THE BELGIAN ‘COMMISSION BANCAIRE’: FUNCTIONS AND METHODS

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The Belgian Commission Bancaire (Banking Commission) plays a prominent role of supervision and counsel which is at the heart of Belgian financial activities. That role is a consequence both of its legal structure and of the work of several outstanding presidents, in particular Mr. Eugène de Barsy, president of the Banking Commission from 1944 to 1972.

This paper is mainly devoted to the methods of the Commission in the field of banking and securities regulation and company (or corporation) law. Emphasis will be placed on the sometimes amazing contrast between the limited legal functions and powers of the Commission on the one hand and, on the other hand, the importance of the principles of company law and financial ethics informally developed by the Commission, described in its annual reports and generally approved and complied with by Belgian company executives.

The importance of the role played by the Commission is shown by a gradual increase in its principal functions up to 1975: banking regulation, securities regulation, and supervision of investment funds and holding companies. Moreover, by an Act of June 30, 1975, usually called the ‘Mammouth Act’, the Commission was given regulatory authority over private savings banks.

In this paper, we intend to examine briefly the legal nature and structure of the Commission (section 1), its banking regulation functions and its other functions as the regulatory body of financial institutions (section 2) and its powers, work and methods in the field of securities regulation and company law (section 3). 1 The paper concludes with some suggestions (section 4).

1. Legal nature and structure of the Commission

A. Origin and legal nature

The Great Depression made clear the need for the establishment of some system of financial regulation in Belgium. As a first step, a Royal Decree of August 22, 1934 prohibited ‘mixed banks’, i.e., financial institutions which functioned both as deposit banks and as holding companies.

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The real reform came one year later through the Royal Decree of July 9, 1935 (Royal Decree No. 185) on regulation of banking and securities issues. The Decree also created the Banking Commission as an ‘organisme autonome’ to be the body that regulated the institutions and transactions specified in the Decree.

Under Belgian administrative law, the Commission is an ‘établissement public’. However, its form does not sufficiently explain its main feature: its autonomy in law and in fact (see subsection C of this section).

B. Structure and organization

The Banking Commission consists of a president and six members appointed by royal decree. There are no restrictions on the choice of the president and two of the members; two members must be chosen from a list drawn up by the banks and private savings banks associations; and two members must be chosen from a list drawn up by the National Bank (‘Banque Nationale de Belgique’ and the IRG (‘Institut de Réescompte et de Garantie’), another monetary institution. Once appointed, the president and members of the Commission usually remain in office irrespective of Government changes; any other governmental attitude would be considered an attack on the Commission’s autonomy.

The president of the Banking Commission is much more than its chairman. He is effectively the head of its management. He represents the Commission and executes its decisions. The Commission itself meets once or twice a month.

The staff is limited in number, although there has been a significant increase during the last ten years. In theory, there are no hearings by the Commission itself. All contacts and meetings are with the president or with the heads of departments.

C. Autonomy

The Commission’s autonomy is an essential characteristic, both because it influences the legal nature of the Commission and, more important, because it is one of the main explanations of the Commission’s efficiency and prestige.

The Commission’s autonomy from the Belgian Government is in reality close to independence. This independence was sought by the authors of Royal Decree No. 185 in 1935, a time when regulatory bodies in the financial field were just being created and were therefore regarded suspiciously. It was a way to establish an agency that in theory would not be influenced by political trends and governments, would have a technical approach, and would be outside the power of the Minister of the Treasury.

Except for a limited number of cases specified by law, the Commission acts and decides independently, and bears full responsibility for its actions and decisions. This independence is illustrated each year by an annual report of high intellectual quality, which is not submitted for any prior governmental or other approval. These reports affirm, once a year, the personality and originality of the Commission. Moreover, there is no general administrative ‘tutelle’ on the Commission and no representative of the Government (‘commissaire du Gouvernement’) is present at
its meetings. Only in a few special cases (e.g., general regulations in the field of
bank ratios) is a prior governmental approval required.

Regulations and decisions of the Commission may be reviewed by an appeal
which sometimes is to the Minister of the Treasury ('Ministre des Finances'), and
sometimes is to the Council of State. Moreover, the Commission may be sued in
tort. However, such appeals or suits are extremely rare.

The initial idea of the Government in 1935 was to give the National Bank
authority over the Commission. For various complicated reasons, that approach was
abandoned, although some traces of it may still be found in Royal Decree No. 185.

The Commission's financial resources in no way depend on the State nor (with a
minor 'historical' exception) on the National Bank. Indeed, an original method of
financing was found, based on the idea that it would be fair to have the supervised
institutions pay the expenses of the supervising body. It was also a clear reminder
of the autonomy of the Commission, and in particular of its autonomy from the
State. 3

But, apart from these legal and financial aspects, the autonomy of the Commis-
sion is a reality in fact. Regulation of each bank (or other regulated financial insti-
tution) and examination of each securities issue file are without external influences.
This independence has made possible the work accomplished by the Commission in
those fields.

Problems of a more general nature are examined by the Commission with the
same intellectual independence, but in these areas consideration is given to main-
taining a subtle balance within what has been rightly called the 'triangle': Treasury,
National Bank, and Banking Commission. Within the 'triangle', the main influence
is of course exercised by the Treasury for problems affecting the State resources
and by the National Bank for all other monetary and macro-economic questions. 4

2. Functions as a regulatory body of financial institutions

A. Banking regulation function

The authors of Royal Decree No. 185 believed that the Commission's essential
function was to exercise permanent and comprehensive regulation of deposit
banks. Two complementary aims appear in the Royal Decree and in the practice of
banking regulation. Both aims are linked to the protection of the banking system as
a whole and its essential monetary role. One aim, micro-economic, is accomplished
through provisions concerning the financial equilibrium of each bank, the quality of
its organization, and its careful management. The other aim, macro-economic, is
accomplished through provisions concerning the equilibrium of the banking system
as a whole.

According to article 1 of Royal Decree No. 185, 'banks' are institutions which
usually receive deposits for no longer than two years in order to use them for cred-
its or investment operations. In fact, this is a definition of the activities of deposit
banks. Once an enterprise meets this legal definition, it is subject to regulation un-
der Royal Decree No. 185. "Foreign banks" operating in Belgium — as branches or subsidiaries — are also subject to the "statut légal".

