



COMMISSION OF THE EUROPEAN COMMUNITIES

STUDIES

*Participation by banks
in other branches
of the economy*

The taking of participation – i.e. shareholdings which carry power to influence another company, plays a big role in banking legislation: many states have forbidden their banks to acquire such holdings in the non-banking sectors of the economy; in other countries, where the banks are allowed to participate, the legal controls on this facility have become the subject of discussion.

The present study describes the legal situation in the member states of the EEC, and puts in perspective the arguments used for and against participation in non-banking sectors by the banks: the risk as well as the position of power resulting from such participation; the use of participation during the crisis of an enterprise, and many other aspects. The study concludes by recommending as a compromise solution, in view of eventual harmonization in this area, the facility of participatory holdings within certain fixed legal limits.

Participation by banks in other branches of the economy

An opinion on the economic, competitive and operational advantages and disadvantages of such participation on the basis of the statutory provisions of the Member States of the European Communities

*On behalf of the
Commission of the European Communities*

Prepared by Professor
Dr. Ulrich Immenga, Göttingen/Lausanne

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CHAPTER ONE

Introduction

I) The concept of participation

The concept of participation must for the purposes of our investigation essentially be taken in its widest interpretation. Participatory investments form part of an undertaking's [long-term] financial assets which also include items held in portfolio (securities). No clear dividing line can be drawn between the two but a distinction may be made with the help of commercial criteria. Where the banks' concern in acquiring shares in companies is solely to employ surplus liquidity, the matter is generally one of "portfolio" interests. But "participation", on the other hand, is said to exist where there is an intention to participate (1). What is not very clear is to what end the intention to participate should be directed. As a purely negative limitation, reference is made to objectives that go beyond mere considerations of the investment of funds on profitability grounds (2).

If an intention to participate is to be distinguished from a simple desire to invest, a minimum prerequisite for assuming that participation exists is the presence of a realizable relationship to the subject matter of participation. This relationship must extend beyond the desire to invest. Participation may always be said to exist if influence can in any way be exercised over the subject matter of participation. Influence is acquired in the case of a financial asset where the latter consists of company securities. These grant property and management rights; the latter include in particular the right to vote, the exercise of which allows genuine involvement in the company. On this interpretation, all shareholding rights in companies, such as shares in the partnership capital of partnerships and shares in joint-stock companies (public or private, AG or GmbH) may be regarded as participation. The share as a form of participation is clearly predominant here. It is very easily interchangeable under all legal systems

and consequently permits of rapid changes in ownership and anonymous acquisition. Moreover, the leading undertakings are constituted in the form of public limited liability companies.

The opportunity to influence, as a criterion for the differentiation of portfolio and participation investment, must apply independently of the commercial interests that such investment creates. Participation may, therefore, not only be said to arise if it follows from business involvement in the company whose shares are acquired. It would otherwise be necessary to prove an objective of this kind in the banks' participatory investment policy which, in the case of investment in the non-banking sector, would be extremely difficult, to say the least. Nor can it be a matter of whether the shares are created or acquired directly in the banks' interests or at the instigation of the companies themselves, or indeed in the interests of outsiders. The only interpretation of the participation concept that can do justice to the banks' participation policy is one which, as we shall see, is characterized by the most varied of motives.

It is not possible to generalize quantitatively as to when a potential for influence may be said to exist. It is certainly not enough to take as a criterion the existence of a majority holding or a holding capable of blocking resolutions requiring a special majority (blocking minority)⁽³⁾. The threshold of influence may lie a good deal lower, depending on the distribution of shares. Moreover, significant rights (e.g. to apply to the courts) may in fact be granted to smaller minorities under the various company law systems of the Member States. Only where holdings are really minimal is it possible, therefore, to assume that the influence capable of being exerted is negligible. As soon as an opportunity for influence arises, shareholding interests can be pursued which are different from those of other investments in securities. However, the holding must be of a certain duration; no influence can effectively be wielded under only a short-term title to shareholders' rights.

II) Delimitation of the subject matter for investigation

Participation by banks characterized in this way may be divided into two sectors: the banking and financial sector on the one hand and the rest of the economy on the other. Participation through the creation of subsidiaries and joint ventures in the banking and financial sector takes the form, in the first instance, of investment in other financial institutions. These are frequently banks specializing in a particular business (e.g. external trade, mortgages, instalment loan financing, etc.). With regard to the remainder of the financial sector, mention may be made in the first place of investment companies. Secondly, the banks frequently have interests in the capital of finance companies, including factoring and leasing business. In this connexion, account should also be taken to an increasing extent of their shareholdings in companies operating data-processing equipment and undertaking the rationalization of banking business.

Such participation is characterized by specific objectives. It is a means of extending the range of banking services since it is related to the (banking) industry. A positive change in a bank's capabilities is sought⁽⁴⁾. This aspect of participation does not arise where it relates to the non-banking sector. Other motives and interests that require further examination are concerned in this case. A differentiation of participation according to the banking and financial sector on the one hand and the rest of the economy on the other is therefore necessary. This will allow the investigation to be restricted and participation in the banking and financial sector to be ignored.

III) Implementation of the investigation

The investigation is introduced by a survey of the legal position and operating conditions in the Member States of the European Community. The banking system in the individual countries will not be described except where there is a direct connexion with the question of participation. Such a limitation is justified by the existence of recent accounts of the banking systems in the European Community⁽⁵⁾.

The main part of the investigation is concerned with the question of the importance and effects of banks' participation in the non-banking sector. The interests affected are assessed and possible solutions are proposed. In this connexion, opinions can sometimes be given on a sound basis only where it is known to what extent the problems dealt with can arise in Member States as a result of the differences in legal background (e.g. the impact of the right to vote on deposited shares, the provisions of company law, etc). This entailed a comparative investigation in the most varied fields of law which in this case could only be undertaken in summary form. An attempt has been made to give some insight and advice in the relevant connexion. No claim to comprehensiveness is made.

The problems affecting the subject matter for investigation are essentially determined by whether a separation exists within a Member State between deposit and investment banks (the separation system) or whether the banks' range of business is unlimited (universal banking system). These distinguishing conditions will have to be continually borne in mind when assessing the effective scope of participation and when developing proposed solutions.

CHAPTER TWO

The legal position and operating conditions in the Member States of the European Community

I) Belgium

- 1) The separation system
- a) The universal banking system applied in Belgium up to the reform of the banking sector of 1934/35, when it was eliminated. Since then, a strict distinction has been drawn between deposit banks (banques de dépôts) and holding banks (sociétés financières).

Deposit banks are commercial banks particularly engaged in short-term deposit and credit business. Only they may now describe themselves as banques. They may commence business only after registering with the Commission Bancaire.

Deposit banks are prohibited in principle from participating in joint-stock companies and from joining a partnership as a partner. This principle is embodied in Article 14 of Royal Decree No. 185, of 1935.

This radical intervention in Belgian banking came as a reaction to the world economic crisis. The concept of protecting deposits was clearly predominant in the new legislation⁽¹⁾. Savers' confidence was to be maintained. The explanatory memorandum states that participation, which was claimed often not to have been clearly evident in the balance-sheets, had disguised the true financial position of the banks and that, furthermore, the prohibition on participation would reduce the risk attaching to the banks' lending business. This business was not to extend to share placings where sudden and substantial falls in value could occur. The aim of this legislation was, further, to make banking business independent from other financial transactions.

- b) The separation between banking and investment business applies to deposit banks when they are in the form of joint-stock companies (public or private limited liability companies and limited partnerships with share capital). Deposit banks in the legal form of partnerships are not subject to the prohibition on participation (Art. 8, Decree No. 185). The reason for this rule is the difficulty of separating the general partner's partnership and private assets. This exception has not, however, given rise to difficulties⁽²⁾. It should be noted in this connexion that even in the case of banks in the legal form of partnerships, participation may be acquired only with the banks' own resources.

Nor does the prohibition on participation apply to public-sector banking institutions or private savings banks⁽³⁾.

- c) The holding banks occupy an important position in business life⁽⁴⁾. The largest company, the Société Générale de Belgique, had a stock exchange value at the end of 1970 of about 5% of the value of all shares quoted in Brussels. These sociétés financières may be distinguished

from holding companies in other Member States chiefly in that they frequently hold a large number of participatory interests in different branches of the economy. However, a 25% holding is not often reached. The holding banks tend as a rule to operate with participation holdings between 5% and 25% and, consequently, within a range which in several Member States lies between the investment fund and the group company qualifying for group tax concessions.

These banks therefore fulfil important functions in the national economy. They initiate cooperation between undertakings, facilitate groupings and obtain an insight into a range of economic sectors, which assists them in their important role of company adviser.

2) Exceptions to the prohibition on participation

Even at the outset, the prohibition on participation was not entirely comprehensive⁽⁵⁾. Provision was made for four exceptions. See also notes page 157.

- a) In the first instance, it is possible for deposit banks to participate in other banks. There are no maximum limits so that, in theory, shares might be acquired beyond the level of the bank's own resources. This provision takes account of the trend towards concentration which is taking place in the banking system. In principle, too, it allows participation in foreign banks insofar as these may be regarded as deposit banks within the meaning of the Belgian law. However, an important exception in this case applies to foreign banks which for their part are permitted to participate in the non-banking sector. It would otherwise be possible to circumvent the Belgian prohibition on participation by working through a foreign bank.

The exception provisions concern not only participation in banks within the meaning of the Act. The Commission Bancaire has in fact recently stated⁽⁶⁾ that participation is also admissible in the case of companies exercising banking functions as a secondary activity. Mention should be made in this connexion of factoring and leasing, and of the data-processing field. In this way, recent developments in the banking sector are appropriately taken into account.

- b) The prohibition on participation, further, does not extend to shares secured by government guarantee. The reason behind this, too, is the security of the participation as a component of lending business. Even so, however, the liquidity risk is not always eliminated.
- c) The deposit banks may, further, acquire shares in the short-term for re-sale (Art. 14 (2)), in order to fulfil a capital market function at least to a circumscribed extent. They were originally permitted in this connexion only to subscribe for shares in the context of a new issue and to accept them for public offer for a period strictly limited to six months.

By an Act of 3 May 1967, however, Article 14 has been substantially modified. In the first place, it is now possible to acquire shares otherwise than by subscription, though no direct approach may be made to the stock market. The intention underlying this is to deprive such business a priori of any speculative aspect.

In addition, sale need no longer take place only through public offer and, finally, the permitted term for holding shares has been extended to one year. The Commission Bancaire may, moreover, extend this period twice for one year in each case. In this way, the bank can have three years at its disposal in order to facilitate the favourable placing of shares.

The Commission Bancaire has additionally retained the right, by means of regulations, to demand information regarding shareholdings permitted within these limits and to limit their extent in particular cases.

The liberalization of the prohibition on participation linked with the modification of Article 14 is based on proposals made by a Commission set up by the Government. The Commission's recommendations had gone quite a way further⁽⁷⁾. The amendment to the Act therefore demonstrates the desire to adhere to the principle of the prohibition on participation.

This is emphasized by the fact that shares may only be held temporarily for the purpose of re-sale (en vue de leur offre en vente). The object is thereby pursued of reacting more flexibly to the requirements of the capital market without neglecting the protection of depositors. To particularize: firstly, the opportunities for placing new issues on the market are improved. Secondly, the creditworthiness of undertakings is protected in that fairly large quantities of shares suddenly released on to the market are acquired by the deposit banks in the interim until a new buyer appears. In accordance with these aims of the new rules of 1967, the acquisition and sale of shares singly or in small quantities is not permitted. Stock exchange dealing is therefore excluded⁽⁸⁾. There is some doubt, however, as to whether such a restricted modification can indeed achieve its intended economic objectives⁽⁹⁾.

- d) Finally, the prohibition on participation is breached under Article 14 (3) in order to provide deposit banks with security against defaulting borrowers by means of debt conversion. Participation in a company by subscription or share acquisition up to the amount of loan granted can protect the bank against losses through failure of the borrower to make repayment. To this extent, the exception is in line with the intention to protect depositors. It should be noted that in such cases the shares must be re-sold within two years. The total of the participation investments of all deposit banks at the end of 1972 was put at 9.1 thousand million Belgian francs⁽¹⁰⁾. The participation probably related for the most part, however, to banks and other financial institutions.

3) Problems of the separation system

It has always been recognized that even the abandonment of the universal banking system did not lead to a clear separation between banking and investment business. The reason for this lies in the influence that holding companies have on deposit banks, which has never quite been removed. This influence was, and still is, exercised through the holdings of the sociétés financières in the deposit banks.

Indeed, the formation of new banks in consequence of the reform of 1934/35 occurred through a dispersal of banking business to new companies whose capital was largely taken up by holding companies⁽¹¹⁾. This type of corporate link was not in fact prohibited by the Act. The Commission Bancaire feared lest, as a consequence of these opportunities for control, financial and industrial groups would be able to pursue their own interests in the deposit banks to the detriment of the depositor.

This threat to the independence of banking business had been of concern to the Commission Bancaire right from the start of the reform. The incompatibility of a seat on the board of a deposit bank with an equivalent position in a holding company, introduced under Article 16 of Decree No. 185, could not guarantee the necessary independence.

In the absence of other statutory bases, the Commission Bancaire has been seeking to prevent possible abuse by agreement with those concerned. In this connexion, mention should be made in particular of the protocol concluded at the beginning of 1974 between the Commission Bancaire and three leading banks (the Société Générale de Banque, the Banque de Bruxelles and the Kreditbank). The protocol relates in the first instance to the management body (comité de direction), which is to be composed exclusively of bankers; it guarantees its independence, including its basic right to make decisions on matters of remuneration. On the supervisory board (conseil d'administration) a balanced composition is to be ensured, in order to enable various interests to be represented and counter-balanced. The major shareholders who were party to the protocol undertook in particular not to alter their holdings without consulting the banks and the Commission Bancaire⁽¹²⁾.

II) Federal Republic of Germany

1) The legal position

Germany is rightly regarded as the classic case of a country with a universal banking system. The institutions held to fall within this category may be distinguished according to three kinds of economic objective, as follows:

- 1) Profit-orientated banking organizations: the commercial or credit banks;
- 2) Community-orientated banking organizations: the savings banks and central giro institutions;
- 3) Public-utility-orientated banking organizations: the co-operative societies ("Raiffeisenkassen").

Shareholdings are taken up predominantly by the commercial banks, although it should not be overlooked that the public-sector banks are becoming increasingly interested in participation business.

The question of participation by banks in the non-banking sector is not regulated by law in Germany. Banks' holdings are restricted only by Section 12 of the Kreditwesengesetz (KWG - Banking Act) together with other long-term investments. Under this law, a credit institution may hold assets in the form of land, buildings, ships and shareholdings only to a total amount not exceeding the book value of its own capital and reserves. The reason for this provision is to protect liquidity.

The shareholdings of banks in industry and commerce cannot, however, be expressed in figures in this way, even approximately. In the first place, shareholdings are aggregated with the other assets mentioned above. Secondly, the concept of participation has not been defined. In practice, this means that the entries under the item "participatory holdings" in the German banking statistics are generally limited to such holdings in credit institutions, property management companies, building societies, etc. Shares in the non-banking sector are as a rule entered on the balance sheet under "quoted dividend-bearing securities" or "other securities"⁽¹³⁾.

This practice has been little altered by the new directives regarding the preparation of the annual accounts of credit institutions. These directives correspond to Section 152 (2) of the AktG (Shares Act). According to this provision, in cases of doubt, shares in a joint-stock company amounting to 25% of its capital will be deemed to be a

"participation". Accordingly, the larger holdings at least must be shown as "participations". Here too, however, an intention to acquire a participation may be denied and the holding may thus be treated differently in the balance sheet⁽¹⁴⁾. It may be assumed that the practice adopted is also due to the desire to avoid infringing Section 12 of the KWG⁽¹⁵⁾.

The separate disclosure of shareholdings as "quoted securities"⁽¹⁶⁾ gives no adequate information as a large part of existing stockholdings are not covered by this designation and, in addition, investment trust certificates are included.

2) Participation in practice

The legal position set out above does not cover statistical data regarding stockholdings in the non-banking sector. Reference can only be made to the figures obtained by the Federal Government in their "enquiry into business concentration"⁽¹⁷⁾. This covers a period up to the end of 1960.

The report indicates that the total holding in shares (share capital) and other stock amounted to DM 2,100 million in nominal value. The report considered all holdings of securities exceeding 5% of a company's share capital or business capital as a "participation". This accounted for DM 1,500 million, participation in banks amounting to DM 402 million and in the non-banking sector DM 1,100 million. The latter amount related almost entirely to shares.

The banks therefore held a total of only some 3.2% of the share capital of all public limited liability companies in the non-banking sector. It should, however, be noted in this connexion that even with a wide distribution of participation over industry as a whole, concentrations of capital were evident in certain sectors and, within these, in leading undertakings. There was, therefore, a potential influence in a few, though important branches of the economy⁽¹⁸⁾.

The position of the three leading banks (Deutsche Bank, Dresdner Bank, Commerzbank) is significant in this context.

In 1960, they held two-thirds of the nominal value of all participatory interests. Amongst these, 69% was concentrated on only ten undertakings.

The enquiry into business concentration indicated that the volume of participation was rising rapidly between 1955 and 1960.

This situation has not changed. For 1970, the Bundesbank estimated that of the nominal capital of German public limited liability companies (excluding insurance companies but including bank shares) some 5 to 7% were held by the banks in their own possession⁽¹⁹⁾. In 1973 the banks' holding was 7.8% according to the Bundesbank's Monthly Report (Report No. 8, 1974, p. 24). The holding of quoted shares and investment trust certificates rose between 1967 and 1972 from DM 3,600 million to DM 6,600 million⁽²⁰⁾.

The capital influence of the German banks on the economy is confirmed by an estimation of participation at 25% or over as at 30.11.1973. The figures included as Annex II to this Report show that substantial parcels of shares are held. Particularly informative, further, is the ratio of ascertained participation to net worth. The percentage in this case is relatively high if account is taken of the fact that only nominal values and participations of over 25% are included.

The opportunity for influence over the non-banking sector acquired through shareholdings cannot be adequately quantified from the figures reproduced here. It should be regarded in conjunction with the German banks' voting rights in respect of shares deposited with them (Depotstimmrecht). To this should be added the link with investment companies, which are usually subsidiaries of banks. This will be dealt with below.

3) Proposals for reform

The financial ramifications of the German banks have led to radical and manifold proposals for reform. Criticism has been directed particularly

against the credit institutions' ability to influence other sectors of the economy. Only a brief reference can be made here to the individual proposals:

- a) In connexion with the disclosure of the banks' stockholdings, consideration is being given, inter alia, to regarding all shareholdings exceeding the normal commercial amounts as a participation within the meaning of the Banking Act. This would include parcels of shares from 5% or 10% upwards. In this way greater "transparency" with regard to participation in practice would be obtained.
- b) A possible restriction on the extent of participation is being discussed from two aspects. Firstly, the possibility of laying down a fixed ratio between the shares held and the bank's own share capital and reserves - as under other legal systems - is being considered. Secondly, thought is being given to limiting the extent of participation in a company in order to eliminate influence on the management of or joint responsibility for the management of the company in question. Exceptions could always be provided for in the case of large-lot dealing by banks and of reorganization measures⁽²¹⁾.
- c) Further, the hiving off of shareholdings by major banks in particular is under discussion⁽²²⁾. These holdings would be transferred to special companies whose shares would be offered to shareholders of the banks concerned and in this way would be widely distributed.

III) Denmark

1) Legal bases

A distinction is drawn in the Danish banking system between deposit banks and savings banks. This grouping is of no significance to the question of participation, however. The banks are supervised on the basis of the Banking Act of 1930 by an Inspector of Deposit Banks and Savings Banks. The Banking Act will be superseded by a new Act on 1.1.1975⁽²³⁾. References below will be to the latter Act. As regards participation, it introduces no changes to existing law.

The holding of shares in other companies in the non-banking sector is restricted in two aspects, as follows :

- a) Under current law, which in this respect is confirmed by Section 1 (4) of the new Act, neither deposit banks nor savings banks are permitted to operate in sectors of the economy other than banking. This principle prevents any control being exercised over other companies as a result of shareholdings. Banks are as a rule prohibited from acquiring majority holdings in other undertakings. As the deciding factor is whether influence can be exercised over another undertaking, a shareholding may be inadmissible from this aspect even if it is below 50%. The distribution of the shareholding in each particular case is decisive.

This rule is intended to prevent conflicts of interest and amounts to a restriction on the universal banking system. This is confirmed by the fact that not only interlocking capital relationships but also similar personal involvement is prohibited. Members of the management bodies of banks may not occupy influential positions in other sectors of the economy. Exceptions apply to the acceptance of administrative posts with institutions of a banking nature⁽²⁴⁾. This also applies to interlocking capital relationships. Participation in finance companies carrying on leasing or factoring business, in particular, is therefore considered permissible, as are capital interests in undertakings carrying out data-processing work on behalf of banks.

- b) The second relevant provision (Section 24 (1)) is rather different from Section 1 (4). This is intended to prevent a bank from being heavily committed in an undertaking on liquidity grounds⁽²⁵⁾. Banks are therefore prohibited from acquiring shares in a single company or from accepting these as security for credit to an extent exceeding 15% of the book value of the bank's net worth.

Under the same provision, a bank's shareholdings may not total more than 50% of its net worth. In this way the risk element in this type of credit business is dealt with.

The total commitment, i.e. including credit of all types, towards a bank customer may not exceed 35% of net worth. There is, however, one exception which allows indebtedness to be increased to 50% in certain circumstances (Section 23 (1)). A general exception to these rules is provided under Section 26.

2) Participation in practice

Shareholdings of deposit banks were said at the end of 1972 to amount to Kr 1,108 million without distinguishing between finance and non-banking investment⁽²⁶⁾. This sum equals 1.6% of the balance sheet total (70,720 million).

As at 31.3.1973, savings banks had a holding amounting to Kr 169.4 million⁽²⁷⁾. This commitment amounted to 0.6% of the balance sheet total (26,114 million).

Shares held by Danish credit institutions accounted for 5% of quoted shares and 0.19% of unquoted shares, computed in each case by nominal value⁽²⁸⁾.

IV) France

1) The legal bases of separate operation

a) The French banking industry may even today still be regarded as separate in operation. Traditional short-term deposit and credit business is transacted by the deposit banks (banques de dépôts). Long-term industrial financing is a matter for the investment banks (banques d'affaires).

This separation of operations is of historical origin. It is a result in particular of the way the national economy developed when the banks were founded during the last century⁽²⁹⁾. It was not imposed by government but arose purely from the limits that the different types of banks that developed set themselves.

It was not until the banking legislation of 1945 that the existing separation of operations was given a legal basis and clearly defined⁽³⁰⁾.

Underlying this legislative intervention was the concept of a more effective control of the supply of credit⁽³¹⁾. The Act created three categories amongst registered banks (banques inscrites).

Firstly, there are the deposit banks. Under Article 7 et seq. of the Act, the leading houses in this group were nationalized. Deposit banks' borrowing business was limited to sight deposits and time deposits at two years' maximum. Participation was permitted only if no more than 10% of the capital of a company was acquired. Provision was made for an exception in the case of interests in banks and finance companies.

On the other hand, investment banks were defined as institutions whose activities principally comprised the formation and administration of stockholdings in undertakings. These operations were therefore in no way restricted. This type of bank was in principle prohibited from accepting sight deposits and time deposits at less than two years' call.

Under the 1946 amendment to the Act, further, the category of medium and long-term credit banks (banques de crédit à long et moyen terme) was created. Their participation business was subject to the same restrictions as had been introduced for deposit banks.

- b) The clear separation of functions of French banks as described above was weakened in 1966/67 by regulations⁽³²⁾. As a result, the situation today is as follows:

Participation in undertakings by the deposit banks is prohibited only if this exceeds a 20% holding in one company. This restriction does not apply to participation in other banks, finance companies and companies rendering services to banks (services d'études ou services techniques ressortissant à la profession bancaire). Where participation is permitted under these regulations, it may not exceed

the bank's own capital resources, including new issues subscribed for.

The restriction on deposit banks to short-term deposit business was removed. Short-term deposit accounts (less than two years) may not, however, be used in participation business.

The investment banks, too, were released by the reform from the restrictions existing hitherto on borrowing business. They may now accept sight and short-term time deposits in the same way as the deposit banks. However, they too are affected by the restriction that participation may not be financed from short-term funds.

The new rules applying to deposit banks with regard to participation also apply to the medium and long-term credit banks.

Various reasons have been given for this weakening in the separation of operations in the French banking system. Firstly, it has been pointed out that the original sharp outlines had already been obscured by large-scale exploitation of the available exception provisions. Thus it was quite easy, for example, for investment banks to engage intensively in credit business as well. It is true that the Act allowed them to grant credit for an unrestricted period only to undertakings in which they had, had had, or intended to have a participatory holding. Although according to the letter of the Act the granting of credit was therefore to be linked to participation business, the investment banks could in fact easily undertake any credit business they wished as it was very difficult to prove the absence of an intention to participate⁽³³⁾.

Further, the penetration of investment banks into short and medium-term business has been blamed on scarcity in the capital market due to economic conditions⁽³⁴⁾. In addition, considerations of credit policy have been put forward⁽³⁵⁾. The request that the banks' opportunities for implementing long-term investment financing be improved can be traced back to the findings of the commission responsible for preparing the Vth Plan (1966 to 1970). The legislative extension of the deposit banks' opportunities for participation may be regarded as being linked with this.

This enlargement of the operational field of the deposit banks and their elevation to equal status with the investment banks as regards borrowing business was also intended to increase the degree of competition within the French banking system⁽³⁶⁾.

- c) It is obvious that in consequence of the reforms of 1966/67 there has been some drawing together in the activities of types of banks hitherto highly specialized, and consequently a trend towards universalization⁽³⁷⁾. It can be seen that this development gives a substantial competitive advantage to the deposit banks, on account of their already long-standing and well-developed branch network.

At the same time a definite process of concentration has taken place. Thus a number of investment banks have been merged with deposit banks. Today both investment and deposit banks may be found within single groups of undertakings. In this way borderlines between specializations are being still further eroded⁽³⁸⁾.

The trend towards universal banking is welcomed in principle. It should be noted in this context, however, that clear distinctions continue to exist in the investment branch in particular. It is further recognized in French banking circles that the transition to "banques à tout faire" is not without its problems. It has been commented that limits must be set to universalization. It has been stated in the first place in this connexion that specialization is an important factor in the productivity of banking services. Furthermore, the well-known conflicts of interest in the universal banking system have been stressed, particularly, for example, where a bank is both majority shareholder and lender. Such conflicts are indeed not merely conceivable in theory but are regarded as genuine dangers⁽³⁹⁾.

2) Participation in practice

- a) As at the end of 1973 the number of deposit banks has been given as 247 and of investment banks as 24. The medium and long-term credit banking sector comprised 50 houses⁽⁴⁰⁾.

As at 4.1.1973, the following figures have been given in respect of participation by the three groups of registered banks⁽⁴¹⁾.

As regards deposit banks, participation amounted to Fr. 3,974 million, compared with a balance sheet total of Fr 480,267 million. These investments therefore equalled only 0.8% of the balance sheet total. On the other hand, participation by the investment banks amounted to 7.4% of the balance sheet total. Their value has been given as Fr 2,225 million, the balance sheet total running to Fr 30,233 million. The corresponding figures for the medium and long-term credit banks are Fr 146 million in participation, with a balance sheet total of Fr 19,417 million. Participation, therefore, as in the case of the deposit banks, equals 0.8% of the balance sheet total.

- b) For the purposes of the investigation being made here, however, these figures are not very informative. No distinction is in fact made under the "participation" item on the balance sheet between shares in banks or other financial institutions and those in the non-banking sector (Titres de Filiales et Participations). In order to obtain a more precise picture of participation practice, recourse must be had to assumptions and trends.

It has been stated that, even in the mid-sixties, the deposit banks' participation in securities portfolios only rarely involved industrial firms, in line with traditional policy. Predominantly, shares were held in other credit institutions or in undertakings active in the finance field. It was also found that a substantial proportion was attributable to subsidiaries at home and abroad⁽⁴²⁾.

It must be assumed that the nature of the deposit banks' participation has changed since the 1966/67 reform and that industrial shares, too, are now readily acquired.

No essential change in the composition of participatory holdings is to be found in later literature, however. It has been revealed in connexion with an investigation of the balance sheets of a number of banks at the end of the sixties that even after the reforms the earlier separation of operations had been upheld to a large extent. In view of their balance sheet structure, states the author, it would hardly have been possible for the deposit banks to extend their participation business⁽⁴³⁾.

It has further been stressed⁽⁴⁴⁾ that the deposit banks have made little use of their improved opportunities for participation consequent upon the reforms. In individual cases, the first step was to incorporate new undertakings. The reason given for this caution is not only the relative lack of long-term funds but also the need to avoid the detrimental consequences of possible participation in competing undertakings.

