Towards a European Securities Commission

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Introduction

In 1996, when many predicted that European Monetary Union ("EMU") would trigger a disastrous form of "legal meltdown", certain of us were suggesting that the introduction of the euro should not pose any major legal issues.[2] Certain of us also suggested that a pro-active forward-looking study of the likely consequences of EMU should lead to a rethink of the regulatory framework of the European capital markets.[3]

The successful introduction of the euro has created a vast market in euro-denominated securities. Since January 1, 1999, approximately 291 billion principal amount of international debt securities denominated in euro have been issued (approximately U.S.$313 billion).[4] The competition between the London International Financial Futures and Options Exchange ("LIFFE") and Deutsche Terminbörse ("DTB") has intensified as both exchanges seek to dominate the euro zone for regulated derivatives products,[5] and discussions on the integration of the major European stock exchanges have accelerated.[6] All this has happened in less than nine months, an unprecedented pace of change in capital markets history. However, the regulatory regime remains unchanged and is therefore lagging behind market developments. With the existence of a single currency and a single market, the lack of a single regulator is a dangerous absurdity. Instead of a central body through which key policies can be devised and uniformly implemented there are 15 different E.U. regulatory regimes, each requiring different levels of disclosure co-operation. Whilst before the start of EMU, the debate on the desirability of a pan-European regulator was limited to a small circle, this issue has, at long last, moved up the agenda at the Commission level and in the press.[7] Fragmented regulation of a single market is bound to prove inefficient.

Attempts at harmonisation ineffective to date

There are directives in place to harmonise certain aspects of the European securities markets, the main ones being the Listing Particulars Directive, the Public Offers of Securities Directive, the Second Banking Directive and the Insider Dealing Directive. However, all practitioners know the fundamental shortcomings of directives: an obligation of each Member State to implement an E.C. policy by enacting national legislation means in practice that directives are interpreted and implemented in different ways by each country. Directives are the result of political compromises, are rather inflexible, and almost impossible to alter once they are adopted. They are therefore rarely implemented into national law uniformly and promptly. To take only one relevant example, the Public Offers of Securities Directive. It is obvious that the stated objective of creating a level playing field in the information provided to investors throughout Europe has not been achieved by this Directive.[8]

So far, challenges of the Europeanisation of businesses and securities, and some of the

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2. Charles Proctor and Gilles Thieffry, "EMU—Business as Usual in Financial Markets: A Legal Analysis of the Impact of EMU on Financial Obligations", Norton Rose briefing, September 1996.
3. Gilles Thieffry, "Regulation of the Securities Markets and the Euro", *European Single Financial Market: 1998/99*, pp. 6–9 and "Regulation and the Euro" (1997) 63 *The London Financial News* p. 7.
4. Based on figures quoted by *International Financing Review*, July 3, 1999, and using exchange rate of 0.93 euro to the U.S. dollar.
5. For example, see comments regarding the initial poor reaction of LIFFE after the initial euro launch in the *Sunday Times*, August 1, 1999; The *Guardian*, June 15, 1999, p. 2b; and Anthony Bromie's comments in the *Observer*, March 21, 1999, p. 4, "The Market Left out in the Cold", highlighting some features of the competition between the exchanges of London and Frankfurt and ways for LIFFE to "sell itself" to the market.
6. For example, see the *Sunday Times*, August 1, 1999 where rumours of the breakdown in talks regarding an allegiance of the London Stock Exchange ("LSE") and Deutsche Börse are denied by LSE chief executive Gavin Lacey; the *Guardian*, June 15, 1999, outlines possibilities of FTSE International joining forces with LIFFE and rival Amsterdam exchanges; the *Sunday Telegraph* reports on LIFFE's rumoured planned alliance with MTS (the Italian government bond market); and increasing demand for one single stock market—for example James Rutter, "One Continent: One Stock Market?" (1998) 349 *Euromoney* 90.
7. See "No SECs Please, We're European", *The Economist*, August 21, 1999, pp. 70–71.
8. Rubin Lee, "Should there be a European Securities Commission? A Framework for Analysis" (1992) Vol. 3 No. 4 *European Business Law Review*.

challenges facing company law in general, have been abandoned or at least not pursued with any vigour.[9] The terms and conditions under which enterprises finance investment and the role of intermediaries still vary considerably from country to country in the E.U. This is due to deeply rooted structural differences in legal systems, development of markets and institutions, and the different role of the State.[10] It will be impossible to stimulate full, cross-border competition in the financial services industry unless a single regulatory body is established. While a relatively weak regulatory framework applies in the euro zone, we run the serious risk of undermining the entire European single currency—a development from which no one would benefit.[11] It should be borne in mind that the European Central Bank ("ECB"), the only pan-European regulator for the euro zone, does not have any jurisdiction over the securities markets.[12]