Once the definition of "bank" is met, the bank must apply for registration with the Commission before beginning its activities (Royal Decree No. 185, art. 2). Once registered, the bank has the right to begin its operations and to use the words "bank" and "banker" (Royal Decree No. 185, art. 3). The list of registered banks is published annually.

The main provision of law applicable to banks, ever since the Royal Decree of August 22, 1934, is the prohibition of "mixed banks". Article 14 of Royal Decree No. 185 therefore prohibits (with exceptions which have been increasing) a bank from investing in stocks. As a supplement to article 14, "protocoles" have been signed between banks and the Commission in order to make effective the autonomy of bank managements and to protect them from the influence of their major shareholders, especially when those shareholders are holding companies that were created by the break-up of former mixed banks.

The structure of supervision of banks by the Commission was completely changed and tightened by the Mammouth Act of 1975. This Act was the result both of recent bank accidents and of the inadequacy of earlier provisions for preventing a bank from getting into serious trouble or for extricating it from such trouble. Under the new structure, supervision may be either direct, or indirect through chartered bank accountants. According to article 25 of Royal Decree No. 185 (as modified in 1975), if a bank has not found a solution to its problems within a time period specified by the Commission, the following powers may be exercised by the Commission: appointment of a special supervisor ("commissaire spécial") to whose prior approval all management decisions are temporarily subject; suspension of bank activities; or withdrawal of the bank's registration. These new powers, as far as we know, were formally used for the first time in the case of the Banque pour l'Amérique du Sud, which was declared bankrupt by the Commercial Court of Brussels in 1976.

Though banking supervision is permanent supervision of the activities of each registered bank, the supervision in practice is characterized by flexibility and cooperation rather than by a strict and pure "administrative" application of banking regulations.

As far as the preparation of new regulations (e.g., in the field of micro-economic bank ratios) and general decisions are concerned, the key word always was and remains "concertation": registered banks and their professional association are really a party to preparing the new regulations and general decisions, and are not merely permitted to make comments or suggestions. From the very beginning, regulations and general decisions have been the product of extensive discussions, and very rarely have been imposed. This procedure has had the immense advantage of systematically creating confidence and cooperation between the Commission and the controlled banks, although it also has had the minor (we think) inconvenience of slower progress.
A noteworthy consequence of this mentality of cooperation and reciprocal confidence may be found in the 'protocoles' mentioned earlier, which organize on a purely contractual basis (rather than by regulations) the essential principle of autonomy in bank management.

This mentality may also be found in the relations between the Commission and each bank. It is usual for a bank to schedule regular meetings with the Commission for discussing the bank's performance, credits and problems. Often, in case of a specific difficulty, the bank managers initiate meetings with Commission officials to obtain explanations or suggestions. Even when there are serious financial or other difficulties, the Commission tries to create flexible solutions, without publicity, except in cases of fraud or clear lack of cooperation.

B. Regulation of other financial institutions

Apart from banking regulation (subsection A, above) and securities regulation (section 3, below), both products of Royal Decree No. 185, several other permanent supervisory functions were given to the Commission after 1935:

(1) Belgian investments funds (Act of March 27, 1957, concerning 'fonds communs de placement');
(2) companies 'subject to the Act of June 10, 1964';
(3) holding companies (Royal Decree No. 64 of November 10, 1967); and

The approach to banking supervision described earlier will, we assume, be applied to the supervision of private savings banks. As to investment funds and holding companies, the objectives and methods are closer to those of securities distribution (see section 3, below).

Apart from the controls described earlier, which are permanent and apply to all activities of supervised institutions, financial law also has developed specific regulations and/or controls linked to specific financial activities.

3. Powers, work and methods in the field of securities regulation and company law

In addition to banking supervision, the regulation of public issues and public offerings of securities was the second mission entrusted to the Commission by Royal Decree No. 185 (Title II). Until recently, the accomplishments of the Commission in securities regulation and related areas of company law were better known than its banking supervisory work.

Regulation of securities distribution was enacted in Belgium as a substitute
(deemed unimportant by many in 1935) for regulation of holding companies. Only nine provisions (articles 26 to 34 of Royal Decree No. 185) are involved, and they focus on two objectives, investor protection and defense of market equilibrium. This kind of regulation was very new and original when adopted in Belgium in 1935. 20

Before 1935, there was no statutory regulation of the issuance of securities in Belgium. Provisions of the Company Act applied to the formation of a 'société anonyme', to capital increases and to certain other areas, and there was a requirement for the publication of a brief 'notice' in the annexes of the official gazette ('Moniteur belge') before any public offering of securities could be made. 21 These provisions, of course, were intended to improve the information available to potential investors, but they did not include any independent supervision of the information. As a matter of fact, the 'notice légale' — which is too short, uncontrolled and formalistic — has never played a significant role in providing information to investors. 22

Important similarities exist between the system of securities regulation enacted by Royal Decree No. 185 and that embodied in the U.S. Securities Act of 1933, as well as between the creative roles played by the Banking Commission and the U.S. Securities and Exchange Commission in the field of company law. However, in the field of company law, the Banking Commission — which oddly enough does not have any legal power in respect of stock exchange transactions 23 — has made use of provisions concerning securities issues and offerings, while the SEC has essentially made use of the Securities Exchange Act of 1934. 24

A. Extent of securities regulation

Article 26 of Royal Decree No. 185 was for many years interpreted and applied by the Courts in a limited manner. 25 Two additional provisions were enacted in 1964 and 1969, in order to extend the field covered by the Decree and, in particular, to extend regulation to new kinds of investments, especially abroad, and new 'aggressive' sales techniques. Article 22 of the Act of June 10, 1964 was called an 'interpretive' provision of article 26, but it was actually an extension of the field covered by article 26 in transactions involving securities. The important Act of July 10, 1969 made subject to regulation various modern types of investments offered to the public, even if no issue or sale of securities was involved. 26

Article 26, as interpreted in 1964, concerns two categories of securities: (1) stock certificates or shares which directly or indirectly represent partnership rights in any kind of civil or commercial company or in a business association, including certificates for stocks of foreign issuers; and (2) bonds, cash certificates and other borrowing certificates, whoever the borrower may be. In short, all securities ('valeurs mobilières'), as customarily defined, in registered or bearer form, are covered by article 26, except securities issued by the State, provinces, municipalities and miscellaneous governmental institutions and companies. 27
Article 26, as interpreted in 1964, concerns four categories of transactions: (1) public 'expositions', public offerings and public sales of securities covered by article 26, and public offers to exchange or purchase (takeover bids) such securities; (2) initial offerings or increases of company capital through public subscriptions; (3) public issues of bonds; and (4) applications for registration on the official quoted list of a stock exchange. To sum up, the regulatory authority covers, with some minor exceptions, all issues and offerings of securities, in the broadest meaning of those words, but under two conditions: the transaction must be public, and territorial conditions must be satisfied.