These statements indicate that the major part of the deposit banks' participatory holdings is in the financial sector and is not therefore of direct interest to this investigation. Participation in the non-banking sector must even today still be attributed to the investment banks mainly specializing in this type of activity.

V) Great Britain

1) Bases of the banking system

For present purposes a distinction must be drawn between the clearing banks and the merchant banks in Britain.

- a) The clearing banks may be regarded as deposit banks. Their chief function is to accept deposits. Differentiation is made between non-interest-bearing sight deposits, interest-bearing deposits at 7 days' call, and savings deposits. These last are regarded as of little consequence by the clearing banks though their importance is increasing in connexion with the expansion in longer-term credit (see below)⁽⁴⁵⁾.

On the lending side, this corresponds to the emphasis placed on short-term credit. This is granted to trade, agriculture, private enterprise and, to a limited extent, also to industry. Credit on current account (the "overdraft") predominates. Generally speaking, therefore, the clearing banks see their function not as financing trade and industry in the long term but as making liquid funds continuously available for the money market. They make an effort to meet their customers' wishes in the matter of repayment. The correspondence between their borrowings and lendings accords with this objective.

A further typical feature is the clearing banks' extensive branch network. This reflects the desire to attract deposits from a wide range of home customers.

The clearing banks are represented for the most part by the "Big Four" London banks (National Westminster, Barclays, Midland and Lloyds), by four Scottish houses, and by eight Northern Ireland banks.

The clearing banks' concentration on short-term deposits and advances precludes intensive activity in the industrial field. Long-term commitments with major customers are almost entirely ruled out. For this reason participation in the non-banking sector does not form part of the banks' lending business. The latter, in fact, serves only three purposes - maintenance of liquidity, investment in securities and the provision of credit. Almost the only securities invested in are British Government securities⁽⁴⁶⁾.

This specialization and, more particularly, the principle of not acquiring parcels of shares, are based on an unwritten code of conduct. However, a tendency towards liberalization is clearly evident. The Bank of England announced a change of policy at the end of 1972⁽⁴⁷⁾. According to this, clearing banks would not be prevented from participating in merchant banks or in other undertakings. Although already existing in law, the opportunity for participation has only just been effectively created by the present positive attitude of the Bank of England.

b) Industrial financing is undertaken by the merchant banks. These are a group which mostly originated as family businesses and in many cases still remain so today. They may be compared with the normal type of private bank found on the Continent. Their activities were originally restricted to the provision of finance by means of acceptance credits. This was the origin of the "accepting houses", the merchant banks in the stricter sense⁽⁴⁸⁾. New issue business, initially for foreign companies and later for home companies as well, was chiefly the preserve of the "issuing houses". A number of merchant banks belong to the "Issuing Houses Association".

The activities of both groups as merchant banks may be defined as follows⁽⁴⁹⁾: most merchant bankers are engaged in the broad field of industrial finance, linked with export and import credit business, dealings on all leading money markets, and the management of share and investment portfolios. Their operations are not limited to the private sector and they also manage the financial interests of governments and other public institutions.

An important aspect of this work is their function as financial advisers to industrial undertakings. This covers consultancy on capital and financial problems and on participation and mergers.

An essential factor continues to be the holding of shares in industrial undertakings⁽⁵⁰⁾, which, together with long-term investment loans, serves to finance industrial projects. Participation can also, however, result from issuing operations. It is considered, however, that in contrast to the French banques d'affaires, the merchant banks have a relatively low level of share investment since their deposit base is too narrow⁽⁵¹⁾. In order to supply long-term capital, the merchant banks have, further, increasingly set up investment trusts⁽⁵²⁾.

c) The separation of functions as between the clearing banks and the merchant banks and the associated restriction of share investment to one type of bank are of historical origin. The clearing banks for the most part developed from the many private banks that dealt with general banking business. The large London banks originate from the joint-stock banks introduced at a later date. The restriction on business policy that still exists has been attributed in part to an excessively conservative attitude⁽⁵³⁾. By contrast, the merchant banks at first had an extremely restricted field of activity the nature of which made such banks increasingly important to the larger industrial enterprises as industrialization progressed. The result was a specialization in industrial financing.

This development shows that there is no separation system in Great Britain analogous to the system of separate deposit banks and finance companies in Belgium, for example. The present structure has been little affected by Government intervention in banking. It may therefore be said that the existing separation of banking functions is not based on considerations of public policy or banking supervision. This does not mean, however, that the principles of separation of operations have not also been considered from these aspects. Thus when a new issue was independently handled by a clearing bank for the first time in 1965, it provoked a great deal of criticism⁽⁵⁴⁾. Reference was made, amongst other things, to the conflict of interests arising under the universal banking system. Caution was advised lest the dubious practices of the German joint-stock banks be adopted.

It may be assumed that the separation of operations, based on unwritten rules in accordance with British tradition, derives from the advantages to be gained from separating commercial from investment banking.

2) Participation in practice

No statistics appear to be available on the actual extent of participation. Some insight may, however, be obtained from general investigations into the distribution of shareholdings⁽⁵⁵⁾. According to these, without any break-down into types, the banks in 1963 held 1.25% and in 1969 2% of quoted shares, by market value. The value of this information, however, is prejudiced by the fact that only securities quoted on the London Stock Exchange were taken into account. Furthermore, securities dealt in only unofficially, which are frequently taken up by merchant banks, were excluded.

A more recent investigation into the shareholders of a leading company showed participation by banks amounting to 3%⁽⁵⁶⁾. If, with all due reservation, this percentage is applied to the market value of all shares quoted in Great Britain as at June 1974, amounting to £27,750 million (Bank of England Quarterly Bulletin), some clue is given as to actual participation in practice. An estimate must, however, be directed towards a lower figure since, according to the Bank of England's records, securities owned by all banks in June 1974, including certain types of debentures, amounted to £991 million.

3) Trends

It is evident that the system of separation of operations, which even before was by no means clear-cut, has noticeably changed recently. Both clearing banks and merchant banks are now penetrating sectors hitherto reserved to the other type of bank⁽⁵⁷⁾.

The clearing banks are taking on industrial business, particularly through subsidiaries. New issues, as stated above, and associated services are becoming more and more frequent. Even long-term credit business is now being carried on by them. On the other hand, the merchant banks have come to recognize the advantages of traditional banking business. They

have increasingly been opening branches, even in sectors of lesser commercial interest, and are seeking to attract deposits from a wider clientele. The previous strong emphasis on either home or foreign business has also lessened.

Keen competition by foreign banks, amongst other things, is said to be responsible for this trend towards a comprehensive range of services. The visible tendency towards universalization is expected to increase in the seventies. It is not accepted, however, that the British clearing banks would be likely, in the course of this process of independent conversion, to change into investment banks of the type of the French banques d'affaires or the large German banks⁽⁵⁸⁾. So far, only a⁽⁵⁹⁾ hesitant approach towards investment business has been noted.

VI) Ireland

1) The legal bases

The Irish banks similarly cannot be simply categorized under either the separation or the universal system. Under the Central Bank Act of 1971, they are subject to uniform supervision. The Central Bank grants the necessary licences for taking up banking business and supervises banks' activities.

The aim of the granting of licences is to maintain the "orderly and proper regulation of banking" (Section 9 (2), Central Bank Act). The same criterion, furthermore, justifies the licence being made subject to provisos and conditions (Section 10 (1)).

The question of participation in the non-banking sector is not specifically regulated by statute and comes into play only within the framework of the above measure for the exercise of banking supervision.

In 1971 the Central Bank had already laid down the criteria, after consultation with the Ministry of Finance and a number of leading banks, that it would apply in exercising its judgement within the framework of its supervisory function⁽⁶⁰⁾. These criteria are intended in particular to clarify the attitude of the Central Bank. In the absence of a statutory basis, they are not directly binding and may be varied in the light of subsequent experience by normal decision-making methods.

In these guidelines, participation is one of a number of points touched upon in the chapter regarding supervision of banks already licensed. It is stated that no bank may hold more than 20% of the capital of another company without the Central Bank's prior approval⁽⁶¹⁾. There are two exceptions, however: the approval requirement is dispensed with in the first place if the shares to be acquired are those of another bank or of companies carrying on banking-type activities or other financing business; in addition, any licensed bank shall be free to acquire shares if its lending commitment (credit, bill acceptances, stockholding rights, etc) in the case of any one undertaking does not exceed 2% of the sum of such items in the balance sheet.

These exceptions indicate that the Central Bank approaches the question of participation from the aspect of investment security and consequently in the context of the protection of depositors. This is confirmed by the criteria mentioned in the same connexion which are directed generally, inter alia, against an undue concentration of risk investment in any one branch of the economy or against too high (i.e. 10% of potential credit) a grant of credit to individual customers.

2) Participation in practice

There is nothing to be said regarding the Central Bank's practice within the framework of the approval requirements that it makes. According to Central Bank information, there have been no cases of participation that required approval under the above criteria. The Central Bank Act has not therefore come up against any extensive practice of participation. No statistics are available as to participation resulting from share acquisitions which banks were free to make without prior approval.

It may be assumed that participation plays no significant role in the lending business of Irish banks. This conclusion is reached from a study of the balance sheets (as at 31.3.1973) of the two leading banks in Ireland, whose share in Irish banking business is about 50%. It appears from this that the Allied Irish Bank Ltd., out of assets of £ 748.9 million, invested only £ 6.2 million in securities (excluding Government securities). The corresponding figures for the Bank of Ireland are £ 906.9 million and £ 10.6 million. As regards these items, it should be remembered that they also include the stock of the statutory authorities. Actual participation may therefore be considered to be small in extent.

Irish company law requires the above banks to disclose cases of participation where these exceed 20%. The only relevant stockholding is the Bank of Ireland's 26% investment in Celtic Oil Ltd. The nature of the Irish banks as deposit banks, and less so as universal banks⁽⁶²⁾, is also clearly reflected in the fact that stockholdings of the leading credit institutions described as "associated banks" have been calculated (excluding Government and public authorities' stock) at £ 9.8 million out of a balance sheet total of £ 1,828.5 million⁽⁶³⁾.

VII) Italy

1) The structure of the banking system

The legal position and operating conditions in Italy are to a considerable extent determined by the structure of the banking and financial sector. The sharp division between short-term business on the one hand and medium and long-term business on the other, introduced under the Banking Act of 1963⁽⁶⁴⁾, predominates. This is the result of experience following the

First World War when the banks had become deeply enmeshed in the long-term financing of undertakings, which led to crises of liquidity. A further structural feature of the Italian banking industry is strong Government participation which, related to deposit business, is said to be 80%⁽⁶⁵⁾.

Short-term business may not exceed a term of 18 months. In this way separation is created between normal credit business and longer-term financing credit. This differentiation leads to distinct grouping within the banking system. Short-term business is carried on by the commercial banks (aziende di credito). These include the public-sector credit institutions (istituti di credito di diritto pubblico), the national banks (banche d'interesse nazionale), characterized by their supra-regional operations, the other commercial banks (banche di credito ordinario), the savings banks (casse di risparmio) and the co-operative banks (banche popolari cooperativo). As these commercial banks restricted themselves to short-term business, this led to the necessary machinery being set up to take on longer-term business, through what in actual practice was merely the formal constitution of special departments as separate entities and through the formation of new financing organizations.

2) Participation by the commercial banks

The commercial banks' lending business is subject to supervision by the Banca d'Italia, which at the same time exercises central bank functions. Article 35 (2a) of the Banking Act empowers the Banca d'Italia to exert influence on the ratio of a commercial bank's share capital to its investments in property or shares. Under an enabling order to Article 35 of the Banking Act⁽⁶⁶⁾, commercial banks are obliged to give prior notification of participatory stockholdings that they wish to acquire for exceptional and justified reasons. Such an application must be accompanied by the balance sheets for the last three financial years. Furthermore, all changes in the shareholding must be notified to the Banca d'Italia as the supervisory authority. Exceptions are made, with the approval of the Banca d'Italia, particularly where the participation

is either one by an azienda di credito in an istituto di credito or a temporary acquisition for re-sale to the public - e.g. as in the case of new issues⁽⁶⁷⁾.

The objective of these regulations is clearly of a supervisory nature. Effective protection to depositors is considered to lie in the restriction of investment in shares. Unrestricted participation in undertakings by the commercial banks would not, moreover, be compatible with their limitation to short-term credit business.

The level of such participation in the non-banking sector is extremely small. For all types of commercial bank at 30.9.1973 it amounted in total to 113 thousand million lire as against total assets of 103 million million lire. The exceptional nature of such stockholdings becomes even clearer when one considers the many times greater participation in banks and in the rest of the financial field⁽⁶⁸⁾.

3) Participation in the longer-term financial sector

True industrial business is carried on by special financial institutions concentrating on medium and long-term credit business (istituti di credito a medio e lungo termine). Investment of assets in shares is not controlled in this case. A feature of these institutions is their orientation towards particular branches of the economy and, in particular, their direct or indirect dependence on the State. They often take the form of public-law corporations⁽⁶⁹⁾. They are consequently instruments of Government economic policy. In addition to the long-term financing of industrial investment, substantial direct participation may also be met with here. Industrial participatory investment by the Istituto Mobiliare Italiano (IMI), whose capital is indirectly held by the State, was said in 1968 to be 35 thousand million lire, which is one-third of its share capital⁽⁷⁰⁾.

The field of operation of these financial institutions extends to the function of administering Government investments. The Istituto per la Ricostruzione Industriale (IRI), in particular, may be regarded as one such holding company. It is seen as the Government's right hand in industry. Amongst other things, it holds the capital of three national banks and their subsidiaries. While it cannot be regarded as a credit institution, its activities nevertheless include the financing of undertakings controlled by it. Industrial interests are handled by five financing companies. Its shareholdings are said to total 800 thousand million lire⁽⁷¹⁾. The IRI's funds derive directly from the State or are raised by the issue of bonds. The IRI may further be distinguished from industrial banks in the traditional sense in that its participatory holdings seldom change hands and it always exercises majority control.

These forms of long-term industrial financing show that Italy has developed a system characterized to a large measure by strong State influence on the economy on the one hand but also by an attempt to achieve equilibrium with the private sector on the other. The question of participation in the non-banking sector must consequently in this case be viewed in different terms.

VIII) Luxembourg

The banking system in Luxembourg must within our present terms of reference be described as atypical. Its international character places it in a special position on the European banking scene. Barely one-third of deposits are made in Luxembourg currency. A majority of the banks have been formed by or are branches of foreign companies⁽⁷²⁾. A distinction must therefore be drawn between banking business at the national level and banking business on the level of international finance.

It is characteristic of the liberal basis of the Luxembourg banking system that participation in the non-banking sector is in no way controlled. Even the banking control commission (Commissariat au Contrôle des Banques) has avoided any intervention in this field. There is merely an obligation to show participatory holdings separately in the balance sheet.

This universality of the Luxembourg banks may particularly be explained by the fact that this country is a small one. The relatively modest extent of the demand for banking services hardly allows of specialization. Operations are said to be concentrated in short-term business⁽⁷⁴⁾. This, too, explains why participation in industrial or commercial undertakings is very low⁽⁷⁵⁾. Long-term investment of current funds is incompatible with sound banking practice.

At the present time, consequently, longer-term financing is carried out with State assistance. The Government invests funds in the banks in order to provide the necessary corporate finance⁽⁷⁶⁾. To eliminate the defects that nevertheless still persist in the Luxembourg capital market, a bill providing for the creation of special banks, rather in the form of a national investment bank, has been submitted to Parliament⁽⁷⁷⁾. Furthermore, there are plans for assisting banks when they run into liquidity difficulties. For this purpose, in the first place, a multi-lateral support system would be developed. In the long term, consideration is being given to setting up a liquidity bank with the role of a central bank as the lender of last resort⁽⁷⁸⁾.

Only brief mention can be made here of the Luxembourg holding company legislation of 1929, which is so important to the international investment sector. It grants substantial tax advantages to companies incorporated under Luxembourg law provided that they restrict themselves to the administration of participatory holdings. A particular feature is the absence of double taxation on joint-stock companies⁽⁷⁹⁾.

The holding companies essentially have no banking function. In principle, financing tasks may only be carried out by companies belonging to a group. Financial holding companies, with bank participation, were not permitted until 1967; the object in permitting their existence was to obtain capital for investment through the issue of bonds. The utilization of the funds for this purpose is supervised. The holding companies cannot therefore be regarded as banks engaged in participation business⁽⁸⁰⁾

IX) The Netherlands

1) The legal bases

There are three main types of bank in Holland. First of all, there are the ordinary commercial banks which in terms of volume of business clearly predominate. At the present time there are some 70 commercial banks of this kind, but their number is being reduced by the trend towards larger units⁽⁸¹⁾. The two leading commercial banks, in particular, are the result of mergers. These are the Amsterdam-Rotterdam Bank N.V. (AMRO) and the Algemene Bank Nederland (ABN).

In addition to the commercial banks, there is a group of agricultural cooperative banks and savings banks. The Nederlandsche Bank carries out central bank functions and is responsible for bank supervision by virtue of the Supervision Act of 1948.

The Dutch banks are essentially universal banks. Participation may be undertaken by all types of bank. At the present time, statutory control of participation of this kind exists on two points only, as follows:

As regards savings banks, depositors are protected in that the bank's portfolio of quoted shares may not exceed 50% of its net worth (capital plus reserves)⁽⁸²⁾.

Banks' participatory holdings are indirectly affected by the supervision of the Nederlandsche Bank as the supervisory authority for mergers in the banking industry. Mergers between banks, in particular, are permissible, under Article 13 (1) of the Banking Supervisory Act, only if the Nederlandsche Bank issues a declaration of non-objection thereto. These powers of approval are normally exercised liberally, i.e. declarations of non-objection are granted as a matter of principle. What is significant for the purposes of our investigation, however, is that the question of participation is subject to the approval procedure. The Nederlandsche Bank examines whether a merger might lead to undesirable developments within the credit system or could conflict with sound banking practice. Under this aspect, the declaration of non-objection to certain amalgamations has been linked to the proviso that after the merger direct or indirect participatory holdings may be acquired only with the Nederlandsche Bank's prior consent. A participatory holding within the meaning of this proviso is a shareholding of more than 5% in another undertaking. This approval requirement is based on the consideration that merged banks, with their greater capital power, should not be completely free to pursue interests in other sectors of the economy. A trend of this kind is regarded as detrimental to the credit system⁽⁸³⁾

In this way an opportunity of controlling the participation policy of merged banks has been created. This factor should not be underestimated: an appreciable move towards concentration in banking has taken place in the Netherlands during the past few years. Twenty-four non-objection declarations are listed for 1964. It should be stressed in this connexion that the two leading commercial banks, the AMRO Bank and ABN, are also the result of amalgamations.

2) Participation in practice

No clear statement can be made regarding the extent of participation in practice. The balance sheets of the commercial banks⁽⁸⁴⁾ for 1966 showed a sum of 458 million florins attributable to participatory holdings. This figure may be compared with the balance sheet total of all commercial banks, indicated at 23.2 thousand million florins (of which it forms barely 2%). The participation item on the AMRO Bank balance sheet was 85.9 million florins (balance sheet total 7.5 thousand million) and the corresponding figures for the ABN were 7.1 million (balance sheet total 7.6 thousand million).

It has been commented in this connexion that the participatory holdings are mainly in subsidiaries or other institutions in the financial sector, that interests in other undertakings are rare and that the Dutch commercial banks are not investment banks⁽⁸⁵⁾.

3) Proposed reforms

Proposals for reform put forward in Holland have taken shape in a bill to bring in a new supervisory law on the credit system⁽⁸⁶⁾. Article 17 (1) of the bill contains amongst other things a prohibition - with a proviso that the prohibition may be set aside if the appropriate general approval is obtained - on direct or indirect participation by credit institutions in other undertakings. This provision is intended to cover participatory interests exceeding 5% of the capital of the companies concerned. In addition, the provision is intended to cover the enlargement of existing participatory interests.

If this provision passes into law in the Netherlands, participation will not be entirely eliminated, because of the existence of the "approval" proviso. Powers for control, however, are comprehensive. The approval requirement already applying now in respect of the acquisition of participatory holdings by merged banks would be extended to the whole of the credit system.

X) Results of the comparative survey of the legal position

1) Control systems and criteria in Member States

- a) The survey of the control on participation in the non-banking sector by banks within the European Community indicates substantial differences between Member States.

In two countries (Germany and Luxembourg) there are practically no limitations. Within the framework of a universal banking system, all that is required is disclosure which is ineffective, however, due to the absence of a statutory definition of the concept of participation, at least in Germany.

Other countries approach such liberalization in the investment sector of banking activities with greater caution and for this purpose have introduced restrictions.

In particular cases, the scope of participation can be controlled on the basis of statutory powers in Holland and Ireland. Denmark has made general provision on this point. Something similar is also projected for Holland in the future.

Contrasting with these countries are Member States where the question of participation in industrial and commercial undertakings is dealt with within the scope of a more or less clear separation of functions within the banking system. Specialization, particularly between short-term credit business and long-term industrial financing, which has either grown up or been statutorily imposed, has led to the traditional deposit banks being prohibited from, or having to accept restrictions on, the holding of shares. In this connexion, Belgium, Italy, France and Great Britain may be mentioned. While in Belgium and Italy, shareholding is denied in principle to a specific category of banks, France has in this respect introduced only a quantitative limitation. Great Britain proceeds flexibly on unwritten principles.

A distinction must therefore be drawn between Member States without controls on participation, those with general controls on all banks, and those with a separation of functions in the credit system.

- b) The criteria of control, where no full prohibition exists, are illuminating. Two aspects are especially important:

Firstly, provision is made for a specific relationship between the bank's own funds and its investments in securities. It is possible to determine, in this connexion, to what percentage point a particular commitment in a single undertaking is permitted. Such provisions exist in Denmark (15%). A ratio may also be laid down between net worth and total shareholdings. This approach has been adopted by France (100%), Holland (50% as regards quoted shares) and Denmark (50%). An equivalent regulation applying in Germany (Section 12, KWG) is practically meaningless in view of its broad drafting.

Secondly, the extent of participation in one undertaking is restricted in a number of Member States. In this case, France - for deposit banks - and Ireland (subject to approval) fix a limit of 20%. Denmark prohibits a bank from undertaking any other business activity but at least relates this to a majority holding. According to the spread of shares, the limit may in fact lie lower. Holland wishes to introduce an approval procedure for 5% participation.

Nothing further will be said at this point on the possible justification of such control criteria. Insofar as they are clearly defined in the individual countries they will be dealt with in connexion with the discussion of problems of participation.

- c) Where banks are prohibited from or subject to restrictions in holding shares, specific situations exist in respect of which exceptions are provided for.

In this connexion, mention may be made in the first instance of interests in the banking industry (Belgium, France, Ireland, Italy and Denmark). The banking industry is in this case taken in a wide sense. Included are all kinds of finance companies (particularly factoring and leasing) and undertakings rendering services to banks. Firms involved in data processing come to mind particularly in this context and are often joint subsidiaries formed by banks on rationalization grounds.

The acquisition of shares is, furthermore, considered permissible where it is only a temporary measure, for example in the placing of new issues offered to the public (Belgium and Italy). This meets the requirements of the capital market.

In Belgium, furthermore, participation has been declared permissible as a reorganization measure to save endangered credit provided this does not lead to a permanent investment.

The most disparate system of exceptions applies in Belgium as a result of the strict prohibition on participation imposed on deposit banks there.

2) Participation practice in the European Community

The practice of banks in the EEC Member States of holding portfolios of shares may be assumed to be substantial.

In those countries where there is a recognizable separation of operations within the banking system this comment requires no further explanation. Specialization can, in fact, be put down to participation as the subject matter of lending business. It can consequently be assumed that houses particularly active in industrial finance will have appreciable shareholdings. This tendency has been proved as regards the countries concerned.

It follows from this that, under such systems, participation by the deposit banks is slight and is frequently confined to other banks or financial institutions.

Share investment by the Irish, Dutch and Luxembourg banks is relatively insignificant. The reason for this could lie in the volume of foreign capital in these countries.

Participation by banks in industrial and commercial undertakings is substantial, however, in Denmark and Germany.

The practical relevance of the subject matter under investigation is confirmed by these findings. It is further confirmed by the fact that the problems of participatory investment by banks in the Member States has in some cases led to comprehensive regulations due to considerations of banking or public policy. The only exceptions to this are Luxembourg and Germany. In the latter country, however, this question has been the subject of fierce controversy for a number of years. Moreover, the banks have already considered the possibility of self-imposed restrictive measures⁽⁸⁷⁾. Legislative action may be expected in the not-too-distant future.

CHAPTER THREE

Reasons why banks participate in the non-banking sector.

I) Introduction

It is not entirely clear - at least at first sight - why banks should frequently participate in large measure in the non-banking sector in the form of shareholdings in undertakings. The prime purpose in banking activity is in fact the provision of services affecting the investment of money and capital, and also the procurement of capital and the transfer of money⁽¹⁾. This conclusion leads one to ask what motives have led the banks to invest their funds in other undertakings outside their own industry.

Reference may be made at this point to the fact that the holding of shares in companies is not always due to the exercise of corporate freedom of action, and reference could be made here to involuntary investment. Banks themselves, in particular, constantly refer to this fact⁽²⁾. If this is the case, one may wonder what links therefore exist with actual banking business. The same question arises as regards voluntary planned investment in company securities. Is it possible to prove some relationship to the principles of profitability, liquidity and security which are central to private enterprise banking policy?

A definition of the reasons why banks participate in industrial and commercial undertakings is synonymous with the banking industry's interests in such investment. We consequently arrive at our first point of reference for assessing the interests arising within the scope of the subject matter under investigation: the purpose and significance to the credit institutions of participatory investment.

In order to determine this criterion of assessment, discussion in this connexion must be restricted. All that need be ascertained is what effects the possession of stockholdings amounting to participation in undertakings has on private enterprise banking objectives. Only in this context can an assessment be considered. Other interests, possibly conflicting, beyond the confines of the credit system, are for the most part not dealt with in this chapter.

II) Participation as a consequence of banks' restricted freedom of action (unplanned investment)

1) Participation resulting from unplaced new issues

Where a bank undertakes to issue other companies' shares on the basis that there will be a firm acquisition of the shares by the bank by subscription, followed by independent placing on the capital market, the bank itself bears the full marketing risk. This situation arises in most Member States of the European Community⁽³⁾. This risk is frequently not borne by one house alone, however. As a rule, it is distributed over several banks in a consortium.

New issue business, and the marketing risk accepted with it, essentially serves profit purposes⁽⁴⁾. The bank receives remuneration for its services, based on the extent of its work and the gravity of the risks accepted. The services rendered include in particular the technical processing of the issue and access to the facilities of its own sales organization.

A further interest in an issue may be the aim to consolidate a medium to long-term preliminary credit through the capital market. This is the case where the bank has had contact with a commercial undertaking for some time and does not wish to carry a whole investment scheme right through to the end⁽⁵⁾.

One aspect of the share-placing risk is that the bank may be obliged to retain for its own account shares for which it has subscribed. This may be due to a slump in the share price of the issuing company or general lack of enthusiasm on the stock market. The bank is then bound in the interests of its trading partner and in view of the commitments it has entered into to make use of the excess shares for its own account.

It may be assumed, however, that shareholdings acquired as a result of failed new issues will in practice rarely reach the level of actual participation⁽⁶⁾. The following reasons may be adduced for this:

The seller's risk is at its greatest in the case of first issues, as in this case the lack of knowledge as to the worth of new undertakings can reduce the market's willingness to take them up. The banks' first issue business has in fact declined substantially. Issues are made today chiefly to strengthen a firm's financial resources by means of a capital increase. This means that the issuing company is already known on the capital market. In addition, the amounts to be placed in such cases are smaller.

It should be added that subscription for shares being issued is in practice undertaken mainly not by a single house but by a consortium of banks formed to launch the issue. If shares cannot be sold, the participants take them up only in due proportion.

Participation as the (infrequent) consequence of an unsuccessful issue must be seen within the framework of general banking objectives. It is a by-product, consciously accepted - and remunerative - of banking activities which are directed towards achieving maximum profit. It is not really possible, therefore, to draw a clear line between investment achieved in this way as being due to contractual obligation and investment made for compelling commercial reasons⁽⁷⁾.

2) Participation as a consequence of price support operations

The fact that the banks' commercial success may depend on the movement of the price of certain shares means that they have not only to keep a careful watch on prices but to intervene actively on the stock exchange and attempt to a certain extent to influence prices⁽⁸⁾. Interest in price trends may, in particular, be dealt with from two aspects, which follow from the bank's activities as an issuing house and as an investor on its own account.

- a) The participating bank may, in connexion with new issues, consider it necessary to intervene during a transitional period if a wide market, with an equilibrium of public supply and demand, has not emerged. Especially if a new issue cannot be permanently placed and selling pressure mounts, it may have to purchase shares on the market itself in order to safeguard the interests of the issuing principal.

