II

(Acts whose publication is not obligatory)

COUNCIL

SECOND COUNCIL DIRECTIVE

of 15 December 1989

on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC

(89/646/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first and third sentences of Article 57 (2) thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas this Directive is to constitute the essential instrument for the achievement of the internal market, a course determined by the Single European Act and set out in timetable form in the Commission's White Paper, from the point of view of both the freedom of establishment and the freedom to provide financial services, in the field of credit institutions;

Whereas this Directive will join the body of Community legislation already enacted, in particular the first Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (4), as last amended by Directive 86/524/EEC (5), Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis (6), Council Directive 86/635/EEC of 8 December 1986 on the annual and consolidated accounts of banks and other financial institutions (7) and Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions (8);

Whereas the Commission has adopted recommendations 87/62/EEC on large exposures of credit institutions (9) and 87/63/EEC concerning the introduction of deposit-guarantee schemes (10);

Whereas the approach which has been adopted is to achieve only the essential harmonization necessary and sufficient to secure the mutual recognition of authorization and of prudential supervision systems, making possible the granting of a single licence recognized throughout the Community and the application of the principle of home Member State prudential supervision;

Whereas, in this context, this Directive can be implemented only simultaneously with specific Community legislation dealing with the additional harmonization of technical matters relating to own funds and solvency ratios;

Whereas, moreover, the harmonization of the conditions relating to the reorganization and winding-up of credit institutions is also proceeding;

Whereas the arrangements necessary for the supervision of the liquidity, market, interest-rate and foreign-exchange risks run by credit institutions will also have to be harmonized;

Whereas the principles of mutual recognition and of home Member State control require the competent authorities of

(1) OJ No C 84, 31. 3. 1988, p. 1.
(2) OJ No C 96, 17. 4. 1989, p. 33 and Decision of 22 November 1989 (not yet published in the Official Journal).
(3) OJ No C 318, 17. 12. 1988, p. 42.
(4) OJ No L 322, 17. 12. 1977, p. 30.
(5) OJ No L 309, 4. 11. 1986, p. 15.
(6) OJ No L 193, 18. 7. 1983, p. 18.
(7) OJ No L 372, 31. 12. 1986, p. 1.
(8) OJ No L 124, 5. 5. 1989, p. 16.
(9) OJ No L 33, 4. 2. 1987, p. 10.
(10) OJ No L 33, 4. 2. 1987, p. 16.

each Member State not to grant authorization or to withdraw it where factors such as the activities programme, the geographical distribution or the activities actually carried on make it quite clear that a credit institution has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State in which it intends to carry on or carries on the greater part of its activities; whereas, for the purposes of this Directive, a credit institution shall be deemed to be situated in the Member State in which it has its registered office; whereas the Member States must require that the head office be situated in the same Member State as the registered office;

Whereas the home Member State may also establish rules stricter than those laid down in Articles 4, 5, 11, 12 and 16 for institutions authorized by its competent authorities;

Whereas responsibility for supervising the financial soundness of a credit institution, and in particular its solvency, will rest with the competent authorities of its home Member State; whereas the host Member State's competent authorities will retain responsibility for the supervision of liquidity and monetary policy; whereas the supervision of market risk must be the subject of close cooperation between the competent authorities of the home and host Member States;

Whereas the harmonization of certain financial and investment services will be effected, where the need exists, by specific Community instruments, with the intention, in particular, of protecting consumers and investors; whereas the Commission has proposed measures for the harmonization of mortgage credit in order, *inter alia*, to allow mutual recognition of the financial techniques peculiar to thal sphere;

Whereas, by virtue of mutual recognition, the approach chosen permits credit institutions authorized in their home Member States to carry on, throughout the Community, any or all of the activities listed in the Annex by establishing branches or by providing services;

Whereas the carrying-on of activities not listed in the Annex shall enjoy the right of establishment and the freedom to provide services under the general provisions of the Treaty;