As far as the public aspect is concerned, the Commission has a very pragmatic and flexible approach. It determines in each case the public or private nature of the transaction. But several specific difficulties, particularly in respect of eurobonds, have obliged the Commission to suggest a legal minimum definition of what is a 'public transaction'.

As far as territoriality is concerned, Belgian securities regulation logically applies to all public issues, offerings, etc., made in Belgium, whatever the nationality or the legal status of the persons or companies involved. In addition, Belgian companies which issue securities publicly outside Belgium must inform the Commission (Royal Decree No. 185, art. 31).

With a minor exception, the Act of 1969 has not made new categories of transactions subject to regulation. However, article 1 of the Act has 'assimilated' to the regulated securities transactions described above any transaction which directly or indirectly involves rights to tangible personal property or real estate, under two conditions: (1) the rights must be to property held in common, or 'groupement de droit ou de fait'; and (2) the holders of the rights must have relinquished private possession of the related property and entrusted its management to a professional manager.

Through this elaborate definition, the authors of the Act of 1969 hoped to make subject to regulation any form of financial participation in any enterprise by a number of persons sufficient to render the transaction 'public'.

Article 2, par. 2, of the Act of 1969 has also extended the categories of certificates subject to regulation by adding to the usual types of securities all certificates ('titres'), whether or not negotiable, and all documents representing such certificates or rights to acquire them.

To sum up, the Commission may now intervene as soon as there is an 'appel public à l'épargne', under either of two conditions: (1) there is a public appeal to the market through the issue, offering or application for stock exchange registration of securities; or (2) there is a public appeal to the market for investment in certificates ('titres'), in the broadest meaning of that word.

Since the Act of 1969, there are no longer any significant loopholes in the fields regulated by the Commission, as its annual reports show. The price paid to reach this result has been poor draftsmanship in the new legal text and elimination of the connection between Commission regulation and the usual notion of a
security. Moreover, the extent of regulation is now so comprehensive that the risk exists that the Commission will be submerged by minor matters and by inquiries as to whether a given minor transaction is subject to its jurisdiction.

Furthermore, the consequent increase in the Commission's staff may be incompatible with the traditional methods of the Commission, which are based on flexibility, accessibility and confidence in the Commission by those subject to its regulation.

B. Powers of the Commission in securities regulation

The Commission's powers in respect of securities regulation are based on the duty of certain persons or companies to supply information to the Commission. Any person or company which, as owner or intermediary or issuer or underwriter, intends to engage in a transaction covered by article 26 must inform the Commission at least fifteen days in advance (Royal Decree No. 185, art. 26, par. 1). A violation of this requirement is a penal offense. In actual practice, information about the proposed transaction is given to the Commission before the fifteen-day deadline.

The required advance notice is accompanied by a file of documents (Royal Decree No. 185, art. 27), together with a draft prospectus. On the basis of these papers, the Commission reviews the contemplated transaction, criticizes the draft prospectus, and raises relevant questions with the applicant.

The Commission usually prepares a list of questions, which is not a standard document but is adapted to each case. The list always includes some questions about the company involved, its activities and financial results, its capital and dividend policy, its directors and managers, its investment program, its profit projections, the reasons for the public offering, and the terms and conditions of the proposed transaction.

All these questions are raised in connection with the two main responsibilities of the Commission in this field: defense of market equilibrium and investor protection (Royal Decree No. 185, arts. 28 and 29). These two objectives determine the limits of the Commission's right to be informed.

According to article 28 of Royal Decree No. 185, the Commission may recommend that an applicant reduce the size of or proceed gradually with a public issue, when the issue as originally proposed could affect market equilibrium. This macro-economic provision is not considered an instrument of financial planning or allocation of financial resources, but a tool for better technical organization of the market. As a matter of fact, this provision is rarely applied under normal market conditions, except indirectly in the field of interest rates.

Under article 29 of Royal Decree No. 185, when the Commission deems that a contemplated transaction is misleading in an important respect, it 'gives notice' to the applicant, and recommends corrective action. If such a recommendation is not complied with, the Commission may prohibit the transaction for not more than
three months by notifying the applicant and giving its reasons for the prohibition. The Commission may also publish its decision. A violation of article 29 is a penal offense.

In theory, the Commission never judges the economic merits of the proposed transaction. Rather, it carefully investigates all available information and uses great care so that the prospectus will include all information necessary for the potential investor to make an informed investment decision.

The prospectus, which is not provided for by statute, is a requirement imposed by the Commission. It and the 'notice légale' are the only offering documents that may be published about the transaction.

The Commission thus acts as a monitor of good disclosure in financial and company matters. Of course, some information disclosed in the prospectus under the Commission's requirements will be considered to reflect the Commission's unfavorable opinion on the merits, but the Commission's role ends when the applicant agrees to include the information in the prospectus. Thus, the Commission grants a 'nihil obstat', but does not approve or authorize the transaction. 34

If an applicant and/or issuer refused to amend the prospectus as recommended, the Commission could use its power to prohibit (temporarily) the transaction and, if necessary, to publish its decision. This power has never been formally used, which is explained by the efficiency of the 'nihil obstat' method under Belgian financial conditions. The financial concentration in this small country practically excludes the possibility that a company would risk publication by the Commission of the reasons for its decision. The consequences for the company's financial standing and for the success of the transaction (and subsequent ones) would be too detrimental.