In this case, too, however, it is unlikely that true participatory investment can result in this way. Such a situation can arise only on first issues which, as already stated, are relatively infrequent on the share market. In the case of capital increases, a price emerges based on the latest quotation of the subscription rights for the new shares, a price which is geared to the price of the old shares⁽⁹⁾. No intervention is necessary. Moreover, the bank may in certain circumstances leave any necessary price support operations to the issuing principal.

- b) Price support operations are of more practical importance to a bank where it intervenes on the market in order to counteract a drop in value in the stock it has taken up on its own account. It should be noted, however, in this case that all price support has its limits. It can balance out chance price fluctuations in tight markets or check or mitigate

seasonal falls. But a bank, with its limited funds, cannot possibly reverse a general downward trend of the market.

The position may be different if a bank has a substantial stake in another company. If, due to special circumstances, the company's shares are in danger of falling, e.g. as a result of rumours about substantial capital losses, the participating bank may intervene. By taking up shares offered on the market, pressure on the shares can be relieved. In this way, the value of the bank's own investment is maintained often with relatively small funds.

If a stabilization in the price is achieved in this way, the shares - which in such cases may achieve the status of a participation - must be retained at least temporarily, as any re-sale might endanger their price on the stock exchange. Where an active effort to sell the shares is made and sale is ultimately accomplished, any additional shareholdings acquired through stock exchange price support operations represent only a temporary measure of banking security policy⁽¹⁰⁾.

- c) Banks' price support is an attempt to influence the market for certain shares. This is not direct involvement, intervention in fact being achieved through utilization of the market machinery. The operation of altering price trends in this way acquires an importance beyond that of the bank's interest since the whole of the market influenced reacts. This effect is the basis for the distinction made between public and private objects of intervention⁽¹¹⁾. The banks are consequently assumed to act in the general interest. This is questionable, however, since public and private interests may coincide, e.g. in containing excessive price movements, since price support is carried on within the framework of commercial banking policy. Price support directed against a fall in prices directly or indirectly serves to maximize profit in the long-term⁽¹²⁾.

National economic considerations by themselves as the sole effective motivation would be in conflict with the interests of banks' shareholders and customers.

3) Participation through recovery of bad debts

Within the context of discussions on banks' participation in industry, reference is continually made to the need for the financial rehabilitation of economically weak undertakings by redeeming "frozen" credit⁽¹³⁾.

Unlike the reasons for participation referred to above, there could be a substantial factor here leading to investment in shares. This is proved, indeed, by the exception provided for from the general prohibition on participatory investment by deposit banks in such cases in Belgium⁽¹⁴⁾.

The circumstances applying in this case are easy to define⁽¹⁵⁾. In the industrial financing field, in particular, the banks do not always succeed in recovering credit granted in the way that was originally intended. Even strict security requirements when checking the creditworthiness of borrowers cannot prevent such difficulties in credit business.

In the case of investment credit, the bank is as a rule neither able nor willing to extend finance beyond a specific period. The redemption of the loan by the issue of debentures or, more frequently, of shares is intended to effect a change in the creditor relationship. This object is jeopardized, however, or proved ineffective if circumstances on the capital market do not permit this. Apart from relatively external factors of this kind, failure to convert the debt may also lie with the debtor himself if his economic situation is not such as to create the necessary basis of confidence for an investment of capital.

In such cases it is directly in the creditor bank's own interests to act as a "new" creditor itself, if the credit commitment is to be redeemed. This is all the more true if the usual credit sureties cannot be realized or if to realize them would bring the debtor to the verge of bankruptcy. Even where credit does not serve the purpose of providing preliminary finance, it may be necessary to recover it through participation. Credit is said to "freeze" when the borrower is no longer able, whether for external or internal reasons, to fulfil his contractual commitments towards the bank and when the latter is unable or unwilling to agree to an extension.

In this case it is in the lender's interest not to content himself any longer with a mere debt, but to achieve a solution through participation. Participation may in such cases take other forms than shares. A decisive factor is the debtor undertaking's legal form. Participation is frequently preceded by a change in the debtor's legal form. This is implemented by the bank in order to adjust the conditions of participation to its own benefit.

The recovery of a debt through company securities may contribute towards the bank's protection against losses on credit business. This is obviously possible only if the company to be rehabilitated makes positive progress so that the participation does not lose its intrinsic value and so that the marketability of the shares is improved in the interests of subsequent re-sale.

Besides securing the bank's claim by debt conversion, the assumption of shareholders' rights in the company gives the bank direct influence on the business decisions of the company to be rehabilitated. This influence

is in practice frequently institutionalized by the bank being appointed to the supervisory board. The opportunity, in particular, of cooperating in the settlement of personnel and financial matters can be important to the creditworthiness of the undertaking and consequently to the bank's commitment. In addition, its influence can be used in order to combine the undertaking with a stronger partner. There is a clear link between participation based on the redemption of frozen credit and credit business as the chief element in a bank's lending operations.

In the course of pursuing the aim of increasing profit, unavoidable credit risk may demand participatory take-over. The latter therefore serves in such cases to prevent or minimize loss and lies directly within the field of the objectives of banking business.

4) Unplanned participation within the scope of commercial banking policy

The investigation of the reasons for pursuing what is known as unplanned participation has confirmed a link with the general aims of banking policy. Investment always serves the interests of the business as a whole and, consequently, the aim of maximizing profit^(15a). This applies even where purely transitory items are concerned.

Participation as a possible consequence of a share issue remaining unplaced or not fully placed, particularly in the course of a capital increase, may be attributed directly to the sales risk normally assumed with issuing business. It is one of the money-earning services within the framework of issuing activities. Participation is therefore an acknowledged possible by-product of banking business.

The same applies in the case of participation resulting from the redemption of bad credit. In this case the profitability of credit business is secured by reducing the risk of loss.

Price support on the stock exchange, with the possible effect of a growing share portfolio, is another component part of business policy. The value of a bank's own share portfolio must be maintained as far as possible, avoiding stock market losses.

On the basis of considerations limited to the banking industry, such participation must therefore be regarded as a positive aspect of banking business. This also applies to this sector of the economy as a whole insofar as its economic strength is regarded as a prerequisite for the achievement of national economic tasks and for the maintenance of the necessary confidence on the part of the public.

Although the involuntary nature of the investment is continually stressed, this does not mean that banks' participation is undertaken against their will, as it were. The participation is not of a kind for the content of which the banks would have had to assume no responsibility. As already explained, the participation always arises as a result of commercial interests, even if only indirectly in certain circumstances. Freedom of action within the framework of participation is restricted by other criteria of commercial policy considered operationally more important. All that is lacking is the force of planned investment policy.

This does not mean, of course, that this cannot arise after a participation has come about.

The concept of involuntariness easily leads to the impression that in the case of participation resulting under these terms banks are assuming extraneous or outside tasks forced upon them. The position is clearly otherwise, however. It therefore seems more proper to speak of unplanned participation as opposed to planned investment which will now be dealt with. Whether this differentiation of investment according to its reason of origin will yield conclusions for the subject matter of our investigation can be discussed only within a later context.

III) Planned participation

1) General prerequisites for planned participation

The investment of shares on a planned business basis is dependent not only on internal considerations of the industry but on various external factors. The literature on this subject⁽¹⁶⁾ stresses, firstly, the connexion between credit demand and investment in securities. If a bank's credit potential is not exhausted, it is permissible in order to stimulate credit business to diversify into the acquisition of participatory holdings. The reverse, however, is permissible only within limits, as even strong demand for credit should not mean that the bank must give up existing investment commitments in order to strengthen credit business.

Secondly, trends on the stock exchange are important to shares. This is more so the case than with fixed-interest stock, as fluctuations of share prices are stronger and less predictable. Moreover, shares are always dependent on their market value on the day of sale as their life is of unlimited duration.

Finally, reference may be made to the acquisition of participatory interests being influenced by the prevailing situation on the securities market. It is obvious that a highly developed market with alternative choices as to both quality and quantity favours share investment. Conditions are at their best when the capital market is buoyant, as this lightens the banks' path to the capital market and facilitates their withdrawal from it⁽¹⁷⁾.

2) The special status of banks in investment business

Compared with other investors, the banks have special institutional advantages, particularly if they are active in dealing in securities. In this connexion, the following considerations apply:

- a) In the first place, the banks that transact securities business for their customers as well as for themselves enjoy a cost advantage. In order to

transact investment business on a commission basis, a specialist organizational framework is maintained through which transactions can also be undertaken on own account. This means that the banks do not have to pay the charges - i.e. commission - which other investors have to pay to make use of this framework. Moreover, the banks have a tax advantage in that, in Germany, they do not have to pay stock exchange turnover tax on their own purchases.

These savings in ancillary charges secure higher profitability for the banks compared with other investors and facilitate the short-term exchange of stocks in portfolio.

- b) A further consideration is the banks' particular closeness to the market. Thus banks with a large volume of commission business can frequently deduce - from customers' instructions received before they reach the exchange - what market trends are developing. Fluctuations can therefore be instantly taken into account for buying and selling purposes. And during stock exchange hours, the optimum moment can be selected for dealing.
- c) What is more important, however, is the banks' opportunity to procure restricted company information and consequently choose suitable stock for investment. Non-banking investors, on the other hand, are directed to general economic intelligence, company reports, stock exchange comparisons, etc. in order to determine their investment policy.

In Germany, at least, there are many and various long-standing links between the credit institutions, particularly the three leading banks, and industry. These links have been built up chiefly on the basis of credit and issuing business, which demand mutual confidence. The consequence is that the banks almost without exception are represented on the governing bodies of major undertakings⁽¹⁸⁾. In this way important

sources of information are opened up, as the supervisory board has to keep watch over management. This means that its members have intimate access to all important data regarding the business results and development of the undertaking. Furthermore, the sum of such knowledge gives an otherwise inaccessible insight into important sectors of the economy.

Even where information is not obtained through a seat on the governing bodies, banks often have better opportunity of apprising themselves on potential investments, since, as lenders and issuing houses, they always transact their business on a basis of intimate knowledge of the commercial situation of the undertakings concerned.

In this way, the banks are able to realize to a substantial extent the objectives pursued through share investment, which will be discussed in detail below⁽¹⁹⁾.

However, it should be noted that the utilization of such inside knowledge is being increasingly confined within limits. Countries with highly-developed securities markets have come to recognize the growing dangers in this connexion, particularly to other investors. Circumscription of the range of insiders, restrictions on share dealing, and duties of disclosure are the subject of government regulations (e.g. in France) or voluntary self-imposed controls (Germany)^(19a). Reference should be made to the relevant literature for a full description of this particular problem⁽²⁰⁾. It cannot be expected, however, that the regulation of "insider trading" will deprive banks of every opportunity of using undertakings' private information, which is to a special degree accessible to them, for the purposes of stock exchange trading.

3) Planned participation within the scope of banking objectives

The long-term achievement of maximum profit while maintaining liquidity at all times on the one hand and capital security on the other, may be

regarded as the guiding light of the banking industry in a market economy⁽²¹⁾. This objective covers the creation or acquisition of participatory holdings.

- a) Commentators see the advantages to the banking industry of shareholding in the form of participation especially from the profitability aspect⁽²²⁾. This obviously applies where the acquisition of worthwhile stock, e.g. growth-orientated dividend-bearing securities, produces a more attractive return on the investment. To this may be added an appreciable increase in the intrinsic value of the shareholding, leading to the creation of hidden reserves for the bank. Profitability is also favourably affected if superfluous liquid funds, that cannot perhaps be used profitably in credit business owing to lack of demand, are channelled into share purchase on own account⁽²³⁾.

This process, which might also be described as the achievement of a balanced spread of business, meets the requirement that the bank, as a service-rendering organization, should adapt its capability to the area of maximum demand⁽²⁴⁾.

The literature on this subject, however, goes beyond this point to stress, most forcibly, the aspect of securing profitability through a spread of risk by means of the acquisition of participatory holdings⁽²⁵⁾. Even in share investment of a semi-permanent nature, an opportunity is seen for stabilizing profit levels. The spread of the commercial risk over several branches of banking business allows of a balancing of risks. It is true that in certain circumstances, owing to a risk-conscious diversification of this kind, profit peaks may become fewer. What is more important, however, is the possibility of compensating for losses, e.g. in credit or issuing business, by the continuous receipt of dividends. Such an opportunity for balancing profit is considered an important factor with regard to the universal banking system as a whole and is described by Büschgen⁽²⁶⁾ as a "built-in stabilizer".

As regards this aspect of participation, it should be noted that the distribution of risk may become effective in two ways. Firstly, risk resulting from the various types of bank business has less impact on profit levels. Secondly, participatory holdings may wherever possible be spread over the various industrial sectors in order to avoid, or at least to reduce, losses due to dissimilar developments in the various branches of the economy.

Both factors serve the banking industry's requirements for security. The dichotomy between profit-seeking and security is thereby restricted⁽²⁷⁾.

The principle of liquidity can be complied with in participation business through the marketability of the shares. In the case of share investment, however, this usually takes second place to the chief reasons underlying distribution. Liquidity requirements merely impose certain limits without being the primary influence on the bank's investment decisions⁽²⁸⁾.

- b) Two further factors should be mentioned when defining the profitability of participation.

When entering into actual participation permitting influence over the company, the tax aspect of group holding company concessions has a part to play in Germany. According to this, participation amounting to at least 25% of a company's nominal capital is exempt from the double taxation levied in the first instance on the company's profits and then on the distribution of those profits to shareholders that would otherwise apply. Under Section 9 of the Corporation Tax Act (Körperschaftsteuergesetz) a bank need pay no corporation tax on income in the form of dividends resulting from participation as a group holding company. Tax advantages also exist under the holding company legislation in Luxembourg referred to above.

Mention should further be made of the value-enhancing effect of what is known as "large-lot" or "package" forming. Should a bank - or any other investor for that matter - succeed in accumulating shareholder's rights through share purchase, so that real influence over a company is possible, control of this kind over the undertaking as a result of the "package" holding is remunerated by a supplement on sale⁽²⁹⁾. The selling price is consequently appreciably above the prevailing quoted price. In this way, the effect of the gradual creation of a participatory holding can be profit-promoting if, upon sale, profit is made in the form of a "package supplement".

4) Influence on the undertaking the object of planned participation?

Banks frequently have participatory holdings that form a substantial part of companies' nominal capital. As regards Germany, this fact has been confirmed time and again⁽³⁰⁾. It would appear that most such holdings lie between 25 and 50%.

The profitability factors referred to above, tax benefits and "package-forming", can only be marginal considerations in this context. The question as to the reason for such participation becomes more urgent when it is considered that substantial investment commitments militate to some extent at least, against the principle of distribution of risk and consequently against security as an objective of banking policy⁽³¹⁾.

Are the banks concerned with influencing the undertakings in which they participate? The answer to this question is a definite "yes", not only in public⁽³²⁾ but also in the specialist literature⁽³³⁾. It is felt that considerations of investment policy alone are not an adequate explanation, as otherwise an undertaking whose shares were acquired by a bank with participation in mind would recognizably surpass all other public companies as regards its earning power and soundness⁽³⁴⁾.

This view cannot of course be wholeheartedly supported, if only for the fact that quite a number of different criteria may underlie a participation. No quantitative analysis of participation is possible from this aspect. On the other hand, the matter is not one of speculation as any other motive is absent and, moreover, this might conflict with the principle of distribution of risk. What objectives can banks pursue through an influence on particular undertakings derived from company securities? What concerns us in this context is whether banking considerations are also to be found here. Other effects will for the most part be ignored.

As a rule, it is in the banks' interests to stabilize commercial relations with their customers. This applies particularly in the case of major customers for whom private banking services are undertaken. It is therefore natural that existing opportunities for influence should be used in order to realize such interests.

This means that a bank with a substantial participation in an undertaking can influence the latter's commercial decisions. Where the undertaking's relations with the banking sector are concerned, this capability can be made use of by the bank in order to promote itself as first choice as trading partner. In this way, credit demand is concentrated, securities transactions and issues are taken up, reinforcement of deposit business is pursued and foreign business is transacted. In short, the whole of the universal bank's spectrum of services is brought into play. Thus the influenced undertaking is put into the service of banking sales and procurement policy⁽³⁵⁾.

It should be noted that the banks can also rely on higher growth rates in repeat business. In this context, there is the chance of opening salary accounts for the trading partner's employees and stimulating small-sum credit business.

The securing of trading relations between the bank and a commercial undertaking is directly aimed at the optimum utilization of the bank's commercial machinery. The influence achieved through participation therefore serves the purpose of profit maximization.

This fact is not synonymous with a general desire for power on the part of the banks, which is sometimes considered excessive. Nor, however, is it ruled out by the assertion, often heard but not examinable in this context, that the banks exercise no corporate functions in undertakings in which they participate⁽³⁶⁾; i.e. that they essentially leave corporate freedom of decision unaffected, as the stabilization of business relations is directed only towards banking objectives.

This influence cannot be denied or diminished by a reference to the increasing competition within the banking business (slogan: competition versus banking power⁽³⁷⁾). Livelier competition between and within banking groups may certainly be accepted as existing today, resulting particularly from freedom in interest rates, expansion of the branch network, and greater room for negotiation in public-sector institutions⁽³⁸⁾. The effectiveness of competition in enhancing trading relations, however, presupposes mobility in demand for banking services, and it is precisely this condition that is absent in practice from the private banking relations with which we are concerned here. Even where the influenced undertaking attempts to "break out", it is often not in a position to do so immediately owing to existing ties. "A change in the banking connexion gives rise to charges for the transfer of securities, for the preparation of new balance sheets and financial plans, for alteration of the banking connexions listed on the company's letterhead, etc. The customer has to take further

trouble in convincing the new bank of his soundness and comparing its charges for the service package required with the charges previously paid. The customer is further faced with some uncertainty in a change where it is not clear whether the new bank is trying to attract him with a special introductory price in order later to charge less favourable prices than the previous bank for certain or all aspects of the business."⁽³⁹⁾.

Existing credit arrangements stand yet more clearly in the way of a change that may be desirable in itself. According to the degree of indebtedness, it will become more difficult for an undertaking to take up other offers.

These opportunities for influence are not, moreover, necessarily dependent on extensive participation amounting to a majority holding. As a rule, even a minority holding of 25% can prevent a public company's General Meeting passing important resolutions as appropriate qualified majority requirements are frequently prescribed by law. Such majorities are required, for example, under various legal systems for capital increases, mergers or alterations of the Articles of Association. This dependence on a qualified minority may oblige the undertaking to consider this minority even in the case of other decisions. Moreover, where shares are suitably distributed, the desired influence can be obtained through a relatively modest participation.

Finally, it should be stressed that participation is not the only instrument at the banks' disposal for extending and securing their trading relations. The right of consultation under company law based on participation is frequently strengthened by proxy voting powers in respect of shares deposited with the banks. Both opportunities for influence are as a rule institutionalized through the banks being represented on the governing body. To this should be added that, in cases of heavy credit dependence on a bank, the latter achieves a status that may be described as de facto participation⁽⁴⁰⁾.

This undisputed fact obviates the need for particularly extensive and consequently costly capital participation as a prerequisite for the exercise of influence.

5) Further motives for acquisition

Parcels of shares in the form of participatory holdings, whether they result by design or otherwise, are frequently regarded by the banks as only transitory items. Participatory holdings which are the subject of dealings are therefore differentiated from genuine [long-term] financial assets. This means, with reference to conditions in Germany, that when production programmes are extended, when new groups are formed, when trading partners amalgamate or split up, when inheritances are passed on and on other such occasions, it proves necessary time and again to find, as a temporary measure, a financially strong purchaser who can cooperate in finding a constructive solution and, in particular, can acquire a participation and also sell it again⁽⁴¹⁾.

In such cases, banks - in view of their activities in the corporate finance and consultancy field - may find themselves acting as a half-way house for major items⁽⁴²⁾. In other countries, these functions are by definition undertaken by the investment banks⁽⁴³⁾. Several countries have created special institutions in order to facilitate industrial reorganization⁽⁴⁴⁾.

A proposal for a change in the ownership of parcels of shares often originates with third parties or with the companies themselves⁽⁴⁵⁾. In this connexion, particular reference may be made to those transactions serving to maintain specific conditions of ownership within a company or intended to prevent influence from being exercised in a particular way. Approaches are consequently made to banks, e.g. if family holdings in public companies are to be maintained.

Banks are further recognized as suitable institutions to restrain the influence of foreign capital interests⁽⁴⁶⁾. Such "anti-alienation defence" is, however, also undertaken by the banks of their own accord⁽⁴⁷⁾. It may well be asked in this context for what reasons banks may be called upon to exercise certain controls over penetration by foreign capital. It must be assumed that not only national interests lie behind such "package patriotism" so often referred to. Customers' long-term interests are often an underlying motive in this case, too.⁽⁴⁹⁾

Recent events have shown, however, that the safeguarding of national interests can be the wholly predominant factor in large-lot or "package" transactions. This is the case where the object pursued in an investment by foreigners is not evident and there is consequently a particular danger of political interference. Because of their financial opportunities and their relations with industry, banks enter into consideration here as sole partners to take up large parcels of shares and then frequently act in consultation with government.

IV) Conclusions

The investigation into the reasons why banks acquire shares or participatory holdings was opened with the question how such activities should be regarded in relation to the functions central to the banking industry, as at first sight there is no link in this case.

It may, however, be confirmed that participation business, even where this concerns the non-banking sector, lies entirely within the framework of banks' commercial policy where the market-economy-based principle of achieving maximum profit while observing the requirements of liquidity and security is taken as a guideline.

It has already been stressed in the case of unplanned participation that this is not indeed in origin the subject matter of selective investment policy but can always be explained by commercial interests in other branches of banking activity.

There is no doubt that the same findings apply in the case of planned participation. This applies particularly in the case of (long-term) financial assets. Direct interest in profitability, full exploitation of lending business, and opportunities for earnings stabilization all come into account here. The special status of banks in investment business in general is a supporting factor.

Nor can participation as the subject matter of trading be regarded separately from commercial objectives. There is direct interest in earnings where purchase and sale are linked to the expectation of a profit margin which certainly cannot always be realized.

In the long term, banking objectives are pursued where parcels of shares are taken up as transitory items in the interests of present or potential customers in order that such shares may be used for corporate development purposes. It is conceivable for a bank in exceptional cases to take up a participation as a protective measure against foreign capital against its own profit-making interests.

We therefore arrive at the certainly unsurprising finding that the acquisition of participatory holdings and their maintenance, whether planned or not, as a rule is clearly linked to banking objectives. While it cannot thereby be denied that national economic interests may also be served simultaneously (this will be dealt with later), this finding prevents the banking industry's participation in the non-banking sector for reasons of public welfare from being over-stressed⁽⁵⁰⁾.

Whether - and to what extent - participation business constitutes a substantial factor in the capability of banks and, consequently, of the banking industry as a whole, from the profitability and risk stabilization aspect⁽⁵¹⁾, cannot be answered here. The small dividend yields and, in particular, the survey of the various banking systems within the EEC, whose efficiency cannot be disputed even where their participatory holdings

are comparatively small, do not support the case for participation being given primary importance within lending business as a whole. It cannot be denied, however, that stock exchange profits can often be obtained from participation.

It should be noted, in addition, that participation cannot be uniformly adjudged as advantageous, even from the banking point of view. We have seen that, particularly where investment in a company is extensive, the risk of this undertaking becomes a risk for the bank⁽⁵²⁾.

While it may therefore be accepted that the advantages accruing to the banking industry from share investment business do not determine the question of participation, the further criteria necessary for such an assessment must be examined.

CHAPTER FOUR

Non-banking areas affected by participation

I) Procedure of the investigation

Banks are the meeting-place of conflicting interests: of those involved, some group is usually dissatisfied with the bank's constitution or its policy and demands reforms for the removal of real or imagined grievances. This explains why the problem of the banks has remained unsolved throughout the world for more than 100 years⁽¹⁾.

This comment, made in 1933, is still valid today and applies especially to the banks' participation policies. A lively debate continues, covering the most widely divergent interests - which are nevertheless relevant to our investigation. This close connexion of the object of the investigation with various interest groups makes it understandable why it has been legal literature rather than economists' studies that has concerned itself with the problems arising. For what is involved is an aspect of the banks' constitutions which requires an evaluating and classifying appraisal. Meaningful conclusions are unlikely to be arrived at by means of empirical studies or model-based theoretical investigations.

After discussing participatory investment under its specifically banking aspects, it is now time to ask what other interests beyond the banking sector are affected. As far as methods are concerned, an answer to this question can be developed in two ways. Firstly, the various reasons for acquiring participatory holdings can be taken as the starting-point in order to permit the examination of the different spheres of influence arising. Secondly, the possible areas affected may be placed in the centre of the investigation.

The latter method enables the positions of the interested parties in relation to the participatory holdings to be determined more exactly, since the various influences can be judged together. This procedure is thus to be preferred. It extends in the same way to cover positive and negative influences within the individual areas affected.

What non-bank interests can be affected by banks' participation in non-banking sectors of the economy? There are several levels to be considered here and further detailed differentiation is necessary.

First we must consider the banks' customers. Here we must distinguish between depositors (savers) and securities customers. From here it is natural to enquire into the importance of participation for the stock market and the capital market, which in turn will involve another aspect: the public interest. On the same level are to be found the possible effects on other market interests. Among these is the competition between the banks, on the one hand, and the competitors of the undertaking in which the participatory interest is held, on the other. In addition, the market for "economic subjects", that is to say, the market for the undertakings themselves, will have to be included.

On another, third, level is the undertaking which is the subject of the participatory holding. It is intended here to regard the undertaking as being equivalent to its shareholders or proprietors, although it should not be forgotten that other interests, such as those of the employees, of the preceding and following links in the chain of production and distribution or equivalent and of the public at large, normally make themselves felt as well.

Where conflicts of interest are found when defining the "areas affected", it will be necessary to examine in detail whether these conflicts can arise only under the universal banking system (conflicts inherent in the system) or whether they are also conceivable under the "separation system" (conflicts not inherent in the system).

The investigation that follows is based mainly on the technical and administrative debate which has been carried on in Germany. This may appear to be a limitation, but it should be pointed out that the Federal Republic is the most logical exponent of the universal banking system in the European Community. It has been in this country that the problems connected with the subject matter of our investigation have been most

intensively discussed recently. Here the conflicts which are possible under this system arise undistorted by statutory regulation or organization.

II) Banks' customers as depositors

A bank pursuing its commercial goal of profit maximization and paying heed to the banking requirements of security and liquidity is acting in accordance with the best interests of its depositors. The latter are interested in the first place in a good rate of return on their deposited funds. A bank which allows itself to be guided by profitability principles cannot come into conflict with this requirement. In addition, the safety of the deposits must be guaranteed in two ways.

It must be possible for the deposit customers to demand the return of their money, in a manner appropriate to the form of the deposit (sight deposits, short or long-term time deposits). In other words, the bank must ensure that its available funds are at all times sufficient to meet its payment obligations. Here we touch on the aspect of liquidity.

At the same time the bank must make sure that the deposits which have been only temporarily entrusted to it are protected against loss. The risks inevitably accompanying lending business must be kept as low as possible. The bank must therefore, in all its commitments, have regard to the principle of security.

The banking maxims of liquidity and security thus lie within the realm of the most basic interests of the depositor⁽²⁾. Participation by the banks can result in the protection of depositors being disregarded under both aspects.

1) Liquidity problems caused by participation

Banking liquidity has been described as the ability to meet, without limit and at any time, all payment obligations falling due⁽³⁾. Maintenance of this ability is one of the most important tasks of a bank's management. The object of liquidity planning is to supervise actions affecting the flow of payments both into and out of the bank. Cash inflows are increased by the realization of assets, that is to say by their conversion into cash. The security of the necessary liquidity planning is therefore fundamentally influenced by whether or not this conversion can be effected continuously and not at a discount.

In this connexion the "golden rule of banking", which is still valid, should be mentioned as an institutional precaution for the maintenance of banking liquidity⁽⁴⁾. This rule states that short-term deposits should be used to finance only short-term lending and that long-term lending should be financed only by long-term deposits. The requirement, set by this rule, that there should be complete congruence between borrowings and lendings as far as maturity dates are concerned, is of fundamental importance for liquidity planning, even though it is modified by the "sediment" theory. This is based on the experience that a certain proportion of funds will not be withdrawn on maturity and is thus permanently available to the bank. A "sediment" remains on individual accounts which is unaffected by day-to-day fluctuations. This means that, to the extent that such a sediment is expected, short-term funds placed with the bank can also be lent medium or long. The crucial point here is not the maturity of the liabilities but the extent to which the liquidation of the liabilities will actually be demanded. Moreover, less attention is now paid to the fact that debts are due to the bank than to whether or not they are actually realizable⁽⁵⁾.

But this modification of the "golden rule of banking" may only be small, since the size of the "sediment" cannot be determined abstractly. It will tend to be nearly zero, if one takes into account exceptional payment requirements which may occur⁽⁶⁾.

