 and had put forward the ambitious programme to establish an internal market in the sense of article 8a EEC Treaty, now 7a EC Treaty which reads:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

The very wording of this provision shows that financial services like banking, credit, insurance, investment, securities etc. were to be included which, at the time being, were still subject to severe restrictions justified by articles 61 and 67 of the Treaty.

On the other hand, the project of establishing an internal market for financial services till 31 December 1992 could not be obtained without guaranteeing consumers of financial services, including depositors in banks, policy holders of insurance companies, a *high level of protection* as this was indirectly indicated in article 100a para 3, even if this provision was not directly applicable to the financial services sector.

Any programme to open up the markets for financial services in the EC had to take account of very different industries, regulations and consumer expectations in the twelve Member Countries. A remarkable "north-south difference" seemed to exist within the EC because countries like Greece, Spain and Portugal had only recently, in 1981 respectively 1986, acceded to the Common Market and were coping with severe adaptation problems, especially with regard to currency fluctuations, flight of capital etc. The Single Act took account of this difference by two important sets of provisions, namely those on regional policies, per articles 130a et sequ. on economic and social cohesion, and in article 8c concerning "two-step integration" which reads:

When drawing up its proposals with a view to achieving the objectives set out in article 8a, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions. If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the Common Market.

The general provision of article 8c could be flexibly used to allow for adaptation periods and safeguard clauses to the lesser developed and less integrated countries within the EC. Even if the internal market for financial services could not be achieved on 31 December 1992, it could at least be envisaged at a specific time to be set in a directive.

This study was concerned with exploring this "*magical triangle*" of integration theory, namely at the same time opening up financial services markets, guaranteeing a high level of protection to consumers of financial services, and allowing for adaptation to specific situations encountered in "southern EC countries", namely Spain and Greece. It seemed appropriate to look at certain areas of EC policy and law making in the financial services sector which we will explain in detail later. At the same time, two "northern countries" with similar economic strength but different industry structure and regulatory traditions were chosen, namely Great Britain and Germany. On the other hand, Greece and Spain seemed good candidates to explore the potential and difficulties of "southern countries" which only recently had adhered to the EC would encounter in realising the above-mentioned magical triangle.

A working group of researchers from the above-mentioned countries was instituted with senior researchers being responsible for each country who directed the contributions of junior researchers with regard to the specific situation in their country.

The work on the project was generously funded by the Stiftung Volkswagenwerk. Concrete research could only be started in 1992 and was finished in 1994. Two conferences were held to discuss preliminary results (1993 in Bremen) and final results (1994 in Santorini/Greece). The results of the different research teams have been published separately in ZERP-discussion papers (dp), namely:

Norbert Reich/John Cecil van Aken: The Evolution of Community Law on Financial Services, ZERP-dp 1/94 (cited: Reich/Van Aken)

Geoffrey Woodroffe/Philip Rawlings/Chris Willet: Financial Services in the United Kingdom, ZERP-dp 4/94 (Woodroffe/Rawlings/Willet)

Pedro-José Bueso Guillén/Jesús Santos Ruiz de Eguílaz: Tarjetas de Transacciones Financieras en Espana: Estándares de Protección del Consumidor (Credit Cards in Spain: Consumer Protection Standards), ZERP-dp 2/94 (Bueso/Santos)

Edda Castelló: Untersuchung von Beschwerdesystemen für Finanzdienstleistungen (Study on Complaint Handling Systems in Financial Services), ZERP-dp 5/94 (Castelló)

Wolfgang Scholl: Transparenzregeln für europäische Versicherungsprodukte (Transparency Rules for European Insurance Products), ZERP-dp 6/94 (Scholl)

E. Alexandridou/M.T. Marinos/C. Mastrokostas/G. Triantaphyllakis: Financial Services in Greece, ZERP-dp 8/94 (Alexandridou/Marinos/Mastrokostas/Triantaphyllakis)

Manuel-Angel López Sánchez/Jesús Santos Ruiz de Eguílaz/Marta Orero Núñez: Servicios financieros, protección del consumidor y sistemas extrajudiciales de resolución de conflictos en España, ZERP-dp 5/95 (López-Sánchez/Santos/Orero Núñez).

Before analyzing in more detail some of the fundamental questions, methods, and findings of the project, a specific problem should be mentioned which could not be foreseen by the collaborators: legislative activity of the EC before the final date of 31 December 1992 accelerated in such a rapid pace that it was nearly impossible to simply follow up EC legislation. This is particularly true with insurance which, when the project was started, was only concerned with partial opening up by the Second Directives (Reich/van Aken, 8-13) but later had been overridden by the liberalization impetus of the Third Insurance Directives 92/49 and 92/96/EEC. They had to be implemented till 1 July 1994 which was beyond the timetable established for the research project. Spain, Portugal and Greece had been granted specific adaptation periods. At the same time, the EC had adopted Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts which has to be implemented by 1 January

1995. Again, this Directive will have certain repercussions on financial services, but these could obviously not be studied by the collaborators.

Therefore, the entire study itself and its findings must be regarded as provisional and cannot give a total account of the concept of two-step integration. As a tentative result we should mention that all participants in the Santorini conference were quite sceptical to the validity of this concept. Integration, especially in complex markets like the one of financial services seems to be a much more difficult task than law makers in Brussels seem to think.

A. The Establishment of an Internal Market for Financial Services

I. The Legal Concept of Financial Services

EC law, unlike legislation in the United Kingdom, does not use the concept of "financial services". The relevant provisions of primary EC law are contained in the articles on the freedom to provide services and freedom of establishment, per articles 59/52, and on free movement of capital, per article 67, now article 73b as amended by the Maastricht Treaty on European Union, in force since 1 November 1993. Because of the restrictions of Member States to the free movement of capital and insurance, existing at the beginning of the study especially in the "Southern countries", but also for insurance in Germany, either a strict reading of the general good proviso of primary EC law or specific directives of secondary EC law had to be invoked in order to realize the objective of the internal market. Primary EC law, unlike free movement of goods, only played a small role in the opening up of financial services markets. The European Court of Justice (ECJ) was rather hesitant to do away with the still existing restrictions on free movement of financial services.

The study therefore had to look at secondary EC law. The most important ones concerned banking, insurance and investment services. They are listed in Reich/van Aken which, on the one hand, gives an overview of the most important EC legislation and, on the other hand, provides for a detailed explanation of the Second Banking Directive 89/646/EEC which has become the model of all later EC regulation in this area.

The important Council Directives on banking, insurance and, later, investment by Dir. 93/22, are accompanied by a large number of ancillary directives which are concerned with specific aspects of the industry, with certain points of consumer protection, with intermediaries and the like. To some extent, competition law also plays an important role.

The study looked at this enormous bulk of legislation from a *consumer perspective*. First of all, it excluded investment and securities services from its focus. Such a decision may be regarded as arbitrary since consumers may also be private investors, especially to improve their old-age benefits and pensions. The problems encountered there are, however, tied closely to the functioning of securities markets which had to be excluded. It would not make sense to simply take out certain aspects and study them separately.

As far as banking and insurance is concerned, only those activities which are of particular interest to the consumer and which have been singled out by law have been made object of research. There may be also overlaps because some types of services like credit or payment cards will not be exclusively offered by credit institutions in the way they are defined by EC banking legislation. On the other hand, insurance regulation is concerned with all types of direct insurance, only part of which is specifically offered and marketed vis-à-vis the consumer *strictu sensu*. EC law to some extent takes account of this difference in distinguishing between "mass" and "commercial" insurance and implying different rules to them, e.g. on choice of law.