To conclude on this subject, a 'nihil obstat' method and a temporary (and not used) prohibition power have been more efficient than a complete prohibition power. We write 'more efficient' because we are convinced that the flexibility of the system explains the results achieved (subsection C, below). We also think that historical conditions, the size of the market and the role played by particular individuals also explain this success, so that the Belgian experience can probably not be transposed without change to other countries, under other conditions, with other people. 35

C. The Commission's work and methods in securities regulation

The gap between the accomplishments of the Commission and its legal powers may now be usefully examined. We shall see how, on the basis of a philosophy of information control, the Commission has deeply influenced company law. We shall also discover how and why the Commission has transformed its power over occasional transactions into continuing authority.

The main task of the Commission is to evaluate the quality and quantity of disclosed information in order to put investors in a position to evaluate a potential investment for themselves. As has been explained, the Commission is an intermed-
The Belgian 'Commission Bancaire' was charged with judging not the transaction itself but the information disclosed about the transaction. The Commission is convinced that this philosophy of requiring full disclosure is the best and most efficient instrument for accomplishing its goals.

Prospectus

As has been stated, the prospectus, including the 'notice légale', is the only document about a proposed securities offering that is available to the public. The preparation of the prospectus thus dominates the procedure, from the first notice given to the Commission until its final 'nihil obstat'. Applicants generally know that the examination of the file and of the prospectus will be made together. The minimum prospectus requirements are generally known. Answers to additional questions during the conversations between the Commission and the applicant will also suggest additions and amendments to the prospectus.

At the last stage, before the 'nihil obstat', the applicant is confronted with a clear alternative: either it deems acceptable the disclosure of facts, figures and comments requested by the Commission, thus obtaining the 'nihil obstat', or it deems such disclosure unacceptable. In the second case, the applicant is confronted with another choice: either modify the situation criticized by the Commission or endanger the whole proposed transaction (by renouncing it spontaneously or by taking the great risk of a temporary prohibition and publication of the Commission's decision).

The efficiency of the prospectus as a disclosure mechanism results, of course, from its examination initially by professionals rather than by private investors. This efficiency would be increased by a substantial improvement in the quality of the financial press in Belgium.

Accounts

Company accounts or financial statements form an important part of the prospectus information. Until 1975, the provisions of Belgian commercial law in respect of accounting and annual financial statements were incredibly out-of-date or even non-existent. There was no official or usual 'plan comptable' and there were few generally accepted accounting principles. For these reasons — and also because of an earlier tradition of permitting business to exercise a great deal of discretion in accounting matters — the Commission began its work in the accounting area under a serious handicap.

The Commission, case by case, has tried to improve the financial information in the prospectus so that it would contain, at a minimum, explanations about the accounting methods used. The main efforts have concerned the profit and loss account, amortization policy, accounting adjustments and a detailed presentation of the appropriation of net profits.

This case-by-case approach has made possible the gradual development of a number of accounting principles and their uniform application by many publicy-held
companies. Various factors have entered into this achievement: intellectual agreement by many businessmen with the principles defended by the Commission, the requirement imposed by the Commission that the prospectus include at least five balance sheets and profit and loss statements prepared on a consistent basis, required forms for financial statements for several categories of financial institutions (in particular, banks), and assistance of chartered accountants and stock exchange authorities.

A first success on this long road was a document often called 'the Brussels recommendations'. But a major development was the Act of July 17, 1975, on accounting for enterprises, a modern and efficient framework of accounting law. The Commission, directly or indirectly, played a significant part in the preparation of this Act, which at many points reflects the Commission's accounting experience. The Commission will also be associated, in various respects, with the new 'Commission des normes comptables', which will be in charge of suggesting and advising in the field of accounting principles.

D. The Commission's work and methods in company law

The most remarkable results of the Commission's activities as a regulator of securities distribution is in the field of company law. These results are frequently referred to as examples of 'droit prétorien' and of 'magistrature économique'. They illustrate the virtues both of the Commission's methods and of its cooperation with the applicants who make filings with it. The results also illustrate how it is possible, under specific favorable conditions, to exercise a pervasive influence on the basis of only limited authority.

The gradual development by the Commission of rules of company law that supplement the Company Act also shows the impossibility in the long run of limiting regulation of a transaction to disclosure alone, without exercising any authority over the substantive factors that disclosure reveals to have shaped the transaction. In practice, the Commission has rather easily been able to widen its influence. Company articles, internal legal structures, provisions for shareholder protection, etc., are usually examined and recommendations are made.

The rules for corporate governance that are thus created by the Commission, which combine pure legal aspects and aspects of financial ethics, are explained in its annual reports. These descriptions and comments are awaited with interest by many chief executives of large companies and by business lawyers, and they influence behavior, legal reasoning, the Courts and the office of the public prosecutor. This work, which is reviewed by interested groups both technically and as a contribution to business and corporate 'morality', has of course at least a formal link with provisions of Royal Decree No. 185: article 29 allows the Commission to intervene when the public may be misled as to the rights represented by securities or 'titres' that are being offered to it.

The creative work of the Commission in the field of company law has primarily
concerned six problems: shareholders preferential (or preemptive) rights in case of a capital increase, issuance of shares for less than par, acquisition by a company of its own shares, sale of controlling interests, appropriation of net profits, and takeover bids. This work by the Commission sometimes seems less impressive today, but only because of the results achieved: the principles advocated by the Commission are now widely accepted and have gradually entered into national or EEC legal texts or drafts.

**Shareholders preferential rights**

It is usual in Belgium to issue new shares at a subscription price equal to or less than the market price of the outstanding shares. Therefore, the granting of preferential (or preemptive) rights to existing shareholders may avoid a loss to them. Such rights are not provided by the Company Act. The Banking Commission has gradually imposed and defined the meaning of such rights in cases subject to its regulation. Moreover, in its reports the Commission has defended the principle for all companies with publicly-held shares outstanding.

The Commission's action has been completely successful. It can be said that today preferential rights have become customary and are provided for in the articles of the great majority of companies.

**Issue of shares for less than par**

The Commission has always fought against the issuance of new shares for a price less than their par value, when all shares have the same rights. The Commission believes that when this occurs there is an unacceptable transfer of value from the existing shares to the new shares. The Commission has even refused its 'nihil obstat' in one case of this kind, and the device has gradually disappeared, at least for publicly-held companies.