Banking liquidity is directly affected by participatory investment. When shares are acquired they cannot be regarded as having a maturity date in the future. The conversion of such an asset into liquid funds will be at the discretion of the bank on business criteria. But the decision will be influenced by many extraneous factors which restrict the possibilities of sale of the investment.

Often there is no market for certain shares, which virtually rules out the possibility of disposing of a participatory holding. This is the case, for instance, when a company has few shareholders and does not contemplate introducing the shares on a stock exchange. Sale may be prevented by the conditions prevailing on the capital market if there is a temporary unwillingness to take up shares.

Furthermore, even if there is a market for the shares, the conversion into liquid funds will depend on the value placed on the shares by the market. If, for political or business reasons, the economic situation is judged to be unfavourable, this usually has a depressing effect on the general level of share prices. Liquidation of the investment may then only be possible if a substantial loss is accepted, which, admittedly, may be covered by reserves undisclosed in the balance sheet. Finally, the sale of large parcels of shares can only be undertaken with extreme caution and in stages, if the market is not to react with a fall in the share price.

The factors mentioned here illustrate the risk to liquidity connected with the acquisition of a participatory holding. Investments in shares are accordingly regarded as non-liquid⁽⁷⁾. For this reason, the use of borrowed funds to provide a business undertaking with its own capital resources is regarded with serious misgivings. Only funds with no repayment obligation, either immediate or after a given period, are considered suitable for participation purposes. Reference is therefore made to the banks' own capital resources as a yardstick for judging participation from the liquidity point of view.

With regard to the restriction of participation business to a certain proportion of the banks' own capital resources, it should also be observed that the latter funds serve certain specific purposes, namely the provision of equipment, etc., and the covering of losses as guarantee capital⁽⁸⁾.

Thus it is evident that the use of customers' money for investment business involves a risk for depositors in the transformation of maturities or the immobilization of funds that is implicit in the acquisition of participatory interests.

2) Security risks in participation

Besides profitability and liquidity, security is one of the maxims of commercial banking policy⁽⁹⁾. This covers the granting of security in the concrete sense and the maintenance of security in the technical and organizational sphere⁽¹⁰⁾. Beyond this, security in the sphere of the provision of finance is of importance here. Above all, as already mentioned, financial losses in lending business, which could prejudice the interests of depositors, have to be avoided.

It is universally recognized that participation involves a considerable security risk⁽¹¹⁾. The risk lies in the danger that the shareholding will lose its value. This relates to the fact that the bank is linked to the business fate of the undertaking⁽¹²⁾. The strength of this link increases with the extent of the holding in the undertaking. Incorrect business decisions by management and structural crises in the particular industrial sector both act directly on the value of the holding.

Capital losses arise when stock exchange prices fall. This affects the whole of a bank's holding. In the case of existing participatory investments, a bank can do little to influence this risk of loss. Where the holding in a company is substantial, joint business responsibility may be assumed through representation on the governing bodies. But management errors cannot be completely excluded in this way. In the case of losses of value for other reasons, control of the risk is impossible.

Security considerations can, however, be taken into account on the acquisition of investments. The spreading of investments is a precaution against loss⁽¹³⁾. Economic fluctuations linked to a particular branch of industry can be evened out in this way, as can losses arising from participation in a single undertaking.

But the risk of loss of value cannot be removed by these means, even though it can be reduced. Limitation of the extent of the investment in any one company can also help to this end. Regulations of this kind are in force, for example, in France - in the case of deposit banks - Ireland and Denmark.

The banks' participatory holdings often conceal undisclosed reserves. Losses in value are not therefore necessarily apparent from the balance sheet. Real losses of assets, however, cannot be ruled out by this. Another risk to security lies in the banks' opportunity to switch investments for speculative reasons. This applies both to stock exchange trading and to dealings in large parcels of shares.

Reference is made in the literature on banking to another element of risk from the security point of view where there is a substantial holding in the shares of one company⁽¹⁴⁾. In these circumstances the bank is linked to the business fate of the undertaking. This may lead to attempts to support the undertaking as much as possible even in an adverse business

situation in order to obviate losses in the share portfolio. In this way credit may be granted when, according to objective criteria of creditworthiness, it should be refused. Participation in the undertaking - the interest in the subsidiary company - can thus give rise to highly risky transactions and endanger customers' deposits through losses in lending business.

3) Unplanned participation and the protection of depositors

Against the judgment expressed above, it must be borne in mind that in exceptional cases investment in shares may be advantageous for the protection of depositors.

It has been indicated above that participation can arise without deliberate planning in the course of the rehabilitation of an undertaking⁽¹⁵⁾. As soon as an advance made by a bank proves unrecoverable, the bank attempts to secure its position by converting the loan into a shareholding. To the extent that losses can be avoided in this way, the interests of the depositors are also served.

This possible positive effect of participation from the point of view of the protection of depositors is insignificant compared with the risks outlined above. Except in times of economic crisis, participation with a view to company rehabilitation is comparatively rare. Although it may provide protection against credit losses, participation in this form nevertheless constitutes a risk from the selling and depreciation points of view described above as being typical. This is not sufficient, at least in general, to legitimize bank participation as being a protection for depositors.

4) The significance of depositor protection

A bank's commercial policy is directed towards the maximization of profit accompanied by the preservation of an adequate payment capability and the greatest possible security. These objectives are closely connected and indispensable. In particular, profitability cannot be achieved without regard for the liquidity and security principle. At first sight there might appear to be a conflict between the goal of profit maximization

on the one hand and the requirements of liquidity and security on the other⁽¹⁶⁾. Raising earnings can, if pursued to its logical limits, endanger solvency and heighten the risk of loss on lending business. The effect would be to endanger the existence of the bank itself. At the same time the depositors' interests would be harmed because it would be impossible to repay them their money or would be possible only to make partial or late repayment. The bank would forfeit the necessary confidence.

These factors show that the fulfilment of the requirements of liquidity and security is a prerequisite for safeguarding banking earnings. They must be continually borne in mind, whereas the earning of profits may be renounced under certain circumstances for a short period⁽¹⁷⁾. Protection against the risk of lack of marketability and loss of value caused by participation is thus not only in the interests of the depositors but also safeguards the banking system's ability to function.

Appraisal of a bank's participatory investment policy is, as these facts show, one of the fundamental tasks of those responsible for supervising the bank's operations.

The rationality of this task is expressed in the supervisory laws of most Member States. The comparative legal survey showed us that it was precisely the necessity for adequate liquidity and security that led to the regulation of participation in the non-banking sector. During the economic crisis of 1930 the need for state intervention became especially clear. Italy and Belgium reacted by separating banking institutions handling medium and long-term business from those handling short-term business and prohibiting the latter from engaging in participation. Denmark, too, introduced banking supervision in 1930 and required the maintenance of a certain ratio between a bank's own capital resources and its share investments. In Germany Section 12 of the Banking Act (KWG) is intended to restrict participation and other long-term investment by reference to the holder's own share capital and reserves. France, like

England - a country with a tradition of separate functioning in banking - has limited the acquisition of shareholding rights by deposit banks by reference to the extent of the participation in a company and to the bank's own capital funds.

It is thus evident that the European systems of banking supervision law have long since recognized their task of depositor protection in the case of banks' participatory investment in the non-banking sector and have implemented it in various different ways.

III) The banks' customers as investors

The banks, as intermediaries on the capital market, discharge an important advisory function vis-à-vis the investing public. The manner in which they exercise their function determines whether the necessary "transparency" for a rational decision by the investor can be achieved.

1) Investment advice with regard to participatory holdings

Doubts are often expressed about the objectivity of the banks in the matter of advice to their customers. Thus it is asked in the first place whether investors are really recommended the best form of investment. This should be considered in conjunction with the thesis, frequently advanced, that the universal banks neglect the securities market in favour of deposit-account saving⁽¹⁸⁾. Significant for the purposes of our investigation alone is the further reproach that even within a specific form of investment (shares) there is a danger of improper recommendation of individual investment outlets (joint-stock companies). The banks' own share portfolios are held responsible for this conceivable conflict of interests⁽¹⁹⁾.

The following case is an example⁽²⁰⁾. A customer complained because in 1953 his bank advised him to sell his Daimler shares and buy other shares. It was established that the bank had given 45 other securities customers the same advice and during that time had built up its own holding in Daimler. The complaint was rejected because it could not be proved that the bank had conducted its customer consultancy operations uniformly and that it intended thereby to favour itself.

In fact it is obvious that stocks will be recommended by a bank for purchase or sale according to whether it wishes to create or build up its own holding or to reduce or dispose of it. If, for example, it is desired to increase participation in order to strengthen the degree of corporate influence or to qualify for the group-company tax concession, it will be natural for the investment adviser to encourage a willingness to sell the shares in question. Recommendations to buy may be made in order to push up the market value of the bank's own investment.

Similarly, there is a real danger of lack of objectivity in investment advice if the bank holds unplanned participatory investments. These have not come into being as a result of planned investment policy and are usually intended to be sold again rapidly. An appropriate willingness to purchase on the part of the bank's customers will facilitate the sale. This practice is expressively described as "unloading" shares on to the public.

2) Investment advice and inside information

Securities customers' interests are not only endangered by a bank making recommendations in order to favour its own portfolio. The bank may also withhold adverse information about the business of certain companies, which it may have received as an "insider", from the advice-seeking public⁽²¹⁾. It may be in the bank's interest to behave in this way if the undertaking's reputation would be harmed were the information to be passed on. Doubt might be cast on its creditworthiness and credits already advanced by the bank might be endangered. Further, the holding of a participatory investment by the bank in the undertaking may be the cause of such conduct. For to communicate the information might result in a fall in the undertaking's shares on the market and lead to substantial losses.

We are dealing with a procedure similar to share price manipulation. It cannot be justified with the argument that defending investments against market losses is at the same time in the interests of the depositors. The conflict between depositors and securities customers is easily soluble. For the protection of depositors is only very indirectly affected. And a bank has a duty to investors to provide true information in order to prevent them suffering losses on their assets.

3) Would competitive conditions produce objective investment advice?

Against the argument of the conflict of interests arising in investment counselling it is held that the pressure of competition in the banking sector would ensure that the customers' interests were taken into account⁽²²⁾. The wrongly advised customer, it is claimed, would not only withdraw his deposit but would also break off all his other business connexions with a bank which short-sightedly gave advice that was only in its own interest.

It may be correct to say that this would impose a certain degree of restraint on a bank. But not even strong competitive pressure will guarantee objective investment counselling. Even where a market situation of this kind does exist, the "migration" of a customer is not the usual consequence of faulty investment advice. For the customer must first find out that the bank has failed to have his interests at heart. But this is only conceivable in exceptional cases. How is the public supposed to detect the building up or disposal of participatory holdings on the market and establish that their own interests have been injured by this action?

And even if the fact of damage to their interests is discovered, there still remain the factors restricting customers' mobility. Among these must be counted the customer's existing regular connexion with his bank, particularly when he has committed himself to heavy borrowing. Moreover, the customer transferring his custom to a competing bank would run a similar risk there, unless it was a house that did not engage in participation business.

The possibility of conflict between a bank's own portfolio interests and the provision of proper advice and information to its securities customers is not the result of the connexion between credit business and securities business within the bank: it can also occur with investment banks in the "separation" system of banking. The conflicts of interest are not inherent in the system. They could only be countered by prohibiting specialized investment banks either from carrying on securities business on a commission basis or from investing on their own account. A solution of this kind is inconceivable. The only remedy here would be to tighten up the disclosure requirements thereby diminishing the banks' key position as advisers of securities customers.

IV) The stock market and capital market

Investment counselling of its securities customers by a bank is an important function in the process of acting as an intermediary between savings and investment, the supply of capital and the demand for capital. Previously we have examined the importance of the banks' participatory holdings in relation to this function. Beyond this it must be ascertained what influence share investment by the banks has in general on the stock market as part of the capital market. Here the investor also comes under consideration, independently of his characteristic as a bank customer.

1) Trading in large parcels of shares by the banks

Dealing in large parcels of shares is a normal form of activity on the capital market in Member States of the European Community where specialized investment banks or universal banks with substantial participation business are active. The French banques d'affaires⁽²³⁾, the British merchant banks and the large German private banks may be mentioned in this connexion. Naturally, large-lot dealing is not the exclusive preserve of the banks. Other undertakings, too, are in a position to carry on such business. However, the banks in special measure, particularly when they specialize in investment business, have the funds necessary to create or to acquire large parcels of shares.

Large-lot dealing leads to greater flexibility on the capital market. The interests of finance are well served by the speedy balancing of supply and demand. Particularly in times of rapid industrial expansion large-lot trading can be a necessity for the capital market.

The exchange of large parcels of shares takes place outside the stock exchange. This is true even of quoted shares. When this happens, it is to the benefit of the stock exchanges, although this is not a deliberate intention⁽²⁴⁾. Violent price fluctuations in a company's shares are prevented. If a major shareholder wishes to dispose of his holdings, this could cause a sharp fall in the share price which would lead to further selling. Such events could unjustifiably injure the market standing of an undertaking.

On the other hand, the exclusion of the stock exchange from such transactions means a loss of market "transparency"⁽²⁵⁾. In particular, the turnover in the shares of a company remains unknown. This makes it more difficult to judge the trend of the share price because it is the quantitative components that make a market quotation more reliable⁽²⁶⁾.

A single verdict cannot therefore be passed on the opportunity for large-lot trading which is opened up by participation, since positive and negative effects for the stock market are inseparably joined.

In order to judge what importance should be attached to the negative effects in relation to the question of participation, it should be remembered that large-lot trading, as mentioned above, is not confined exclusively to the banks. Regulation of the banks' shareholdings therefore might well reduce the problems of extra-bourse trading in large parcels but it would not remove them. Moreover, this trading even has a positive effect for the stock exchange. In addition, it fulfils an important function on the capital market. Reference may be made here to what was said earlier on the subject of participatory investments as transitory items held by the banks⁽²⁷⁾. And finally it should be noted that the problems arising in connexion with large-lot trading also occur with specialized investment banks, that is to say, they are not inherent in the system.

2) Share price manipulation

Share participation enables banks to manipulate the quoted price of shares by buying and selling. The price of certain shares is deliberately altered in the interest of the banks or of major customers of the banks⁽²⁸⁾. The price then no longer reflects the conditions of the economy as a whole or of a particular industry but presents a falsified picture of an undertaking.

The prerequisites for effective price manipulation are a rather narrow market for the shares chosen for the operation and, according to the aim in view, a falling or rising market, sufficient liquid funds and a substantial holding of the shares⁽²⁹⁾.

In principle, these prerequisites could also be valid for investment banks and even for non-banking undertakings. It can be assumed, however, for practical reasons that these prerequisites tend to be more relevant for universal banks⁽³⁰⁾.

Share price manipulation affects the reliability of the stock market as an indicator [its "transparency"]. Manipulated prices cease to reflect the general assessment of a company's worth under given economic and political conditions.

When there are artificial rises in a share price the investor is tempted to follow suit by buying, in order to benefit from a possible gain in value. Conversely, a fall in the price may lead to anxious selling which is not justified by the financial position of the company in question⁽³¹⁾. In certain circumstances a manipulated fall in the share price can lead to the calling in of a loan against securities because the share cover, in view of the falling price, is no longer adequate.

Deliberate influencing of the prices of certain shares can, however, also be to the advantage of the investor. This has already been seen in the concept of price support operations by banks.

We have seen that the banks take this course in order to protect their own portfolio interests or to prevent a collapse in a share price following an issue. Support from both these motives can serve the interests of other shareholders. This is particularly true when the market operations combat short-term technical price fluctuations⁽³²⁾. The opportunity to influence certain share prices conferred by a bank's participation can thus be appraised in two ways. On one side there is the fact that the stock exchange picture is distorted and investors' interests harmed; on the other side, investors' interests are safeguarded by the balancing out of price fluctuations. Which effect has the greater weight cannot be answered for lack of empirical documentary evidence. For this reason, in the first place, it can be stated that the banks' opportunity for share price manipulation is not of crucial importance in the question of the control of participation. In addition, this opportunity is not inherent in the banking system but is available to other firms or persons provided they have the necessary funds. This means that even specialized investment banks can be subject to the same problems. A solution would have to be sought in the realm of an official supervisory authority with wide powers of obtaining information and carrying out audits. Only in this way could share price manipulation, with its negative effects, be separated from price support, with its positive effects.

3) The secret building up of participatory holdings

The bank engaged in securities business has, in principle, an opportunity to carry out "offsetting" with regard to customers' orders. Incoming buying and selling orders received by the bank are set off against each other without use being made of the stock exchange. In Germany this opportunity is given by the law on commissions which allows a bank itself to deal under certain specified conditions⁽³³⁾.

The offsetting of buying and selling orders for securities received by a bank as agent can be used in the interests of the bank itself or of a customer to build up large holdings of shares with a view to participation without the members of the public thereby affected being able to find out about it. Other investors do not have an opportunity to react to occurrences of this kind. In principle it can be assumed that the creation of a large holding of shares through the medium of the stock exchange leads to higher prices because of the increase in demand. The shareholders of a company in which a party is attempting to secure a participatory interest can escape the future influence of an emergent major shareholder by selling their shares at a higher price. In addition, it can happen in the course of participatory purchase operations that sales are made simply for profit-taking motives. Investors who do not discover that an attempt to secure a participatory stake in their company or to take it over is being made are precluded from the possibility of having recourse to such lines of action⁽³⁴⁾.

This secret building up of large shareholdings entails a further danger for the shareholders of the company affected. They are suddenly, perhaps at the General Meeting, confronted with a majority shareholder. Insofar as the latter is in a position to control the company on the basis of his holding, the other shareholders' opportunities for influence, which were at least available if they acted collectively, lose their force in proportion to the extent of the controlling shareholding. This exclusion from the right to take part in exercising control is usually expressed in a falling share price. There is a loss of value. Anyone wishing to withdraw from the controlled company will receive a lower price on sale⁽³⁵⁾.

The situation as described with regard to the secret building up of participatory holdings, which in certain circumstances can be effected not only by "offset" business but also in other ways, shows that it cannot be of great importance for the problem of the control of participation. For what is involved here are the procedures of securities business, which are not necessarily connected with the problem of participation by banks.

Secret building up of large shareholdings may also be undertaken by banks on behalf of third parties.

Participatory holdings may also be acquired by other firms or persons outside the stock exchange through the purchase of various holdings.

The question of the protection of shareholders, which certainly requires a solution, therefore demands a different answer. It is to be sought in company law, as the problem mainly affects the rights of the shareholders of the company affected by the participatory share build-up. This will principally involve the provision of information to the shareholders, information which will have to include notification of the intention to participate. The notification requirements as laid down by the German Shares Act (Section 20) in respect of holdings of 25 and 50% are not sufficient. These relate to actions that have already taken place. More appropriate are the rules on participatory acquisition in force in various other Member States of the European Community. One should mention the rules relating to "take-over bids" in Britain and offres publiques d'achats in France and Belgium. These rules give a higher priority to the principle of the provision of information. The details cannot be discussed here⁽³⁶⁾, but it should be noted that the Commission is currently preparing a proposal for a directive on the settlement of this question.

4) Advantages enjoyed by those with inside information

The problem of "insider trading" has frequently been alluded to in our present discussion. It cannot, however, be used as a criterion for the assessment of participation by banks or, following from this, for a decision in the context of the subject of our investigation. What is involved here is the exploitation of information about matters relating to an undertaking, which, if accessible to the general public, would influence the share price of the undertaking in question. Such information can be gained at an early stage by persons close to the undertaking's management and can be used for stock exchange transactions. In this way it is possible to make profits or avoid losses without risk, ahead of the general investing public⁽³⁷⁾.

Banks are, it is true, particularly well placed to acquire inside information and to use it for their own interests. Lending commitments, supervisory board posts, preparatory work on share issues and the influence gained through participation give access to useful facts about companies.

But it is evident from this that participation is not the decisive factor in access to inside information. Moreover, it should be noted that the circle of insiders extends beyond the banks. Company officers occupying responsible positions must be included, in particular. The acquisition of information which can be used on the stock exchange prematurely is not therefore inherent in the banking system.

The banks, by virtue of their capital strength combined with a participatory holding in the undertaking involved, are in an especially good position to exploit inside information. But other firms or persons also have these opportunities.

The protection of investors can only be achieved permanently, therefore, if a general regulation is implemented which goes beyond the banks and their participation. Various Member States have already taken such steps⁽³⁸⁾. An appropriate provision is also contained in the proposal for the creation of a European company⁽³⁹⁾.

5) The importance of participation for the capital market

Although negative influences may result from banks' participation as far as the stock market and its sound functioning are concerned, these must be seen in connexion with the importance of the opportunity to participate for the capital market as a whole. This can only be dealt with briefly for our purposes⁽⁴⁰⁾. We are concerned purely with the role of participatory shareholding in the financing (especially the provision of equity capital) of the undertakings which go to make up the demand for capital.

In connexion with the issue of new shares, the banks' ability to hold shares is significant for two reasons. Firstly, the placing of the shares taken over is assisted. The risk on the issue for the issuing company is removed since the bank or consortium can itself initially take up the non-placeable shares, in order to dispose of them on a more favourable occasion⁽⁴¹⁾. Secondly, it is possible for the bank handling the issue to intervene with price support operations in connexion with the share issue until a stable market has established itself and a regular price trend has been achieved. The disposal of shares to the public, which is often necessary in the absence of institutional investors, is thus facilitated.

The points outlined here accord with the demand made in the EEC study on the creation of a European capital market (the Segré Report) that the regulations on the banking institutions' holdings of securities should make it possible for them to discharge their duties with regard to the placing of shares with the necessary flexibility⁽⁴²⁾.

These capabilities also have an effect, indirectly, on the supply of medium and long-term credit to industry. The banks exercise a mobilization function in that they take over the issue of shares to replace investment credits. Making this function more difficult by limiting the extent to which banks can take part in the placing of shares could lead to gaps in the supply of medium and long-term credit to industry because full use would not be made of the banks' transformation function for credit supply⁽⁴³⁾.

In the circumstances described, the shareholdings already discussed as "unplanned participation" have a role to play. But the banks also render planned assistance to the internal financing of undertakings by acquiring participatory interests. Large-lot trading should be mentioned in this connexion in the first instance: reference has already been made to the importance of this form of activity for an elastic capital market⁽⁴⁴⁾.

Further, the banks' investment activities bring about an enlargement of the capital market so far as the financing of undertakings by participation is concerned. The banks, more than any other institutional investors, are in a position to act as intermediary between savers and share investment in an appropriate manner.

These capital market functions of the banks are proved better than by theoretical deductions by legislative measures reflecting government banking and capital market policies in two Member States of the European Community. In France the deposit banks were given permission to increase their investment business in 1966/67. They were allowed to participate in undertakings to the extent of 20% and also to accept medium and long-term deposits. This liberalization was quite clearly aimed at improving the efficiency of the capital market. It involved a "transformation" intended to facilitate the conversion of surplus liquid savings into long-term risk capital⁽⁴⁵⁾. The new rules governing share ownership by the deposit banks were part of a comprehensive programme to give a new direction to the financing of capital investment projects⁽⁴⁶⁾.

The considerations influencing the Belgian legislators in 1967 were little different from this⁽⁴⁷⁾. The concern here was simply to permit temporary share ownership to a greater extent. The reform was mainly directed towards large-lot dealing, since it is still not permissible to make use of a stock exchange for the purposes of making a participatory investment, and the prohibition, which required that sales should only be effected by means of public offers, was lifted. Behind this lay the idea that more use should be made of the banks for the provision of long-term finance to industry, even though the liberalization was not carried as far as it was in France⁽⁴⁸⁾.

The banks thus make a definite contribution to the enlargement of the capital market in the equity financing sector through their investment activities. This contribution arises in conjunction with the simultaneous pursuit of banking objectives, which are directed towards the maximization of profit.

The extent to which this function of the banks is necessary for the capital market cannot be determined in isolation from the actual conditions prevailing with regard to that market. The answer to this question is also, and particularly, dependent on the extent to which other institutional investors, such as insurance companies and pension funds, take on the role of intermediary on the market.

Digression:

Companies' decision-making and the influence of the banks

In Chapter Three it was stated that the ability to influence companies in which a participatory interest was held was one of the reasons behind the formation of such shareholdings by banks. Before the effect of this influence on the company itself and on various markets with which it is associated can be investigated, it must be shown that this influence does exist - at least as a possibility. It is hardly possible to quantify such influence, since several ways are open to the banks for impinging on the decision-making of companies. Among them are:

1. Participation (capital involvement)
2. Bank-linked investment companies
3. The right to vote on deposited shares
4. Credit relationships
5. Representation on governing bodies
(personal involvement)

1). Voting rights from participatory holdings

Participation confers membership rights under company law which in turn give the right to vote on the appropriate bodies, in the case of joint-stock companies the general meeting. The size of the participatory holding determines the extent of the voting influence.

Here two clarifications are necessary. The exercise of the right to vote in joint-stock companies relates in most legal systems mainly to the constitutional bases of the company and then to the balance sheet and

distribution of profit and to the appointment and discharge of the governing bodies. Despite the small ambit of the subject matter on which the vote can be cast, the possible influence extends to the company's business policy. A decisive factor here is the appointment of management.

Even the relatively small influence of the voting right, which can only impede certain specific resolutions requiring a qualified majority (blocking minority) has an effect on general decision-making by the company. The approval of a given resolution (e.g. for a capital increase) may sometimes have to be "bought" with concessions in other areas.

It follows that even a relatively small degree of participation can confer opportunities for influence. This prerequisite is present in the case of the Belgian financial holding companies, the French participation banks, the Italian financial institutions and the German "Grossbanken" in numerous instances⁽⁴⁹⁾.

2) Bank-linked investment companies

This voting influence can be strengthened if the banks participate heavily in investment companies and can thus influence the votes of the latter in the companies. The German securities funds are largely controlled by the banks⁽⁵⁰⁾. With few exceptions they are shareholders in the funds.

Often a large commercial bank is at the centre while the remaining shareholdings are distributed over smaller financial institutions. Similar relationships also exist to a certain extent in other Member States of the European Community. This is suggested by the exceptions to the prohibition on participation by the banks enjoyed by the investment funds. In France most companies are set up by banks. Often it is a question of joint subsidiaries of deposit and participation banks⁽⁵¹⁾.

In Britain there are countless personal links and group-company connexions between the funds and the merchant banks⁽⁵²⁾.

The danger of interference by banking interests is in this way increased, even though the influence is only exercisable indirectly. Voting by the funds at the general meetings of the companies represented in their portfolios is largely determined by the bank-shareholders⁽⁵³⁾. It should be realized, of course, that not every bank has the necessary weight to impose its views on other shareholders. The possibility nevertheless remains of strengthening the voting influence given by participation through associated investment companies.

3) The right to vote on deposited shares

Voting influence is decisively enhanced - and without the necessity for the investment of any of their own capital - by the banks' right to vote on deposited shares (Depotstimmrecht). This refers to the voting power exercisable by a bank in respect of the shares of its security-depositing customers. Banks' influence in general meetings arises from the fact that decision-making is not effected by the votes of the security-depositing customers themselves as shareholders but by the banks standing in their shoes.

In Germany the Depotstimmrecht was developed into a proxy voting right by the company law reform of 1965. This voting power has given way to a proxy voting power⁽⁵⁴⁾. If the bank wishes to vote on behalf of the security-depositing customers it has to ask for instructions, stating its own suggestions at the same time. In practice this rule has not prevented the banks from pursuing their own interests⁽⁵⁵⁾. The opportunity of giving instructions is only made use of by a very small percentage of depositing shareholders⁽⁵⁶⁾. Provided no instructions have been received, a bank may vote according to its own proposals. It can even deviate from these if it can assume that the shareholders would have agreed had they known the facts of the case.

In Germany in 1973 50.7% of all shares of domestic issuers (excluding insurance shares) were deposited with banks. Together with the banks' own holdings of 7.8%, the credit institutions have, in certain circumstances, almost 60% of the votes⁽⁵⁷⁾. There is thus a considerable voting influence, when it is considered that the average attendance at a general meeting is 70 to 80%. The banks' influence thus rests in large part - in Germany at least - on the Depotstimmrecht. One should not conclude from this, however, that participatory share ownership can be disregarded. It retains its character as an influencing factor where the shareholding is considerable. Whether this is the case or not depends on the distribution of the shares.

For the other Member States the significance of the voting representation found in each country can be outlined as follows⁽⁵⁸⁾. The banks clearly have influence in Italy, where they are represented in their own name as empowered shareholders with a lawful title, analogously to the situation in Germany before the reform of 1965. In the remaining countries, on the other hand, the votes of the small shareholders are predominantly transferred to the management bodies. In France the blank proxy form serves this purpose. The same applies to Belgium, where the banks are already excluded from representation by the prohibition on holding shares, because most joint stock companies specify shareholder characteristics in their Articles of Association even for those holding a right to vote by proxy. The practice of "management voting" is also found in Luxembourg.