New developments in financial services show that the clear-cut regulatory distinctions between banking, insurance and security services are gradually overcome by the marketing of "financial

conglomerates" of complex financial services products, like mortgages tied with insurance, life insurance combined with investment and deposit, payment cards linked with credit transaction and household insurance. The complexities of modern financial services packages make all classical distinctions lose importance the more the internal market is established and the more suppliers of financial services of one country may offer their products in other EC countries even when they have been unknown in this country so far.

II. The Concept of Two-Step Integration

1. Generalities

As we mentioned in our preliminary remarks, the concept of two-step integration which was developed with the access of southern countries to the EC played a determining role at that time. The same has been true after the ratification of the Maastricht Treaty where again ideas of a Europe of different speeds, e.g. to realize the Monetary and Economic Union, are discussed.

The E(E)C legislator, based on the general provision of article 8c, now article 7c, used this instrument in its most important Directives concerning free movement of capital, banking and insurance services. On the other hand, it can be shown that in more recent Directives the importance of such clauses is less than originally thought of.

2. The Reality of "Multiple-step Integration"

A more realistic approach to EC integration shows that there is a large discrepancy between the theory and the practice of two-step integration. EC institutions in Brussels, Luxembourg and Strasbourg seem to think that once a delay for implementation of a certain Directive has run out, Member States either

- will have correctly implemented the Directive;
- in the negative case, can be forced by proceedings under article 169 to do so without unreasonable delays;
- can be indirectly forced to adapt their legislation by the so-called theory of direct effect as developed by the European Court, including a right to damages of private persons who suffered loss due to belated or incorrect implementation of EC Directives.

Belated implementation, in this view, is regarded as a problem of law enforcement, not as a structural problem of the EC.

The reality is much more complex and diffuse, as our study has shown:

- a) The most important variable seems to be how EC legislation fits into industry structures and regulatory patterns of the country. Since the United Kingdom traditionally had a strong financial services industry and since, as the UK Report has shown (Woodroffe/Rawlings/Willet, 11-59), regulation had been limited to a rather informal network insisting only on solvency aspects, the EC Directives aiming at liberalization and deregulation require little change. Potential conflicts therefore did not arise. The same is true with Germany insofar as banking, but as not as insurance law is concerned. In "southern" countries like Spain and Greece, industries traditionally were protected and had to face more competition by deregulation (Alexandridou/Marinos/Mastrokostas/Triantaphyllakis). It is obvious that resistance to EC opening of markets is greater than in countries with more developed industries. Spain seems to be exceptional insofar as banking traditionally is more developed there (Bueso/Santos 5-44).
- b) A second important variable is concerned with the nature of regulation itself. Since EC Directives are mostly concerned with the opening of markets it is much easier to impose implementation upon Member States because this will usually be in the interest of the industry itself. The theory of direct effect of the European Court will come to help to suppliers of financial

services because they can directly invoke the newly granted freedoms against a deficient Member State.

- c) If EC Directives are concerned with performance standards, especially in the area of consumer protection, delays in all Member States have been quite common unless existing law already complied to EC law. This phenomenon is not restricted to consumer law but can be found in other areas like safety at work, environmental protection, non-discrimination and the like. The battles which are waged on Community level against a certain Directive granting consumers, workers, women or nature more protection will be repeated again in the national *fora* and lead to considerable delays in implementation. The Consumer Credit Directives 87/102 and 90/88/EEC which were part of our study are a good example. Since UK law more or less complied to EC law, there were obviously no problems of implementation. Germany and Greece implemented the Directive with some delay. Spain only introduced the Directive after this study was finished, namely by Act 7/1995 of 23 March. These delays have nothing to do with the concept of two-step integration but with diversities as how to protect the consumer and with the non-willingness of governments to commit themselves in this area, which could not be overcome by a rather weak consumer lobby. The Commission acted against Spain by using its powers under article 169 EC-Treaty, but the proceedings did not end with a condemnation. The theory of "direct effect", as developed by the European Court in the *Dori*-case (C-91/92, [1994] ECR I-3325), is a weak instrument to protect consumers of financial services because directives do not create rights and obligations on their own in private law relationships, and only in exceptional cases can be invoked against a non-complying state for compensation. There have been no actions in the area of financial services so far.
- d) Directives aimed at opening up of markets are usually quite specific as far as reaching their objectives is concerned. Member States only need to copy these Directives into their statute books to implement them. They do so frequently by specific framework legislation. On the other hand, directives

aiming at increasing performance standards are worded much more loosely and sometimes even take the form of containing general clauses, or only recommendations. They therefore need a much more complex enforcement mechanism. It is easy for a non-complying state or for unwilling financial service providers to delay implementation for a long time. The case which was studied under the project concerned EC Recommendation 88/590/EEC on payment systems. While the existing legal and regulatory framework in the UK and in Germany in general was sufficient to adapt to EC standards, Spain (Bueso/Santos, 181-187) and Greece (Triantaphyllakis 96-104) did not have similar instruments so that the financial services industry could simply avoid its "indirect obligations" under EC law. Again, this is not a problem of two-step integration in the classical sense but of the weakness of political and institutional structures aiming at protecting the consumer. Simple EC law making will not be able to overcome this weakness.

3. *Discarding the Concept of "Two-step" Integration?*

As a summary, this study does not totally discard the concept of two-step integration. But it is quite clear that the optimistic hypothesis underlying the framework of the study could not be verified and that a much more differentiated and sophisticated approach must be taken to understand the implementation of EC law by the Member States. Such "multi-step integration" of course poses a certain threat to the very concept of internal market. It was, however, not the task of this study to offer any solutions in this regard.

III. *Different Aspects of Regulation*

As far as a conceptual approach to EC Directives on financial services was concerned the authors expressly or implicitly distinguished between institutional and functional regulation. This concept has been developed in the paper by *van Aken* (89-90) with

regard to banking; it can also be used in the area of insurance and other financial services.

1. Institutional Regulation

The very concept of internal market is directed at institutional regulation. Its basic problem in the area of financial services has been how to overcome the need for financial service institutions to be regulated by twelve and not simply by one regulator. The economic and integration policy arguments for this concept of "single licence" have been argued elsewhere and cannot be repeated or criticized here. It is mostly concerned with efficiency aspects. Consumer choice also plays a justifying role.

In order to realize the principle of a single licence the EC could have created centralized regulatory agencies which control access to and performance of financial services institutions. This is usually the approach of federal states towards regulation. This rather costly approach could not be realized in the context of a decentralized EC. As a "second-best solution", the home control principle was developed, first by the case law of the European Court most in the area of free movement of goods, later by the White Paper of 1985 of the EC-Commission on completing the internal market. Under the aspects of the home control or single licence principles, the supplier of financial services only needs the authorization in one Member State to do business in the entire EC. The home control authority, that is the agency where the supplier has his permanent business seat is responsible not only for business activity in the home country but also in other EC countries where the services are offered. The supplier is entitled to offer his services either via branches or via transborder provision of services. Restrictive member state regulation requiring a separate authorization for branching or prohibiting transborder services, which to some extent had been justified for insurance by the German insurance judgment of the European Court of 1986, have to be abolished.