**Acquisition by a company of its own shares**

Except for one special case prohibited by article 206, this matter is not regulated by the Company Act. However, the commentators have demonstrated the dangers of this practice. The Commission has decided that, in principle, the practice is not acceptable, at least from the point of view of financial ethics.

**Sale of controlling interests**

The Company Act ignores notions like control and controlling interests. But the Commission, on the basis of its experience, has developed principles of financial ethics which must be complied with in case of a private sale of a controlling interest which would otherwise escape accountability to the shareholders as a group or any intervention by the Commission. The core of the matter is usually the control premium or additional price ('surprix') paid to the seller. Of course, a sale of a controlling interest will also raise questions as to the future of the company, which will be determined by the new dominant shareholder, the new dividend policy, etc.
When a sale of a controlling interest is impending, the Commission, in order to maintain equal treatment among the shareholders (another key principle in its work and method), reminds the board of directors, if it is composed of representatives of the controlling shareholders, that its fiduciary duties to all shareholders, including minority shareholders, require it to make the best decision for the company, and to refuse a sale advantageous only to the directors or their group. More and more frequently, the Commission requires that the purchase offer (private or through a takeover bid) be extended to all shareholders on the same conditions when it is clear that the minority shareholders will lose any possibility of influence if the purchase offer is accepted. 

Appropriation of net profits

The Commission has acted patiently in this area. It has tried to avoid any undue increase or reduction in net profits. The Commission has also gradually been successful in moderating the percentage of the net profits that the directors allocate to themselves. The Commission is assisted here by its requirement that directors' remuneration be disclosed in the prospectus.

Takeover bids

Since the 1964 Act, the Commission is in charge of the regulation of takeover bids. This extension of the field covered by Title II of Royal Decree No. 185 has required the Commission to develop all the rules to be applied to takeover bids under articles 28 and 29. These rules and their application now form a significant new chapter of company law.

E. Influence of the Commission

Although the Commission's legal authority is exercised only upon the occasion of its review of information to be disclosed about a specific transaction, its influence over company activities is really much more continuous.

The first file submitted by a company to the Commission provides the opportunity for a thorough review by the company and by the Commission of the company's articles (charter), accounting principles, disclosure policy and financial ethics. After the Commission has made its recommendations for amendment and has explained the principles it believes should be applied, and the whole procedure has ended with the Commission's 'nihil obstat', a new type of relationship frequently begins between the Commission and the company.

The chief executives of the company know that the Commission, even after the end of the particular transaction under review, will follow the company's progress and will see to it that the commitments included in the prospectus are complied with. Moreover, after a first trip to the public market, the company will often make new issues or offerings, and thus will prepare new filings for the Commission and will have to comply again with the rules and recommendations of the Commission.
All this tends to cause the company to apply the Commission’s rules and recommendations on a permanent basis, particularly with respect to accounts, company law and financial ethics. The reading of the Commission’s annual reports by the company’s executives may also encourage this tendency.

The Commission’s influence may be even more permanent and significant when the chief executives of a company consider the Commission to be their natural adviser, which is certainly consistent with the wishes of the authors of Royal Decree No. 185. The Commission also has an open door policy towards directors and managers of companies, who know that any really important financial or legal problem of their company will eventually become subject to formal Commission regulation. Therefore, they prefer to initiate contacts and meetings with the Commission, and to have the advantage of informal conversations with the Commission. The president and managers of the Commission spend a large part of their time in contact of this kind, which is typical of the flexible mentality and methods of the Commission.

The continuity of the Commission’s policies in the fields of company law, accounting principles and financial ethics have played a great part in giving the Commission a great moral authority. This moral authority is responsible for an essential fact: the Commission is generally considered to be an indispensable partner for the majority of the activities, discussions and committees in respect of financial and accounting principles and company law, at the Belgian level and at the EEC level. This participation strengthens further the permanence of the Commission’s influence.

In the field of company law, several changes were made at the Commission’s suggestion. The Commission took an important part in the preparation of other amendments to the Company Act. Representatives of the Commission were members of the committee which prepared the new Company Act already referred to, and several principles developed by the Commission were included in the draft.

At the EEC level, the Commission also sends representatives to many EEC committees in charge of company law and/or financial ethics problems.

As stated by Buonomo, the Commission is really ‘le centre moteur de la législation sur les sociétés’.

In the field of accounting, the ‘Recommandations de Bruxelles’ in 1968 were a sign of the acceptance of the accounting principles advocated by the Commission. These recommendations were prepared by a working group presided over by the general manager of the Commission and comprised of particularly well-known persons from bank and stock exchange circles, the Bar, etc. The recommendations were unanimously adopted, and were issued as a ‘good behavior code’ for companies. Although not compulsory, these recommendations served as useful guidelines until the adoption of the Accounting Act of 1975.
4. Conclusion and suggestions

In 1972, as the conclusion of an extensive article on the Commission, we made some comments and suggestions. It may be interesting to check where we are now, some five years later. Two questions were raised in 1972: which institution should be in charge of banking regulation? And should the regulatory goals be expanded?

For various reasons, we have preferred the Commission to the National Bank as the regulator of banking. Nothing has changed in this respect, except that the National Bank has now been granted additional power by statute with respect to macro-economic ratios. This limited reform is reasonable.

As one of the reasons for keeping the Commission in charge of banking regulation, we emphasized the efficient complementarity between banking supervision and securities regulation. Indeed, there is a continuous exchange of confidential information between these two departments of the Commission concerning banks, issues and offerings, important credits and other significant financial items. This cooperation improves the operations of both departments. Cooperation also exists, with similar advantages, between the securities department and the other departments of the Commission (investment funds, holding companies, etc.).

Since the 1969 Act, two serious dangers have existed for the Commission. The first, already mentioned, is that the Commission will become overwhelmed with too many insignificant files, because of the extended scope of the Act. So far, the Commission has been able, in our opinion, to resist the pressure. But we are still convinced that a system of exemptions for categories of transactions should be developed.

The second risk is that the Commission, in an apparently logical extension of the 1969 Act, will be granted the authority to exercise permanent control over various categories of persons involved in financial services (such as financial advisers, real estate agents, etc.).