An independent solution of the problem has been developed in the Netherlands. Undertakings with widely distributed share ownership and banks have set up joint stock companies for the sole purpose of safekeeping and administering the shares of the small shareholders on a trust basis. These companies are called administratiekantore. For each share a certificate is made out and issued to the shareholder. The shareholders, as certificate-holders, receive the dividends on the shares and the proceeds of liquidation if the

company is wound up. The owner of the shares, and thus the possessor of the voting rights, is the administratiekantoor. The voting influence therefore lies with the shareholders of the administratiekantoor, among whom are the banks. An attempt to prevent circumvention of the prohibition on "management voting" (Art. 44a (4), Wetboek van Koophandel) has been made in that certificates may only be dealt in on a stock exchange if the administratiekantoor is independent of the undertaking's management.

In Britain the same system applies as in the USA, namely the proxy system, which in this case results in voting rights for management. The board sends to the shareholders, at the company's expense, proxy forms made out in favour of itself⁽⁵⁹⁾.

The Commission's proposal for a 5th directive on the harmonization of company law has not tackled the institutional side of voting representation. Article 28 only introduces regulations for the implementation of voting representation insofar as a public offer has been made. This applies to banks, to the companies themselves, to shareholders' associations, etc.⁽⁶⁰⁾.

4) Credit relationships

The banks' credit business may lead the borrowing undertakings into a state of dependency. If the borrowing undertaking is heavily indebted to the bank, a termination of credit can threaten its further existence. "The critical degree of indebtedness at which an undertaking begins to lose its independence to a bank is naturally reached sooner with small and medium-sized businesses than with large companies which have many different sources of finance and a greater number of banking connexions. As a bank usually has a good insight into the business progress of its customers, particularly through its knowledge of current customer movements, it can measure out its influence in such a way that it is effective at the time when the negotiating position of the other party in relation to the bank is at its weakest."⁽⁶¹⁾

5) Personal involvement

The occupation of seats on the supervisory board is an expression of banking interests and potential influence in an undertaking⁽⁶²⁾. Of course, this may also be the consequence of a desire for expert advice and a strengthening of credit relations on the part of the undertaking. But frequently the banks' representation on supervisory boards is simply the outward sign of the voting influence which has been described.

Whether representation on the governing bodies on its own can be considered an autonomous influencing factor may be doubted⁽⁶³⁾. In the first place the bank is only one mandate-bearer among several and will usually find itself in the minority. Often there are representatives from several other banks. The occupation of positions on the governing bodies should be seen more as the institutionalization of an already existing influence (voting right, credit relationship). However, it should be noted that the opportunities for obtaining information about the economic position and the business policies of an undertaking are considerably increased in this way. In addition, a bank's representative on the decision-making bodies can indicate the limits which must be set for business decisions on the basis of its influence elsewhere.

6) Conclusions

The influencing factors outlined here may affect undertakings' decision-making to the benefit of the banks. The opportunities for influence have not been quantified in detail. These lie, as already mentioned, in the cumulative force of the factors. This clear power of influence must be included in the investigation. The Enquiry into Business Concentration in Germany also stresses the cumulative aspect. On what interests the influence can be effective will be shown in the sections that follow.

From the description of the individual sources of influence it is evident that typically they only have effect on certain types of undertaking. Dependence arising from credit relationships occurs principally in the case of small and medium-sized businesses. Influence through the right to vote on deposited securities primarily has impact on large public companies with a wide distribution of share ownership. Participatory holdings may enter the picture here, but can also be found in companies with a small number of shareholders.

Banking influence on undertakings is not, in principle, linked to the universal banking system. This would only be the case if one regarded an accumulation of all factors as a prerequisite for influence, so that even the credit relationships would necessarily have to be included. But the factors can be sufficiently effective on their own. Therefore, the separation system can also lead to dependence of undertakings on banks.

V) Market interests

1) Market relationships of undertakings

The question whether the banks' influence can have effects on the market relationships of undertakings in which they hold a participatory stake is little discussed. A negative answer appears to be obvious if one proceeds from the generally accepted premise that the banks, in particular through their participatory holdings, do not pursue business goals⁽⁶⁴⁾. A self-restriction of this kind is not, however, institutionally ensured. It is conceivable that it could be abandoned if the banks' interests demanded it. That might be the case in the following set of circumstances.

A bank, which through its financing is involved in the production sector, begins to bear business risks. This applies both to long-term investment credit and to participation. The fate of the undertaking gains in importance for the bank. With this, its market relationships inevitably also come within the sphere of interest. Usually one will be able to assume that even here self-limitation on the part of the banks is sure to be advised. The banks are basically not in a position to replace the business decisions of the companies in question in order to improve the

companies' position on the market. A different situation with regard to interests can arise, however, when the same bank can also exert influence on other firms in the market, whether at the same stage in the economy or in preceding or subsequent stages. It is conceivable that there could be influence to reduce the pressure of competition or to secure an outlet for production⁽⁶⁵⁾. In either case, other competitors or consumers would be put at a disadvantage because of interference with the market mechanism.

In the literature⁽⁶⁶⁾ another possibility of influencing the market relationships between undertakings as a consequence of participation has been indicated. A bank has, as already demonstrated, an interest in economic advantages for the undertakings in which it has a participatory stake. This interest could cause more favourable conditions to be given for credit or services than other, competing, undertakings could obtain from the same bank or from other banks. This would be an appreciable competitive advantage for the undertakings in which the participatory stakes were held.

These possibilities for interference by the banks with the market relationships of undertakings in which, owing to joint assumption of the business risk they are particularly interested, cannot however provide a criterion for rules to govern participation. The problems are not inherent in the banking system. Conduct of this kind can always be found in company group relationships. Intervention affects competitive relationships and should be judged principally from the point of view of cartel law. Action to control concentration and a prohibition on discrimination could be considered here. A deeper examination of these questions is not required for the purposes of our enquiry.

2) The market for undertakings

Undertakings appear on the market as trading entities ("subjects"). In addition, they are themselves the "objects" of market relationships on the market for undertakings. Supply and demand are not only effected

here by the sale of an undertaking as a whole entity, but by acquisitions under group-company law, mergers, and transfers of control through the sale of large parcels of shares. In these cases the power of disposal over the corporate resources changes.

The price of this power of disposal and hence of the undertaking is calculated in different ways according to the nature of the transfer of control. In mergers it is expressed in the exchange relationship of the shares of the participating companies. The price of group-formation lies in the - at least - partial acquisition of the shares of the company being incorporated in the group, if the most important case for practical purposes, the participation group, is involved. In the case of the sale of a majority block of shares, the price will be determined in the negotiations between buyer and seller⁽⁶⁷⁾.

The basis of this price formation on the market is the participants' valuation of the resources connected with the undertaking⁽⁶⁸⁾. In this way there tends to be an alignment of the transfer of power according to business objectives. The power of disposal is only sought when economic advantages, through rationalization for example, seem attainable. The market mechanism, forming a price by balancing the interests of the participants, ensures in this way, as it does on all other markets, that the resources of the undertakings are put to optimum use in the interests of the national economy as a whole.

The prerequisite for the functioning of the market for undertakings in the manner just outlined is an independent balancing of interests between those involved. This prerequisite is not present, however, if a bank exerts decisive influence on both sides and is solely responsible for the uniting or transfer of resources linked to undertakings. The market mechanism is set aside to the extent that independent price formation in the pursuance of opposing interests no longer takes place⁽⁶⁹⁾. In Germany the transactions

carried out by the banks in the brewing industry provide a vivid example of this. The reference to national interests in this connexion⁽⁷⁰⁾ is evidence that economic goals of the participating undertakings are not motivating factors.

If a non-banking undertaking is behind a change of corporate power of disposal, a different situation with regard to interests must be assumed. It is then a question of a fresh organization of the factors of production of group companies. The cause of action on the undertakings market is a business viewpoint. If the interests of the undertakings as market objects are not taken into account, at least an overlapping group interest will be intended to be furthered. Possible harm to the interests of the other shareholders of the "object undertaking" is covered by company law.

By contrast, a bank cannot pursue its own group interests by appearing in the market for undertakings in the non-banking sector. It is not possible to add to the bank the resources of industrial or commercial undertakings. Furthermore, a bank is less obliged to seek profitability in the transaction. The capital which a bank is required to commit is sometimes relatively small if it can rely, in addition to its participatory holding, on the right to vote on deposited shares. A bank is in a position to pursue its interests in a different way. It may, in particular, promote mergers, in order to earn profits through commissions or in order to handle any share issues that may be necessary⁽⁷¹⁾.

Another motive can be the desire to build up a larger customer with a corresponding share of business. The preservation of the interests of third parties must also be considered.

The intervention by the banks, on the basis of their participatory holdings, on the market for undertakings can hardly be controlled by company law⁽⁷²⁾. This course would presuppose the possibility, which does not exist, of arriving at a sufficiently accurate valuation of the undertakings as the object of the transactions⁽⁷³⁾. Even a cartel-law

authority to control business concentration, as exists in Germany⁽⁷⁴⁾ and has been proposed for the European Community⁽⁷⁵⁾, would only impinge marginally on this state of affairs. The creation or strengthening of a position of dominance on the market is not inevitably the result, even when there is an amalgamation of the resources of competing undertakings. The consequences indicated could only be prevented by a limitation of the influence of banks in industry.

3) Competition between banks

We can assume for our purposes that banking competition within the limits imposed by the banking supervisory laws has a positive function⁽⁷⁶⁾.

The influence on the decision-making capacity of the undertakings affected, procured through participatory investment in particular, can be used by the banks to consolidate their business relationships⁽⁷⁷⁾. This applies both to borrowing and to lending business and extends to cover the whole field of services. The influence thus becomes, as we have already seen, a tool of the sales and procurement policy. In this way the undertaking's links with the banking sector are reduced to one bank. The price and quality competition offered by competing banks can be excluded to the extent of the influence. With this striving for the servicing of an undertaking by a single bank, freedom of manoeuvre without regard to competition is created through the exclusion of competitors. The influenced undertaking can no longer react autonomously to a lower quality of services from his bank. A bank which thus secures itself in various ways in its customer relationships removed itself from the pressure of competition. Competition in the banking system is impaired.

This consequence of influence on the undertakings in which participatory interests are held is acknowledged to be a possibility⁽⁷⁸⁾. How far such conduct is really to be met cannot be proved empirically. Cases are

quoted in the literature on banking of unfavourable conditions in comparison with the general market being imposed on undertakings⁽⁷⁹⁾. In any case we may assume that there is a danger. The prerequisites for the creation of monopolies are present⁽⁸⁰⁾.

The banks' freedom of action based on participatory shareholdings and other influencing factors cannot, however, be extended at will. The competitive situation in the banking sector is able to set limits here. "The stronger the competitive pressure, the less the chance for the influence-exerting credit institution to obtain special advantages for itself in the long run and to block the access of other credit institutions to certain market participants"⁽⁸¹⁾. The competitive process, which is strengthened in Germany by the activities of the public-sector credit institutions and in France and Britain by the partial abolition of specialization, reduces to a certain extent the danger of long-term fixing of business relationships⁽⁸²⁾. Every increase in the financial autonomy of the customer also acts as a limitation. This autonomy may consist in possibilities for self-financing and in the acquisition by the undertaking of its own bank⁽⁸³⁾.

It must be recorded that the holding of participatory interests opens up commercial strategies for the banks which lead to stable customer relationships without these being attributable to market services provided by competitors. Strong competition in the banking sector and, in particular, the opportunity enjoyed by large undertakings of financial self-sufficiency can work against this. The two factors do not, however, remove the danger connected with participatory shareholding.

VI) The undertakings affected by the participatory shareholding

Insofar as the banks have a monopolistic freedom of action in their business relationships with the undertakings in which they have participatory holdings, they may implement their own interests in opposition to those of the managements of the undertakings. Of course, it can be assumed that in principle it will not be in the interests of a bank to harm the influenced undertaking, because in the case of a participatory link this might adversely affect the value of the shareholding⁽⁸⁴⁾. This does not, however, prevent prices for bank services being unfavourable for the undertaking. The value of the shareholding will not be prejudiced by this.

In addition, conflicts between the objectives of banking policy and the interests of the company arise. Harm can then be done to the undertaking and its shareholders. If, in this case, a bank is pursuing its own interests, this is not as a rule known. The value of the participatory shareholding is not endangered. And even if this was the case, the bank might be prepared to accept such consequences. For it would be able to recoup the losses through profits earned in the pursuit of its own interests.

Conflicts of this kind can occur in two fields. Firstly, the bank may impose its own will in banking relationships. Secondly, it is conceivable that it might use the powers conferred on it by company law through its participatory interest and its right to vote on deposited shares otherwise than in the best interests of the company or the other shareholders.

1) Possibilities of undertakings being put at a disadvantage in banking relationships

The bank may make use of the exclusivity of the business relationship which it gains as a result of its influence by charging more than the normal market rates for its services. This, however, is a case of the usual opposition of interests between partners in a market and does not require further examination. Of course, the possibility cannot be excluded that a bank would use its potential for influence here too. An observation has already been made in this connexion⁽⁸⁵⁾.

- a) Conflicts of interest going beyond this occur in the field of credit security. "Its insight into the company's circumstances enables the bank to adapt the security given for the debts due to it to the prevailing risks and state of affairs and in this way to procure for itself an advantage over other creditors. Through excessive securing of debts, funds could be withdrawn from the company which were essential for its continued operation but which were in the bank's hands. It is well known how many difficult and doubtful legal questions arise from the banks' credit-securing business. And it is doubtful whether these questions can be properly examined by a management body on which the bank's representatives have a seat and a vote"⁽⁸⁶⁾.
- b) Reference is often made to the possible conflict of interests between a bank and an undertaking in connexion with the financing of the undertaking⁽⁸⁷⁾. It is said that the universal banking system gives the banks the opportunity to determine the financial plans of an industrial undertaking. If, owing to the financial position of a customer, a need for equity capital arises, but the undertaking's bank is tempted by a higher profit from the granting of loans, the capital-requiring undertaking, it is said, is often left with no choice but to cover its requirement, which is really of a long-term nature, with short-term credits⁽⁸⁸⁾.
- If the external financing of an undertaking under the influence of a bank is determined in this fashion, there is a threat, from the point of view of the individual sector of the economy involved, to the sound financial structure of the undertaking. There will be a tendency to encourage under-capitalization. Added to this, there is, from the point of view of the economy as a whole, the argument that the securities market is neglected owing to the influence of the universal banks⁽⁸⁹⁾. In connexion with this, the view that deposit-saving is favoured at the expense of saving through share investment plays a part⁽⁹⁰⁾. The conflict of interests described thus gains a special importance.

The higher profitability of short-term lending, in particular, compared with share issue business is not questioned⁽⁹¹⁾. Accordingly the conditions for a conflict of interests are present. The following arguments, however, have been advanced against the actual imposition by the banks of their own interests in this sphere⁽⁹²⁾. The negotiating power of an undertaking capable of issuing shares is as a rule large enough to enable it to obtain finance in a suitable form. The bank has an interest, in the long term at least, both in its own security and in the security of the undertaking whose affairs it is handling. It has further been pointed out that when there is noticeable competition the bank cannot act against the interests of a customer if it does not wish to endanger its business relationship.

The argument of the bank's interest in the suitable equity financing of its customers has a direct effect on the significance to be accorded to this conflict. It does not alter the fact, however, that there is such a conflict.

The further arguments, which are also advanced in other connexions, speak against an exploitation of the banks' influence. The competition argument is not valid, however, if the bank's influence has led to a hardening of the business relationship and thence to monopolistic freedom of action. The same consideration applies to the undertaking's negotiating power. The contrary arguments can only be upheld if neither participatory share ownership nor the right to vote on deposited shares give the bank a strong position. This state of affairs is not the object of our investigation, however.

2) Fossibilities of undertakings being put at a disadvantage directly through the exercise by banks of powers under company law

- a) Banks' influence on companies through participatory shareholding and, in certain circumstances, the right to vote on deposited shares can lead to a lack of control on the part of the governing bodies. The repeatedly advanced statement that the banks almost without exception vote in support of the management's proposals⁽⁹³⁾ is not the equivalent of a renunciation

of control. It might reflect confidence in the undertaking's management, but it could equally well be the case that the bank's view or influence had already made itself felt by the time the management's proposals came to be made. For the rest, it does not need to be stressed that it is not in the banks' interests to use their powers of control otherwise than to assist the efficient running of the business, in other words in the interests of the company.

The representation of the banks, gained through their influence in company law, on governing bodies (in the case of separation between management bodies and supervisory bodies) leads to other conclusions, however⁽⁹⁴⁾. In the first place, criticism in the literature on banking is directed against the remuneration for the representatives' activities (supervisory board fees) which in this way can reach an unreasonably high level. Conflict situations between bank and company interests can also arise on the annual discharge from liability of the directors. And it is doubtful whether substantiated claims for compensation could in fact be upheld against management. In these cases the banks' representation in the companies may lead to unreasonable caution in the exercise of supervision under company law.

- b) A further field of possible conflict can be indicated: this is the case where a bank uses its voting influence in order to implement its own interests against the ideas of the company and its shareholders. This does not involve the general set of problems relating to groups of companies which concerns the possibility of the controlling shareholders in the undertaking using the resources of the controlled company for their own ends. Instead, what is involved is the pursuit of banking objectives unaccompanied by the goal of business subordination through voting power. This is in line with the often quoted statement that the banks do not undertake business functions through their participatory holdings.

Under this aspect the possibility of conflict in connexion with capital increases is conceivable. As already mentioned, the bank may oppose a resolution for a capital increase in order to compel the company to adopt a method of external financing that is more favourable to the bank's profit policies.

In the case of the decision on the payment of a dividend, it might be in the interest of the bank to leave the highest possible amount of funds in the company for reasons of credit security⁽⁹⁵⁾.

- c) Further possibilities of conflict are discussed in the literature, such as the exclusion of the right to subscribe for new shares, in order to enable a participatory holding to be increased under the most favourable possible conditions, or the prevention of a capital increase in order to maintain the percentage share in the company's assets without the need to increase the participatory shareholding⁽⁹⁶⁾. Here, however, we are dealing with situations that do not only arise in connexion with participation by banks. They are therefore not significant for the purposes of our enquiry.

3) Conclusion

Banks, by pursuing their own interests, act against the interests of undertakings partly owned by them if their influence is used as a lever to assist lending business. This applies to the problems of credit security (over-securing; impeding of dividends) and of external financing in a manner designed to benefit the bank. The possibilities of putting the undertakings in question at a disadvantage can be said to be inherent in the system in that they only occur in connexion with the participatory shareholdings of banks of the universal type. This does not apply, however, to the criticism that has been made that undertakings refrain

from exercising supervision as prescribed by company law where banks are represented on the governing bodies. Where this occurs, it cannot be said that purely banking interests are being pursued.

It remains to be asked whether ways are open, under company law, for limiting harmful exercise of influence by banks. The possibility of group-company-law obstacles to controlling influence must in particular be considered. Here a comparative legal survey of the relevant regulations employed by the Member States of the European Community would be necessary, but this would be outside the scope of this investigation. It may be mentioned that in Germany the law relating to the de facto group, in French and Belgian law the institut des abus de droit and in English law the concept of fiduciary duties which also applies to the major shareholders, limit the influence exercisable under company law. It hardly seems possible, however, that the conflicts of interest described can be combated by this means. It would be difficult to prove control on the part of banks as their potential for exerting it depends on several factors. Moreover, influence can also be made effective below this threshold. And finally there is the problem of quantifying the extent of possible disadvantage.

VII) The power aspect

There is hardly any other factor in the field of the social sciences which is as hard to define as the concept of power. We must content ourselves with sketching an outline from the point of view of the banks' participation policy.

Economic power is described as the capability of altering objective economic parameters such as prices, forcing business partners to revise their prices, subjugating competitors, making full play with one's own information against other economic "subjects" and influencing the framework of conditions established by the state for economic activity in order to create economic advantages for oneself at the expense of others without making any corresponding contribution to the national product⁽⁹⁷⁾.

The effects which the banks have on undertakings and markets, as described, indicate at least an approach towards this state of affairs. The banks' own business relations can be determined unilaterally, competition between banks is affected by the immobilization of customers, markets in undertakings are influenced and undertakings' links are withdrawn from market decisions.

These phenomena are stated on the basis of individual possibilities of conflict. In aggregate there is an influence which goes beyond this which can be in opposition to other economic or company interests. In this way competition as a condition of decentralized economic planning in the market economy is not only affected at certain points by some actions of the banks taken in their own interests. Rather, the banks' holding company function which arises from participatory ownership leads to a concentration of economic decision-making powers⁽⁹⁸⁾.

For theoretical purposes this form of economic power is described, in contrast to horizontal and vertical conditions of origin, as "diagonal-functional"⁽⁹⁹⁾. This is because of the combination of various functions in a single entity. Express reference is made in this connexion to the position of the banks of the universal type as an example. The aggregation of functions is said to have led in Germany to a concentration of power which has not yet been tempered by the law⁽¹⁰⁰⁾.

This power may chiefly have implications for the economic sphere in the narrower sense. But the exercise of functions for the common good by the authorized bodies could possibly be endangered. This is the case when the data set by the state, which are important for the economic success of the bearer of the power, are influenced. Economic pressure is brought to bear, for example, to force the amendment of laws, to gain tax relief or to obtain subsidies⁽¹⁰¹⁾.

The result is a disruption of economic and public functions through the exploitation of power that is not integrated into the system and is thus only controllable to a limited extent. This state of capital and executive accumulation can be attained in particular when the economic "subjects" are closely interlinked and the banks, themselves concentrated through mergers etc., exercise their influence in the controlling companies.

In the USA the reports of recent investigations indicate that developments of this kind have been taking place there⁽¹⁰²⁾. It emerges from the report of two Senate sub-committees that a large and significant proportion of undertakings is under the control of a small number of financial institutions, especially banks. It is interesting to note that these findings have been made with respect to a system based on the separation of commercial and investment banking. It is said in this connexion that the banks have extended their influence through trust departments, holding companies and letter-box firms. The trend towards universalization in the USA, long since noted⁽¹⁰³⁾, thus assists the concentration of economic power.

To what extent similar circumstances have come about in the Member States must remain unanswered here. But the latest events involving the Suez Group in France⁽¹⁰⁴⁾ and a listing of the substantial participatory holdings of the major German banks⁽¹⁰⁵⁾ make analogous developments seem probable here. Also interesting in this connexion is the news that in France 6 banking groups account for 80% of the aggregate balance sheet total⁽¹⁰⁶⁾.

It should be noted, therefore, that the fields of influence of the banks, as described above, carry in themselves the tendency for the development of a power potential extending beyond the determination of individual conflicts of interest in their favour. Participatory share ownership alone is not responsible for this. It is, however, a precondition which cannot be ignored.

CHAPTER FIVE

Conclusions from the analysis of the banking and non-banking effects of participation

The starting point for the development of our conclusions is the evaluation and assessment of the interests affected by the banks' participation policies. In this connexion we will start with the universal banking system, since in this way it will be possible to include the areas of conflict comprehensively. Only then will the patterns of interests in the separation system be appraised.

I) Positive effects

1) Banking policy

An evaluation of the arguments advanced against bank participation must proceed from the assumption that such participation is advantageous from the banking point of view. This is valid in the first place for unplanned participation. Although this is not the result of deliberate investment policies, it is always compatible with the banks' commercial interests and hence with the goal of profit maximization. Here, the avoidance of losses (e.g. price support operations to maintain the value of the banks' own holdings; recoupment of bad debts on lendings; the consolidation of credit advanced by way of preliminary finance) or the improvement of earning power (assumption of sales risks on share issues) may be the most important factors.

Profitability considerations also determine planned participatory investment. The following factors are important here. In the first place the acquisition of a participatory interest may be directly geared to profit maximization, when attractive shares are purchased, whether with a view to good dividend payments or in the expectation of a rise in the share price. Secondly, participatory investment, like all share investment,

serves the purpose of the banks' need to make full use of their capacity as service-rendering undertakings, when surplus liquid funds are used for the purpose. Further, there is the intention to balance income risks between the various departments and in the field of financial assets. Finally, the possibility, accompanying participation, of being able to influence the decision-making of the other parties to market transactions, the effect of which can be a freezing of business relations, which in turn is in the interests of earnings.

It remains to be asked, on the subject of the positive results accruing from the banking point of view, whether these are only obtainable through participation, that is to say according to our definition through the acquisition of shareholders' rights which it is not intended shall be held for the short term only and which by their extent may make it possible to exert influence. Or is it conceivable that other financial investments could also have similar effects? Surprisingly enough, no comments on this point are to be found in the literature.

In the field of planned investment one can only within limits describe the acquisition of shareholders' rights of a volume such as to amount to participation as being necessary for the pursuit of earnings interests. The spreading of income risks and the utilization of capacity can also be achieved through the investment of surplus liquidity in the purchase of securities which carry no shareholding rights or through the creation of holdings of shares which do not reach the volume of a participatory investment in any one company. Moreover, the significance of participation for the earning of profits can hardly be assessed from outside⁽¹⁾. Certainly there is a favourable correlation here, because the book values of participatory investments are often very small in relation to the companies' dividends. Nevertheless doubts remain as to whether there must be participation in order to pursue these earnings goals.

The formation of large parcels of shares is clearly encouraged by the tax concessions, already mentioned, in Germany and in general by the premiums obtainable when large parcels of shares are dealt in. Investment to the extent of participation is also necessary in order to stabilize business relations or to carry out transactions on the market for undertakings (preparations for mergers, etc.).

As far as unplanned participation is concerned, investment of this kind is an important instrument of commercial policy which can hardly be dispensed with. Larger shareholdings, which have to be taken over in the course of issue business, whether as a consequence of placement difficulties or share price support operations, serve capital market interests which must also be included and which cannot be pursued elsewhere. Participation, as a special case, for the conversion of bad debts incurred on lending business is under certain circumstances the sole possibility of avoiding losses on advances.

2) The capital market

An assessment of the shareholdings owned by the banks must also take into account the importance of the ownership for the capital market. Four functions should be mentioned here:

- 1) Acting as an intermediary between supply and demand through collaboration on the launching of share issues, which frequently leads to temporary share ownership.
- 2) Enlargement of the market for participation capital through an increased capability for taking up shares. The banks enter the market as investors owing to the liquid funds at their disposal and assist the supply of equity capital to business undertakings.
- 3) The share market gains elasticity through participatory share ownership. To the extent that banks enter the markets as acceptors and sellers of larger parcels of shares, they are able to react more rapidly to large-lot transactions.

- 4) Within the capital market the banks exercise a "mobilization" function. Long-term investment credit is replaced by share issues, which the banks either take up themselves or place on the market.

These functions can as a rule only be fulfilled when it is possible for the banks to enter the share market in connexion with larger lots which reach the extent of participatory holdings. It should be stressed that the importance of participation for the capital market in the four above-mentioned cases is not exclusively dependent on the banks. Promotion of the elasticity of the capital market through large-lot dealing and also its enlargement can be implemented in similar fashion by other institutional investors. The extent to which, from the above points of view, participatory share ownership by banks is necessary will therefore be governed by the conditions prevailing on the capital market at the time.

II) Negative effects

1) Solving the problems without controlling participatory share ownership

Our investigation of the non-banking areas affected has shown that some of the problems discussed in connexion with participation in the non-banking sector must be assessed ambivalently. Moreover, it has become clear that to a partial extent solutions involving control of participatory share ownership has to be ruled out and answers sought in other areas. This is usually the case when the effects in question do not emanate from the banks alone.

In this connexion the question of large-lot dealing should first be mentioned. The associated circumvention of the stock exchange has positive effects, in that violent price fluctuations are avoided, but it militates against market "transparency". In addition, large parcels of shares are also exchanged by non-banking undertakings, with the same results. In this area, therefore, a genuine solution cannot be attained through control of participation.

A similarly ambivalent effect is produced by the use of shareholdings to influence share prices. This practice may mislead investors and induce them to carry out loss-making transactions (share price manipulation) or it may prevent short-term fluctuations in a narrow market (share price support). This capability, too, is enjoyed by other institutions besides banks.

In these cases the problems arising must be dealt with in other ways, if a comprehensive solution is desired. Possibilities here may be found in an improvement of supervision of the securities market coupled with the introduction of disclosure requirements and powers to obtain information.

Solutions on a different level must be selected to deal with the questions of the use of inside information and the secret building up of participatory holdings. In contrast to the circumstances mentioned above, these problems, although they involve transactions which must unequivocally be described as harmful, are nevertheless not inherent in the banking system as such.

The secret building up of participatory interests is a problem of information for the shareholders of the company affected. It must be ensured that notification is made as early as the stage of the intention to participate. This falls under the subject matter governed by group-company law. In some Member States this question has already been tackled through standardization in matters relating to "take-over bids".