2. *Implementing of the Concept of Mutual Recognition*

Experience in EC legislation also has shown that a simple deregulation is not enough to guarantee free access to the entire internal market to all suppliers of financial services. Quite to the contrary. Since regulation serves the public interest, especially to guarantee the solvency of financial services institutions (banks, insurance companies, investment houses and the like) rather complex regulatory standards must be established; they must be harmonized for the entire EC. This harmonization is called by us institutional regulation. It has been undertaken, in the area of financial services, by the Second Banking, the Third Insurance and the Investment Services Directives. Details in the area of banking have been studied in the paper of van Aken. They show the complexity of EC law making in this point and cannot be said to simply deregulate and liberalize.

- a) The home country control principle cannot avoid the fact that a financial services institution, via branching or transborder provision of services, encounters laws and regulations in different Member States which may be a direct or indirect impediment to its activity. Therefore, one of the most complex problems of EC law making has been how to define the relationship between the powers of the home country and the host country. This has usually been circumscribed by the concept of "*general good*". The host country has to abide to the authorization and control by the home country authority, but has residual powers if its general good or public interest so requires. This very broad concept is written into the relevant EC Directives and has been taken over by implementing legislation. Due to the very short time lapse of the Directives concerned and the simple fact that the implementation is scheduled later than the conclusion of the study, no answers could be given to the working of the concept of the "*general good*." This will certainly be one of the most important and interesting future study areas in the area of financial services. But time has been too short to make any conclusions in this respect.

- b) The idea of the "home control" or "single licence" principle is that it will increase consumer choice by more competition and variety in the financial services market. Any supplier of financial services should be capable of offering his financial services in any country at the same conditions as in his home country. If there are still existing regulatory differences, these should be levelled out by a "*competition between legal orders*" (Reich, CMLRev 1992, 861-896). Again, our study does not reveal whether this concept is fictitious and thought about by law makers, or whether it functions in reality. The time span was too short to collect any relevant information in that respect. It will be shown later that the complaint handling systems which are important for consumer justice and consumer trust in the offering of financial services have not yet adapted to the need to encounter transborder provision of financial services. While the EC seems to strive at a "Community-wide" supply of financial services, these are in reality still only offered at national markets with different conditions to basically local consumers. But this statement is only true for the time being and does not say anything about the future working of the concept.
- c) The extent of the home control principle and its restrictions by the general good powers of the host country have been subject to a very intense legal debate especially in the area of private law. Should it not be possible for any supplier of financial services established under the home control principle to offer his services under the same marketing and contractual conditions all over the EC as in his home country? This debate goes beyond the supply of financial services and is one of the very basic discussions on the extent of the fundamental freedoms of the EC Treaty, as written in articles 30, 59 and 52 of the EC Treaty. Recent case law of the European Court has shown that there are certain limits to this concept and that its extension to marketing practices law must be seen with caution. It should be explicitly said that the study is silent on that point and does not give any answers. This is quite obvious because nowhere could it be shown that European financial services products already exist which are supplied under identical or similar conditions within the entire EC. The study by *Wolfgang Scholl* on transparency conditions for insurance products makes some basic observations

on that point, and it should be mentioned that German insurers, not so much consumers were very interested in this study which proved to be a "best-seller". But this happened in a time and an area of change where the new European products had still to be developed but did not yet exist. The same is true in other areas. As a general rule one can say that the internal market exists maybe as a legal, but not yet as a marketing concept. The "Euro"-financial services product for which the EC institutional set-up has been created will be developed not by regulation, but by changes in technology which is happening with high but different speed!

3. *Functional Regulation*

Functional regulation is concerned with *performance standards*. In theory this is done by competition. But it must be kept in mind that financial services are an abstract good which have to be concretized by contract provisions. Consumer credit, payment cards or insurance policies consist of a relatively complex set of pre-formulated legal documents which accompany a financial transaction or make such transaction possible by setting precise standards. Under the concept of freedom of contract which exists in all market economies of the countries studied, the supplier himself will define the standards under which his services are offered. Since there is always danger of abuse due to market failure or structural imbalance of power between suppliers and consumers, law has to counterbalance market failure and unfairness. This is the object of functional regulation which, with regard to the Member States part of this study, has been one of the central objects of research undertaken and will be analyzed in more detail in Section B.

As far as the EC is concerned, functional regulation to some extent accompanied institutional regulation but looks much more like a patchwork than like a comprehensive concept. While it was easy to define, from a legal policy point of view, what is meant by institutional regulation, namely the right of any supplier of financial services to have access to the entire internal market under the single

licence principle, the objectives of functional regulation are much harder to define. In our study, we have distinguished between transparency, fairness and complaint handling. We have left out social policy objectives justified from distributional justice point of view. They certainly are also part of financial services provision but not of EC-regulation.

- a) If EC has been active in the area of financial regulation, it was mostly concerned with *transparency*. Most important in this aspect is the Consumer Credit Directive as amended which proposes a uniform formula all over the entire internal market to fix the annual rate of charges. It also provides for some basic information to the consumer taking out credit depending on the forms of credit granted.

As far as other banking services are concerned, the relevant institutional directives are completely silent on that point. It is only by the general clauses of the Misleading Advertising and the Unfair Contract Terms Directives that some sort of mostly negative transparency is made an objective under EC law forbidding deception and non-transparent terms but not imposing a general transparency obligation on providers of financial services. Since the Unfair Contract Terms Directive will only enter into force from 1 January 1995 on, its impact on the provision of financial services could not be studied.

Insurance is another type of contract where transparency is particularly important for consumers. This is the more so because the Third Insurance Directives Non-life and Life have abolished any prior authorization of policies by government authorities and leave it to competition how insurance conditions are formulated. Therefore, the Directives set minimum standards on information, e.g. on applicable law and complaint handling. The said Directive Life 92/96 is somewhat more explicit on transparency because it formulates the contents of policies at the time of entering into the contract and to a lesser extent during the lifetime of the policy. Strangely enough, no similar provisions have been put into non-life insurance, for instance health or accident insurance, where such information is just as important. Again, only the general obligation of clear and

intelligible clauses in consumer contracts, including insurance policies, may help improve transparency.

- b) A much more complex problem of financial services, but also of any other contract is the problem of *fairness*. EC law had been near to silent with respect to fairness in financial services. It is only the general clause of article 3 of the Unfair Contract Terms Directive which may be a starting point for a Community specific concept of fairness.

As far as other directives and recommendations are concerned, the Consumer Credit Directive contains some references to fairness in consumer credit transactions but leaves it to the discretion of the Member States how it is implemented, e.g. in cases where bills of exchange serve as collateral or where credit is tied to the sale of goods or provision of services. As far as payment cards are concerned, fairness of exclusion clauses in cases of loss or theft of cards before and after notification is regarded as a problem, but is solved by the "soft law" instrument of a recommendation.

- c) Community law leaves the standard of fairness to Member States. This decentralized approach towards fairness and good faith in contract law, including contracts for the provision of financial services, conforms to the principle of subsidiarity but may provoke difficulties in marketing and conflict resolution of transborder financial services. The two most important instruments for consumer protection through rules of conflict have been the Rome Convention and the Second Insurance Directives. Both take a fundamentally different approach as far as their character as legal instruments and their solutions are concerned (Reich/van Aken, 15-22, 99-122):

The Rome Convention which is now part of the legal order of most Member States is an instrument of international law adopted by Member States as sovereigns of their legal orders. There is no control of interpretation by the European Court; the proposed Protocols are not yet ratified. Consumer protection is offered by article 5 and article 7 (2) of the Rome Convention as far as the rule of closest connection resp. limits to choice of law clauses are concerned in favour of the so-called "passive

consumer". The Rome Convention tries to protect her/him by referring to her/his law of residence, not the law chosen or the law of the business seat of the provider. There is, however, some doubt how far these rules apply to the provision of consumer credit which is not tied to the sale of goods or supply of other types of services, because this is not expressly mentioned in the concept of consumer contract, per article 5 of the Rome Convention. As a last resort the consumer may be protected by the mandatory provisions of the *lex fori*. The "active" consumer who on his own shops around for financial services in the internal market will usually not be protected by the law of his country of residence.