In addition to these comments, we think it necessary to point out once again the anomalous present situation as far as stock exchange transactions are concerned. Although there is Commission regulation of an application for registration on the official quoted list, and there is in fact some cooperation between the Commission and the stock exchange authorities, it seems inefficient that the Commission be without legal authority once a security has been registered and, more generally, that the Commission be without legal authority as far as stock exchange transactions are concerned.

In the field of banking supervision, the Mammouth Act of 1975, which gave the Commission permanent authority over private savings banks, has also significantly increased the power of the Commission. Moreover, the autonomy of the bank regulatory function has been improved by the method of ‘protocoles’. Although it is too early to evaluate the sufficiency of the Commission’s new powers, much will depend on the way in which the Commission uses them, particularly as to direct investigations and emergency measures.
As to regulation of securities distribution, we have pointed out how the legal powers of the Commission (articles 28 and 29: temporary suspension and possible publication of the Commission’s decision) were both extraordinarily limited (‘rudimentaire’, to use the words of Henrion) and extraordinarily efficient. The way chosen continues to depend upon flexibility and pragmatism rather than upon sophisticated regulations. Since 1935, an extension of the Commission’s power over securities distributions has never been seriously proposed. However, the experience of recent years makes it appear, in our opinion, that three improvements may be suggested:

(1) When a publicly-held company publishes in any way any inexact information, the Commission should have the power to investigate and to disclose, if necessary, the conclusions of its investigation.

(2) When a publicly-held company publishes in any way any information which is contradictory to other information published by any other person or company, and when the information concerns a takeover bid or transfer of a controlling interest, the Commission should also have the power to investigate and to disclose, if necessary, its conclusions.

(3) Finally, we suggest that the Commission should have the power, under specific conditions, to publish press releases in case of illegal or suspicious operations.

Moreover, adaptations of Belgian law to future EEC directives on prospectuses, minimum conditions for registration on the stock exchange official quoted list, etc., could be necessary in the coming years. But they will probably not be substantial.

The Banking Commission, we wrote in 1972, was ‘à la croisée des chemins’. This basic feeling is more intense for us now, after the adoption of the Mammouth Act. The risks remain:

— that the Commission’s legal nature and composition may be changed for political or other reasons not inspired by regulatory efficiency; and
— that the increasing assignments and powers, and their consequence on the size of the Commission staff, will gradually alter its traditional way and methods, which have been based on flexibility and confidence much more than on a strict ‘administrative’ application of legal texts.

However, we must admit that, after eight years of application of the Act of 1969, the securities department of the Commission has been successful in resisting this pressure and in maintaining its former approach. We do hope this will remain possible in the coming years.

As we wrote in 1972, in order for the Commission to maintain its efficiency and reputation, a balanced mixture must be found between the traditional ‘image’ and methods, and the various pressures of a changing financial world, new legislation, new facts, and new people. It will not be easy.

The socialist opposition, during the parliamentary consideration of the Mammouth Act, did attempt to make a fundamental change in the structure of the Commission: transformation of the Commission into a ‘paritaire’ institution with half of the members proposed by the trade unions and half of the members proposed by the employers. This proposal, which was not adopted, in our opinion would have been extremely dangerous for the efficiency of the Commission and did not take into consideration that the Commission is a technical regulatory body, making decisions in general and individual cases. See in this respect Bruyneel, *La loi du 30 juin 1975*, supra n. 1, at nn. 30–34.

The system works as follows. Each time securities issuers submit a transaction to the Commission, they pay a fee calculated in proportion to the value of the securities concerned. Special fees are paid by controlled investment funds, controlled holding companies, etc. The difference between these fees and the Commission’s expenses is paid by all regulated banks and private savings banks, and shared among them mainly on the basis of their respective total assets, as shown by balance sheet totals.

Since the Act of December 28, 1973, the National Bank has the responsibility for monetary policy and measures, in the form of ‘recommendations’, which are always complied with by financial institutions. From time to time, these recommendations, insofar as they concern banks, are transformed into regulations by Banking Commission decrees.

There are certain exceptions, principally non-private banks and private savings banks.

A special regulation (Royal Decree No. 185, arts. 6, 10) applies to Belgian branches of foreign banks in various respects, in order to have them controlled in a way comparable to other banks. As to setting up foreign banks in Belgium, see Lempereur, *L’implantation en Belgique de banques étrangères*, 1975 Droit et Pratique du Commerce International 395–408. Apart from the numerous ‘foreign banks’, which comprise a quarter of the total number of registered banks, there are also representative offices of foreign banks. As to their regulation, see Annual Report 1971–1972, at 16–18, and Annual Report 1972–1973, at 17–19.


Such accountants, or 'reviseurs de banques', are chartered by the Commission. Each registered bank must appoint one or more 'reviseurs', after prior approval by the Commission. As provided in Royal Decree No. 185, the 'reviseurs' have duties that are partly private (they are 'commissaires' inside the bank, they are elected by the general meeting, they have the authority provided by the Company Act, and they are paid by the bank), and partly public (they are chartered and supervised by the Commission, they are required to inform the Commission on their own initiative in case of irregularities and difficulties, they have the right to postpone a bank decision for eight days, and they must prepare special reports required by the Commission) (Royal Decree No. 185, arts. 20–24, 38). The efficiency of this original mixture of duties has been seriously questioned in recent years, with the result that the Mammouth Act reinforced the 'public' side of the duties of the 'reviseurs' and provided for direct regulation of banks by the Commission. Cooperation with foreign banking control authorities is provided for in new article 40 of Royal Decree No. 185. For a summary of the system, its 'philosophy' and methods, see Annual Report 1976–1977, at 51–61.

This was the first bank bankruptcy in Belgium since 1939, and occurred because of very special circumstances. A second (fraudulent) bankruptcy occurred beginning 1978.

In such cases, the Commission has had the necessary powers only since the adoption of the Mammouth Act. For a description of the situation prior to that Act, see Bruynel, La commission bancaire, supra n. 1, at 24–25; see also Annual Report 1969–1970, at 38–42.

As far as foreign investment funds are concerned, the jurisdiction of the Commission depends on such funds making public offerings of securities in Belgium (article 6 of the Act of March 27, 1957). Such control may be compared to control of public offerings of foreign securities.