The acquisition of information which can be exploited prematurely on the stock exchange is another matter that cannot be dealt with by limiting the banks' right to participate. Ownership of shares in a company is only one of several ways of obtaining such information. And the circle of "insiders" clearly extends beyond the banks, showing that here, too, other means of protecting investors must be found.

The significance of participation for the counselling of investors saving through buying shares must be judged somewhat differently. Here there is a conflict of interests which could endanger the objectivity of the banks' conduct. It may be questioned, however, whether control of participation is the right answer. For the danger is not inherent in the system, that is to say, it is also present in the case of investment banks in the "separation system" and can even occur where the shareholding is small. Therefore a prohibition or even a limitation on participation to deal with this conflict of interests does not really seem to be an appropriate reaction. It would be more suitable to increase the publicity requirements so as to provide savers who invest in shares with unbiased information which prepares them for their buying or selling decision and removes from the banks their key position when giving advice. At most, this possibility of conflict can be said to provide additional grounds for controlling participation.

In the area of market interests we established that a bank can exert influence on the competitive relations of an undertaking which it is able to influence. Here the disruption of the market process is involved; the removal or prevention of this disruption is basically to be regarded as a matter for the law on the restriction of competition.

An analysis of the problems occurring in connexion with participation by the banks thus shows, in the situations quoted, that it is not really possible to achieve a suitable solution by interfering with the banks' freedom to invest. This does not apply, however, to the remaining areas affected by participation.

2) Participatory share ownership as a criterion for control

- a) Ownership of shares by banks can, particularly if it has reached the level of participation, lead to considerable risks for depositors. This applies first of all under the aspect of liquidity. It has been pointed out above, in the context of the discussion on depositor protection, that investment of customers' money in shares clearly impairs the banks' payment capabilities. To meet the maturity of liabilities there is no corresponding

possibility of converting participatory shareholdings into liquid funds. A situation of unwillingness to buy prevailing on the capital market and the risk of selling at a loss due to changed share prices are factors responsible for the immobilization of the participatory shareholding.

Equally clear, secondly, is the security risk for customers' deposits. Price fluctuations inherent in the stock market often lead to losses in value, which in times of economic crisis can reach substantial proportions. This risk is heightened when the share investment is concentrated in a few industries and is increased still further when there are large participatory holdings in individual undertakings. An additional factor threatening security is the possibility of speculative transactions with participatory investments.

Here there is a serious problem of deposit protection which can only arise when deposit and investment business are linked. A solution to this central question of banking supervision is only conceivable through control of participatory share ownership, unless there is to be an abolition of this link in favour of a "separation system".

- b) The opportunities to exert influence on business undertakings conferred through company law by participation can have an adverse effect both for the undertakings themselves and for market interests. The banks' potential for influence threatens the interests of the undertakings. To the extent that an exclusive business relationship is established, be it only partially, the business undertaking ceases to be able to take advantage of more favourable offers from competing banks. It is also possible that charges in excess of current market rates could be demanded.

This conflict of interests is further strengthened if the bank pursues its own special commercial objectives against the undertaking's interests (promotion of credit business) or neglects company-law supervision when it is itself represented on the governing bodies.

The restriction of undertaking's freedom of action caused by the bank's influence also affects competition between banks. Competition by other banks is excluded in proportion to the influence.

On the market for undertakings the banks' participation policy gives them the opportunity of freeing supply and demand from economic considerations and pursuing their own or third parties' interests.

The concentration of various functions in the banks' hands produces a power potential extending beyond the possibility of deciding conflicts of interests arising directly within the business area in their own favour. There is a danger that these centres of decision-making will disrupt the market economy and harm the functions which the public institutions discharge for the general good.

- c) The causality of banks' participation for the above-mentioned opportunities for exerting influence and the adverse consequences of this participation are not as clear as in the realm of depositor protection. With regard to the question whether participatory share ownership can be considered a suitable criterion for control the following points are significant.

The banks' potential for influence cannot exclusively be attributed to the possession of shareholders' rights, although this may be regarded as an essential precondition. In some countries the right to vote on deposited shares, where large undertakings are involved, is an additional factor. Credit relations may give rise to dependence, particularly in the case of smaller companies. Personal involvement institutionalizes an influence.

For the subject matter of our investigation this possibility of accumulation has no direct importance. For whenever participation exists at all there is, according to the concept of participation we have used here, a possibility of influence. The other elements mentioned are then only contributory factors. They gain qualitative importance only when they are the factors establishing an influence. It follows from this that

participatory holdings, although causal as regards an influence on business undertakings, are not causal as regards the whole range of dependencies. This finding is not an argument against using participation as a starting point for a solution but is an argument for control of the other potential causes of interference also.

Dependencies cannot, it is true, be established and developed by the banks without limit. Lively competition in the credit sector may stand in the way of this. Monopolistic freedom of action made possible by a close business relationship is determined in this way. In addition, an undertaking with growing financial autonomy is able to withdraw itself from situations of dependence. The two factors do not, however, exclude participatory influence. Strong pressure of competition on the markets for banking services cannot entirely prevent a bank exerting influence on the decision-making of the other party on the basis of participatory influence and undertakings cannot instantly change a banking relationship. Finance obtained independently of banks can only serve to combat leverage, in the form of the exerting of influence in favour of credit business. Effects going beyond this are not included.

It is repeatedly stressed that it is possible for there to be influence on industry and conflicts of interest between undertaking and bank. However, this situation, it is said, need not necessarily have adverse effects for market interests or undertakings' interests, since a bank must first actualize its influence by using the opportunities for influence open to it. This, it is said, cannot immediately be accepted as happening and indeed has not been proved⁽²⁾.

This argument relies basically on the effectiveness of moral and social constraints. These should not be ignored in an economic and governmental system capable of self-criticism. It may be asked, however, whether the endangered interests are sufficiently protected in this way. The answer must be "no".

The effectiveness of moral constraints cannot be guaranteed. And the danger of injury to interests is too great so long as the banks promote their own commercial objectives in the context of profit maximization. Cases of unilateral exploitation of their position by banks have only comparatively rarely come to light. The reason for this is probably that even those affected are not always aware of the situation. In addition, litigation, as always in business life, is avoided as far as possible in order not to endanger business interests. Public opinion remains uninformed. Meetings are the actual venue for the settlement of disputes.

The relevance of participation for the banks' influence and associated problems is thus proven. The control of share ownership becomes an appropriate starting point for a solution. Other standardization mechanisms are excluded. Control of voting power and additional influence through the medium of group-company law could, it is true, be considered. But there are limits inherent in this area of the law. This applies, for example, to the threshold of application of protection provisions and to the qualification and quantification of acts prejudicial to dependent companies. No relevant investigation of the position of the banks in group-company law has been made. A decisive factor, beyond this, is the fact that in the Member States of the European Community group-company law is still in the development stage, with the result that company-law solutions at Community level are not yet available.

III) Assessment of the relative importance of the interests involved

Our analysis of the arguments put forward in connexion with the participation question under the aspect of "participation as a criterion for control" has greatly limited the scope of relevant considerations. The positive effects of banks' participation policy find expression in the sphere of

of banking operations and on the capital market. In contrast to these effects, there are disadvantages from the point of view of the principle of deposit protection and as a consequence of influence on undertakings and on certain markets. Participation thus basically affects the following objectives: bank profitability; viability of the capital market; protection of depositors; protection of competition between banks and protection of the market mechanism on the market for undertakings; and the independence of the undertakings in which the participatory interests are held. An assessment of the relative importance of the interests involved must proceed from an evaluation of these objectives and their relationship to participation policy.

1) Assessment of the relative importance of the interests involved in the sphere of banking policy

A permanent safeguarding of earning power is a precondition for the viability of the individual bank and is therefore important for the banking system as a whole. The acquisition and creation of participatory interests should be regarded as a beneficial, but not essential, activity in the attaining of this goal. Investment in securities is a lower priority, from the profitability point of view, than other lending business and in particular is ranked behind the granting of credit; this is not to say, however, that investment in securities makes no contribution to profit maximization. As we have shown, income risks can be balanced out through participation and also with the help of other portfolio investment. The same is true of the full utilization of capacity. The trend towards the creation of holdings of sufficient size to amount to participation for tax reasons or for the realization of a gain in the form of a premium on large-lot dealing do not suffice to make participation qualify for description as an essential part of earnings policy.

This loose but definite relationship between the safeguarding of earnings and the policy of participation stands in direct opposition to the goal of depositor protection. The latter, in the form of security and liquidity requirements, is one of the fundamental tasks of banking policy. The holding of participatory investments, which always implies that the shareholding is fairly substantial, represents a clear risk of lack of marketability and loss of value for the depositors. This risk is linked to participatory share ownership and is not separable. It must be

emphasized that the possible harm to the depositors can occur directly and without further action on the part of the bank. The danger is latent and can become reality through influences beyond the banks' control.

The adverse effects of participation for the protection of depositors are thus more important than its significance for the safeguarding of banks' earnings. This interim conclusion is a point in favour of intervention in the banks' freedom of action with respect to their investment decisions.

But unplanned participation which arises in connexion with share issue or credit business must also be considered. It can have beneficial effects as an instrument of commercial policy, at least temporarily. However, the necessity for control of participation, which we have affirmed, cannot in general be called in question on account of this. The assessment was the result of an appraisal of the effects inherent in participation. Unplanned participation only involves particular, clearly definable, situations. A general set of rules could make specific provision for such situations.

2) Assessment of the relative importance of the interests involved in the sphere of influence on business undertakings

Connected with the goal of earnings safeguarding is the influence on business undertakings as a determining cause of participatory investment. The desired freezing and extending of business relations must be judged by reference to the non-bank-related consequences of influence. For this purpose one must proceed from the maintenance of undertakings' private and autonomous freedom to take decisions in their business relations and from their possibility of protecting their own interests. Further, competition between banks and the maintenance of independent decisions on the market for undertakings must be included. These market-economy objectives are

threatened by influence on decision-making in the undertakings in which participatory interests are held. Admittedly, this consequence is dependent on the manner in which use is actually made of the opportunities for influence. But this does not stand in the way of the necessity for neutralizing conflicts of interest through intervention in the banks' participation policy. The goal of profit maximization through stabilization of relations with customers cannot justify the threat to the interests thereby affected. The necessity for standardization, which has thus been demonstrated, is supported by a consideration of the power aspect. Limitation of participatory shareholding would reduce the concentration of decision-making powers. The coming into being of economic power positions would be made more difficult and their dismantling would be assisted.

3) Taking capital market functions into account

Finally, the capital market functions of participation must be included in the assessment of the relative importance of the interests involved. Basically, these functions have been described as beneficial. But here the banks only partially play an indispensable role. The enlargement and elasticity of the capital market through the increase in supply and the fact of large-lot dealing can also be undertaken by other investors, although as a necessary precondition they would have to have sufficient liquid funds at their disposal. However, the acquisition of participatory holdings in the process of placing new issues can only be carried out by institutions carrying on share issue business. Reference has already been made to this participatory function in connexion with unplanned participatory investment. The mobilization function on the capital market through the combining of credit and investment business has been similarly characterized.

For the significance of these effects of participation in the context of the assessment of the relative importance of the interests involved, the conclusions already stated in connexion with unplanned investment apply. A general modification of the judgment is not necessary, as limited situations, which must be separately covered as individual cases in the regulations, are involved.

IV) Relevant interests in the "separation system"

By a "separation system" we mean a banking system which differentiates between business departments and prohibits deposit and credit banks from carrying on share issue business and dealing in securities and vice versa. In a system of this kind the area relevant for the assessment of interests is appreciably reduced.

The security and liquidity risk associated with participation does not arise. An interest in profitability, associated with the acquisition of shares, remains. However, the need to make full use of capacity has less importance because the investment in shareholders' rights does not take place as a complement to credit business. The same is true of the spreading of risk, which in the main only takes place in the context of share investment. The positive effects for the capital market that are connected with participation business are also, and particularly, relevant in the case of investment banks. Unplanned participatory holdings can only arise in connexion with share issue business.

Against this positive evaluation stands the possibility of an influence on the undertakings in which the participatory interests are held. Thus even in the "separation system" there can be a threat to the independence of corporate decision-making. This chiefly means that business relations can be stabilized. In this connexion it should be borne in mind, however, that the scope of the commercial interests pursued is considerably smaller and can basically only cover, in addition to consultancy, dealings in securities and share issue business. The danger arising from the opportunity to exert influence thus loses its force. The autonomous pursuit by undertakings of their own interests can only be prejudiced to a slight extent. The same is also true of possible adverse consequences for competition. Only a narrowly limited sector of banking services can be affected.

It should further be noted that as a result of diminished possibilities of conflict which are otherwise rooted in the link with credit business, the inducement of firms to act against their own interests is only conceivable in infrequent cases. The danger of neglect to exercise proper supervision under company law when there is representation on governing bodies still exists. Conditions that are unfavourable in comparison with those offered by competitors can also be imposed.

The possibility, conferred by participation, of influencing decisions on the market for undertakings is not affected by the organization of the banking system. The market mechanism can be made inoperative insofar as decision-making by the other party in the market can be influenced.

The interests affected by participation are thus less pronounced in the "separation system" than they are in the universal banking system. In particular, the sharp conflict between profitability interests and depositor protection disappears. The potential for influence over undertakings, conferred by shareholding rights, has less scope for effect and its use is less determined by conflicts of interest. Only a distortion of decisions on the market for undertakings is conceivable, as in the universal banking system.

On the basis of these considerations it cannot be recommended that the freedom of action of securities banks or investment banks with regard to their investment policies should be limited. This only applies, of course, to the extent that these special banks are prevented from exercising any influence over deposit banks. A development such as has been seen in the USA, with increasing links between banks in spite of the separation of departments, must be ruled out.

CHAPTER SIX

The effects of differences in Member States' regulations on the European Community's integration objectives

(The need for Community legislation)

I) The present state of integration

Particular value attaches to the development of the banking sector within the framework of European integration since its importance to many other fields of the Community's economy is obvious. Integration of the markets for banking services can play a leading role particularly in the attempt that is still being made to set up economic and monetary union. The usual distinction which has existed up to now in Europe between home and foreign business cannot be retained until true monetary union is effected. The processes involved in developing the banking system and in moving towards monetary union are gradual and depend on market conditions and political factors. The creation of a common banking market, however, must come first in time so as to prepare the way for further integration objectives⁽¹⁾.

Within the existing institutional framework of the Treaty of Rome, the instruments for integrating the banking sector are contained in the provisions for the freedom of establishment and for the free provision of services and movement of capital (Articles 52-73 of the Treaty). Action within this framework to date may be outlined as follows. On 28.6.1973 the Council issued a directive to remove restrictions on the freedom of establishment and on the free provision of services regarding the independent activities of banks and other financial establishments⁽²⁾. This directive is aimed at guaranteeing equal treatment for banks in the Member States. These are in each case to be able to pursue their business activities in the same way as domestic organizations, through their own

branches or through international trading. Other restrictions are not removed. Restrictions on business activities based on national law are not covered. Individual States' regulations as to the acquisition of participatory holdings are accordingly not affected by the directive⁽³⁾.

Direct investments as a component part of the movement of capital were liberalized by the directive of 11.5.1960⁽⁴⁾ as extended by a directive of 18.12.1962⁽⁵⁾. Here, too, one restriction applies. Under Article 5 (3) of the 1960 directive, restrictions on capital movement resulting from the regulations of a Member State remain intact. The creation of participatory holdings therefore continues to remain subject to national law. In line with the progressive liberalization of capital movement, however, it is also intended that banking services linked to capital movement should be liberalized (Art. 61 (2) Treaty of Rome).

The requirement for Community legislation on banking activities therefore continues to exist. In December 1974 a proposal for a directive was prepared for this purpose⁽⁶⁾. Harmonization of national laws with regard to the admissibility of the acquisition of participatory holdings in the non-banking sector presupposes a reply to the question to what extent differing laws affect the realization of a common banking and capital market.

II) Legal differences and a common banking market

1) Competitive advantages for banking?

The survey of regulations in Member States has shown that substantial differences exist. The spectrum ranges from unrestricted opportunity for participation within the universal banking system to prohibition in the case of specific types of banks. The resultant effects for any common banking market that might be set up can only be determined by proceeding from an equal basis. Only in the matter of participation should differences exist between the national banking systems under competitive conditions that are otherwise equal.

The importance of the opportunity for participation as a parameter of activity on the market for banking services depends on the question of what advantages arise with regard to the competitive position. On this point, reference may be made to the comments on the status of participation within the banking field.

From profitability aspects, major shareholdings may be regarded as advantageous for banks. Reference may be made to the doctrine of utilization of capacity, stabilization of the income risk, and direct profit-making interests (dividends and share price rises). The opportunities for diversification, in particular, offered thereby may lead to more favourable profit levels and consequently to competitive advantage. Increased profitability can be utilized by the banks to expand business through more favourable offers.

Such competitive advantages exist as long as other institutions cannot diversify in this way. We have seen, however, that other portfolio investments, too, made with a view to utilizing capacity and stabilizing risk can yield comparable results⁽⁷⁾. And opportunity for profit through dividends and increases in share values are hardly assessable. Banks' competitive advantages on the basis of participation opportunities must therefore, to this extent, be judged cautiously. They exist, but are not specific in nature.

In the field of participation as unplanned investment, too, a preferential position may be gained in international competition. The chief elements here are the reduction of risk in issue business and the security of credit. The account of the legal approach to participation in Member States has in fact shown that no relevant differences exist here. Even in the case of prohibitions on participation, exceptions apply to temporary stockholdings which as a rule cover such cases.

Apart from this, the situation in this case is a special one beyond selective investment policy and plays no really important role within the scope of the business as a whole.

If the opportunity for participation cannot accordingly be considered as of decisive importance to a common banking market, it should nevertheless be noted that associated services may affect the assessment. The very fact of being able to keep large holdings of shares enlarges the banks' spectrum of services. This applies irrespective of whether issuing business and dealing in securities are also undertaken. Greater recourse will be had to a bank with this capability as business consultants; this applies especially in the case of company rehabilitation and the reorganization of corporate structures by grouping and mergers. In this connexion, transitory items are commonly accepted.

2) Competitive advantages as a result of influence based on company law

The relevance of participation opportunities to international competitive status is further increased if influence based on the exercise of voting rights is included. This leads to trading from a monopolistic position and to a restriction of independent action by market rivals. The consequence is stabilization of business relations. Competing banks are thereby eliminated and competition is reduced.

This capability is particularly noticeable in international competition. Where participation allows influence, foreign banks can be prevented from penetrating the home market. Existing business relations are hard to sever. International banking services are not encouraged. Conversely, banks with participation business are in a better position to operate in other foreign markets. Market relations not secured through company law are easier to alter. Where new sales opportunities are created, in certain circumstances a participatory investment can in turn be made in order to consolidate them.

The result may therefore be taken to be that competitive advantages based on banks' opportunities for participation are appreciable. Influence through voting rights linked by definition to participation, in particular, leads to market positions that, especially in a common banking market within the EEC, could produce serious competitive disadvantages in the absence of uniform regulations.

III) Legal differences and integration of the capital market

It may be accepted that the importance to integration policy of the inter-relationship of capital markets is substantial⁽⁸⁾. This aim is pursued in the first place by the removal of selective controls on capital movements which are discriminatory in effect. Article 57 of the Treaty of Rome provides a suitable legal basis for this. In addition, every Member State has statutory and administrative rules governing the movement of money, credit and capital which, without being discriminatory, differ as to aims and methods and consequently militate against an integration of the capital market⁽⁹⁾. These provisions also include the differing regulations regarding the admissibility of participation by banks in the non-banking sector.

The importance of such investment to the market for participation capital has already been outlined⁽¹⁰⁾. It lies in the first instance in an expansion of the market, when the bank invests liquid funds in this way. The EEC investigation into the setting up of a European capital market (Segré Report) lays great stress on this function, especially where other institutional investors are less in evidence⁽¹¹⁾. To this should be added an increased elasticity in setting off supply against demand through dealing in large parcels of shares. The acquisition of shares, moreover, assists the placement of issues with a reduction of the associated risk, when gradual selling is made possible in this way⁽¹²⁾.

Harmonization of the legal differences concerning participation would in the first instance only secure similar capital market conditions in the Member States. An improvement in the functional capacity of the individual markets is, however, an important precondition for their integration. At the same time, the inter-linking of markets would be encouraged. It is in this area that the banks could make a special contribution. Compared with other investors, they are better able to obtain information on undertakings and stock exchange organization in other Member States. Balanced, undistorted development of a common market for participation capital therefore requires coordination of the regulations to enable banks to take up shareholding rights in other undertakings.

IV) The harmonization of legal differences from the supervisory law aspect

In authoritative literature on banking, it is advanced as an argument against harmonization of the rules on the acquisition of participatory holdings that an important question of control policy in the banking system would thereby be opened up. Standardization associated with the harmonization of commercial activities in the EEC would not therefore, it is claimed, be appropriate⁽¹³⁾. Behind this lies the view that only a common approach to the organizational principles on which banking is based could cover the question of participation.

Coordination of the various national attitudes to matters regarding the structure of banking is unlikely in the foreseeable future. This would require unanimity as to the system on which European banking business should be based. A decision of this kind is not, however, necessary for regulation of the acquisition of participatory holdings under Community law.

The need for legislation arises in two sectors. Clearly in the foreground is the question of protecting depositors, as participation by banks in the non-banking sector gives rise to problems of banking solvency owing

to the difficulty of liquidating the investments without loss. Moreover, the risk of a drop in value also affects the security requirement.

Liquidity and security are two of the traditional subjects of banking supervisory legislation. Coordination of the relevant provisions in the Member States cannot affect the structure of the banking system.

For the rest, as stated in the summary of the legal position in the various countries, clear concordance in banking legislation is already evident and based on supervisory law. This may be seen in the standardization of the relationship between participation and banks' own resources and the capital of the companies concerned.

Further, the possible influence through participation on the companies concerned would support an intervention in the matter of the banks' freedom of action in the investment field. The considerations in this case are in fact of a regulative nature and relate to banking competition and the possibility of concentration of power. The question of the structure of the banking sector is not, however, affected thereby.

The substantive content of legislative control of participation consequently shows that harmonization does not in fact affect or intrinsically prejudice the structural basis. The position might well be otherwise if the opportunity for participation were to be entirely excluded. There are no grounds, however, for recommending this, as is shown by the proposal for legislation put forward in the next chapter.

CHAPTER SEVEN

Development of a proposal for legislation

I) Possible methods of control and their relevance to present problems

1) Prohibition of participation

A prohibition on participation could be effected through the removal of participatory investments from the banking assets and their transfer to a special company⁽¹⁾. This would constitute an approach to a system whereby deposit banks were separated from investment banks. Such a solution, as indeed the introduction of a separation system, can, however, be left out of consideration immediately. It would, in particular, leave out of account the important contribution of banks' participatory holdings towards the viability of share markets. The report of the EEC investigation into the setting up of a European capital market (Segré Report) rightly advocates in several passages, a liberalization of the strict rules of a number of Member States⁽²⁾ which, in any event, also contain exceptions with regard to the expansion of the share market⁽³⁾.

Further, such radical solutions would be regarded as a political encroachment on a number of banking systems within the EEC. The measures could not be covered by a consensus regarding supervisory controls on banking activities.

2) Limitation in proportion to own resources

The comparative account of the legal position in Member States revealed a number of possible methods of control. Mention might be made here in the first instance of restriction on participation so as to maintain a specific ratio to the bank's own funds. This can be done in two ways. The restriction may apply to the ratio between shares in one company and the bank's own funds or all shareholdings as a whole may be related to the bank's own funds.

Restriction of participation from this point of view will reduce the liquidity risk. This risk arises especially where short-term deposits are used for share investment which is frequently not immediately realizable. The transformation of maturity dates implicit in this action jeopardizes the bank's ability to repay the deposits. This problem does not arise only in the case of individual participation, but through shareholding in general as there are no maturity dates for this kind of investment. It would consequently be more appropriate if shareholdings as a whole were to be restricted in proportion to own funds. In this way, the security requirement would be met at the same time. If the utilization of customers' money for participatory investment is excluded, there will be no risk of loss of value of deposits.

3) Limitation of the level of participation in individual undertakings

A further possible control lies in an obligation on the bank to limit its shareholdings in companies within the non-banking sector to a specific level. An encroachment of this kind on freedom of action would have a two-fold effect. Firstly, the restriction on the level of participation would serve to protect depositors. As capital interests in an undertaking are strengthened, so the security risk in lending business rises. The economic losses of the undertaking affect the bank in proportion to the capital involvement. Secondly, a restriction on the level of participation affects the banks' opportunities for influencing the undertaking. Influence through voting rights is directly reduced. This means a less adverse effect on market interests that might be influenced through the undertaking. At the same time, the concentration of powers of economic decision is countered. If a limit is set to the level of participation, this may, however, affect the functional viability of the share market.

4) Restriction on the exercise of voting rights

An interesting provision is made in connexion with banks' participatory holdings in the German Restriction of Competition Act (GWB), as amended in 1973. Section 23 of the Act requires notice to be given of mergers of undertakings. The circumstances in which mergers must be notified include share acquisitions at a certain level. An exception applies, however, under Section 23 (5) of the GWB where a credit institution acquires shares in another undertaking in connexion with the incorporation or capital increase of an undertaking or otherwise in the normal course of business for the purpose of re-sale on the market, provided that it does not exercise the voting rights on these shares and that re-sale is effected within twelve months.

This provision should be judged with reference to the purpose of mandatory notice. What is concerned is control of the concentration of undertakings from the cartel law aspect; the acquisition of shares by a bank within the stated conditions is not regarded as an element of amalgamation. The restriction on the exercise of voting rights where a shareholding is only temporary means in other words that the opportunity for economic influence is reduced.

II) Proposal for legislation

1) Limits to participation

Due weighing of interests has meant that the pursuit of profitability underlying banks' participation policy must give way before the hazards in securing depositors associated therewith. The liquidity risk is most effectively restricted by a ratio between the bank's total shareholding and its own funds. As regards the question of how this ratio is to be

fixed, there are no absolute yardsticks. A criterion may be found in the consideration that own funds serve not only to satisfy creditors but also as working capital. To meet this criterion, total participatory shareholdings would always have to be lower than a bank's own funds. Such a limitation would, however, have detrimental effects, particularly with regard to the expansion of the share market and to the often only temporary holding of shares, since the banks' own funds form only a small proportion of their balance sheet total. A limitation on shareholdings to the full amount of own funds therefore seems appropriate. This provision is in line with French banking supervision law. It is more liberal than the Dutch and Danish Acts, which impose a limit of 50%.

The security risk for lending business associated with the possible depreciation of participatory holdings can be controlled especially by restricting the level of individual participation. In this way a better spreading of risks is achieved. When the level of participation is being fixed, account must at the same time be taken of the hazards arising from participation as a result of the opportunity to influence the undertaking concerned.

Both aspects would support as low a shareholding as possible in individual companies. It should be noted in this connexion that where a company's shares are sufficiently widely distributed, even a very small holding can procure influence.

A lower limit is in fact inherent in the concept of participation which excludes the possibility of influence. As long as 5% is not reached, these conditions do not arise. A draft Dutch law on banking supervision, however, provides for the introduction of an approval proviso in respect of this percentage and upwards.

This limitation would certainly adequately restrict the problem of the protection of depositors and the influence over commercial undertakings. The question may still be asked, however, whether the importance of participation for a large capital market should not lead to a different conclusion. As explained, this importance depends on the existence of other institutional investors who combine to provide the supply of capital and are able to place it on the market for participation capital. In the investigation into the setting up of a European capital market (Segré Report) the proportion of institutional investors in Member States is considered too small for this purpose, except in Holland and Great Britain⁽⁴⁾. On the basis of this assessment, a higher proportion would seem desirable. In this way the opportunity for large-lot dealing would also be increased. A limit on participation of 10% of nominal capital is therefore proposed. This lies below the corresponding provisions in France and Ireland which specify a limit of 20%. Such a level of participation cannot, however, be supported if it is intended that the influence of banking on the economy should be restricted. It should further be noted that in Italy and Belgium there is a general prohibition on participation. The sole criterion of Danish legislation is the opportunity to exert influence, although no concrete limits are set.

2) Exceptional provisions

The analysis of the effects of participation on banks and the non-banking sector has indicated, with a due weighing of interests, that in certain situations the holding of shares fulfils important functions, for which special provision should be made. Mention should be made here of the creation of participatory holdings in the course of executing share issues (price support operations, temporary placement difficulties, etc). This promotes mediation between supply and demand on the share market. Shares are further taken up by way of debt conversion to save endangered credit, while temporary shareholdings promote elasticity in the capital market, especially in the creation of new corporate structures.

Depending on circumstances, such factors could be regarded as exceptional provisions, as is the case in Belgium. In other countries, such as Italy and Ireland, an approval proviso has been introduced that can be exercised accordingly.