Article 7 of the Second Insurance Directive Non-life and article 4 of the Directive Life have provided a different system of private international law, as far as risks within the EC are concerned. As a general rule, the law of country where the risk situated is applicable; in normal circumstances this will be the law of the country of residence of the policy holder, with the exception of certain types of insurance like holiday, car and house insurance. The policy holder, with the exception of commercial insurance, will therefore usually be protected by the law of residence, whether active or not, unless some of the very narrow leeways of choice of law clauses are possible. Choice of law can be extended by the Member State where the policy holder had its residence, but this depends on its discretion. Member States have made different use of this option: the UK has continued its liberal approach to choice of law clauses, while continental countries have imposed the law of residence on insurance contracts in the interest of the (non-commercial) policy holder. This different approach depends on the legal traditions and not on the so-called north-south difference, as our study could show.

- d) This somewhat puzzling approach to general contract law on the one hand and insurance contract law on the other by rules on conflict has been subject to an intense debate which will not be mentioned here in any detail. This debate has been without any influence on law making on EC or Member State level. The discrepancies and the applicable rules of consumer and policy holder protection make it nearly impossible to supply a complex

financial product in identical form in the entire internal market. There are not only no common standards of fairness, but rules on conflict divide a uniform product into several bits and pieces by applying different rules on it. EC law making has not yet been able to overcome this paradox. Harmonization in the area of EG insurance contract has been abandoned and left to rules of conflict. *There is no common EC law on financial services emerging.*

B. The Search for Performance Standards in the Internal Market for Financial Services

This study, especially the national reports and case studies were concerned with developing performance standards, either by looking at implementation of EC Directives or by analyzing autonomous developments in the countries which could serve as a model for other countries. Three aspects have been of interest to this study: origin of standards, transparency and fairness. We will give an overview of the most important results.

I. Origin of Standards

1. EC Law

It need not be repeated in detail that EC law in this area is extremely incomplete, incoherent and underdeveloped. There is a decline in the intensity of regulation starting with consumer credit as the most regulated type of financial services followed by payment cards where only a recommendation exists to life insurance where detailed information obligations have been written into Annex of Directive 92/96 to other services which are ruled either by rules of conflict or, in future, by Directive 93/13 on Unfair Terms in Consumer Contracts.

As far as case law of the European Court is concerned, hardly any case has been concerned with financial services. Starting point of the EC is the concept of the *informed* and *active consumer* whose freedom to demand financial services all over the EC must be assured. This can be said to be the basic ruling of the ECJ since the *Luisi* and *Carbone* Judgment (case 286/83, [1984] ECR 377).

The impact of the competition rules has not been studied in detail here. In its exemptions granted either individually or, to the insurance industry by a group exemption, the EC Commission has insisted that certain performance standards be kept up with. This is particularly true with regard to Regulation (EC) 3932/92 concerning group exemptions for insurance where detailed provisions on insurance policies have been developed. They, however, cannot be imposed on undertakings but are only applicable if they make use of collaboration coming under the exemption.

2. *Business Standards*

In a system where competition functions in the interest of the consumer, it would be up to business itself to develop performance standards in the interest of its own marketing activity, but also in the interest of consumers. There has been some hesitancy among consumer associations to accept business performance standards as serving the consumer. The British experience, however, shows that under certain conditions business codes of conduct, statements of insurance practice and the like may serve the consumer interests if they are monitored correctly and improve the position of the consumer or policy holder beyond existing law. The British approach towards improving consumer standards has been to encourage such codes of conduct which are monitored either by the Office of Fair Trading or by specific regulatory bodies like in the area of financial services (mostly for investment services). Usually these codes of conduct are linked with complaint handling systems and will be mentioned somewhat in detail there.

In Germany, business performance standards are usually developed through general contract conditions (Allgemeine Geschäftsbedingungen), especially terms for banking contracts and for insurance policies. They had been subject to government supervision, but to a different extent which will change in the future. Uniform banking conditions which took the form of a recommendation of the relevant trade association of German private banks, saving banks or co-operative banks had to be registered with the Cartel Office and were of non-binding nature to the members. As a general rule, these terms were used in business with all bank clients, whether consumers or not. The general terms had been supplemented by specific terms, e.g. concerning EC- and EUROCARD services. These terms came under the general control of the Act regulating the law of general terms. The group action of consumer associations which again will be looked at later made possible to eliminate non-transparent or abusive terms out of banking conditions.

As far as insurance policies are concerned, they used to be under government supervision by the Federal Insurance Office and could not be used or modified before approval. This regime of prior authorization has been abolished by the Third EC Directives which entered into force by 1 July 1994, the German legislator somewhat belatedly has implemented EC law by Act of 28 July 1994. Insurance policies now may be formulated collectively through recommendations or individually by insurers and are subject to the AGB-Gesetz and to the specific Act on Insurance Contracts. This will change considerably insurance policies but could not be studied in detail here.

Spain and Greece have no developed systems of business performance standards, codes of practice etc.

3. Regulatory Standards

The traditional approach towards financial services has been a rather detailed regulation by government. This pattern has been changed

dramatically by the impact of EC law. It is here that we can show different traditions which are not necessarily linked to north-south differences but which stem from the regulatory environment of the countries:

- a) Financial services in the UK usually could be provided without performance standards imposed by government. There have been notable exceptions in the area of consumer credit via an extensive regulation of the consumer credit of 1974, for building society contracts and for financial services coming under the Financial Services Act. The latter are, however, concerned not so much with contract regulation but with the regulation of the activity of intermediaries and have not been included in our study. *Consumer credit* regulation established a system of licensing through which standards could be imposed. Credit contract law was regulated in detail by the Act, notwithstanding whether the supplier was a bank or not. Indeed it was mostly concerned with regulating credit not supplied by banks.
- b) In Germany, regulation of *banking* is done by a special office (Bundesaufsichtsamt für das Kreditwesen) which however is not competent to issue or monitor consumer performance standards. It is only concerned with banking supervision under solvency aspects. The *insurance* industry used to be heavily regulated by the Versicherungsaufsichtsgesetz which established the Bundesaufsichtsamt für das Versicherungswesen (BAV). Regulation by the BAV has not been abolished but severely limited by introducing EC-Directives 92/49 and 92/96 into German law. The former contract regulation has been abolished (with some exceptions for health and mandatory insurance) and cannot be supplemented by any similar regulation. The most important impacts on performance standards have come and will, in future, come even more from court practice, especially the Federal Court under the group action proceedings of the Act on general contract terms (AGBG).
- c) In Spain, *banking* regulation is done through the Bank of Spain. Regulatory powers have been conferred upon it by Act 26/1988

of 29 July (Ley de Disciplina e Intervención de las Entidades de Crédito - LDIEC), recently amended by Act 3/1994 to make it conform to EC-Directive 89/646. The Bank of Spain has autonomous regulatory powers by issuing "circulars" which may include rules on depositor and investor protection (López-Sánchez/Santos/Orero, 33-40). There are specific regional supervision authorities for savings and co-operative banks.