Article 15 of the Act of June 10, 1964 is one of the most important provisions of Belgian financial law. The receipt of repayable funds from the public in response to an 'appel public à l'épargne' (i.e., roughly 'call to the market', except by a regulated financial institution, is prohibited, and violation of this prohibition is a penal offense.

This legislation, as revised by the Act of January 20, 1978, mainly has the objective of improvement in the information disseminated by holding companies to shareholders and others. See also chapter I of the abovementioned Act as far as the improvement of economic planning is concerned.

According to article 72 of the Mammouth Act of 1975, the Banking Commission may require from any person or company any information necessary in order to determine whether that person or company has engaged in a transaction or activity regulated by the Commission. The lack of such a general power of investigation before 1975 was a serious gap that hindered Commission action.

For example, mortgage loans, life insurance, lending upon pledge of the whole business ('fonds de commerce'), consumer credit transactions, factoring and stock exchange transactions (see also section 3, infra). Until now, the usual conduct of credit activity has not been regulated as such; however, article 71 of the Mammouth Act empowers the King (in fact, the Government) to impose such regulation.

20 It was the first case of such regulation in Europe and, as far as we know, the second in the world, after the U.S. Securities Act of 1933 and Securities Exchange Act of 1934.

21 These provisions, later included in the 1935 coordination of the Company Act, were enacted principally by the Act of May 25, 1913.

22 The system was changed, but not basically, by another Act of June 30, 1975 (see comment by Steenbergen in 1975–1976 Rechtskundig Weekblad 822). Nor was any significant role played by article 202 of the Company Act, which provides that the publication of misleading information about securities offered, subscribed or sold is a penal offense. For an interesting recent application of article 202, see Antwerp, Nov. 21, 1975, 1977 Jur. Comm. Belgique 34 and note by Wymeersch.

23 The main responsibilities in this respect are, according to articles 81 to 109 of the Commercial Code, placed on (1) the stock exchange commission ('Commission de la Bourse', composed of elected stockbrokers) of each stock exchange, (2) the Government representative ('commissionnaire du Gouvernement') in each stock exchange, (3) the appeal commission ('Commission d'appel', a majority of whose members are stockbroker representatives) and (4) the official quoted list committee ('Comité de la Cote', half of whose members are stockbroker representatives). Although these typical Belgian combinations of stockbrokers, who can be expected to defend their own professional interests, and government officials offer some flexibility and advantages, they seem to us rather out of date and no longer adequate for the protection of investors. U.S. and French stock exchange regulation methods are certainly more consistent and efficient. The problem of insider trading, which the Banking Commission would like to have prohibited by law, contrary to the wishes of stock exchange circles, is a good illustration of the difference in philosophy.


27 Even with respect to such issues, however, the Commission must be informed, except for issues of State, provincial and municipal bonds (Royal Decree No. 185, art. 34).

28 It must be noted that in the case of such applications, the 'nihil obstat' of the Commission is not sufficient; another decision of the 'Comité de la Cote' is also required. This case illustrates perfectly how illogical it is that the Commission does not have any formal power of intervention in stock exchange transactions, once a class of security has been registered on the official quoted list.

29 See article 5 of the Act of July 10, 1969 and article 1 of the Royal Decree of November 12, 1969, which in practice are useful guidelines rather than clear and sure legal provisions. See also article 2 of the same Royal Decree, which is very typical of the flexible method which has been adopted by the Commission as far as advisory techniques are concerned. These new texts were considered as merely 'interprétive': see Brussels, Mar. 7, 1972, 1972 Revue de la Banque 411, note by Lempereur; Antwerp, May 6, 1976, 1976 Revue Pratique des Sociétés 212 and 1976–1977 Rechtskundig Weekblad 504.

30 This assimilation, with minor exceptions, works for all legal provisions in the field of securities. See Commercial Code, art. 108, with respect to the Minister for Finance's authorization in case of the public offering in Belgium of foreign securities; Royal Decree No. 185; and Royal Decree No. 71 of November 30, 1959, prohibiting peddling of and canvassing regarding securities.

31 However, there still are 'accidents', chiefly with foreign investments, e.g., foreign real estate investments.

See, e.g., the criticisms in Witterwulgh, op. cit. supra n. 26, and Bruyneel, La commission bancaire, supra n. 1; see also comment by Van Ryn and Heenen, 1972 Revue Critique de Jurisprudence Belge 392 n. 47.


Apart from what has been explained about the Commission's interventions, the Company Act provisions and the stock exchange authorities, there are three other kinds of interventions in the field of securities distribution. (1) The Minister of the Treasury (article 108 of the Commercial Code) must authorize public issues, offers, etc., of foreign securities; such authorization is also required in case of takeover bids initiated by persons or companies from outside the EEC. As a matter of practice, the authorization procedure follows the 'nihil obstat' granted by the Commission; it is discretionary in character. (2) The 'Comité de la Cote' may require that securities which are frequently traded be quoted on the official list of a stock exchange (article 104 bis of the Commercial Code, as introduced in 1967). In such a case, the normal procedure is applied, on the one hand by the Commission, on the other hand by the Comité de la Cote. (3) The King (in fact, the Government) may organize markets with respect to securities that are not quoted on a stock exchange (article 100 bis of the Commercial Code, as introduced in 1969).

However, its action cannot be referred to by the offeror (Royal Decree No. 185, art. 30).

See Gelders, L'information publiée par les sociétés, Cahier n. 149 du Centre d'Etudes Bancaires et Financières (1969) and the miscellaneous works now in progress at the EEC level.


For various examples of interventions on the basis of article 29 which are directly linked to information disclosure, see Bruyneel, La commission bancaire, supra n. 1, at 134.

And also by holding companies, within the framework of their permanent supervision (consolidated accounts, for example).

See section 3, subsection B in fine, infra.

The Royal Decree of October 8, 1976 applies and details the Act of July 17, 1975 as far as annual accounts are concerned. The report to the King, which introduces the Decree, is a remarkable text about accounting principles and about the philosophy of disclosure. See also, the Royal Decree of March 7, 1978, and the Act of March 24, 1978.