The objections to an approval facility in respect of participation exceeding the 10% limit, when such a facility is not concretely defined, are appreciable. This facility would allow the competent authorities to exercise the discretion granted them in accordance with the most varying criteria. The need for control that would arise might then be left out of account in certain circumstances. If, for example, a liberal outlook on approval was motivated by the needs of the capital market, the requirements of depositor protection and, particularly, the significance of a free banking market for integration policy would recede into the background.

As long as Community powers of approval cannot be realized, a system of limited exceptions must be proposed. However, a compromise is conceivable in this case which would allow more flexible reactions and could assist the ability to arrive at a political consensus on this point. The special conditions of participation referred to are already essentially fulfilling their function in the case of temporary shareholdings. Approval for the acquisition of participation for a set period could consequently be provided for in order to cover exceptional situations and to take account of other situations where necessary (e.g. the employment of capacity). A one-year period such as exists in Belgium for such cases might be appropriate. However, an opportunity for extension should be introduced where holdings can demonstrably not be reduced to 10% without substantial loss.

A relatively open-ended clause of this kind must be restricted in two ways if the general problems of participation are also to be taken into account. If a participation in certain circumstances exists for several years or even for only one year, influence on the undertaking concerned is likely. This may, to a certain extent at least, be countered by prohibiting the exercise of voting rights. Banking interests will not be adversely affected by this. The functions of middleman on the capital market remain viable. At the same time, sale of the holdings is encouraged.

A restriction on the level of participation must also be demanded in this case in the interests of protecting depositors. Even in the case of a temporary shareholding, a high commitment means a high risk of depreciation. It is therefore suggested that an upper limit of 50% of the share capital be imposed.

Exceptional provisions in respect of the fixing of the ratio between the shareholding and the bank's own funds are not necessary since sufficient freedom of action for participatory investment remains within this framework. There are no special regulations of this kind within Member States.

3) Combating circumvention of the provisions

The limits here placed on participatory holdings could be evaded by the banks interposing other companies. Shares in another undertaking would go beyond the proposed limit of 10% if a subsidiary were also to hold shares. Influence could in this way be increased to an inadmissible extent. No risk would arise, however, with regard to the protection of depositors and the problem of evasion thus loses its significance.

Evasion of this kind would require group-type links between at least two companies under simultaneous controlling influence of the bank whose participatory holdings were restricted. This condition would apply to a bank only if it interposed other banks or financial institutions. For control can, as a rule, only be exercised over an appreciable participation, which in turn would be permissible only in the case of companies within the banking sector.

The possibilities of this kind of circumvention become particularly important if a bank whose participatory holdings are restricted joins with another institution to which no such limit applies. This would apply, for example, to controls on investment banks or credit institutions with registered offices outside the EEC. A conceivable solution would be to consolidate holdings in the non-banking sector by dependent companies with the overall holdings of the controlling bank. Consolidation of this kind could be extended to cover a group in its entirety. Indirect influence on other undertakings by means of participation would thus be prevented. The overstepping of permissible shareholding limits would have to be remedied through the relinquishing of the controlling participation in the interposed company. This relinquishment could be implemented in conjunction with a duty of disclosure or an approval requirement in respect of connexions between undertakings in the financial sector.

Another conceivable means of circumvention would be the interposition of a holding company intended to hold participatory interests in the non-banking field. If the holding company's shares were taken up by the bank itself, the problem would be no different from the problem of evasion already discussed. The position would be different, however, if the shares in the holding company were taken up by the bank's shareholders on an exchange basis. The bank's shares would then form part of the holding company's assets.

A solution could not be related to the bank's activities nor to the formation of the holding company by the bank, since a "man of straw" could be interpolated.

It would be difficult to prohibit the transfer of banking shares to holding companies within the banking supervisory purview. In order to secure compliance with the suggested provision, therefore, it would be necessary to include the participatory interests held by banking holding companies.

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Prof. Dr. Ulrich Immenga

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Notes

Chapter One

- 1) Cf. e.g. Enzyklopädisches Lexikon für das Geld-, Bank- und Börsenwesen, p. 214 ; Müller/Löffelholz, p. 327 ; Obst-Hintner, 36th edition, p. 559
- 2) Büschgen, Bankbetriebslehre, p. 451
- 3) Under German shareholding law participation is assumed to exist if a holding of 25 % is reached (§ 152(2) AktG)
- 4) On this, cf. also Büschgen, p. 770
- 5) Forrest, An Analysis of Banking Structures in the European Community, London 1974 ; I.D.E.F., Institutions et mécanismes bancaires dans les pays de la C.E.E., Paris 1969 ; Regul/Wolf, Das Bankwesen im grösseren Europa, Baden-Baden 1974 ; Troberg, Die Banksysteme in der Europäischen Gemeinschaft, Bank-Betrieb 1973, p. 422 und 475 ; 1974, p. 6, 206 and 259.

Chapter Two

- 1) Ponlot, p. 89 et seq.
- 2) Ponlot, p. 111
- 3) de Brabandère/Pardon, in : I.D.E.F., p. 398
- 4) Stoller, Europäische Steuerzeitung (Intertax) 1971, p. 119 et seq.
- 5) For details as to exceptions, cf. Le Brun, Revue de la Banque 1966, p. 710 and 731 et seq.
- 6) 1972-73 Annual Report, p. 31
- 7) Le Brun, Revue de la Banque 1966, p. 710, 741
- 8) Le Brun, op.cit. p.748, 749
- 9) The Act of 3 May 1967, amending banking regulations in Belgium
- 10) Abraham/Simal, in : Regul/Wolf p. 175
- 11) On this point, cf. Ponlot, p. 93 et seq. Illustrative Beispiele bei de Brabandère/Pardon, in : I.D.E.F., p. 401
- 12) Protocol of 1.2.1974. For an earlier protocol, see Le Brun, Revue de la Banque 1966, p. 739
- 13) Konzentrationsenquête, p. 321 ; Kühnen, p. 150
- 14) Mühlhaupt, Strukturwandlungen, p. 278
- 15) Gafton, Die Konzernverflechtung der westdeutschen Banken, Diss. Wien 1967, p. 259
- 16) Regulation regarding forms for the layout of the annual accounts of credit institutions, of 20.12.1967 (Federal Law Gazette, I,p.1300)
- 17) Konzentrationsenquête, p. 321
- 18) In this connexion, see Mühlhaupt, p. 298

- 19) According to Möschel, p. 43
- 20) Die Wirtschaft 1973, p. 59
- 21) The considerations set out here are based on information from the Federal Ministry of Finance, but are applied generally
- 22) Günther, ZfgK 1970, p. 29 ; Hofman, ZfgK 1971, p.56
- 23) Act No. 199 of 2.4.1974
- 24) Cf. Forrest , p. 10
- 25) The provisions dealt with here appear in Part 6 of the Act concerning Investment and Liquidity
- 26) Beretning om de Danske Bankers Virksomhed i Arøt 1972, Kopenhagen 1973, p. 29, 38
- 27) Beretning om Sparekasserne i Danmark 1972-73, p.11-12
- 28) Information from the Danish Banking Federation
- 29) Lammerskitten, p. 51 et seq.
- 30) Act No.45-015 of 2 December 1945, J.O. of 3 December 1945
- 31) On this and the following point, cf. Fournier, N., in : I.D.E.F., p. 77 et seq.
- 32) Decree No.66-81 of 25 January 1966, 66-1053 of 23 December 1966, 67-757 of 1 September 1967
- 33) Fournier, M., in : I.D.E.F., p. 79
- 34) For detail on this point, with references, Lammerskitten, p. 53
- 35) Fournier, H., Banque 1972, p. 7 ; also Büschgen, p.156 and 157
- 36) This is also the aim of the liberalisation of the establishment of branches and the elimination of minimum conditions in lending business. On this point, cf. Fournier, H., op.cit.p.8
- 37) More recently on this point, cf. Fouchier, Banque 1973, p. 523
- 38) Examples from Troberg, Bank-Betrieb 1974, p. 8
- 39) Bloch-Lainé, Banque 1973, p. 528
- 40) Forrest, p. 23
- 41) Source : Commission de Contrôle des Banques, 1972 Report, p. 30, 44,50
- 42) Lammerskitten, p. 172
- 43) Westrick, p. 46 et seq.
- 44) On the following point cf. Sobotka, Reformen im französischen Bankwesen, p. 42

- 45) Falk-Bjerke, p. 18
- 46) Büschgen, p. 132
- 47) Troberg, Bank-Betrieb 1974, p. 452
- 48) Falk-Bjerke, p. 22
- 49) v.Stechow, p. 27
- 50) v.Stechow, p. 25, 26
- 51) Forrest, p. 66
- 52) References in Büschgen, p.134
- 53) v.Stechow, p. 2, who also gives an instructive survey of the development of the clearing bank (p. 12 et seq.) and the merchant bank (p. 24 et seq.)
- 54) On this and the following points, cf. v.Stechow, p.73 et seq.
- 55) On this point, as regards 1963, cf. Revell/Moyle, and as regards 1957-70, John Moyle
- 56) Vernon/Middleton/Harper
- 57) Falk-Bjerke, p. 23; v.Stechow, p. 42 et seq.
- 58) Büschgen, p. 143
- 59) Campbell, in : Regul/Wolf, p.309
- 60) Central Bank Quaterly Bulletin Autumn 1971, p. 68
- 61) ditto, p. 68
- 62) Also referred to by Troberg, Bank-Betrieb 1974, p. 206
- 63) Figures according to Troberg, op.cit., p. 207
- 64) No. 37 of 12.3.1936
- 65) Forrest, p. 43
- 66) Istruzioni Vigilanza - G par. 17
- 67) Troberg, Bank-Betrieb 1974, p. 263
- 68) See Annex I
- 69) Mattioli, in : I.D.E.F. p. 340
- 70) ditto, p. 346, 347
- 71) ditto, p. 349
- 72) Forrest, p. 53
- 73) For detail on this point, cf. Guill, in : I.D.E.F., p. 643
- 74) Dermitzel/Damm/Richebächer, p. 325
- 75) Luxemburg, ein internationaler Finanzplatz, from Informations- und Pressedienst des Staatsministeriums, p. 23
- 76) Deschenaux, in : Regul/Wolf, p. 396
- 77) Cf. footnote 71, p. 25
- 78) Cf. Sparkassenzeitung (Savings Banks Gazette) of 4 October 1974 (No.76),p.3
- 79) As to detail, cf. Forrest, p. 55
- 80) Deschenaux, in : Regul/Wolf,p. 384
- 81) On this point cf. Forrest, p. 57 ; Bosman, in : Regul/Wolf, p.407 et seq.

- 82) Bosman, op.cit., p. 421
- 83) Forrest, p. 58 ; also information from the AMRO-Bank
- 84) References under Zijlstra, in : I.D.E.F., p.573
- 85) Bosman, in : Regul/Wolf, p. 411
- 86) See Annex
- 87) Thus a running down of banks' own shareholdings in industry was announced at the 1974 Banking Conference by the representative of the Board of Management of the Deutsche Bank, Mr. Ulrich. What would be aimed at would be to hold only as many parcels of shares as would at the most cover the banks' net worth. Majority interests would not be held in industrial companies and parcels of shares acquired temporarily would be given up (FAZ of 12.3.1974).

Chapter Three

- 1) Cf. Aust.v. 152, who refers to extraneous activities in the commercial policy of most banks. See also Büschgen, p. 769 and 770
- 2) E.g. annual reports by the Federation of German Banks 1972/73, p. 12
- 3) This is usually the case in Germany. As regards other countries in the EEC, cf. on this point Lutter, p. 63 and 175
- 4) On this and the following points, cf. Willners, p. 40
- 5) On details of conceivable groupings cf. Willners, p. 49 et seq.
- 6) Büschgen, p. 774
- 7) Willners, p. 39 and 40
- 8) Cf. article on "Price support" (H. Reimann), Handwörterbuch der Betriebswirtschaft, 3rd edition, Volume III, col.3635
- 9) Willners, p. 64
- 10) Büschgen, p. 775
- 11) A. Weber, p. 268 and 269
- 12) Ebenso Willners, p. 57
- 13) Hofmann, ZfgK 1971, p. 56 and 57 ; Möschel, p. 365
- 14) See page 8 above
- 15) On subsequent points, cf. Willners, p. 52 et seq.
- 15a) Cf. also, Hofmann, ZfgK 1971, p. 55
- 16) On subsequent points, see the comprehensive account by Willners, p. 71 et seq.
- 17) Thomas, p. 50
- 18) Figures in Möschel, p. 47 and 48. Also A. Weber, p. 263
- 19) Engler, p. 268

- 19a) For a new draft of the guidelines on "insider trading" in Germany, cf. Degner, AG 1974, p. 365
- 20) Cf., in particular, Hopt/Will, Europäisches Insiderrecht, Stuttgart 1973
- 21) Cf. e.g. Mühlhaupt/Wielens, p. 217
- 22) Günther, ZfgK 1970, p. 29 ; Hofman, Zfg K 1971, p. 56 ; Büschgen p. 777 ; Willners, p. 175 et seq.
- 23) Hagenmüller, Der Bankbetrieb, Vol. II, p. 172 ; Linhardt, p. 81
- 24) Cf. Mühlhaupt/Wielens, p. 219
- 25) Büschgen, p. 776 ; Hofmann, ZfgK 1971, p. 56 Mühlhaupt/Wielens, p. 220
- 26) Page 603
- 27) For detail, cf. Willners, p. 193 et seq.
- 28) Willners, p. 175
- 29) Mestmäcker, p. 205 ; Lenel, p. 292
- 30) Möschel, p. 42 et seq. with further references ; see also Annex II
- 31) Kühnen, p. 150 ; Willners, p. 198/199
- 32) Thus Büschgen, p.781
- 33) Willners, p. 199 with references. He does not mention : Aust, p. 156 ; Möschel, p. 366 ; Roth, p. 308 ; Hagenmüller, Der Bankbetrieb, Vol. II, p. 172
- 34) Willners, p. 199
- 35) On this point, see Aust, p. 153 ; Willners, p. 199 ; Hofmann, ZfgK 1971, p. 56 and also in A. Weber, p. 270
- 36) Enquiry into business concentration, p. 39
- 37) Büschgen, p.782
- 38) Hankel, Währungs politik, p. 218 et seq.
- 39) Mühlhaupt/Wielens, p. 241
- 40) Aust, p.151
- 41) Bundesverband deutscher Banken, Jahresbericht 1972/73, p. 12
- 42) Most recently, Lichtenberg, ZfgK 1974, p. 180
- 43) As regards England, cf. von Stechow, p. 33 (Merchant Banking Sector)
- 44) Such considerations may be found in the Commission's memorandum on Community Industrial Policy (Brussels 1970) and reference is made to the Industrial Reorganisation Corporation in Great Britain and the Institut de Développement Industriel in France, which concern themselves with the promotion of mergers of undertakings (p. 28).

- 45) Enquiry into business concentration, p. 39
- 46) Büschgen, p. 783
- 47) Hofmann, ZfgK 1971, p. 56
- 48) On this point, see the gloss on "Patriotic Package Purchases" ZfgK 1969, p. 925
- 49) See the example given by Wiborg, FAZ of 8.6.1972
- 50) Lichtenberg, ZfgK 1974, p. 180
- 51) According to the Annual Report of the Federation of German Banks 1972/73, p. 12
- 52) Büschgen, Bankbetriebslehre, p. 453 ; Kühnen, p. 150

Chapter Four

- 1) Walb, Grundsätzliches zur Frage der Bankenreform, Kölnische Zeitung vom 25.6.1933 ; quoted in Mühlhaupt/Wielens, p. 217
- 2) On profit policy with equal regard to the principles of liquidity and security, cf. principally Feldbansch, p. 36
- 3) Witte, Zeitschrift für Betriebswirtschaft, 1964, p.763, 765
- 4) The "golden rule of banking" was developed by Hübner (Die Banken ; Leipzig 1854). As regards its present-day significance, cf. Kalveram/Günther, p. 120 ; Schlüter, p.83
- 5) For more detail on this point, cf. Kalveram/Günther, p.118, 120
- 6) Schlüter, p. 105, referring to W. Stützel
- 7) Büschgen, Bankbetriebslehre, p. 454 ; Willners, p.124
- 8) Aust, p. 152
- 9) On this point generally, cf. Hartmann, p. 22 et seq.
- 10) Schlüter, p. 27 et seq.
- 11) Büschgen, Bankbetriebslehre, p. 453 ; Hartmann, p. 30 ; Willners, p. 155, 198
- 12) Point made forcefully by Kühnen, p. 150
- 13) On this point, cf. Hartmann, p. 30
- 14) Hankel, Währungspolitik, p. 254
- 15) See page 44 above
- 16) Kalveram/Günther, p. 116, 118
- 17) Berger, Zeitschrift für Betriebswirtschaft, 1968, p. 221, 222
- 18) For detail on this point, cf. Büschgen, p. 514
- 19) Mühlhaupt/Wielens, p. 236 ; Kruk, FAZ of 28.11.1969 ; Hankel, Währungspolitik, p. 254

- 20) Demonstrated by Arndt, *Wirtschaftliche Macht*, p. 20 ; and Spiegel, No. 4, 1971, p. 46
- 21) Mühlhaupt/Wielens, p. 236
- 22) Büschgen, *Ergebnisgutachten*, p. 31
- 23) Lammerskitten, p. 220
- 24) Also A. Weber, p. 276 ; most recently on this point, Lichtenberg, *ZfgK* 1974, p. 118
- 25) Hankel, *Währungspolitik*, p. 254
- 26) Ost, *Das Wertpapier* 1964, p. 444
- 27) See page 57 above
- 28) See pages 42 and 43 above
- 29) On this point, cf. Büschgen, p. 664
- 30) Büschgen, p. 665
- 31) On this and the following points, cf. Mühlhaupt/Wielens, p. 230
- 32) Thus also Büschgen, p. 666 ; Mühlhaupt/Wielens, p. 231
- 33) Cf. Article 400 of the Commercial Code. It was decided in 1968, however, on the basis of an agreement between the German banks, to handle all customers' orders for officially quoted shares through the stock exchange if no other express instructions were given by the customer (Büschgen, p. 661)
- 34) Mühlhaupt/Wielens, p. 231
- 35) Similarly, Büschgen, p. 661
- 36) In the literature, cf. on this point Weinberg, *Take-Overs and Amalgamations*, London 1967 ; Groos, *Öffentliche Übernahmeangebote in Frankreich*, AWD 1973, p. 592
- 37) For detail on this, cf. Hopt/Will, p. 29. In banking literature, Mühlhaupt/Wielens, p. 229 ; Büschgen, p. 666
- 38) For detail, Hopt/Will, p. 90 et seq.
- 39) Article 82 (Special Supplement to Bulletin 8-1970 of the European Community)
- 40) For detail on banks' tasks in the capital market, cf. Büschgen, p. 466 et seq.
- 41) Büschgen, p. 473 et seq.
- 42) p. 263
- 43) Mühlhaupt/Wielens, p. 223
- 44) See page 57 above
- 46) Büschgen, p. 159
- 47) For details, see p. 7 et seq. above

- 48) Le Brun, Revue de la Banque 1966, p. 742, 745,
with reference to the explanatory memorandum to
the amending bill
- 49) For spectacular examples, cf. Heymann, Vision of
15.5.1971, p. 15 and 16
- 50) Roth, p. 156 with references
- 51) Lorain, Banques 1968, p. 161
- 52) Burton/Corner, p. 165 et seq.
- 53) Roth, p. 160 ; Immenga, Aktiengesellschaft, p. 29
- 54) For details, see Vallenthin, Die Stimmrechtsvertretung
durch Banken nach dem Aktiengesetz von 1965,
Frankfurt 1966
- 55) Immenga, Blick durch die Wirtschaft vom 6.8.1969 ;
Möschel, p. 46
- 56) Cf. the announcement by the Bayerische Hypothekenbank as
regards voting rights on deposited shares, ZfgK 1974, p. 184.
Out of 300,000 requests for instructions, negative
instructions were received in only 350 cases.
See also, Schmidt, D, ZfgK 1970, p. 179
- 57) Monthly reports by the German Bundesbank 1974, No. 8, p.24
- 58) On subsequent points, cf. Tiling, Die Aktiengesellschaft,
1968, p. 343
- 59) Gower, p. 484
- 60) Sonnenberger, Die Aktiengesellschaft 1974, p. 39
- 61) Aust, p. 154
- 62) Möschel, p. 47, 48 ; Aust, p. 154 ; Ponto, Bank-Betrieb
1972, p. 4
- 63) Günther, Bank-Betrieb 1974, p. 199
- 64) Konzentrationsenquête, p. 39 ; Schwilling, in :
Festschrift für Heinrich Rittershausen, p. 294
- 65) Similarly Worret, p. 75
- 66) Hankel, Währungs politik, p. 254 ; on this point,
see also the case described by Heymann in Vision
of 15.5.1971, p. 24
- 67) We cannot here discuss in detail the inadequacies of
the formation of prices for undertakings as based
on company law, particularly group-company law
- 68) Cf. on this point Immenga, FAZ of 16.11.1972
- 69) Similarly Püttner, p. 77 and 78
- 70) Wiborg, FAZ of 8.6.1972
- 71) Cf. also Lenel, p. 291 and 292, with corresponding
examples from economic history, p. 288
- 72) For detail on this point, cf. Immenga, FAZ of 16.11.1972

- 73) For the problems in valuing undertakings, cf. Kolbe, p. 13
- 74) Cf. Sections 23 et seq. of the Act against Restrictions of Competition
- 75) O.J. No. C 92/1 of 31.10.1973 ; on this point, Deringer, Europarecht 1974, p. 99
- 76) Aust, p. 14 et seq. ; Immenga, Wettbewerbsbeschränkungen, p. 138 ; Möschel, p. 363 et seq.
- 77) Hofmann, ZfgK 1971, p. 56 ; Möschel, p. 366 ; Aust, p. 155 ; for France, see Lammerskitten, p. 220
- 78) Hofmann, ZfgK 1971, p. 56 ; Möschel, p. 366, Aust, p. 156,157
- 79) Püttner, p. 65
- 80) Aust, p. 159 ; Worret, p. 75
- 81) Möschel, p. 366
- 82) Hofmann, ZfgK 1971, p. 56
- 83) Cf. Aust, p. 158 ; Worret, p. 75
- 84) Büschgen, p. 781,782
- 85) Cf. particularly, Püttner, p. 76
- 86) Mestmäcker, p. 244
- 87) Demonstrated particularly in newspaper articles, quoted by Büschgen, p. 515 ; cf. also Mühlhaupt/Wielens, p. 224 with references ; Hankel, Währungspolitik, p. 253
- 88) Cf. particularly, Weymer, Industriekurier of 22.6.1967, quoted by Büschgen, p. 516
- 89) On this point, cf. Mühlhaupt/Wielens, p. 224 ; EEC Study, p.233
- 90) Mühlhaupt/Wielens, p. 235
- 91) Only Büschgen (p. 515) considers that this view cannot be proven, because of the difficulties in attributing commercial income and expenditure
- 92) On subsequent points, cf. Mühlhaupt/Wielens, p. 225 and Büschgen, p. 517 et seq.
- 93) E.g. Mestmäcker, p. 245 ; Gieseke, p. 39, 40
- 94) On subsequent points, cf. Püttner, p. 74,75 with a summary of the views found in the literature
- 95) Püttner, p. 75
- 96) Püttner, p. 76
- 97) Arndt, Markt und Macht, p.101
- 98) Kruk, FAZ of 28.11.1969
- 99) Arndt, Theorie der Macht, in : Die Konzentration in der Wirtschaft, p. 101
- 100) Arndt, in : Grosser, Konzentration ohne Kontrolle, p. 40
- 101) Arndt, Ökonomische Theorie der Macht, op.cit. p. 122, 133

- 102) Disclosure of Corporate Ownership. Prepared by the Subcommittees on Intergovernmental Relations, and Budgeting, Management, and Expenditures. Committee Print. Dec. 27, 1973
- 103) Büschgen, p. 102 et seq.
- 104) Cf. Express of 26.8.1974, p. 28
- 105) Möschel, p. 43 et seq.
- 106) D'Illiers/Morgenroth, in Regul/Wolf, p. 280

Chapter Five

- 1) Büschgen, Bankbetriebslehre, p. 453
- 2) This line most recently taken by Günther, Bank-Betrieb, p. 194 et seq.

Chapter Six

- 1) From the speech by Vice-President Simonet, reproduced in Revue de la Banque 1974, p. 374
- 2) O.J. No. L 194 of 16.7.1973, p. 1 ; reproduced in Hellmann/Molitor, p. 148
- 3) On this point, cf. Detienne, Revue de la Banque 1973, p. 419 ; Troberg, Bank-Betrieb 1973, p. 318
- 4) O.J. No. 43 of 12.7.1960, p. 921 ; reproduced in Hellmann/Molitor, p. 127 ; on this point cf. Maestripieri, in : L'intégration des marchés européens de valeurs mobilières, p. 35 et seq.
- 5) O.J. No. 9 of 22.1.1963, p. 62 ; reproduced in Hellmann/Molitor, p. 131
- 6) COM (74) 2010 final (10.12.1974)
- 7) See p. 103 above
- 8) Regul, in : Regul/Wolf, p. 34 ; Segré Report, p. XII
- 9) Gleske, in : Deutscher und internationaler Kapitalmarkt, p. 79
- 10) See p. 79 and 80 above
- 11) Page 248
- 12) Cf. Segré Report, p. 263
- 13) Falk, ZfgK 1972, p. 1118

Chapter Seven

- 1) For relevant proposals in Germany and associated problems, see Büschgen, p. 793 et seq.
- 2) Pages 248, 263 and 338
- 3) See page 6 above for Belgium
- 4) Segré Report, p. 234 ; no relevant evidence is available in respect of the countries subsequently acceding

Addendum

After the completion of this study (February 1975), the Belgian Law Bank was amended (Amending Law of 30 June 1975, Moniteur Belge, 2 August 1975, page 9471). Article 14 of the previous Bank Law is affected by the amendment. In principle, the separation system is retained, but the following additions must be made to Chapter 2, Section I (Belgium)(2)(Exceptions) of the study :

- (a) : Banks are now permitted to invest not only in other banks but also in savings banks and in credit institutions set up under special laws. The interpretation given in the second paragraph of (a) (footnote 6) is expressly incorporated into the law in the form of the power to authorise exceptions (Article 14(7), new version).
- (b), (c) and (d) : Unchanged
- Addition : (e) : Article 14 (4) of the Belgian Bank Law was redrafted in June 1975 and now in addition permits shares to be held where these shares do not exceed certain limits with regard to their value or to the voting rights which they confer; these limits are to be determined by royal decree, issued on the basis of an opinion by the Banking Commission. This very far-reaching general exception will still prevent banks from exerting a controlling influence over non-banks (no majority holdings, etc.) but represents a distinct step in the direction of the "despecialisation" of Belgian deposit banks. A revised form of Article 14 (6) of the Belgian Bank Law confers upon the Banking Commission a specific right to require the communication of information and a right to set limits to the risks that may be assumed by way of trade investments.

ANNEX I

STATUTORY BASES

Article 14

No bank established in any of the forms specified under Article 8 may possess partnership shares or shareholdings of any kind whatever in any one or more commercial companies or companies having a commercial form other than banks or in any one or more undisclosed partnerships.

Such banks may, however, subscribe for or purchase such securities, other than through a stock exchange, for the purpose of offering them for sale and may retain ownership therein for a period not exceeding one year as from the time subscription or purchase is first undertaken to this end. Subject to the same limitations, they may similarly hold shares in one or more undisclosed partnerships formed for the purpose of offering shares or bonds for sale.

Such banks may, furthermore, acquire ownership of the securities referred to in paragraph 1 of this article in order to protect themselves against their doubtful or overdue debts. Such securities shall be disposed of within a period of two years.

The prohibition imposed under paragraph 1 shall not apply to the securities referred to therein where these are guaranteed by the State, by the Colony, by the provinces or by the civil parishes, nor to shares in the capital of credit institutions set up by special statute.

The Banking Commission may, in respect of periods not exceeding one year in either case, grant two extensions to the periods specified under paragraphs 2 and 3.

The Banking Commission may, by regulation approved by the Minister of Finance and by the Minister for Economic Affairs, lay down instructions applicable to all registered banks intended on the one hand to ensure that it receives information on the transactions set out in paragraph 2 and, on the other hand, to limit the relative extent of portfolios of securities to be offered for sale.

The Banking Commission may grant dispensation from the limits laid down by it by virtue of the preceding paragraph where these are justified by exceptional circumstances.

PENAL SANCTIONS. Article 42 (4) - Directors, managing partners, managers and chief clerks who contravene the provisions of Article 14 shall be punished by the penalties provided for under Article 179 (now 204) of the consolidated legislation on commercial companies (imprisonment for one month to one year and a fine of 50 to 10,000 francs, or either of these two penalties alone).