Insurance regulation is done by a special department in the Ministry of Finances based on Act 33/1984 of 2 August together with Reg. 1348/1985, amended by Act 21/1990 of 12 December implementing the Second EC Non-Life Insurance Directive 88/357. No prior approval of terms is foreseen; insurance policies have to be notified to the Ministry. Regulation is concerned with solvency and to a lesser extent with transparency. Parliament is now debating the implementation of the Third generation directives 92/49 Non-Life and 92/96 Life which, however, was not completed during the time of writing (López-Sánchez/Santos/Orero, 85-89).

The *Consumer Credit* Directive has been implemented by Act 7/1995; transparency obligations had been issued before by circulars 8/1990 and 13/1993 of the Bank of Spain.

- d) As far as Greece is concerned, supervision of *banking* activities is done by the Bank of Greece but does not concern performance standards. *Insurance* regulation required prior approval of policies; it will eventually be abolished. The Consumer Credit Directives in the meantime have been adopted.

4. *Consumer Initiated Standards*

A somewhat unorthodox approach to defining consumer performance standards would vest initiatives in consumer organizations themselves. This might be somewhat unusual with reference to the way financial services are marketed today.

It is certainly not contrary to principles of market economy that consumer associations define themselves standards of performance and make recommendations as to their use on the market. Such an

approach may be particularly valuable where different products from suppliers from different countries compete on the market and where the consumer should really have a choice what product serves optimally its needs. It would be up to the initiative of the demanders, not the suppliers to specify performance standards.

The study by *Wolfgang Scholl* on transparency rules for European insurance products uses such an approach. This approach is exemplified by two types of consumer insurance: household insurance and life insurance tied to a fund (unit linked endowment policy). The methodology of the research compared different products offered in the EC as far as household protection on the one hand and endowment plans based on unit funds on the other hand were concerned. Transparency is regarded as a two-step procedure: there is a transparency for less sophisticated consumers which need quick information to make their decisions, and another a more sophisticated transparency for consumers who looked for advice. The transparency offered to the consumer also intends to overcome the effect that commission systems for the sale of insurance, especially life insurance, is front loaded so that a large part of the premiums paid by the policy holder in the first years is not put into protection or savings but into commissions.

Moreover, the above study makes a series of proposals on how to improve the product: insurance contract law should be changed in such a way that the policy holder is free to decide about entering into a contract and comparing different offers. Contracting should be a three-step, not just a two-step procedure, namely consisting of a written offer from the insurer to be delivered by mail (proposal), followed by an application from the consumer (application) and finally the acceptance of the application by the insurer (policy).

The proposal terms must contain all essential information, such as: both the offer in a compact form (key features) plus the relevant information, accompanied by a separate enclosed printed leaflet (client's guide) containing the insurance conditions under a standardized form of contents listed under uniform numbers in each case (case of household goods insurance).

In the life insurance sector (with at least partly savings character) information must be in the form of core data. These data should be more informative and comprehensive than the key features listed in Annex 2 of EC Directive on Life Assurance 92/96.

As far as household insurance is concerned, a certain standardized model should be developed and get approval by European consumers' associations. Deviations from the standardized policies, especially by restrictions and exclusions should be stated clearly. The model policy whose most important features are listed in the case study can at the same time be used as a starting point for the development of a "green" policy with a quality seal for lesser informed consumers.

As far as life insurance is concerned, the terms must be structured in such a way that the client knows where the funds are channelled into, namely the costs, and the funds which are being offered.

The model study as developed by Wolfgang Scholl is certainly not one which can be simply imposed upon insurers and other suppliers of financial services. In abolishing prior authorization, EC law also abolished the standardization of cover which, unless the general good clause can be invoked, must be left to competition. But insurers may co-operate under EC Regulation 3932/92, and consumers may by their market power (if any!) demand participation in the elaboration of policies.

The study by Wolfgang Scholl is a good example how, within the framework of EC Directives, performance standards may be increased by market forces and by using countervailing power of consumer associations.

II. Transparency

1. Generalities

Transparency is a very fundamental element to make financial services compatible with consumer demands. One might even argue

that without adequate transparency financial services are a hazardous product and should not be admitted to the market.

Unfortunately, for consumer law there exists no general transparency obligation to provide financial services in the EC. The freedom of market access which primary and secondary EC law tried to grant to every provider of financial services, is not extended to a corresponding right of the consumer to be entitled to transparent services. Things may change, however, once the EC Directive 93/13 on Unfair Contract Terms is implemented with article 4 para 2 reads:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied during exchange, on the other hand, insofar these terms are in plain intelligible language.

This para makes clear that the control of preformulated contract terms is not extended to the main subject matter of the contract, e.g. in credit contracts the amount of interest paid, in banking contracts the cost of charges, within insurance contracts the premium, corresponding to the cover or the investment. But this exemption from control is conditioned on plain intelligible language of the terms itself. There must be transparency first of the subject matter of the financial service and the price for it; if this is not the case, the fairness of the clause can be controlled.

As far as sectoral directives are concerned, transparency obligations are included to a rather different extent. We will briefly summarize existing legislation and regulation in the countries concerned with a view to see how far transparency is implemented.

2. United Kingdom

A "negative" transparency obligation has for the first time been written into British law by implementing the Directive on Unfair Terms in Consumer Contracts in a Statutory Instrument (SI) which entered into force in mid 1995. Regulation C2 has taken over article 4(2) of the Directive.

As far as sectoral regulation is concerned, consumer credit legislation is most extensive. Other sectors have been left to self-regulation. The Banking Code of Good Practice as amended which tries to establish good banking practices contains some duties of disclosure by banks, especially concerning charges for services which they render to their clients (Woodroffe/Rawlings/Willet, 95-104).

In insurance law, disclosure has taken a different form because not the insurer was required to inform on terms of policies, exceptions etc. Rather the policy holder had a far reaching duty to disclose material facts before the contract is entered into. It is not necessary that the insurer ask specific questions. A Statement of Insurance Practice tries to smooth the disclosure rule, e.g. by allowing only a proportionate reduction of the amount due in case cover materializes and not a complete repudiation of the policy (ibid, 126-128).

3. *Germany*

A general transparency obligation has been read into the general clause of the Act on General Contract Terms by the case law of the Federal Court. This obligation has been particularly important to make financial services for consumers more accessible. It has mostly a negative impact, e.g. by forbidding providers of financial services to invoke clauses which allow a unilateral yet non-transparent imposition of interest, charges, costs without prior information of the consumer. The extent of this principle has been somewhat in doubt lately. Its application to insurance contracts is not yet clear, but this should be the case after prior control by the BAV was abolished. The general transparency obligation of EC-Directive 93/13 was not yet implemented in German law at the time of writing.

Besides this general obligation, several specific acts exist to make certain financial services more transparent to consumers. Consumer credit legislation of 1991 should be mentioned here which implements EC Directives but does not provide for a formula to

easily compare APR all over Europe. Insurance law has recently been amended to make German law conform to the Third EC Directives after prior approval of conditions has been abolished. According to the new Annex D of the Insurance Supervisory Act, the insurer has to give the potential policy holder certain specific information, including the one listed in Annex 2 of EC Life Insurance Directive 92/96. Moreover, information is concerned with the general terms of insurance duration, conditions of cover, payment of premiums, information about a right of withdrawal or cancellation, applicable law and address of the supervisory authority where the consumer can complain. If the information has not been delivered in due time, the consumer has a right of repudiation.