Whereas it is appropriate, however, to extend mutual recognition to the activities listed in the Annex when they are carried on by financial institutions which are subsidiaries of credit institutions, provided that such subsidiaries are covered by the consolidated supervision of their parent undertakings and meet certain strict conditions;

Whereas the host Member State may, in connection with the exercise of the right of establishment and the freedom to provide services, require compliance with specific provisions of its own national laws or regulations on the part of institutions not authorized as credit institutions in their home Member States and with regard to activities not listed in the Annex provided that, on the one hand, such provisions are compatible with Community law and are intended to protect the general good and that, on the other hand, such institutions or such activities are not subject to equivalent rules under the legislation or regulations of their home Member States;

Whereas the Member States must ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State, as long as the latter do not conflict with legal provisions protecting the general good in the host Member State;

Whereas the abolition of the authorization requirement with respect to the branches of Community credit institutions once the harmonization in progress has been completed necessitates the abolition of endowment capital; whereas Article 6 (2) constitutes a first transitional step in this direction, but does not, however, affect the Kingdom of Spain or the Portuguese Republic, as provided for in the Act concerning the conditions of those States' accession to the Community;

Whereas there is a necessary link between the objective of this Directive and the liberalization of capital movements being brought about by other Community legislation; whereas in any case the measures regarding the liberalization of banking services must be in harmony with the measures liberalizing capital movements; whereas where the Member States may, by virtue of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1], invoke safeguard clauses in respect of capital movements, they may suspend the provision of banking services to the extent necessary for the implementation of the abovementioned safeguard clauses;

Whereas the procedures established in Directive 77/780/EEC, in particular with regard to the authorization of branches of credit institutions authorized in third countries, will continue to apply to such institutions; whereas those branches will not enjoy the freedom to provide services under the second paragraph of Article 59 of the Treaty or the freedom of establishment in Member States other than those in which they are established; whereas, however, requests for the authorization of subsidiaries or of the acquisition of holdings made by undertakings governed by the laws of third countries are subject to a procedure intendet to ensure that Community credit institutions receive reciprocal treatment in the third countries in question;

Whereas the authorizations granted to credit institutions by the competent national authorities pursuant to this Directive will have Community-wide, and no longer merely nationwide, application, and whereas existing reciprocity clauses will henceforth have no effect; whereas a flexible procedure is therefore needed to make it possible to assess reciprocity on a Community basis; whereas the aim of this

[1] OJ No L 178, 8. 7. 1988, p. 5.

procedure is not to close the Community's financial markets but rather, as the Community intends to keep its financial markets open to the rest of the world, to improve the liberalization of the global financial markets in other third countries; whereas, to that end, this Directive provides for procedures for negotitating with third countries and, as a last resort, for the possibility of taking measures involving the suspension of new applications for authorization or the restriction of new authorizations;

Whereas the smooth operation of the internal banking market will require not only legal rules but also close and regular cooperation between the competent authorities of the Member States; whereas for the consideration of problems concerning individual credit institutions the Contact Committee set up between the banking supervisory authorities, referred to in the final recital of Directive 77/780/EEC, remains the most appropriate forum; whereas that Committee is a suitable body for the mutual exchange of information provided for in Article 7 of that Directive;

Whereas that mutual information procedure will not in any case replace the bilateral collaboration established by Article 7 of Directive 77/780/EEC; whereas the competent host Member State authorities can, without prejudice to their powers of control proper, continue either, in an emergency, on their own initiative or following the initiative of the competent home Member State authorities to verify that the activities of a credit institution established within their territories comply with the relevant laws and with the principles of sound administrative and accounting procedures and adequate internal control;

Whereas technical modifications to the detailed rules laid down in this Directive may from time to time be necessary to take account of new developments in the banking sector; whereas the Commission shall accordingly make such modifications as are necessary, after consulting the Banking Advisory Committee, within the limits of the implementing powers conferred on the Commission by the Treaty; whereas that Committee shall act as a 'Regulatory' Committee, according to the rules of procedure laid down in Article 2, procedure III, variant (b), of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission [1],