Article 44 - Bankers, directors, managing partners, managers and chief clerks failing to observe the provisions of the regulations laid down by Article 14 (6) shall be punished by imprisonment for eight days to three months and a fine of 50 to 10,000 francs, or one of these penalties alone.

(5) The equity capital shall be valued on the basis of the most recent balance sheet drawn up as at the end of a financial year. Capital changes subsequently entered in public registers shall be taken into account.

Section 11 Liquidity. Credit institutions shall invest their funds in such a way that adequate liquidity shall be guaranteed at all times. The Federal Supervisory Office shall lay down principles in consultation with the German Federal Bank by means of which it shall normally be judged whether a credit institution's liquidity is adequate; the credit institution's professional associations shall be consulted beforehand. The principles shall be published in the Federal Gazette.

Section 12 Investment in land, ships and participation. Permanent investment by a credit institution in land, buildings, ships and participation may not in aggregate, when calculated by book values, exceed the equity capital. The Federal Supervisory Office may on application permit a credit institution to depart from this provision temporarily.

2. Credit business

Section 13 Major credit (1) Credit granted to a borrower exceeding in the aggregate 15% of the credit institution's equity capital ("major credit") shall be notified forthwith to the German Federal Bank; this shall not apply to major credit where the sum granted or drawn is not more than 20,000 Deutsche marks, unless such major credit exceeds the credit institution's equity capital. Major credit already notified shall be notified again if it is increased by more than 20% of the sum last notified. The German Federal Bank shall pass such notification on to the Federal Supervisory Office together with its opinion thereon; the latter may waive the passing on of specific notification. The Federal Supervisory Office may require credit institutions to submit a summary once yearly of major credit qualifying for notification.

(2) Credit institutions having the legal form of a corporate entity or a trading partnership may without prejudice to the effectiveness of the transaction grant major credit only by virtue of a unanimous decision by all management. The decision shall be taken before credit is granted. Where this is impossible in

particular cases owing to the urgency of the transaction, the decision shall be taken subsequently without delay. The decision shall be officially recorded. If a decision has not been obtained within one month the Federal Supervisory Office shall be informed accordingly.

(3) Major credit shall not in the aggregate comprise more than one-half of the sum of all credit granted by the credit institution. The relevant amounts for this purpose shall be the sums drawn.

Chapter 6

Investment and liquidity of assets

Section 23. A bank or savings bank may not grant a customer credit or take up guarantees for the person concerned to such an amount that the bank's or savings bank's total outstanding account with, or obligations on behalf of, the person concerned exceed 35 per cent of the bank's or savings bank's equity capital at the beginning of the year, in addition to equity capital originating from share or guarantee capital subscribed during the year. Upon the unanimous recommendation of the Board of Managers and with the consent of at least two-third of the Board of Directors in each case, this limit to the extent of individual commitments may be increased to 50 per cent. Such a decision must be reported to the Inspectorate of Banks and Savings Banks. This also applies to a bank's or savings bank's total outstanding accounts with, and obligations on behalf of, undertakings between which there is such a connexion that the commitments with these constitute a joint individual risk for the bank or savings bank.

Para. 2. The Minister of Trade may establish regulations providing for particularly safe claims to be disregarded in the calculation of the amounts set out in Para. 1.

Section 24. A bank or savings bank may not own or raise a loan on shares, co-operative shares or guarantee certificates in an individual company at a book value higher than 15 per cent of the bank's or savings bank's equity capital. However, the bank's or savings bank's interest in the undertaking concerned may not thereby exceed the limit set out in Section 23, Para. 1. The book value of the shares, co-operative shares and guarantee certificates acquired by a bank or savings bank may not exceed 50 per cent of the bank's or savings bank's equity capital.

Para. 2. A bank or savings bank may not acquire or, with a right to exercise voting rights, pledge more than 30 per cent of the share capital in a bank or of the guarantee capital in a savings bank. With its annual accounts, the bank or the savings bank shall submit to the Inspectorate of Banks and Savings Banks a return of the shares in banks and guarantee certificates in savings banks that it possesses or has pledged.

Para. 3. A bank may not acquire or accept as security its own shares to a total face value greater than 10 per cent of the share capital. Pledges may not exceed 75 per cent of the pledged document's market value and of its face value or, if the document is the subject of a market quotation, 75 per cent of the buying price quoted at any time. A report on such pledging and acquisition shall be submitted to the Inspectorate of Banks and Savings Banks together with the monthly balances.

Para. 4. If a bank or savings bank grants a loan for the taking up of its share of guarantee capital beyond 5 percent of the bank's or savings bank's total share or guarantee capital, incontestable surety must have been provided for the excess amount.

Para. 5. A savings bank may not acquire or accept as security its own guarantee certificates.

Section 25. A bank or savings bank may not own real property or have shares (holdings) in property companies at a higher book value than 20 per cent of its equity capital. Real property that a bank or savings bank has acquired in order to operate bank or savings bank activities therein is however not covered by the regulation.

Section 26. The Inspectorate of Banks and Savings Banks may grant exemption from the provisions of Section 23, Para. 1, Section 24, Paras. 1 and 2 and Section 25.

Section 27. A bank or savings bank may not, without the permission of the Inspectorate of Banks and Savings Banks, grant credit to or issue guarantees for undertakings or persons which, through shareholdings or otherwise, directly or indirectly, have a controlling influence upon the bank's or savings bank's transactions, or which are controlled by undertakings or persons having such an influence.

Para. 2. If the Inspectorate has good reason to assume that permission pursuant to Para. 1 is necessary, and this is contested by the bank or savings bank concerned, it is for the latter to prove that this is not the case.

Section 28. According to the circumstances of the bank or savings bank, it must have a sound cash balance, in which may be included fully secure and liquid demand deposits with Danish and foreign banks and savings banks as well as credit balances on postal giro accounts. The cash balance, together with the value of the holdings of secure, easily realizable, unpledged securities and credit instruments shall amount to at least 15 per cent of the liabilities that - irrespective of any payment conditions - the bank or savings bank is required to pay on demand or at notice shorter than one month. The liquid holdings referred to must also amount to at least 10 per cent of the bank's or savings bank's total liabilities and guarantee obligations, as computed pursuant to Section 21.

Para. 2. If the requirements of Para. 1 are not met and the position not rectified within eight days, the bank or savings bank shall report this immediately to the Inspectorate of Banks and Savings Banks. The Inspectorate sets a time limit for the requirements to be met.

France

Article 5 (Decree No. 66-81 of 25 January 1966). Deposit banks (banques de dépôts) are banks whose chief activity is to carry on credit operations and to receive sight and time deposits from the public.

(Decree No. 66-1053 of 23 December 1966). They shall not keep participatory shareholdings to an amount exceeding 20% of the capital in undertakings other than banks, financial institutions or companies necessary to their operation and undertaking the management either of real assets or research services or technical services connected with banking.

(Decree No. 67-757 of 1 September 1967) Furthermore, the aggregate of the said participatory holdings, including firm subscriptions for share issues, shall not exceed the aggregate of their own resources.

Deposit banks, in the absence of special and temporary dispensation granted by the Banking Control Commission, shall not exceed the limits set out in the two preceding paragraphs or use any sight deposits or deposits with a term of less than two years for participatory investment or investment in immovables.

Deposit banks whose chief activity is to intervene on the money market or the foreign exchange market may receive deposits from the public only up to the level of such proportion of their own resources as may be fixed by the National Credit Council.

Investment banks (banques d'affaires) are banks whose chief activity, other than the granting of credit, is the acquisition and management of participatory holdings in existing businesses or businesses in the course of being set up.

For this purpose they may not invest funds received at sight or for a term of less than two years.

Long and medium-term credit banks (banques de crédit à long et moyen terme) are banks whose chief activity is to grant credit for a term of at least two years. They may not receive deposits for a shorter term than this without the permission of the Banking Control Commission.

They shall be subject to the same restrictions as deposit banks as regards participation by them, save in the case of special and temporary dispensation granted by the Banking Control Commission.

The above provisions shall not apply to credit establishments placed under State control exercising their activities within the framework of a constitution defined by law. Such provisions, however, may be extended in whole or in part by decree of the Council of State⁽²⁾.

(1) Former Art. 4: there are three classes of bank: deposit banks, investment banks, and long and medium-term credit banks.

Each bank must adopt one or other of these classes by declaration made to the Banking Control Commission within three months of the effective date of the present Act. They are allowed one year to conform with the rules applying to their class except in the case of dispensation or extension granted by the Banking Control Commission.

All of them shall be subject to the controls provided for under Arts. 12-15 below.

(Added under Act No. 46-1071 of 17 May 1946): The Control Commission may within a period of two months indicate that it does not accept the classification requested by a bank and may place it in another class. Similarly, where a bank's activities no longer comply with the conditions on which its previous classification had been based, the Control Commission may amend such classification. In either case, an appeal may be lodged against the decision before the National Credit Council within a period of one month.

(2) Former Art. 5 (wording of the Act of 2 December 1945): Deposit banks are banks receiving sight deposits or deposits with a maximum term of two years from the public. They may not hold participatory interests in undertakings other than banks, financial institutions or property companies necessary for their operation exceeding 10% of the capital of such undertakings. They may not in the form of participation or in investment in real property use the deposits that they receive from the public without permission from the Deposit Committee of the National Credit Council.

Investment banks are banks whose chief activity is to acquire participatory holdings and to manage such participatory holdings in undertakings and which do not receive sight deposits or deposits with a term of one year or less except from their own staff, their active or sleeping partners or from undertakings in which they effectively hold 15% of the nominal capital or which they have caused

to be set up by accepting participation at a level of 15% of the initial capital.

The class of long and medium-term credit banks covers the establishments having such objects, which have been placed under State control and which carry on their activities within the framework of a constitution laid down by law. Their chairman, director-general or governor shall be appointed by the State. Banks specialising in long and medium-term credit not falling within this definition shall be deemed to be investment banks.

Former Art. 5 (wording of Act No. 46-1071 of 17 May 1946): Deposit banks are banks which receive sight deposits or deposits with a term not exceeding two years from the public.

They may not hold participatory interests in undertakings other than banks, financial institutions or property companies necessary for their operation to an amount exceeding 10% of the capital of such undertakings.

In no case shall the total sum of such participation, including firm subscriptions for share issues, exceed 75% of their own funds. Any exceeding of this limit and any utilization of their deposits in the form of participation or property investment is prohibited unless authority is granted by the Deposit Committee of the National Credit Council.

Investment banks are banks whose chief activity is to acquire and to manage participatory holdings in existing businesses or businesses in the course of being set up and to offer credit without limitation as to time to public or private undertakings which benefit, have benefited or will benefit from the said participation.

For this purpose they shall invest only such funds as derive from their own resources or from deposits at not less than two years' call or notice.

(Note continued on page 3)

In exercising the function of supervising the activities of holders of licences, the Bank will continue to apply, as appropriate, the requirements and standards set out above. In addition it will apply the following standards:-

1. Structure

A holder of a licence

- (i) Should observe minimum liquidity standards appropriate to its class of bank.
- (ii) Should not pay a dividend until all of its preliminary expenses have been recovered out of profits.

2. Activities

A holder of a licence

- (i) Should not, except under penalty as to rate, repay on shorter notice than that which was agreed, money held on deposit in cases where the agreed notice period exceeds ten days.
- (ii) Should not owe more than 10 per cent. of deposits to any one depositor.
- (iii) Should not extend more than 10 per cent. of total bills, loans and advances (including acceptances) to any one individual, firm or group of companies.
- (iv) Should not extend more than 2 per cent. of total bills, loans and advances (including acceptances) to any of its directors or a business in which it or any of its directors has what is considered by the Central Bank to be a major interest.
- (v) Should not, without the prior approval of the Central Bank, make an investment in voting shares of another company in excess of 20 per cent. of such shares except in the case of:-
 - (a) another bank or a company offering financially-related services, i.e. engaging in activities functionally related to banking; or
 - (b) a business in which the holder's investment by way of shares, bills, loans and advances (including acceptances) is less than 2 per cent. of the total of its assets in these forms.

- (vi) Should not have an undue concentration of risk assets in any one sector of business or economic activity.
- (vii) Should not grant an advance, loan or credit facility against the security of its own shares or the shares of any subsidiary, fellow-sub subsidiary or parent company unless such shares are quoted on a Stock Exchange.
- (viii) Should ensure that its activities are consistent with the aims of economic and monetary policy, the safety of depositors' funds and fair trading in banking.

Article 35

The Supervisory Office further disposes of the following powers with regard to undertakings under its supervision:

- a) to order meetings to be convened of shareholders and participating corporate entities and of the board of management and other governing bodies in order to submit to them for comment the instructions considered necessary in respect of the undertakings and to convene meetings itself if the competent bodies fail to heed this call;
- b) to order compulsory execution proceedings to be opened against debtors through whom the financial undertaking is considered by the supervisory office to be in arrears of payment;
- c) to lay down provisions for the elimination, reduction or settlement of interruptions in payments occurring in the case of the said undertakings.

The Supervisory Office may, further:

- a) specify the relationship between the company's assets and investments in land and securities;
- b) lay down upper limits to the granting of credit and issue provisions and time-limits with regard to reductions in the case of excessive credit;
- c) issue provisions regarding the declarations to be made by applicants concerning their financial and economic position in order to obtain credit;
- d) give its opinion on an application that the undertaking proposes to make to the court to summon the creditors for the purpose of making a composition. An application shall be deemed unacceptable by the court if it is not accompanied by such an opinion or a simple declaration by the Supervisory Office that there is no impediment to such an application being made.

17 - Participatory Holdings

(Articles 33 and 35 of the Banking Act)

For supervisory purposes "participation" shall as a general rule mean any investment intended to create economic and/or capital links in other than a transitory manner:

- in the shares of part-holdings in the capital or capital funds of banking and non-banking companies and organizations for the purpose of exercising, either exclusively or in concert with other subsidiaries, the rights and powers attaching to the ownership of shares or part-holdings;
- in shares taken up in organizations set up or promoted by the State or by other public bodies entrusted with specific tasks or functions of a general nature.

Participatory holdings which credit institutions may wish to take up in exceptional circumstances for good reason shall be notified beforehand to the Supervisory Office accompanied by a full explanation of the matter and by copies of the balance sheets for the last three years of the establishment in which a participatory holding is to be taken up.

The requirement as to prior notification relates both to the assumption of shares in the initial capital or capital funds of a company or organization and to an increase, even by a scrip issue, in such holdings already in being.

Notification shall further be made of any variation made in participatory holdings even where no actual payments are concerned (refunds, transfers, depreciation).

The Bank of Italy has instituted a general scheme for a credit system with regard to "banking and other" participatory holdings and has prepared appropriate documents known as Forms 84 Vig. and 85 Vig.

Form 84 Vig. was completed at the end of the 1969 financial year in respect of all participatory investments held by a finance house or special credit institution, however such holdings may be treated for accounting purposes, including those totally written off or depreciated which, moreover, shall be shown separately in open account if only at the nominal value of 1 Lira.

Form 84 Vig. must be used to notify the assumption of new participatory holdings and shall further be used as soon as any individual new investment is made whether wholly or in part.

Credit houses and special credit institutions shall on their own accord enter on form 84 Vig. only the following details for the time being:

- details of the credit house and the special credit institution making notification;
- details of the participatory holdings: such details must include individual specification of the items in the account (forms 81, 82 and 140 Vig.) under which the holding has been entered;
- details of commercial activities, to be indicated in conformity with those adopted by the Risk Centre.

As regards the registered office, in addition to the details entered in full, credit houses and special credit institutions shall place only a cross "X" in box "R" as regards resident companies and in box "NR" as regards non-resident companies. A similar cross must further be placed in one of the boxes to the right of the capital entry for the purpose of indicating cases where the capital of the company comprises listed shares ("AQ"), unlisted shares ("ANQ") or part-shares ("Q").

Form 85 Vig. shall be used only to indicate any variation occurring in the participatory holding and also affecting any entry in the "registry" or "status" sections of form 84 Vig.; notwithstanding the above, the registry section shall in all cases include an indication of the company's name and registered office to permit proper identification of the holding.

The Netherlands

From the Dutch Bill to reform the Supervisory Act

Article 17

1. Credit institutions shall not, save where a declaration of consent has been obtained from the Bank:
 - a) reduce their own assets by a repayment of capital or payment out of the reserves;
 - b) obtain participation in other undertakings or institutions directly or indirectly, participation being taken to mean an interest exceeding 5% of the net worth of the undertaking or institution concerned, nor increase such a participation;
 - c) take over the assets and liabilities of other undertakings or institutions in whole or in a substantial part;
 - d) enter into mergers with other undertakings or institutions;
 - e) proceed to financial reorganization;
 - f) cause a managing partner to join a credit institution.

ANNEX II

STATISTICAL DETAILS REGARDING BANKS' PARTICIPATION IN THE NON-BANKING SECTOR
IN GERMANY

Banks' participation in the non-banking sector

(Notes on the tabulated summaries)

Introduction

Having regard to the relevance of a 25% participation under shareholding law (Sections 179 (II) 1. and 182 (I) 1. AktG.), only such participation has been included in the investigation where the shareholder owns at least one-quarter of the share capital of a public limited liability company or a limited partnership with share capital.

For the sake of clarity, it should be pointed out that all capital sums referred to below represent the nominal value.

1. General

In 1972/73 there were 2,169 public limited liability companies and limited partnerships with share capital having their shareholders' rights embodied in formal documents; the total share capital of these companies amounted to DM 64,455 million.

Amongst these companies, a total of 2,816 participatory holdings of 25% and over was ascertained. This participation represents DM 40,477 million or 62.8% of the total share capital. In other words, only 37.2% of the total share capital (i.e. DM 23,978 million) was held by small and medium-sized shareholders; of the latter sum, in turn, DM 9,532 million was attributable to 36 companies, mainly major undertakings, in the case of which substantial participation could not be determined.

2. Banks' participation in particular (position at 30.11.1973)

2.1 The scope of the investigation

Included in the investigation were 400 companies, i.e. 18.44% of the total basic unit of 2,169 companies. 73, i.e. 18.25%, of the companies investigated held

one or more participatory interests of 25% and over. Altogether, 83 participatory holdings were found amongst the 73 companies.

2.2 The extent of participation in detail

The share capital of the companies investigated amounted to DM 3,359.45 million, i.e. 5.21% of the total share capital.

The total amount of the banks' participation in the companies investigated was DM 1,279.01 million. Of this, DM 90.23 million related to majority holdings, and DM 1,188.78 million to participation from 25% up to, but not including, 50%.

Participation by only one bank was found in the case of 63 companies, by two banks in the case of 9 companies and by three banks in the case of only one company.

Participatory holdings were owned by 24 credit institutions - major banks and private banks - the greatest extent of participation by value (but not by volume) falling, as might be expected, to the three major banks. In relation to the total amount of share capital, banks' participation amounted to about 2%.

2.3 Participation and net worth of the banks

The statistics on the banks' participation and net worth/own funds deserve special attention.

If calculation is based exclusively on the share capital of the bank concerned, it appears that, for example, participation by the Deutsche Bank amounted to just under 60% of this capital sum, by the Dresdner Bank to about 49%, and by the Commerzbank to 42%. If the reserves are added to the share capital, participation by the three major banks changes within a range of 16-19% of this capital sum. It should be stressed once again in this connexion that the percentages quoted have been calculated on the basis of the nominal value of the participation. If the balance sheet values were used as a basis for participation, the latter would exceed the net worth of the credit institution concerned many times over.

Participations by banks in the non-banking sector

As of November 30. 1973

No	B a n k	Global amount of participations ⁺ in mill. DM	
1.	Deutsche Bank	431,56	(10)
2.	Dresdner Bank	261,49	(12)
3.	Commerzbank	187,29	(8)
4.	Bayer. Hyp. & W.	127,54	(16)
5.	Westdt.Landesbank, Girozentrale	95,32	(3)
6.	Bankhaus Merck, Finck & C°	30,73	(5)
7.	Warburg-Brinckmann, Wirtz & C°	28,80	(1)
8.	Bayer.Vereinsbank	25,59	(8)
9.	Vereinsbank Hamburg	15,66	(4)
10.	BHF-Bank	13,17	(1)
11.	Bankhaus Sal.Oppenheim	11,32	(1)
12.	Bayer.Landesbank	8,96	(1)
13.	Bankhaus Werhahn	8,82	(1)
14.	Bankhaus Friedr.Hengst & C°	8,70	(2)
15.	Investitions- und Handelsbank	6,00	(11)
16.	Aug. Lenz & C°	5,90	(1)
17.	Westfalenbank	3,00	(1)
18.	ADCA	2,40	(1)
19.	Handels- und Gewerbebank	2,29	(1)
20.	Bankhaus Aufhäuser	1,53	(1)
21.	Städt.Girokasse Stuttgart	1,09	(1)
22.	Westbank	1,02	(1)
23.	Württbg. Bank	0,48	(1)
24.	Bankhaus Metzler	0,35	(1)
Total participations		<u>1.279,01</u>	(83)

+ the number of participations held by each bank is
indicated in brackets

Participations by banks and own funds (as of November 30, 1973)

No.	B a n k	equity capital (mill.DM nominal)	participations (mill.DM nominal)	participations/ % of equity capital	equity capital and open reserves (mill.DM nominal)	participations/ % of equity capital and open reserves
1.	Deutsche Bank	720,00	431,56	59,94	2.217,1	19,00
2.	Dresdner Bank	533,58	261,49	49,01	1.514,5	17,27
3.	Commerzbank	444,00	187,29	42,18	1.139,9	16,43
4.	Bayer.Hyp. & W.	240,00	127,54	53,14	932,4	13,68
8.	Bayer. Vereinsbank	223,00	25,59	11,48	838,6	3,05
9.	Vereinsbank Hamburg	45,53	15,66	34,40	125,0	12,53
10.	BHF-Bank	75,30	13,17	17,49	228,4	5,77
15.	Investitions- und Handelsbank	140,00	6,00	4,29	199,4	3,01
18.	ADCA	91,25	2,40	2,63	102,0	2,35
22.	Westbank	26,00	1,02	3,92	76,8	1,33
23.	Wirttbg. Bank	18,00	0,48	2,66	51,0	0,94

Participations by banks and own funds (as of November 30, 1973)

P a r t i c i p a t i o n s

Shareholder	C o m p a n y	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Bayer.Hyp. & W.	AGROB-AG f. Grob- und Feinkeram.			26	3,01		
"	Aktienbrauerei Kaufbeuren					x	0,67
"	Diamalt	x	3,73				
"	DUB Schultheiss Brauerei					x	44,52
"	Erste Kulmbacher Actien-Brauerei Exp.	x	2,91				
"	Heilmann & Littmann					x	2,70
"	Metallp. Bronzefarb.- Blattmetallwerke					x	0,45
"	Neue Baumwoll- Spinn.u.Web.					x	3,30
"	Niedermayr Papier					x	0,60
"	Papierwerke Waldhof- Aschaffenburg			30	39,48		
"	Patrizier-Bräu					x	4,74
"	Paulaner-Salvator- Thomasbräu	x	4,52				
"	Reichelbräu Kulmbach	x	2,41				
"	Rosenthal AG					x	6,15
"	Ver. Fränk. Schuhfabriken	x	0,58				
"	Wickiller-Küpper-Brauerei KG	x	7,77				
TOTAL 127,54 Mill.DM			21,92		42,49		63,13

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Bayer. Vereinsbank	Aktien-Brauerei Kaufbeuren	x	1,14				
"	Andraae-Noris Zahn					x	7,80
"	Augsbg.Brauerei zum Hasen	x	1,22				
"	Bayer.Harstein-Ind.					x	0,18
"	Hacker-Pschorr-Bräu	x	8,40				
"	Hageda AG					x	2,55
"	Neue Baumwoll-Spinn. u.Web.			35	3,85		
"	Universitäts-Druckerei H. Stürtz					x	0,45
TOTAL 25,59 Mill.DM			10,76		3,85		10,98
Aug.Lenz & C ^o	AGROB-AG f.Grob. u.Feinkeram.	x	5,90				
TOTAL 5,90 Mill.DM							

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
BHF-Bank	ALOKA Allg. Organ. u. Kapitalbeteiligung- AG	x	13,17				

TOTAL 13,17 mill.DM

Deutsche Bank	Augsbg. Kammgarn- Spinnerei					x	4,20
"	Bayer. Elektrizi- tats-Werk			40	8,80		
"	Daimler Benz					x	284,92
"	Didier-Werke					x	20,40
"	Hoffmanns Starkefab.					x	2,24
"	Holzmann, Philipp					x	13,50
"	Karstadt					x	67,50
"	Moenus Maschinen					x	1,20
"	Pittler Maschinen- Fabrik					x	5,40
"	Suddeutsche Zucker					x	23,40

TOTAL 431,56 mill.DM

8,80

422,76

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Westfalen- bank	Balcke-Dürr AG					x	3,00
TOTAL	3,00 mill.DM						
Bkhs.Sal. Oppenheim	Basalt AG, Linz	x	11,32				
TOTAL	11,32 mill.DM						
Vereins- bank Ham- burg	Bavaria-u.St. Pauli Brauerei					x	4,56
"	Haller-Meurer- Werke					x	1,80
"	Holsten Brauerei					x	7,50
"	New York Hambg. Gummi-Waren					x	1,80
TOTAL	15,66 mill.DM						15,66

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Warburg- Brinckmann	Beiersdorf & C ^o					x	28,80
TOTAL		28,80 mill.DM					
Westdt. Landesbank- Girozen- trale	Berliner Kindl Brauerei					x	6,27
"	Preussag			26,5	83,47		
"	Werkzeugmasch. Gildemeister					x	5,58
TOTAL		95,32 mill.DM					
Handels- und Gewerbebank	Brauerei-Cluss	x	2,29				
TOTAL		2,29					
Bankhaus Aufhäuser	Bürgerl. Brauhaus Ingolstadt	x	1,53				
TOTAL		1,53					

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Bankhaus Metzler	Chem. Werke Brockhues					x	0,35
TOTAL 0,35 mill.DM							
Dresdner Bank	DUB Schultheiss Brauerei					x	44,52
"	Grün & Bilfinger	x	11,47				
"	Hageda AG	x	4,33				
zusammen mit Dt. Länd. Bk. Dresdner Bank	Heidelberger Portland Zementwerke					x	32,40
"	Kaufhof					x	90,00
"	Kempinski					x	3,30
"	Metallgesellschaft					x	62,02
"	Nordwolle Beteiligung- u. Grundbes. AG	x	2,44				
"	Pittler Maschinenfabrik					x	5,40
"	Reichelt, F.					x	1,81
"	Verein. Kanngarnspinnereien					x	3,00
"	Ver. Schmirgel- und Maschinenfabriken					x	0,80
TOTAL 261,49 mill.DM			18,24				243,25

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
Commerzbank	Hannov.Papierfabriken					x	8,40
"	Gesellschaft Hochtief					x	13,95
"	Isenbeck Brauerei					x	1,80
"	Kaiserbrauerei					x	0,81
"	Karstadt					x	67,50
"	Kaufhof					x	90,00
"	Kempinski					x	3,30
"	Maihak	x	1,53				
TOTAL	187,29 mill.DM		1,53				185,76

Bankhaus Merck, Finck & Co	Hochtief					x	13,95
"	Markt & Kühlhallen					x	6,89
"	Sektkellerei Wachenheim					x	0,54
"	Ver.Werkstätten					x	6,80
"	Würzburger Hofbräu		2,55				
TOTAL	30,73 mill.DM		2,55				28,18

Shareholder	C o m p a g n y	majority	mill.DM	%	P a r t i c i p a t i o n s		
					mill.DM	over 25 %	mill.DM
Investitions- u.Handels- bank	Hussel AG					x	6,00
TOTAL	6,00 mill.DM						
Westbank	Kühlhaus- Zentrum	x	1,02				
TOTAL	1,02 mill.DM						
Bankhaus Friedrich Hengst & C° "	Maschinenfabr. Hartmann Roland Offset					x	0,90
						x	7,80
TOTAL	8,70 mill.DM						8,70
Bayer.Lan- desbank	Münchener Licht- und Kraft- anlagen			32	8,96		
TOTAL	8,96 mill.DM						

Participations

Shareholder	Company	majority	mill.DM	%	mill.DM	over 25 %	mill.DM
ADCA	Norddt.Stein- gutfabrik					x	2,40
TOTAL		2,40 mill.DM					
Städt.Giro- kasse Stuttgart	Schlossgarten- bau Stuttg.					x	1,09
TOTAL		1,09 mill.DM					
Württbg. Bank	Stuttgarter Bäckermühlen					x	0,48
TOTAL		0,48 mill.DM					
Bankhaus Werhahn	Strabag Bau					x	8,82
TOTAL		8,82 mill.DM					
GENERAL							
TOTAL	1.279,01		90,23		147,57		1.041,21

STUDIES

which have been published in English in the
"Competition" – "approximation of legislation", series⁽¹⁾

8267 – No. 9

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