4. *Spain*

The Consumer Protection Act of 1984 which was enacted without regard to EC legislation has had no visible impact on the transparency of financial services.

Responsible for transparency in banking transactions have been regulations by the Bank of Spain, authorized by a Regulation of the Ministry of Finance of 12 December 1989 and implemented by Circulars 8/1990, 13/1993 and 5/1994 of the Bank of Spain. All banking institutions coming under regulation of the Bank of Spain have to disclose interests, charges and costs of their services to the consumer. There are certain requirements as to contract forms and information to be handed out to bank clients (López-Sánchez/Santos/Orero, 50-57).

On the other hand, the Consumer Credit Directive has been implemented in Spain only recently by Act 7/1995 of 23 March 1995 and could not be included in our study.

As far as *insurance* law is concerned, insurers have to notify their terms to the Ministry of Finance which may insist on their improvement. This systematic notification has to be abolished if the Third Directives Life and Non-Life are implemented in Spain within

the specific delay granted. Nothing has been done to assure implementation in time (López Sánchez/Santos/Orero, 85-89).

5. *Greece*

The Greek Consumer Protection Act 1961/1991, which to a great extent was restated in 1994, contains an article 22 which takes over the transparency obligation included in article 4 para 2 of the EC Unfair Contract Terms Directive 93/13. The reason for this anticipated implementation is that Greece had already transposed the proposal of the Commission into law (Alexandridou et al, 6). However, there is no remedy against non-transparent contract conditions in financial services except the rule "contra proferentem", that is a standardized contract, in cases of doubt, will be interpreted in favour of the consumer. Of course, this individual remedy does not guarantee transparency on the market in general. Other transparency obligations depend on the type of service which is furnished:

EC consumer credit directives have been taken over by ministerial decision of 21 March 1991 (Triantaphyllakis, in: Alexandridou, 93).

Banks which are regulated by the Bank of Greece are obliged to furnish certain information to their clients, according to Order 1969/1991. This is mostly concerned with information about costs and charges levied vis-à-vis customers (Mastrokostas, in: *ibid*, 44).

Insurance supervisory or contract law has not yet implemented the second or third EC Directives. It does not provide for any information of the policy holder. Insurance policies had to be submitted to the minister for prior approval; in this procedure, the authorities could impose certain transparency obligations upon the insurers. This prerequisite will be abolished by 1 July 1994 for most part of insurance policies. The legislator must develop an equivalent to impose information obligations upon the insurer (Marinos, in: *ibid*, 133 ff.).

III. Fairness

1. The Absence of a General Concept of Fairness in the EC

While there may be wide consensus about the concept of transparency in financial services vis-a-vis the consumer, the concept of fairness is much harder to define. Community law, before the adoption of Directive 93/13, was completely devoid of any concept of fairness which is now written into articles 3(1) and defined in article 4(1) to assess the unfairness of terms in preformulated consumer contracts. These rules have to be implemented in the time being and did not form part of our study.

The Consumer Credit Directive, as we have mentioned, contains some articles which have to do with assuring a fair balance in relationships between professional suppliers of credit and consumers. It is up to the Member States to assure fairness and perhaps extend it even further according to their legislation. The Recommendation on Payment Cards is to some extent also concerned with fairness, especially with regard to exclusion clauses of the credit card company and the imposition of liability on the consumer.

On the other hand, fairness must be assured by the rules of conflict especially by articles 5 and 7 para 2 of the Rome Convention resp. the Second Insurance Directives and their implementation into Member State law.

2. United Kingdom

There is no concept of fairness in common law of contract except some rules in the Consumer Credit Act which are concerned with the fairness in the relationships regulated there, e.g. extortionate dealings. The British study shows that the thresholds for assessing unfairness are quite high and do not allow for a general assessment of fairness in consumer credit relationships.

On the other hand, codes of conduct especially in the financial services industry are concerned with assuring fairness. The concept

of fairness itself is used only in the terms of reference of the insurance ombudsman, not in the Statement of Insurance Practice. It relates mostly to complaint handling about which we will report later, not with ensuring overall fairness in contractual relationships outside of any specific dispute settlement. The Code of Banking Practice does not mention the term "fairness"; the concept of good banking practice may be read in the sense of allowing a fair assessment of bank-customer relationships, even though it is not expressly phrased in that sense. Again the Code is addressed more to complaint handling and not to overall ensuring contractual fairness between banks (respectively building societies) and customers.

Some reference is made to fairness in the Unfair Contract Terms Act of 1977. It is mostly concerned with exclusion clauses which must meet a reasonableness test. However, this Act does not apply to the insurance business. As far as banking is concerned, it did not seem to have any impact on the contractual relations between banks and customers because exclusion clauses are not the problem there, but rather defining the rights and obligations of the parties in a more general sense.

3. *Germany*

A general test of fairness has been introduced in article 9 (1) of the AGB-Gesetz and has been actively used in litigation of consumer associations against banks, savings banks, credit card companies and, lately, insurers. The Federal Court has been willing to submit a wide range of clauses in financial services contracts to a general fairness test, for instance charges in banking and credit card services. Substantive fairness has played a role of controlling excessive interest rates and, lately, on the initiative of the Constitutional Court, unconscionable third party guarantees which banks take from family members of the debtor.

As far as insurance contracts are concerned, courts have been willing to strike down certain exclusion clauses which are against the very nature of the cover paid for by the consumer. Also clauses

which automatically extend insurance contracts for a period of ten years without offering the consumer a bonus or giving him or her a possibility to cancel the contract after some time have been declared void because of unreasonable restricting the freedom of decision making by the policy holder. The reform of insurance contract law of 1994, by implementing the Third EC Directive, to some extent has taken over this case law and will now allow only five-year contracts for non-life insurance.

4. *Spain*

The Spanish Civil Code as well as the Consumer Protection Act of 1984 contain the somewhat classical provisions on fairness and good faith, but have not been operative in financial services contracts. A case study on the Spanish credit card business which was undertaken as part of the research shows quite clearly that unfair exclusion clauses in credit card contracts are quite common. The authors insist that many clauses in these contracts may be "abusive not only due to their lack of transparency but also their lack of fairness by being unbalanced and one-sided. This is particularly true concerning clauses on changing the contract which allow a unilateral modification on the part of the card issuer without even notifying the consumer. The same is true with clauses concerning cancellation and renewal of the card (Bueso/Santos, p. IV)." As far as the distribution of risk in case of loss or theft of the card is concerned, EC Recommendation 88/590 is not implemented by banks. Usually, the holder is made liable in case of any type of negligence. There is no limitation on his liability in operations before notification of loss or theft with the issuer. The consumer is not protected in cases where the risk is caused by sending to the consumer the card or the PIN number. The card issuer usually exonerates himself from any liability in case of non-performance, wrong performance or unauthorized withdrawals.

A certain recognition of the fairness test can be found by the Bank of Spain reference to good banking practice when controlling the

activities of banks under its supervision, which lately has been extended to include credit card companies. The Bank of Spain takes EC law, including Directive 93/13 and recommendations 89/590 and 90/109, as statements of good banking practice and therefore to some extent is able to eliminate unfair clauses in contracts on banking services. This is, however, true only insofar as suppliers of financial services come under its jurisdiction, those are credit institutions in the sense of the EC banking legislation (López-Sánchez / Santos / Orero, 50-57). On the other hand, there may be conflicts between what the Bank of Spain regards as good banking practice, and the standards imposed by Spanish contract law as monitored by the Tribunal Supremo. This will result in confusion and legal uncertainty (loc. cit. 56).

