

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE 92/30/EEC

of 6 April 1992

on the supervision of credit institutions on a consolidated basis

THE COMMISSION 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,

In cooperation with the European Parliament⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

Whereas Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis⁽³⁾ established the necessary framework for the introduction of supervision of credit institutions on a consolidated basis; whereas, following the transposition of that Directive into the national law of the Member States, the principle of supervision on a consolidated basis is now applied throughout the Community;

Whereas, in order to be effective, supervision on a consolidated basis must be applied to all banking groups, including those the parent undertakings of which are not credit institutions; whereas the competent authorities must hold the necessary legal instruments to be able to exercise such supervision;

Whereas, in the case of groups with diversified activities the parent undertakings of which control at least one credit institution subsidiary, the competent authorities must be able to assess the financial situation of a credit institution in such a group; whereas, pending subsequent coordination, the Member States may lay down appropriate methods of consolidation for the achievement of

the objective of this Directive; whereas the competent authorities must at least have the means of obtaining from all undertakings within a group the information necessary for the performance of their function; whereas cooperation between the authorities responsible for the supervision of different financial sectors must be established in the case of groups of undertakings carrying on a range of financial activities;

Whereas rules limiting the risks taken by a credit institution on the mixed-activity holding company of which it is a subsidiary, as well as those taken on the other subsidiaries of the same mixed-activity holding company, can be particularly useful; whereas it would, however, appear to be preferable to settle this question in a more systematic manner in the framework of a future Directive on the limitation of large exposures;

Whereas the Member States can, furthermore, refuse or withdraw banking authorization in the case of certain group structures considered inappropriate for carrying on banking activities, in particular because such structures could not be supervised effectively; whereas in this respect the competent authorities have the powers mentioned in Article 8 (1) (c) of the First Council Directive (77/780/EEC) of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions⁽⁴⁾ and in Articles 5 and 11 of the Second Council Directive (89/646/EEC) 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⁽⁵⁾, in order to ensure the sound and prudent management of credit institutions;

⁽¹⁾ OJ No C 326, 16. 12. 1991, p. 106, and OJ No C 94, 13. 4. 1992.

⁽²⁾ OJ No C 102, 18. 4. 1991, p. 19.

⁽³⁾ OJ No L 193, 18. 7. 1983, p. 18.

⁽⁴⁾ OJ No L 322, 17. 12. 1977, p. 30. Directive as last amended by Directive 89/646/EEC (OJ No L 386, 30. 12. 1989, p. 1).

⁽⁵⁾ OJ No L 386, 30. 12. 1989, p. 1.

Whereas the Member States can equally apply appropriate supervision techniques to groups with structures not covered by this Directive; whereas, if such structures become common, this Directive should be extended to cover them;

Whereas supervision on a consolidated basis must take in all activities defined in the Annex to Directive 89/646/EEC; whereas all undertakings principally engaged in such activities must therefore be included in supervision on a consolidated basis; whereas, as a result, the definition of a financial institution given in Directive 83/350/EEC must be widened to cover such activities;

Whereas, regarding the consolidation of financial institutions involved in activities principally subject to market risks and subject to particular rules of supervision, the coordination of the methods for the consolidated supervision of market risks is possible in the framework of Community harmonization of capital adequacy of investment firms and credit institutions, for which the Commission has introduced a proposal for a Directive; whereas such harmonization concerns, *inter alia*, the conditions which must be applied when offsetting opposing positions in the group and the case where these financial institutions are subject to specific supervisory rules regarding their financial stability; whereas this implies that, until the future Directive on capital adequacy to cover market risks is brought into effect, the competent authorities shall include in consolidated supervision financial institutions which are principally exposed to market risks, in accordance with methods determined by those authorities in the light of the particular nature of the risks involved;

Whereas, following the adoption of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions⁽¹⁾, which, together with the Seventh Council Directive (83/349/EEC) of 13 June 1983 on consolidated accounts⁽²⁾, established the rules of consolidation applicable to consolidated accounts published by credit institutions, it is now possible to define more precisely the methods to be used in prudential supervision exercised on a consolidated basis;

Whereas this Directive is fully in keeping with the objectives defined in the Single European Act; whereas it will, in particular, ensure the homogeneous application throughout the Community of prudential rules established by other Community legislation, which must be observed on a consolidated basis; whereas this Directive is, in particular, necessary for the correct application of Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions⁽³⁾;

Whereas supervision of credit institutions on a consolidated basis must be aimed at, in particular, protecting the interests of the depositors of the said institutions and at ensuring the stability of the financial system;