The fragmented regulatory structure is such that competition between national governments to satisfy their domestic constituents naturally encourages protection of their own interests. It is difficult to see why market participants should deal with such varying complexities and expenses of complying with several quite different national laws when they are dealing, or would want to deal, with only one euro-denominated securities market. The lack of an expert, decisive and forward-thinking body which, crucially, is able to enforce its policies uniformly in each Member State is damaging to the market and may prejudice investors.

In any event, there is a certain amount of inevitability about the creation of some form of central regulator. The current position of 28 separate national stock exchanges and 15 regulatory regimes, which enjoy a virtual domestic monopoly, cannot survive. It is more than possible that a single exchange for euro securities will arise. We could wait until necessity forces some Community action, but it would be better to take anticipatory action to support the financial markets.

Objections

The first type of underlying objection to the creation of a European Securities Commission ("ESC") rests on the theory that the European Community is based on the principle of limited or conferred powers—that is, that Community institutions possess only those powers conferred on them. It has been suggested that creating such a body would involve amending the Treaty establishing the European Community (the "Treaty"); that the Treaty is silent on how and by whom any centralised policies on financial services should be implemented[13]; and that the European Community authorities have no power under present Treaty provisions to establish new organisations entrusted with rule or policy-making powers.[14]

These objections are ill-conceived and short-sighted. It is true, for example, that there is no express mention of an ESC within the Treaty. Yet it is the case that, at the time of drafting, the introduction of the single currency was the ultimate (and seemingly unattainable) goal; to prevent the proper regulation of the securities market on the basis that it was simply not contemplated by the Treaty's draftsmen is both illogical and irresponsible. These objections can be addressed by looking into the Treaty, its interpretation and European precedent and practice.

The second type of objection revolves around the actual need to create a pan-European regulator. The only relevant precedent in this field can be found in the United States, with the creation of the Securities and Exchange Commission ("SEC"). It will be clear that parallels can be drawn between the United States and Europe. Once more, history will prove the relevance of that parallel, and how much it should help us in designing the future.

Objections based on lack of powers under the Treaty

The practical significance of the concept of conferred powers is diminished mainly by the existence of Article 235 (which has now become Article 308) of the Treaty, upon which the formation of a body such as the proposed ESC can be properly based. This provides that:

> "If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

Essentially therefore, this Article grants power to take any steps to take whatever measures are necessary to attain the objectives of the Community. In order fully to comprehend the ambit of the power,

9. James Kirkbride, "European Company Law Harmonisation: a study" [1994] 8 I.C.C.L.R. 280.
10. Karel Lannoo, "The First Weeks in Euroland" (1999) Vol. 14(3) *Butterworths Journal of International Banking and Financial Law* 81.
11. Gilles Thieffry, "Thinking the Unthinkable—the Break-up of Economic and Monetary Union", Norton Rose briefing, March 1998.
12. The ECB role is limited to monetary matters.
13. Howard Davies in his "Euro-Regulation" European Financial Forum Lecture, April 8, 1999.
14. Eddy Wymeersch, "From Harmonisation to Integration in the European Securities Markets" (1981) 3 *Journal of Comparative Corporate Law and Securities Regulation* 1.

it is necessary first to consider the procedural and substantive requirements of Article 308.

Requirements for the validity of E.C. legislation

In essence, to be beyond challenge by E.C. institutions at a later stage, Community legislation must be "necessary to attain" an "objective of the Community". This must take place within the operation of the Common Market and the measure must be appropriate. Finally, there must be no specific powers on such a topic provided for elsewhere in the Treaty. This final element can be disregarded as I agree with the opinion that the Treaties are silent on the formation of this body (though I disagree with the conclusion that this will prevent its establishment altogether).

The objective is contained in Article 2 of the Treaty:

> "the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities and economic and social cohesion and solidarity among Member States".