Insurance contracts are regulated by a special Act 50/1980 (Ley de Contrato de Seguro, LCS) as amended by Act 21/1990. It might be mentioned that non-transparent and unfair clauses in general insurance terms which have been voided by a decision of the Tribunal Supremo may be banned in all insurance contracts by an act of the supervisory authority (López-Sánchez/Santos/Orero, 92-94).

5. *Greece*

Greek legislation has a general clause on fairness in consumer contracts, namely in the Consumer Protection Act of 1991. It anticipated the EC Directive on Unfair Terms and put it into Greek law before the final adoption of the Directive. Since group action by consumer associations was, till 1994, limited to cases where the supplier is a monopoly or enjoys exclusive rights, it could not be used against commercial banks or insurance companies. The Greek report insists that the case law of the Areopag (Supreme Court) is quite hostile to developing a consumer specific concept of fairness and to imposing it on financial services contracts, quite contrary to the German Federal Court (Alexandridou et al., 72, 134 f.).

As far as banking law is concerned, fairness is not really the heart of the bank-customer relations. There is no code of practice of Greek banks.

As far as consumer credit is concerned, the most important achievement of Greek law has been to overcome the still existing restrictions for taking out credit by consumers. Consumer credit regulation in former times was taken as an instrument to control inflation and to guarantee balance of payments. This policy has been abandoned with the coming into force of the internal market, most recently in the beginning of 1994 where most restrictions on consumer credit have been abolished with the exception of a general cap on the total taking of credit by Greek consumers (Alexandridou, 3-4). As far as fairness is concerned, the implementation of Community Directive 87/102 guarantees a certain balance in supplier-consumer relations. As far as third party financing is concerned, Greek law has implemented an interesting provision that the consumer, in a litigation pending between him and the supplier of the financed good, may refuse payment to the creditor (Triantaphyllakis, 102-112).

Insurance contract law is not concerned with guaranteeing fairness between the insurer and the policy holder. Even though the Consumer Protection Act of 1991/4 is applicable to insurance contracts, it has not yet been used in a specific case (Marinos, 144-148).

C. Complaint Handling

I. The Starting Point - Absence of and Need for a Coherent Approach

Complaint handling in financial services is embedded in the much larger context of access of consumers to law. As the EC-Commission Green Book of Consumer Access to Justice (Com (93) 576 final) has correctly stated, access to law is part of government of laws: If the

Member State or the Community gives to its citizens a substantial right, they must be able to enforce it speedily and without unnecessary costs.

The aim of the study was therefore not to evaluate comprehensively the different complaint handling systems which exist in the four countries of the study, but to analyze the specific mechanisms which had been developed in the area of financial services. This is justified by the nature of the product itself which is highly complex and can only be defined out of a contractual context in which transparency and fairness play a role. Complaint handling usually needs some specialized knowledge about the industry concerned. It will be shown that the development of complaint handling in the area of financial services is a particular fruitful and dynamic field of study.

The practice in *Great Britain* has been particularly important and has therefore highlighted the study on financial services there (Woodroffe/Rawlings/Willet, 105-158). The institution of ombudsmen in the insurance, banking and building society sectors has found attention and imitation not only in common law countries but, though to a lesser extent, in other jurisdictions.

As far as *Germany* is concerned, the study is concerned with consumer specific advice and complaint handling systems (Castelló, 63-100). There has been quite some activity by Consumer Advice Centres (Verbraucherzentralen) by using both collective and individual mechanisms. The study therefore focused mostly on that.

With regard to *Spain*, a comprehensive approach is still missing even though some recent important developments must be noted, especially in the banking sector (Bueso/Santos, 78-84). Arbitration schemes have been developed but are not specific to financial services (López Sánchez/Orero 119-170)

Greece has included complaint handling as part of its consumer protection legislation, while industry specific mechanisms have not been developed at all (Alexandridou et al., 46-54, 110, 149-150).

In the area of complaint handling it is impossible to talk of a two-step integration but rather of a continuous development which takes

different forms, success stories and set-backs according to the specific situation of the country concerned. The picture is extremely blurred and incoherent.

As a special part of the study we looked at the handling of cross-border complaints. The answer, however, must be totally negative. There are yet hardly any cross-border complaints nor are there mechanisms to handle them adequately. The financial services markets for consumers are, despite EC activity to open up markets, still closed to consumers. Provision of financial services is done locally or regionally, not across borders. The active consumer who shops around in different countries for the "best value for money" is a product of phantasy of EC-regulators, not yet a real person. Therefore, the discussion taking place about settlement of cross-border conflicts is to a large extent theoretical.

This is even true with regard to the EC Recommendation 90/108/EEC concerning transborder payments which includes the establishment of a speedy complaint handling system. Even where this has been established, there have been no cases to allow for evaluation.

II. The British System

1. Ombudsmen

The British study is very explicit on the establishment and functioning of the different ombudsmen schemes in the area of insurance, banking and building societies. It is part of a more general movement towards industry sponsored complaint handling, to some extent monitored by the competent regulatory authorities and in the area of building societies even part of statutory regulation. In areas like insurance and banking it must be seen as an answer of industry to growing consumer dissatisfaction and to public pressure that the industry will be regulated if it does not respond by itself. The two seemingly classical British responses have been a setting up up Codes

of Conduct (in the insurance industry: Statement of Insurance Practice) and the institution of an independent ombudsman.

The British study gives a comprehensive view of the position of the different ombudsmen, their jurisdiction, terms of reference, standards to be used in adjudication, enforcement, transborder complaint handling and rules for reform. The three ombudsmen which have been looked at, namely in the insurance, banking and building society industries, have established themselves in the British public as independent institutions with a relatively high profile, even though paid by the relevant trade associations. They have developed their own position vis-a-vis industry and consumer groups. As far as jurisdiction is concerned, it applies only to members of the relevant trade associations. This may create problems for consumers who may not know the details of membership. As far as jurisdiction of the statutory ombudsman of building societies is concerned, the limitations imposed by the legislator especially on the pre-contractual phase have caused problems to complaining consumers. According to the British study, there may be a reason to believe that industry self-regulation allows for a more extended jurisdiction than legislative intervention which usually will narrowly define ombudsman's competence.

As far as terms of reference are concerned, these are in all cases not confined to common law or statute law but allow the drawing on good industry practices. This may even go so far, as in the insurance sector, that the ombudsman will set aside well established common law principles on disclosure. However, these decisions do not amount to precedents and therefore cannot reform law.

Satisfaction of consumers with the ombudsman complaint handling system seems to be high which is also supported by the fact that awards are binding on the industry and can easily be enforced. Consumer policy discussion has positively reacted to ombudsman practice, even if some improvements have been suggested, e.g. publicity of decisions and of companies against whom complaints have been directed.

As far as transborder conflicts are concerned, jurisdiction of the ombudsman is usually confined to practices of member companies in

Great Britain. It does not extend to foreign branches and therefore does not take account of the "home country control principle" which is part of the very concept of internal market. It is not sure whether that will change.

2. Money Advice Centres

As far as consumer advice is concerned, money advice centres have been established in several cities to help debtors in trouble. Their service is usually provided for by Citizens Advice Bureaus which provide free, confidential and impartial advice to everybody regardless of race, gender, sexuality and disability. The British report includes a case study of the Leeds pilot scheme which, according to the authors "has made an encouraging start, although the 1994 review will be crucial to its continuation and expansion" (Woodroffe/Rawlings/Willet, p. 187).