Whereas it is desirable that agreement should be reached, on the basis of reciprocity, between the Community and third countries with a view to allowing the practical exercise of consolidated supervision over the largest possible geographical area;

Whereas the amendments to be made to Directive 83/350/EEC are so considerable that it is preferable that it be wholly replaced by this Directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Definitions

For the purposes of this Directive:

- *credit institution* shall mean a credit institution within the meaning of the first indent of Article 1 of Directive 77/780/EEC, or any private or public undertaking which corresponds to the definition in the first indent of Article 1 of Directive 77/780/EEC and has been authorized in a third country,
- *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 referred to in numbers 2 to 12 of the list appearing in the Annex to Directive 89/646/EEC,
- *financial holding company* shall mean a financial institution the subsidiary undertakings of which are either exclusively or mainly credit institutions or financial institutions, one at least of such subsidiaries being a credit institution,
- *mixed-activity holding company* shall mean a parent undertaking, other than a financial holding company or a credit institution, the subsidiaries of which include at least one credit institution,
- *ancillary banking services* undertaking shall mean an undertaking the principal activity of which consists in owning or managing property, managing data-processing services, or any other similar activity which is ancillary to the principal activity of one or more credit institution,
- *participation* shall mean the ownership, direct or indirect, of 20 % or more of the voting rights or capital of an undertaking,

⁽¹⁾ OJ No L 372, 31. 12. 1986, p. 1.

⁽²⁾ OJ No L 193, 18. 7. 1983, p. 1. Directive as last amended by Directive 90/605/EEC (OJ No L 317, 16. 11. 1990, p. 60).

⁽³⁾ OJ No L 124, 5. 5. 1989, p. 16.

- *parent undertaking* shall mean a parent undertaking within the meaning of Article 1 (1) of the Directive 83/349/EEC and any undertaking which, in the opinion of the competent authorities, effectively exercises a dominant influence over another undertaking,
- *subsidiary* shall mean a subsidiary undertaking within the meaning of Article 1 (1) of Directive 83/349/EEC and any undertaking over which, in the opinion of the competent authorities, a parent undertaking effectively exercises a dominant influence. All subsidiaries of subsidiary undertakings shall also be considered subsidiaries of the undertaking that is their original parent,
- *competent authorities* shall mean the national authorities which are empowered by law or regulation to supervise credit institutions.

Article 2

Scope

This Directive shall apply to credit institutions that have obtained the authorization referred to in Article 3 of Directive 77/780/EEC, financial holding companies and mixed-activity holding companies which have their head offices in the Community.

The institutions permanently excluded by Article 2 of Directive 77/780/EEC, with the exception, however, of the Member States' central banks, shall be treated as financial institutions for the purposes of this Directive.

Article 3

Supervision on a consolidated basis of credit institutions

1. Every credit institution which has a credit institution or a financial institution as a subsidiary or which holds a participation in such institutions shall be subject, to the extent and in the manner prescribed in Article 5, to supervision on the basis of its consolidated financial situation. Such supervision shall be exercised at least in the areas referred to in paragraphs 5 and 6.

2. Every credit institution the parent undertaking of which is a financial holding company shall be subject, to the extent and in the manner prescribed in Article 5, to supervision on the basis of the consolidated financial situation of that financial holding company. Such supervision shall be exercised at least in the areas referred to in paragraphs 5 and 6. The consolidation of the financial situation of the financial holding company shall not in any way imply that the competent authorities are required to play a supervisory role in relation to the financial holding company standing alone.

3. The Member States or the competent authorities responsible for exercising supervision on a consolidated basis pursuant to Article 4 may decide in the cases listed below that a credit institution, financial institution or auxiliary banking services undertaking which is a subsidiary or in which a participation is held need not be included in the consolidation :

- if the undertaking that should be included is situated in a third country where there are legal impediments to the transfer of the necessary information,
- if, in the opinion of the competent authorities, the undertaking that should be included is of negligible interest only with respect to the objectives of monitoring credit institutions and in all cases if the balance sheet total of the undertaking that should be included is less than the smaller of the following two amounts : ECU 10 million or 1 % of the balance sheet total of the parent undertaking or the undertaking that holds the participation. If several undertakings meet the above criteria, they must nevertheless be included in the consolidation where collectively they are of non-negligible interest with respect to the aforementioned objectives, or
- if, in the opinion of the competent authorities responsible for exercising supervision on a consolidated basis, the consolidation of the financial situation of the undertaking that should be included would be inappropriate or misleading as far as the objectives of the supervision of credit institutions are concerned.