Article 3.1(c) and (g) provides:

> "1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
> (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
> (g) a system ensuring that competition in the internal market is not distorted;"

It is safe to assume that this objective will be accepted by the E.C. Court. Opinion 2/94[15] (the key to interpreting the ambit of Article 308) stated that the limitation to Article 308 was that it cannot serve as the basis for widening the scope of Community powers beyond the framework created by the Treaty taken as a whole and, in particular, beyond those provisions that define tasks and activities of the Community. The reference to "tasks" echoes the wording of Article 2 of the Treaty and the reference to "activities" picks up the language of Articles 3 and 4 of the Treaty. So it is reasonable to assume that the Court considers that the objectives of the E.C. are principally set out in Articles 2, 3 and 4 of the Treaty.[16] Moreover, since Article 308 does not specifically refer to those objectives it might be possible to infer additional objectives from other provisions of the Treaty.[17]

The next stage is to show that Community action is "necessary" to attain the objective. This is not merely a decision of fact but involves a great deal of discretion on the part of the Community institutions and will be made, at least in the first instance, by the Commission and Council.[18] This should not prove to be a difficult hurdle to overcome, were the Commission minded to do so, especially when one considers the robust way in which the Commission has interpreted the powers given to it in other contexts (*e.g.* in the field of competition law). Clearly the case for an ESC must be strongly made out, as there is a difference between that which would promote an objective of the Community and that which is absolutely necessary to achieve it, the latter being a far harsher test but one that can be satisfied. The need to avoid arbitrage and forum shopping, the need for the uniform implementation of rules and policies, and to protect investors and to control the market, is clearly of paramount importance. A single regulatory body is the only method of properly achieving this.

It may be argued (against all evidence) that the present system could achieve these goals, and that these objectives, whilst desirable, are not necessities. However, it has been seen that events in the securities markets (and the related derivatives market) can totally and immediately undermine the economy (the 1929 crash was a dramatic example of such an occurrence, but the Long-Term Capital Management ("LTCM") incident of 1998 proves beyond doubt the direct correlation between the events taking place in the securities markets, monetary policy and the economy at large).

It is also necessary for the objective to be attained "in the course of the operation of the Common Market", the precise meaning of which is slightly unclear although it has been suggested either that it means the establishment of the Common Market (rather than simply carrying out common policies[19]) or, in accordance with a slightly less strict view, that it means no more than that the action must fall within the context of the Treaty.[20] In either case, this criterion is satisfied.

Finally, the act in this case (that of setting up an ESC) must be regarded as being "appropriate", and

15. Re the Accession of the Community to the European Convention on Human Rights (ECHR) [1996] E.C.R. I–1759; 2 C.M.L.R. 265.
16. Paul Beaumont, "The European Community cannot accede to the ECHR" [1997] 1 E.L.R. 235.
17. Whereas Article 95(1) ECSC contains an express reference to Articles 2, 3 and 4 ECSC (the equivalent provisions), which means that the objectives must be taken exclusively from these Articles.
18. Hartley, *The Foundations of European Community Law* (1998), p. 104.
19. Article 2(2) E.C. appears to draw such a distinction between the two concepts.
20. Dashwood, "The Limits of European Community Powers" [1996] 21 E.L.Rev. 113 at 123, cited by Hartley, *op. cit.*, p. 105.

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this encompasses the Community principle of proportionality. Clearly, one of the objectives of effective market regulation is the prevention of market failure. When one considers the social, political and economic consequences of major market disruptions, it cannot be said that the foundation of a regulatory body is disproportionate.

The courts

As well as the mere existence and usage of Article 308, there is evidence that the purposive attitude of the courts undermines the principle of limited powers. For example, there is increasing recognition that the E.C. recognises the implied powers doctrine, which is a recognised international legal principle.[21] This is subject to two interpretations. The narrow view is that the existence of a power within a Treaty Article necessarily implies that all other powers necessary for the exercise of that former power be implied. This view has largely been accepted by the courts.[22] Alternatively, on the wider view, a Community institution might claim that a mere function or objective of a Treaty Article implies powers to enable the institution to carry them out. This wider view could be said to be encapsulated within Article 308 itself.

Further, the phrase "necessary Community action" has received rather lenient interpretation by the E.C. institutions. Opinion 2/94 actually referred to previous rulings of the European Court of Human Rights which has repeatedly equated necessity with a "pressing social need".[23] While there is no real evidence that the Court would adopt this approach it serves to re-emphasise the characteristically purposive stance the Community has taken when it decides that something must be done.