The lacunae of the Company Act (which has been frequently but not basically modified) are serious. These gaps explain the importance of the complementary law created by the Commission, which sometimes provides an interpretation of the Act, and sometimes creates law out-
side of the Act (for example, with respect to takeover bids). For many years, a complete new Company Act has been ready for parliamentary discussion. It is still delayed, however, for various reasons: political (as far as 'workers participation' is concerned), EEC directives, draft directives and other works in the field of company law. For an up-to-date description of the causes of delay, see Lempereur, *Vers un code européen de bonne conduite pour les transactions sur valeurs mobilières?*, Revue de la Banque 3-19.

44 See, with respect to this last item, the fine comments of del Marmol, 1955 Revue de la Banque 20. There is close cooperation in Brussels between the Commission and the 'Parquet' (public prosecutor's office). The situation seems less satisfactory with other 'parquets'. We think therefore that a minimum level of cooperation should be provided for by law, for example through the advice of 'magistrats délégués' to the Commission, as in the French COB structure.

45 For other examples, see Bruyneel, *La commission bancaire*, supra n. 1, at 135 n. 279.

46 On the evolution of and the exceptions to the Commission's jurisprudence, see Ponlot, *op. cit. supra* n. 1, at 285–304. For recent applications, see Annual Report 1973–1974, at 179, and Annual Report 1975–1976, at 76. The preferential right is now provided for in article 101 quater of the Company Act as far as issues of convertible debentures are concerned. It is also provided for by the draft revision of the Company Act and by the second EEC company directive of December 13, 1976.


48 The prohibition against issues for less than par is provided by the second EEC company directive of December 13, 1976.


50 See also, the 'Code de conduite européen concernant les transactions relatives aux valeurs mobilières' (EEC Commission recommendation of July 25, 1977, JOCE, L. 212/37 of August 20, 1977).


52 For the three principles developed in this respect, see Bruyneel, *La commission bancaire*, supra n. 1, at 137.


54 See the 'rapport au Roi' which introduces Royal Decree No. 185.

55 Article 71 of the Company Act (cf. Annual Report 1954–1955, at 89–93); convertible bonds (articles 101 bis to 101 octies of the Company Act). It is worth noting that in respect of convertible bonds, the Commission has jurisdiction over all issues, even private issues, in order to protect existing shareholders; moreover, when the issue is public, the Commission also has jurisdiction (on the basis of Royal Decree No. 185) in order to protect the public.

56 E.g., Act of December 1, 1953 (chartered accountants); Act of January 6, 1958 (modification of company purpose); Act of June 30, 1961 (assets in kind brought into the company); and Act of February 23, 1967 (transformation of companies).

57 See supra n. 43.


60 Bruyneel, *La commission bancaire, supran* 1, at 251–56.

61 In 1972 we wrote as follows (id. at 252): "C'est particulièrement vrai lorsque le service des émissions, grâce aux données qui lui sont transmises par le service chargé du contrôle des banques, peut améliorer sensiblement la qualité de l'examen auquel est soumise une banque qui se propose d'émettre des titres (établissement d'un questionnaire mieux adapté aux problèmes propres à cette banque, confrontation des informations fournies par la banque dans le cadre de la procédure d'émission et des données dont le service chargé du contrôle des banques dispose en permanence) ou vérifier ultérieurement si les engagements officiels pris par une banque lors de l'émission ont été tenus; c'est vrai également lorsque l'émetteur fait partie d'un groupe de sociétés dans lequel figure une ou plusieurs banques; c'est vrai encore lorsque l'émetteur bénéficie de crédits importants.

"D'autre part, il peut arriver que la Commission, dans le domaine du contrôle des banques, se heurte à la mauvaise volonté ou à l'incompréhension d'un administré, ou encore soit empêchée d'agir à cause de l'insuffisance de ses pouvoirs; au cas où la banque en cause fait publiquement appel à l'épargne, la menace, d'un refus du 'nihil obstat' ou l'obligation de publier dans le prospectus des informations détaillées sur certaines faiblesses, apportent un appui précieux à l'action permanente du service du contrôle des banques."

62 See the comment in our 1972 article (id. at 253): "La Commission, par son refus (d'ailleurs motivé par le dispositif légal actuel) de se dessaisir de sa compétence pour les affaires d'importance financière minime, est en danger – à moins d'éttoffer son personnel dans une proportion fâcheuse – soit de devoir consacrer beaucoup de temps à ces affaires, soit de risquer son crédit en accordant le 'nihil obstat' au terme d'examens sommaires, soit encore d'empêcher la réalisation de ces opérations à cause des frais liés à l'intervention de la Commission (notamment le coût du prospectus)."

63 However, it is the intention of the present Government once again to revise banking regulation in two apparently important respects: complete reform of the bank chartered accountants system (so that the accountants would become representatives of the Commission, which would pay them), and appointment of a 'délégué du Gouvernement' to the board of directors of the four big deposit banks (under a Government agreement called 'plan d'Egmont', n. 14, and arts. 16 and 17 of a proposed Act presently submitted to parliamentary discussion (Chambre, 1977–78, doc. 405/1). Also, adaptations to EEC law will be unavoidable (cf. first EEC banking directive of June 28, 1973, JOCE, L. 194 of July 16, 1973, which in principle was compiled with via the Mammouth Act; proposal of a second EEC banking directive, JOCE, C. 12/7 of Jan. 17, 1975, and JOCE, C. 128/7 of June 9, 1975; and recent jurisprudence of the EEC Court of Justice in the field of right of establishment).
The Minister of the Treasury has a power of this kind, in the case of an unauthorized public issue or an offering of foreign securities, under Article 108 of the Commercial Code. In present practice, a company may issue a press release "at the request of the Banking Commission". Another suggestion, made by the author in 1972, concerned cooperation in the field of securities distribution between the Commission and foreign regulatory authorities. Such cooperation was brought closer to realization in 1975 by new article 40 of Royal Decree No. 185.

Such flexibility and confidence are directly linked to the cooperation of controlled companies. See Bruyneel, La commission bancaire, supra n. 1, at 256, in respect of a new type of 'administrés'.

This reputation remains considerable, but has necessarily suffered from recent banking accidents, such as the exchange losses of one of the first Belgian banks and the bankruptcy of the Banque pour l'Amérique du Sud.

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