4. When the competent authorities of a Member State do not include a credit institution subsidiary in supervision on a consolidated basis under one of the cases provided for in the second and third indents of paragraph 3, the competent authorities of the Member State in which that credit institution subsidiary is situated may ask the parent undertaking for information which may facilitate their supervision of that credit institution.

5. Supervision of solvency, and of the adequacy of own funds to cover market risks and control of large exposures, as governed by the relevant Community acts in force, shall be exercised on a consolidated basis in accordance with this Directive. Member States shall adopt any measures necessary, where appropriate, to include financial holding companies in consolidated supervision, in accordance with paragraph 2.

Compliance with the limits set in Article 12 (1) and (2) of Directive 89/646/EEC shall be supervised and controlled on the basis of the consolidated or sub-consolidated financial situation of the credit institution.

6. The competent authorities shall ensure that, in all the undertakings included in the scope of the supervision on a consolidated basis that is exercised over a credit institution in implementation of paragraphs 1 and 2,

there are adequate internal control mechanisms for the production of any data and information which would be relevant for the purposes of supervision on a consolidated basis.

7. Without prejudice to specific provisions contained in other Directives, Member States may waive application, on an individual or sub-consolidated basis, of the rules laid down in paragraph 5 to a credit institution that, as a parent undertaking, is subject to supervision on a consolidated basis, and to any subsidiary of such a credit institution which is subject to their authorization and supervision and is included in the supervision on a consolidated basis of the credit institution which is the parent company. The same exemption option shall be allowed where the parent undertaking is a financial holding company which has its head office in the same Member State as the credit institution, provided that it is subject to the same supervision as that exercised over credit institutions, and in particular the standards laid down in paragraph 5.

In both cases, steps must be taken to ensure that capital is distributed adequately within the banking group.

If the competent authorities do apply those rules individually to such credit institutions, they may, for the purpose of calculating own funds, make use of the provision in the last subparagraph of Article 2 (1) of Directive 89/299/EEC.

8. Where a credit institution the parent of which is a credit institution has been authorized and is situated in another Member State, the competent authorities which granted that authorization shall apply the rules laid down in paragraph 5 to that institution on an individual or, when appropriate, a sub-consolidated basis.

9. Notwithstanding the requirements of paragraph 8, the competent authorities responsible for authorizing the subsidiary of a parent undertaking which is a credit institution may, by bilateral agreement, delegate their responsibility for supervision to the competent authorities which authorized and supervise the parent undertaking. The Commission must be kept informed of the existence and content of such agreements. It shall forward such information to the competent authorities of the other Member States and to the Banking Advisory Committee.

10. Member States shall provide that their competent authorities responsible for exercising supervision on a consolidated basis may ask the subsidiaries of a credit institution or a financial holding company which are not included within the scope of supervision on a consolidated basis for the information referred to in Article 6. In such a case, the procedures for transmitting and verifying the information laid down in that Article shall apply.

Article 4

Competent authorities responsible for exercising supervision on a consolidated basis

1. Where a parent undertaking is a credit institution, supervision on a consolidated basis shall be exercised by the competent authorities that authorized it under Article 3 of Directive 77/780/EEC.

2. Where the parent of a credit institution is a financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities which authorized that credit institution under Article 3 of Directive 77/780/EEC.

However, where credit institutions authorized in two or more Member States have as their parent the same financial holding company, supervision on a consolidated basis shall be exercised by the competent authorities of the credit institution authorized in the Member State in which the financial holding company was set up.

If no credit institution subsidiary has been authorized in the Member State in which the financial holding company was set up, the competent authorities of the Member States concerned (including those of the Member State in which the financial holding company was set up) shall seek to reach agreement as to who amongst them will exercise supervision on a consolidated basis. In the absence of such agreement, supervision on a consolidated basis shall be exercised by the competent authorities that authorized the credit institution with the greatest balance sheet total; if that figure is the same, supervision on a consolidated basis shall be exercised by the competent authorities which first gave the authorization referred to in Article 3 of Directive 77/780/EEC.

3. The competent authorities concerned may by common agreement waive the rules laid down in the first and second subparagraphs of paragraph 2.

4. The agreements referred to in the third subparagraph of paragraph 2 and in paragraph 3 shall provide for procedures for cooperation and for the transmission of information such that the objectives of this Directive may be achieved.

5. Where Member States have more than one competent authority for the prudential supervision of credit institutions and financial institutions, Member States shall take the requisite measures to organize coordination between such authorities.