Limitations of Article 308

I am not claiming that the scope of Article 308 is boundless. Its limitations were well set out in Opinion 2/94 which concerned the legality of using Article 308 (or Article 235 as it then was) to accede to the European Convention of Human Rights ("ECHR"). The court stated that accession to the ECHR would result in a substantial change in the present Community system for the protection of human rights, as it would involve the Community entering into a distinct international institutional system which integrates all the provisions of the Convention into the Community legal order.[24] As this was of constitutional significance, it would be such as to go beyond the scope of Article 308. Having said that, the formation of an ESC is not a substantial change in the Community system; the single currency and single market already exist and I am merely recommending that the securities markets be regulated at European level in order to protect the integrity of the single currency or the single market, or, to use the words of Article 2 of the Treaty, to "strengthen economic cohesion".

The Opinion cited the main limitation to Article 308, namely that it cannot serve as the basis for widening the scope of Community powers beyond the framework created by the Treaty taken as a whole, and in particular by those provisions that define tasks and activities of the Community.[25] Nor can it be used as the foundation for the adoption of provisions which would, in substance, amend the Treaty without following the necessary amendment procedure. But, for the reasons given earlier, these limitations are not relevant to the proposed creation of an ESC.

Achievements of Article 308

It is more useful to focus on what, in practice, Article 308 has been used to achieve. It has become a useful residual legislative power for the Community, filling the gap where the Community did not possess more specific legislative authority in substantive areas at the relevant time. It has been used to legitimise legislation in areas such as the environment before such matters were dealt with by particular provisions in the Treaty.[26] It has

21. This was developed as a principle of constitutional and administrative law in the United States and in England, and is now recognised internationally—see International Court of Justice, Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 174 at 182.

22. The following case on the immigration of non-Community workers provides a good example of the reasoning adopted by the Court in relation to the legislative competence of the Community institutions. In case *Germany v. Commission* [1987] E.C.R. 3203, [1988] 1 C.M.L.R. 11, the Commission made a decision pursuant to Article 118 which established a prior communication and consultation process in relation to migration policies affecting workers from non-E.C. countries. A number of States challenged this measure on the basis that Article 118, which concerns collaboration in the social field, did not expressly give the Commission power to make binding decisions. This is true: the second paragraph provides that the Commission is to act, *inter alia*, by arranging consultations. However the court still found that in order for the provision not to be rendered wholly ineffective, where an Article of the EEC Treaty confers a specific task on the Commission it must confer on the Commission all the powers necessary in order for it to carry out that task. Again this wording echoes that contained in Articles 2, 3 and 3a E.C. and my argument is further strengthened.

23. See for example *Sunday Times v. U.K.* (1979) ECHR Series A, as cited by Paul Beaumont, "The European Community Cannot Accede to the ECHR" (1997) 1 E.L.R. 235.

24. Beaumont, *op. cit.*, at 245.

25. Beaumont, *op. cit.*, at 246.

26. Introduced by the Single European Act ("SEA") or the Treaty on European Union ("TEU").

also been used in areas as diverse in subject as the conclusion of international agreements and the granting of emergency food aid to third countries.

Through the use of Article 308, company law has enjoyed significant progress on technical matters such as consolidated accounts, listing particulars and disclosure of information and qualifications of auditors.[27] It has also been used as the basis for the creation of new legal entities under Community law, the European Economic Interest Groupings ("EEIGs").[28]

Significant uses to which Article 308 has been put also include the establishment of the European Regional Development Fund in 1975[29] and its contribution to the European Monetary System. Even though the exact mechanics of the monetary system were enacted through the European Council, the powers of the European Monetary Co-operation Fund ("EMCF") were enacted using Article 308 as a basis.[30] In order for the Community's objectives to be achieved (cited as the "gradual convergence of Member States' economic policies, the smooth functioning of the common market and the attainment of economic and monetary union"[31]) it was decided that the EMCF should be empowered to receive monetary reserves from the monetary authorities of the Member States and to issue ECU against such assets.

Therefore, Article 308 has been interpreted in such a wide and radical manner that "it would become virtually impossible to find an activity which could not be brought within the objectives of the Treaty".[32]

Objections based on lack of need to create an ESC

Objections on the merits

Many people have strongly doubted the feasibility of the single currency and often, likewise, have taken a negative position on a proposed ESC. However, often the same contenders see the benefits of a central unified national regulator. It can reduce the direct costs of regulation and is better for consumers who may be confused by a fragmented system.

If this reasoning is correct at a national level, it follows that it is equally applicable at the European level in the context of a single currency, a single market, free capital flows and a global market place. With an ESC there would be one place to come for complaints and one ombudsman scheme. It would also inevitably engender a clearer system of accountability.[33]

My final point on this issue is that, to spend a great deal of time arguing over the desirability of an ESC is putting off the inevitable. If the U.S. precedent is anything to learn from (as discussed in further detail below), the initial reluctance to adopt federal regulation fell away in the face of the crash of 1929.

