II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive on investment services in the securities field

COM(88) 778 — SYN 176

(Submitted by the Commission on 3 January 1989)

(89/C 43/10)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 57 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas this Directive is to constitute an instrument which is essential for achieving 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 investment firms;

Whereas the approach which has been adopted is to achieve only the essential harmonization necessary and sufficient to secure mutual recognition of authorization and of supervisory systems, thus enabling the application of the principle of home country control and the granting of a single authorization recognized throughout the Community;

Whereas it is necessary, for reasons of fair competition, to ensure that non-bank investment firms have similar freedoms to create branches and provide services across frontiers as those envisaged by the proposal for a second Council Directive in the field of credit institutions;

Whereas it is also necessary and appropriate to liberalize access to membership of stock exchange and financial futures and options markets in host Member States for investment firms authorized to carry out the relevant services in their home Member States;

Whereas responsibility for the financial soundness of an investment firm will rest with the competent authorities of its home Member State; whereas to permit this responsibility fully to be assumed by such competent authorities a further directive will be necessary to coordinate rules in the area of market risk;

Whereas it is essential for the creation of the internal market for the home country supervisors to monitor all aspects of the investment firm's activities in host Member States whether such activities are carried on by the provision of services or the creation of branches there;

Whereas the Member States should ensure that there are no obstacles to the activities coming within the scope of this Directive being undertaken using the financial techniques of the home Member State, so long as the latter are not in violation of the legal provisions governing the public good in the host Member State;

Whereas requests for authorization of a subsidiary whose parent is governed by the laws of a third country or the acquisition of a participation by such a parent are subject to a procedure intended to ensure that Community investment firms are granted reciprocal treatment in the third countries in question;

Whereas the smooth running of the internal market in financial services will require, in addition to common legislative standards, close and regular cooperation between the competent authorities of the Member States;

Whereas in the case of problems concerning investment firms a contact committee is the appropriate forum for discussion and consultation;

Whereas it is necessary, in order to facilitate the achievement of the objectives of this Directive and to take account of the rapid development of national and international financial markets, to introduce a procedure for the adaptation of certain technical features; whereas, because of the important and sensitive nature of that

adaptation, procedure III, type (a), as defined in Article 2 of Council Decision 87/373/EEC (1), is the most appropriate,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

Definitions and scope

Article 1

For the purposes of this Directive:

— *'credit institution'* is defined in accordance with the first indent of Article 1 of Council Directive 77/780/EEC (2),

— *'investment firm'* means any natural or legal person whose business it is to engage in one or more of the activities set out in the Annex to this Directive,

— *'home Member State'* means:

  — where the investment firm is a natural person, the Member State where that person has his residence,

  — where the investment firm is a legal person, the Member State where its registered office is situated or if it has no registered office then the Member State where its head office is situated,

— *'host Member State'* means the Member State where an investment firm has a branch or into which it supplies services,

— *'branch'* means a place of business which forms a legally dependent part of an investment firm and which provides an investment service for which the investment firm has been authorized,

— *'qualified participation'* means a holding, direct or indirect, in an investment firm which represents 10 % or more of the capital or of the voting rights or which enables the exercise of a significant influence over it within the meaning of Article 33 of Council Directive 83/349/EEC (3),

— *'parent undertaking'* is defined in accordance with Articles 1 and 2 of Directive 83/349/EEC,

— *'subsidiary'* means a subsidiary undertaking in accordance with Articles 1 and 2 of Directive 83/349/EEC.

(1) OJ No L 197, 18. 7. 1987, p. 33.
(2) OJ No L 322, 17. 12. 1977, p. 30.
(3) OJ No L 193, 18. 7. 1983, p. 1.

Article 2

This Directive shall apply to all investment firms. However, only Articles 3, 4, 5, 8, 9, 10 and 21 shall apply to investment firms that are credit institutions.

Article 3

Member States must require that investment firms which are legal persons shall have their head office in the same Member State as their registered office.

TITLE II

Harmonization of authorization conditions

Article 4

1. Investment firms wishing to engage in one or more of the activities referred to in the Annex within one or more Member States shall obtain authorization in their home Member State before commencing such activities. Such authorization shall be granted by the home Member State's competent authorities designated in accordance with Article 14. Following the granting of authorization the investment activity in question may be engaged in forthwith by the investment firm together with any activities that are ancillary thereto.

2. Without prejudice to other conditions of general application laid down by national law, the competent authorities shall not grant authorization unless:

— the investment firm has sufficient initial financial resources having regard to the nature of the activity in question,

— the persons who effectively direct the business of the investment firm are of sufficiently good repute and experience,

— holders of qualified participations in it are suitable persons.

3. Member States shall also require applications for authorization to be accompanied by a programme of operations setting out *inter alia* the types of business envisaged and the structural organization of the investment firm.

4. The applicant shall be notified within three months of submission of a complete application whether or not authorization is granted. Reasons shall be given whenever an authorization is refused. If no decision is notified within six months of submission of the complete application this shall be deemed to be a refusal.

5. The authorization referred to in paragraph 1 shall not be required where the investment firm is a credit institution whose authorization as a credit institution by the competent authorities specified in Article 3 of Directive 77/780/EEC includes authorization of the investment activity concerned.