Article 5

Form and extent of consolidation

1. The competent authorities responsible for exercising supervision on a consolidated basis must, for the purposes of supervision, require full consolidation of all the credit institutions and financial institutions which are subsidiaries of a parent undertaking.

However, proportional consolidation may be prescribed where, in the opinion of the competent authorities, the liability of a parent undertaking holding a share of the capital is limited to that share of the capital because of the liability of the other shareholders or members whose solvency is satisfactory. The liability of the other shareholders and members must be clearly established, if necessary by means of formal, signed commitments.

2. The competent authorities responsible for carrying out supervision on a consolidated basis must, in order to do so, require the proportional consolidation of participations in credit institutions and financial institutions managed by an undertaking included in the consolidation together with one or more undertakings not included in the consolidation, where those undertakings' liability is limited to the share of the capital they hold.

3. In the case of participations or capital ties other than those referred to in paragraphs 1 and 2, the competent authorities shall determine whether and how consolidation is to be carried out. In particular, they may permit or require use of the equity method. That method shall not, however, constitute inclusion of the undertakings concerned in supervision on a consolidated basis.

4. Without prejudice to paragraphs 1, 2 and 3, the competent authorities shall determine whether and how consolidation is to be carried out in the following cases :

- where, in the opinion of the competent authorities, a credit institution exercises a significant influence over one or more credit institutions or financial institutions, but without holding a participation or other capital ties in these institutions,
- where two or more credit institutions or financial institutions are placed under single management other than pursuant to a contract or clauses of their memoranda or articles of association,
- where two or more credit institutions or financial institutions have administrative, management or supervisory bodies with the same persons constituting a majority.

In particular, the competent authorities may permit, or require use of, the method provided for in Article 12 of Directive 83/349/EEC. That method shall not, however, constitute inclusion of the undertakings concerned in consolidated supervision.

5. Where consolidated supervision is required pursuant to Article 3 (1) and (2), ancillary banking services undertakings shall be included in consolidations in the cases, and in accordance with the methods, laid down in paragraphs 1 to 4, of this Article.

Article 6

Information to be supplied by mixed-activity holding companies and their subsidiaries

1. Pending further coordination of consolidation methods, Member States shall provide that, where the parent undertaking of one or more credit institutions is a mixed-activity holding company, the competent authorities responsible for the authorization and supervision of those credit institutions shall, by approaching the mixed-activity holding company and its subsidiaries either directly or via credit institution subsidiaries, require them to supply any information which would be relevant for the purposes of supervising the credit institution subsidiaries.

2. Member States shall provide that their competent authorities may carry out, or have carried out by external inspectors, on-the-spot inspections to verify information received from mixed-activity holding companies and their subsidiaries. If the mixed-activity holding company or one of its subsidiaries is an insurance undertaking, the procedure laid down in Article 7 (4) may also be used. If a mixed-activity holding company or one of its subsidiaries is situated in a Member State other than that in which the credit institution subsidiary is situated, on-the-spot verification of information shall be carried out in accordance with the procedure laid down in Article 7 (7).

Article 7

Measures to facilitate the application of this Directive

1. Member States shall take the necessary steps to ensure that there are no legal impediments preventing the undertakings included within the scope of supervision on a consolidated basis, mixed-activity holding companies and their subsidiaries, or subsidiaries of the kind covered in Article 3 (10), from exchanging amongst themselves any information which would be relevant for the purposes of supervision in accordance with this Directive.

2. Where a parent undertaking and any of its subsidiaries that are credit institutions are situated in different Member States, the competent authorities of each Member State shall communicate to each other all relevant information which may allow or aid the exercise of supervision on a consolidated basis.

Where the competent authorities of the Member State in which a parent undertaking is situated do not themselves exercise supervision on a consolidated basis pursuant to Article 4, they may be invited by the competent authorities responsible for exercising such supervision to ask the parent undertaking for any information which would be relevant for the purposes of supervision on a consolidated basis and to transmit it to these authorities.

3. Member States shall authorize the exchange between their competent authorities of the information referred to in paragraph 2, on the understanding that, in the case of financial holding companies, financial institutions or ancillary banking services undertakings, the collection or possession of information shall not in any way imply that the competent authorities are required to play a supervisory role in relation to those institutions or undertakings standing alone.

Similarly, Member States shall authorize their competent authorities to exchange the information referred to in Article 6 on the understanding that the collection or possession of information does not in any way imply that the competent authorities play a supervisory role in relation to the mixed-activity holding company and those of its subsidiaries which are not credit institutions, or to subsidiaries of the kind covered in Article 3 (10).