HAS ADOPTED THIS DIRECTIVE:

TITLE I

Definitions and scope

Article 1

For the purpose of this Directive:

1. 'credit institution' shall mean a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC;

2. 'authorization' shall mean authorization as defined in the second indent of Article 1 of Directive 77/780/EEC;

3. 'branch' shall mean a place of business which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions; any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be regarded as a single branch;

4. 'own funds' shall mean own funds as defined in Directive 89/299/EEC;

5. 'competent authorities' shall mean competent authorities as defined in Article 1 of Directive 83/350/EEC;

6. 'financial institution' shall mean an undertaking other than a credit institution the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 in the Annex;

7. 'home Member State' shall mean the Member State in which a credit institution has been authorized in accordance with Article 3 of Directive 77/780/EEC;

8. 'host Member State' shall mean the Member State in which a credit institution has a branch or in which it provides services;

9. 'control' shall mean the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC [2], or a similar relationship between any natural or legal person and an undertaking;

10. 'qualifying holding' shall mean a direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the undertaking in which a holding subsists.

    For the purposes of this definition, in the context of Articles 5 and 11 and of the other levels of holding referred to in Article 11, the voting rights referred to in Article 7 of Directive 88/627/EEC [3] shall be taken into consideration;

11. 'initial capital' shall mean capital as defined in Article 2 (1) (1) and (2) of Directive 89/299/EEC;

12. 'parent undertaking' shall mean a parent undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;

13. 'subsidiary' shall mean a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;

[1] OJ No L 197, 18. 7. 1987, p. 33.

[2] OJ No L 193, 18. 7. 1983, p. 1.

[3] OJ No L 348, 17. 12. 1988, p. 62.

any subsidiary of a subsidiary undertaking shall also be regarded as a subsidiary of the parent undertaking which is at the head of those undertakings;

14. 'solvency ratio' shall mean the solvency coefficient of credit institutions calculated in accordance with Directive 89/647/EEC (1).

Article 2

1. This Directive shall apply to all credit institutions.

2. It shall not apply to the institutions referred to in Article 2 (2) of Directive 77/780/EEC.

3. A credit institution which, as defined in Article 2 (4) (a) of Directive 77/780/EEC, is affiliated to a central body in the same Member State may be exempted from the provisions of Articles 4, 10 and 12 of this Directive provided that, without prejudice to the application of those provisions to the central body, the whole as constituted by the central body together with its affiliated institutions is subject to the abovementioned provisions on a consolidated basis.

In cases of exemption, Articles 6 and 18 to 21 sahll apply to the whole as constituted by the central body together with its affiliated institutions.

Article 3

The Member States shall prohibit persons or undertakings that are not credit institutions from carrying on the business of taking deposits or other repayable funds from the public. This prohibition shall not apply to the taking of deposits or other funds repayable by a Member State or by a Member State's regional or local authorities or by public international bodies of which one or more Member States are members or to cases expressly covered by national or Community legislation, provided that those activities are subject to regulations and controls intended to protect depositors and investors and applicable to those cases.

TITLE II

Harmonization of authorization conditions

Article 4

1. The competent authorities shall not grant authorization in cases where initial capital is less than ECU 5 million.

2. The Member States shall, however, have the option of granting authorization to particular categories of credit institutions the initial capital of which is less than that prescribed in paragraph 1. In such cases:

(a) the initial capital shall not be less than ECU 1 million;

(b) the Member States concerned must notify the Commission of their reasons for making use of the option provided for in this paragraph;

(c) when the list referred to in Article 3 (7) of Directive 77/780/EEC is published, the name of each credit institution that does not have the minimum capital prescribed in paragraph 1 shall be annotated to that effect;

(d) within five years of the date referred to in Article 24 (1), the Commission shall draw up a report on the application of this paragraph in the Member States, for the attention of the Banking Advisory Committee referred to in Article 11 of Directive 77/780/EEC.