There is a great deal of support for the need to update the regulation of the euro securities market, not least from the European Commission itself. The Commission has recently issued an Action Plan for implementing a framework for the financial markets. In this it accepts that many more changes to the current system are needed before Europe has a single, homogenous, capital market. It explicitly states that "any remaining capital market fragmentation should be eliminated"[34] and admits that a "more wide-ranging rethink of the way in which policy for financial markets is processed is required".[35]

In the United Kingdom Mr Tim Jones recently advocated the benefits of a single regulator. Having proved that increased powers were necessary before the European Commission had an effective role in creating an internal market for goods, services and capital, he stated that "it is proving much harder to cajole the same people into accepting the giant unified financial market they say they want ... a Euro-version of the U.S. SEC".[36]

The U.S. precedent

In 1932, whilst depression continued throughout the U.S. economy, commentators realised that dismissing the concept of federal regulation was only possible if the numerous separate exchanges were enforcing the highest standards of business ethics. If there was even the slight likelihood that central

27. See Department of Trade and Industry (DTI) publication "The Single Market: Company Law Harmonisation" (March 1993).
28. Council Regulation 2137/85 [1985] O.J. L199/0001.
29. Council Regulation 724/75 [1975] O.J. L73/1; Council Regulation of December 5, 1978, [1978] E.C. Bull. 12, point 1.1.11.
30. Council Regulation 3181/78, December 18, 1978.
31. *ibid.*, preamble.
32. J. Weiler, "The Transformation of Europe" (1991) 100 Yale L.J. 2403 at 2445–2446.
33. Howard Davies, *loc. cit.*
34. "Implementing the Framework for Financial Markets: Action Plan", May 1999, p. 1.
35. *ibid.*, p. 14.
36. This is a view that is shared by Mr Jeremy Jennings of Arthur Anderson (and President of the British Chamber of Commerce in Belgium). He has recently been quoted as stating that "European Union Tax Harmonisation can be exaggerated by the tabloids but with the single currency we will get a single stock exchange ... there will be an umbrella of common rules and procedures, which might give rise to a European equivalent of the Securities and Exchange Commission. This is a good thing. Financial regulation and auditing are becoming global. It is not appropriate for the US to dominate such important issues"; "EU: Profile—The Accidental Eurocrat," Accountancy Age (January 7, 1999) p. 14.

government intervention could better the situation, then action was required from Congress.[37]

Constitutional concerns

There is a strong analogy between the current discussion in Europe and those discussions that were being conducted in the United States in the first part of this century. Similarly, in Europe today, the concept of federal regulation of exchanges was resisted as it was in the United States before the 1920s, when some doubted the constitutional ability of Congress to legislate for what were essentially voluntary organisations.[38] In the U.S., by 1923, the correct position appears to have emerged; the enactment by Congress of federal legislation (on any area including the regulation of securities) in reliance on the "commerce power" would be held constitutional and perfectly acceptable.[39]

Fragmentation

The 1929 crash should serve as a clear lesson on the dangers of a fragmented regulatory system. The United States' problems were not limited to the well-documented issues of non-disclosure and fraudulent self-interest which prevented the market regulators from noticing the outrageous market speculation and the huge increase in trading on margin that would have alerted them to a potential crash. The main issue was that economically, politically, and between regulators, there was fragmentation, ineffective delegation and non-co-operation. Everybody "co-operated", but no one had a unified picture of the situation nor did they have the power to act swiftly before the crisis arose.

Responsibility for market regulation fell to several different authorities. No one took action, either because they simply did not want to assume responsibility for the crash or because another authority disagreed. The lack of central regulation gave rise to the opportunity for some of the key market players and private organisations to manipulate the market. Bodies such as the Investment Bankers Association ("IBA") resisted "undesired regulation" and advocated the application of generic fraud laws, which did not include the demand for full financial disclosure.[40]

Early efforts to regulate the exchanges

Proposals for a single core regulator fell on deaf ears. It is widely accepted today that unified regulation could have prevented the 1929 crash and subsequent depression. Indeed, for some considerable time before the speculation of the late 1920s the benefits of federal regulation were being strongly advocated in some quarters.

In 1922 various states, which were aware of the fraudulent dealing and trading on margin, enacted securities laws known as the "blue sky laws". Each state would have a bureau and a commission to implement the laws. Their administrative functions were mainly to investigate dealings and to require the disclosure of certain information before determining whether such securities should be sold within the state.