III. Germany

As far as Germany is concerned, access to law and to courts is much easier than in common law countries because small claims procedures exist already on the local level and do not require legal representation (Amtsgericht). There are schemes for citizens in need to get help if they cannot meet the legal costs of a proceeding (Prozeßkostenhilfe). On the other hand, court practice is not specifically concerned with complaints of financial services and has therefore not been studied expressly.

The German study concentrates on mechanisms of complaint handling which have been specifically developed by consumer advice centres in the financial areas sector. This has been a rather recent development which first started in the area of credit, then went over to banking services and has only recently been extended to insurance services. Consumer Advice Centres (Verbraucherzentralen) are funded by the German Länder, have a head office in the capital of

the Land and branches in more important communities of larger Länder. The Consumer Advice Centres are entitled by law to provide extra-judicial services, including those concerning complaints in the area of financial services, to consumers. Consumers may or may not have to pay a certain sum to obtain advice, according to the by-laws of the Centre. The Consumer Advice Centres also may take collective action concerning unfair trade practices or contract terms to courts. Usually that will be done on a centralized basis by the Verbraucherschutzverein in Berlin which is funded by the Ministry of Economics of the Federal Government.

The German study concentrates on the practice in the insurance sector which lately has come under much public scrutiny and criticism. The complaints of the Hamburger Verbraucherzentrale are analyzed and evaluated. A questionnaire tried to establish specific complaints in the cross border area.

As a somewhat surprising result, the mere activity of advice could not alone guarantee enforcement of consumer rights. Frequently it was necessary to litigate out consumer complaints with the help of advice centres. Voluntary complaint handling culture does not seem to be very common in Germany (Castelló, 64-70).

Response of government or industry in the area of complaint handling has been slow. The banking industry has developed an ombudsman scheme to implement the EC-Recommendation on Transborder Payments and to improve its image vis-a-vis the public. The terms of reference of the German ombudsman are much more narrow than its English counterpart and are limited to explaining the complainant the existing legal situation. It may make awards only up to 10,000 DM (Castelló, 53-58). This is not extended to savings and co-operative banks.

In the insurance industry the Federal Supervisory Office receives many complaints but usually will not look into the civil law relationship between the company and the policy holder respectively the insured (Castelló, 40-47). It will usually refer cases to civil courts and not try a settlement of its own.

The German Act implementing the Third EC Insurance Directive makes it an obligation of the insurer to inform the policy holder of

the address of the supervisory office where he or she can turn with complaints. This is an implicit recognition that the office is also engaged in complaint handling, even though it has not yet developed specific policies or strategies in that area.

There had been some discussion in Germany about setting up an insurance ombudsman, but these discussions have led to no result.

IV. Spain

1. Arbitration

Article 31 of the Consumer Protection Act of 1984 (LGDCU) provides for the establishment of advice centres and arbitration mechanisms, but leaves that to the autonomous regional governments. They have done so in different intensity. These complaint handling systems have not been established with specific regard to financial services.

Due to constitutional disputes on competence, only 9 years later comprehensive and country wide arbitration schemes for consumer disputes have been set up. They are contained in the Royal Decree 636 of 3 May 1993 (special report by López Sánchez/Orero 132).

The arbitration system is linked with public administration and is managed by a board of consumer arbitration (*junta arbitral del consumo*). This board will receive the complaints, provide the necessary infrastructure for its channelling and monitoring and appoint an arbitral committee (*collegio arbitral*) which is responsible for the decision making. The committee has three members, one representative of the public administration, one representative of business and one representative of consumers.

Arbitration cannot be imposed upon consumers or business, but must be agreed upon by the parties. This may be done by a general agreement (it is the policy of the public administration to convince traders to adhering to such general agreements) or by individual action. Arbitration is only accessible to consumers, not to business.

The scheme will be free of costs, except when the parties are assisted by an attorney of their own choice. The approval procedure is said to be simple and flexible. Adjudication may not only refer to law but also to equity (Lopez-Sánchez/Orero, 135).

Since the system is new and not specifically tailored for financial services, only preliminary conclusions can be drawn today. It must be evaluated together with the pilot project started in 1986 by the Instituto Nacional del Consumo (INC) in Madrid, Valladolid, Huelva, Badalona y Sestao (López-Sánchez/Orero, 124-126). It was finished in 1991 with 22 schemes participating. As a result, it shows an increasing acceptance not only by consumers but also by business and government. It is, however, not specifically directed at settling consumer complaints in the financial services area. Only 5,9 % of the complaints were directed at insurance companies, 3,7 % against banks.

2. The Bank of Spain's Complaint Handling Service

The Bank of Spain as the main regulatory agency of the banking industry has set up a complaint handling system for banks under its jurisdiction (Servicio de Reclamaciones del Banco de España - SRBE) by Regulation of 3 March 1987 and Bank of Spain Circular 24/1987. It has been specified by Regulation of 12 December 1989 and Circular 8/1990, thereby to some extent implementing the EC Recommendations on payment cards and on transborder payments. Any client may complain that the bank which is under the supervision of the Bank of Spain has violated good banking practice. Remedies are of public law nature and do not directly concern the contractual relationship between the client and the bank.

The Circular gives detailed rules on complaint handling. A letter addressed to one of the offices of the Bank of Spain is sufficient to open up an inquiry. The credit institution against which the complaint is directed is offered a chance to submit its points to the complaint. Any client, not just consumers in the narrow sense, may complain. Consumer associations may assist clients in their complaint but have

no rights of their own. The Bank of Spain, as a result of its inquiry, can only issue an official report (*informe motivado*) which is an administrative act having a factual importance in bank-client relationship. It is not yet sure whether and in what way the report has importance in private law proceedings between bank and customer. The Spanish report of this study gives a detailed evaluation of the functioning of the system based on an analysis of the yearly reports of the SRBE (López-Sánchez/Santos/Orero, 58-79).

3. *Ombudsmen (defensor de la clientela)*

A special Spanish report also looked at private ombudsmen schemes in banking and insurance companies which could be compared to the British model (Santos 171-219). They are not established on a trade association but rather on an individual company basis. As far as banks are concerned, the ombudsman must abide to the guide-lines issued by the Bank of Spain. As far as insurance is concerned, there is one company *Mapfre* which has established a "Comisión de defensa del asegurado" whose work is studied in detail. Reform legislation may make such an institution imperative on Spanish insurance companies, thereby implementing the Third Insurance Directives.

The report gives a comprehensive empirical analysis of existing voluntary ombud systems and makes suggestions for improvement.

V. *Greece*

1. *Legislation*

The Greek Consumer Protection Act of 1991 provides for a complaint handling system to be established with the regional administration (prefectures). This has been done in some but not all prefectures in Greece. There is little complaint handling practice as yet and therefore no evaluation possible.

2. *Consumer Associations*

Consumer Associations have theoretically the possibility to give advice to their members and to take cases to court, including collective proceedings to a somewhat limited extent. Due to the weak position of Greek consumer associations, there have been no cases in Greece so far. An amendment to the Consumer Protection Act may extend the collective action against any type of unfair term, not only terms by companies enjoying a monopoly position. Such legislation of course will not settle the problems of inadequate resources of consumer associations in Greece.

3. *Complaint Handling Schemes*

They have been imposed upon Greek banks by transferring the EC-Recommendation on Transborder Payment (Mastrokostas, in: Alexandridou, p. 43). This has been extended to all types of complaints. So far there has been little practical experience which makes impossible any evaluation.

There are no complaint handling systems in the area of consumer credit or insurance.