Article 5

The competent authorities shall not grant authorization for the taking-up of the business of credit institutions before they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.

The competent authorities shall refuse authorization if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the abovementioned shareholders or members.

Article 6

1. Host Member States may no longer require authorization, as provided for in Article 4 of Directive 77/780/EEC, or endowment capital for branches of credit institutions authorized in other Member States. The establishment and supervision of such branches shall be effected as prescribed in Articles 13, 19 and 21 of this Directive.

2. Until the entry into force of the provisions implementing paragraph 1, host Member States may not, as a condition of the authorization of branches of credit institutions, authorized in other Member States, require initial endowment capital exceeding 50 % of the initial capital required by national rules for the authorization of credit institutions of the same nature.

3. Credit institutions shall be entitled to the free use of the funds no longer required pursuant to paragraphs 1 and 2.

(1) See p. 14 of this Official Journal.

Article 7

There must be prior consultation with the competent authorities of the other Member State involved on the authorization of a credit institution which is:

— a subsidiary of a credit institution authorized in another Member State, or

— a subsidiary of the parent undertaking of a credit institution authorized in another Member State, or

— controlled by the same persons, whether natural or legal, as control a credit institution authorized in another Member State.

TITLE III

Relations with third countries

Article 8

The competent authorities of the Member States shall inform the Commission:

(a) of any authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of a third country. The Commission shall inform the Banking Advisory Committee accordingly;

(b) whenever such a parent undertaking acquires a holding in a Community credit institution such that the latter would become its subsidiary. The Commission shall inform the Banking Advisory Committee accordingly.

When authorization is granted to the direct or indirect subsidiary of one or more parent undertakings governed by the law of third countries, the structure of the group shall be specified in the notification which the competent authorities shall address to the Commission in accordance with Article 3 (7) of Directive 77/780/EEC.

Article 9

1. The Member States shall inform the Commission of any general difficulties encountered by their credit institutions in establishing themselves or carrying on banking activities in a third country.

2. Initially no later than six months before the application of this Directive and thereafter periodically, the Commission shall draw up a report examining the treatment accorded to Community credit institutions in third countries, in the terms referred to in paragraphs 3 and 4, as regards establishment and the carrying-on of banking activities, and the acquisition of holdings in third-country credit institutions. The Commission shall submit those reports to the Council, together with any appropriate proposals.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country is not granting Community credit institutions effective market access comparable to that granted by the Community to credit institutions from that third country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community credit institutions. The Council shall decide by a qualified majority.

4. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information that Community credit institutions in a third country do not receive national treatment offering the same competitive opportunities as are available to domestic credit institutions and the the conditions of effective market access are not fulfilled, the Commission may initiate negotiations in order to remedy the situation.

In the circumstances described in the first subparagraph, it may also be decided at any time, and in addition to initiating negotiations, in accordance with the procedure laid down in Article 22 (2), that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending at the moment of the decision or future requests for authorizations and the acquisition of holdings by direct or indirect parent undertakings governed by the laws of the third country in question. The duration of the measures referred to may not exceed three months.

Before the end of that three-month period, and in the light of the results of the negotiations, the Council may, acting on a proposal from the Commission, decide by a qualified majority whether the measures shall be continued.

Such limitations or suspension may not apply to the setting up of subsidiaries by credit institutions or their subsidiaries duly authorized in the Community, or to the acquisition of holdings in Community credit institutions by such institutions or subsidiaries.

5. Whenever it appears to the Commission that one of the situations described in paragraphs 3 and 4 obtains, the Member States shall inform it at its request:

(a) of any request for the authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of the third country in question;

(b) whenever they are informed in accordance with Article 11 that such an undertaking proposes to acquire a holding in a Community credit institution such that the latter would become its subsidiary.