4. Where a credit institution, financial holding company or a mixed-activity holding company controls one or more subsidiaries which are insurance companies or other undertakings providing investment services which are subject to authorization, the competent authorities and the authorities entrusted with the public task of supervising insurance undertakings or those other undertakings providing investment services shall cooperate closely. Without prejudice to their respective responsibilities, those authorities shall provide one another with any information likely to simplify their task and to allow supervision of the activity and overall financial situation of the undertakings they supervise.

5. Information received pursuant to this Directive and in particular any exchange of information between competent authorities which is provided for in this Directive shall be subject to the obligation of professional secrecy defined in Article 12 of Directive 77/780/EEC.

6. The competent authorities responsible for supervision on a consolidated basis shall establish lists of the financial holding companies referred to in Article 3 (2). Those lists shall be communicated to the competent authorities of the other Member States and to the Commission.

7. Where, in applying this Directive, the competent authorities of one Member State wish in specific cases to verify the information concerning a credit institution, a financial holding company, a financial institution, an ancillary banking services undertaking, a mixed-activity holding company, a subsidiary of the kind covered in Article 6 or a subsidiary of the kind covered in Article 3 (10), situated in another Member State, they must ask the competent authorities of that other Member State to have that verification carried out. The authorities which receive such a request must, within the framework of their competence, act upon it either by carrying out the verifi-

cation themselves, by allowing the authorities who made the request to carry it out, or by allowing an auditor or expert to carry it out.

8. Without prejudice to their provisions of criminal law, Member States shall ensure that penalties or measures aimed at ending observed breaches or the causes of such breaches may be imposed on financial holding companies and mixed-activity holding companies, or their effective managers, that infringe laws, regulations or administrative provisions enacted to implement this Directive. In certain cases, such measures may require the intervention of the courts. The competent authorities shall cooperate closely to ensure that the abovementioned penalties or measures produce the desired results, especially when the central administration or main establishment of a financial holding company or of a mixed-activity holding company is not located at its head office.

Article 8

Third countries

1. The Commission may submit proposals to the Council, either at the request of a Member State or on its own initiative, for the negotiation of agreements with one or more third countries regarding the means of exercising supervision on a consolidated basis over :

— credit institutions the parent undertakings of which have their head offices situated in a third country, and

— credit institutions situated in third countries the parent undertakings of which, whether credit institutions or financial holding companies, have their head offices in the Community.

2. The agreements referred to in paragraph 1 shall in particular seek to ensure both :

— that the competent authorities of the Member States are able to obtain the information necessary for the supervision, on the basis of their consolidated financial situations, of credit institutions or financial holding companies situated in the Community and which have as subsidiaries credit institutions or financial institutions situated outside the Community, or which hold participations in such institutions,

— that the competent authorities of third countries are able to obtain the information necessary for the supervision of parent undertakings the head offices of which are situated within their territories and which have as subsidiaries credit institutions or financial institutions situated in one or more Member States, or which hold participations in such institutions.

3. The Commission and the Advisory Committee set up under Article 11 of Directive 77/780/EEC shall examine the outcome of the negotiations referred to in paragraph 1 and the resulting situation.

*Article 9***Final provisions**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993. They shall forthwith inform the Commission thereof.

When Member States adopt the abovementioned measures, the measures shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Notwithstanding the provisions of Article 3 (5) and until the future Directive on capital adequacy to cover market risks is brought into effect, the competent authorities shall include in consolidated supervision financial institutions which are principally exposed to market risks in accordance with methods to be determined by those authorities in the light of the particular nature of the risks involved.

3. Member States shall communicate to the Commission the texts of the main provisions of internal law which they adopt in the field governed by this Directive.

Article 10

1. Directive 83/350/EEC is hereby repealed with effect from 1 January 1993.

2. In the following provisions, the words 'Directive 83/350/EEC' shall be replaced by 'Directive 92/350/EEC':

— Article 5 of Directive 89/299/EEC,

— Articles 12 (5), 13 (3) and 15 (2) and the fifth indent of the first subparagraph of Article 18 (2) of Directive 89/646/EEC,

— Article 3 (3) of Directive 89/647/EEC.

3. In Article 1, point 5, of Directive 89/646/EEC and the first indent of Article 2 (1) of Directive 89/647/EEC, the definition of competent authorities shall be replaced by the following:

'the national authorities which are empowered by law or regulation to supervise credit institutions'.

Article 11

This Directive is addressed to the Member States.

Done at Luxembourg, 6 April 1992.

For the Council

The President

João PINHEIRO