All this may sound rather familiar, and that is because these laws provided each commission with very similar powers to those which the SEC boasts today. Yet the weaknesses of the state-by-state system soon became apparent. First of all, some states chose not to adopt the legislation. Others followed the precedent of those states who had this legislation in place, but would make a few amendments here and there, trying to improve it in places. And in some states where the trade in securities was of a lesser magnitude than others, the legislation was fairly crude as they were passing laws in areas in which the legislators had no real experience.

Similar to the regulatory levels which vary between Member States in present-day Europe, it quickly became apparent that the state securities laws varied considerably. As Congressman Denison said in 1922: "There is, of course, a lamentable lack of uniformity in them".[41] It enabled fraudulent dealers to "forum shop"—that is, choose the state with the least regulation or no regulation at all (which is a danger for Europe now). The states could not prosecute them because they were not committing their offences within the state borders, but they were effectively evading and, to that

37. John Hanna, "The Federal Regulation of Stock Exchanges" (1931/32) 5 *Southern California Law Review* p. 9.

38. A series of cases in the early 1920s concerned federal legislation in various areas such as the federal taxing power and the Child Labor Tax, for example in *The Bailey Case* [1922] 259 U.S. 20, 42 Sup. Ct 449, it was held that federal legislation that intended to do merely what state legislation could and should do was unconstitutional. The Future Trading Act of 1923 was held to be invalid in *Hill v. Wallace* [1922] 259 U.S. 44, 42 Sup. Ct 453. This was on the basis that it was a device to regulate the boards of trade, which Congress lacked the power to do because when it was enacted they had not had the commerce power in mind.

39. In 1923 the Futures Trading Act 1923 was re-enacted as the Grain Futures Act. Essentially there are no real differences between the two pieces of legislation apart from the fact that the latter was correctly based upon the commerce power and not described as a tax measure. This made it valid, as held in *Board of Trade of the city of Chicago v. Olsen* [1923] 262 U.S. 1, 37, 43 Sup. Ct 470. This mere technicality of a proper legal basis mirrors the current debate concerning the suitability of Article 235 as a foundation for the ESC.

40. Bealing, Dirsmith and Fogarty, "Early Regulatory Actions by the SEC: An Institutional Theory Perspective on the Dramaturgy of Political Exchanges" (1996) 21(4) *Accounting Organisations and Society* 317.

41. Statement of Hon. Edward E. Denison, Representative of Congress from the State of Illinois, Subcommittee of the Committee on Interstate Commerce, Wednesday December 6, 1922, p. 2.

Concluding comments

It has been repeatedly said by certain commentators that "we don't want an SEC here".[50] Yet it is arguable that a proper understanding of the workings of the SEC would not lead to such a hasty conclusion. Some are happy to advise regulation in the form of "statutory regulation, albeit with a light touch" while at the same time stating that "what we don't want is an American-style SEC. That would be extreme."[51] Yet this reaction is itself extreme. Far from fearing the impact of a sole regulator one must understand that the ESC would still need to consult widely with the industry concerning the interpretation of legislation, publicise proposed rules and amendments and invite public comment. The exchanges and national regulators would still operate their own surveillance and compliance departments while the ESC would concentrate its efforts on overall policy and supervision. To that extent, the blue-print to be followed should be Anglo-Saxon.

As has been demonstrated in this article, it is fairly easy to establish a parallel between the U.S. situation prior to 1934 and that of Europe today. A comparative study of the various laws and rules applying, for example, to market making, price stabilisation, on and off exchange trading in France, Germany and the United Kingdom (to take only three countries) should convince the most sceptical minds of the parallel drawn above.

This fragmentation, which prevented the U.S. authorities from foreseeing the catastrophic market crash of 1929, is an issue on which the E.U. Member States and the market participants involved in the European securities market should concentrate. It might be practically difficult to establish a securities commission for the euro zone, but the lessons of the past should highlight the urgent need for one. Leaving aside (admittedly difficult) national and political issues, the creation of an ESC is a necessary consequence of monetary union itself, and is necessary to preserve the stability and credibility of the currency union.

50. Rowan Bosworth Davies, "The SEC: An Examination of its Structure, Powers and Procedures"; Journal of Financial Regulation and Compliance (August 20, 1993) Vol. 2 No. 1 p. 31.

51. Quote from Alistair Darling M.P., as cited in Davies, *loc. cit.*, p. 32.

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