6. The competent authorities may withdraw the authorization issued to an investment firm subject to this Directive only where the investment firm:

(a) does not make use of the authorization within 12 months, expressly renounces the authorization or has ceased to engage in business for more than six months, if the Member State concerned has made no provision for the authorization to lapse in such cases;

(b) has obtained the authorization through false statements or any other irregular means;

(c) no longer fulfils the conditions under which authorization was granted;

(d) no longer possesses sufficient financial resources or can no longer be relied upon to fulfil its obligations towards its creditors, and in particular no longer provides security for the assets entrusted to it;

(e) falls within one of the other cases where national law provides for withdrawal of authorization.

Article 5

Member States shall not apply to branches of investment firms having their registered office outside the Community, when commencing or carrying on their business, provisions that result in more favourable treatment than that accorded to branches of investment firms having their registered office in a Member State.

Article 6

1. Requests for authorization of a subsidiary whose parent undertaking is governed by the laws of a third country or the acquisition of a participation as provided for in paragraph 3 shall be subject to the procedure laid down in this Article.

2. The competent authorities of the relevant Member State shall inform the competent authorities of the other Member States and the Commission of the request for authorization.

3. In the same manner, when informed, according to the provisions of Article 7, that an undertaking governed by the laws of a third country is considering the acquisition of a participation in a Community investment firm such that the latter would become its subsidiary, the competent authorities of the relevant Member State shall inform the competent authorities of the other Member States and the Commission.

4. The competent authorities of the Member State concerned must suspend their decision regarding requests as referred to in paragraphs 1 and 3 until the procedure provided for in paragraphs 5 and 6 is completed.

5. The Commission shall, within three months of receiving the information provided for in paragraphs 2 and 3, examine whether all Community investment firms enjoy reciprocal treatment, in particular regarding the establishment of subsidiaries or the acquisition of participations in investment firms in the third country in question.

6. If the Commission finds that reciprocity is not ensured it may extend suspension of the decision referred to in paragraph 4, using the procedure provided for in Article 20.

7. The Commission shall present suitable proposals to the Council with a view to achieving reciprocity with the third country in question.

TITLE III

Harmonization of conditions relating to the pursuit of the business of investment firms

Article 7

1. Member States shall require any natural or legal person who is considering the acquisition of a qualified participation in an investment firm to first inform the competent authorities, telling them of the size of the intended participation. The abovementioned persons must similarly inform the competent authorities if they propose to increase their qualified participation such that the investment firm would become a subsidiary. The competent authorities shall assess the suitability of the abovementioned persons.

2. Investment firms shall each year furnish the competent authorities of the home Member State with the names of major shareholders and members as referred to in paragraph 1 and the size of their qualified participations, in accordance with the names registered at the annual general meeting of shareholders and members or in accordance with information received as a result of compliance with the regulations relating to companies quoted on stock exchanges.

3. Member States shall require that in cases where the persons referred to in paragraph 1 exercise their influence in a way which is likely to be to the detriment of the prudent and sound management of the activities of the investment firm, the competent authorities shall take appropriate measures to bring such a situation to an end. Such measures may consist in particular in injunctions, sanctions against directors and managers or the suspension of voting rights in respect of the shares held by the shareholders or members in question.

Article 8

1. The competent authorities of the home Member State shall require continuing compliance by an investment firm authorized by them with the conditions referred to in Article 4 (2). In appropriate circumstances, the competent authorities may allow an investment firm a certain limited period to restore its financial resources to the agreed initial minimum. The competent authorities of the home Member State shall also require that investment firms authorized by them make sufficient provision against market risk in accordance with rules to be prescribed in a further coordinating directive.

2. The supervision of compliance with the conditions referred to in Article 4 (2) shall be within the exclusive regulatory competence of the home Member State's competent authorities irrespective of whether or not the investment firm establishes a branch or provides services in another Member State.

Article 9

1. Member States shall draw up prudential rules to be observed on a continuing basis by investment firms authorized by their competent authorities. Supervision of such prudential rules shall be within the exclusive competence of the home Member State's competent authorities irrespective of whether or not the investment firm establishes a branch or provides services in another Member State. Such rules shall require that the investment firm:

— has sound administrative and accounting procedures and internal control mechanisms,

— arranges for securities belonging to investors to be kept separately from its own securities and for money belonging to investors to be placed in an account or in accounts which are separate and distinct from the firm's own account,

— is either a member of a general compensation scheme designed to protect investors who are prevented from having claims satisfied because of the bankruptcy or default of the investment firm or makes individual arrangements which provide investors with equivalent protection. Pending further harmonization of compensation schemes branches of investment firms shall be subject to the compensation scheme in force in the host Member State provided that payment or contribution to such a compensation scheme shall be calculated by reference to their income in respect of investment activity carried out in that State,

— provides the competent authorities of the home Member State with such information on request and at such intervals as they may determine (but not less than quarterly) in order that they may assess its financial soundness, including the adequacy of its provision in respect of market risk,

— arranges for adequate records to be kept relating to executed transactions which shall be at least sufficient to enable the home Member State's authorities to monitor compliance with prudential rules which they are responsible for applying including rules relating to market risk. Such records shall be retained for periods to be laid down by the competent authorities,

— is organized in such a way that conflicts of interest between the firm and its clients or between one of its clients and another are reduced to a minimum.

2. If the rules contained in paragraph 1 are not appropriate to the nature of the investment service in question, Member States may adapt them or provide that they shall not apply.

3. Member States may provide that the rules set out in the second and third indents of paragraph 1 shall not apply where the service is provided to business or professional investors.

TITLE IV

Provisions relating to freedom of establishment and freedom to provide services

Article 10

1. Host Member States shall ensure that at least the activities set out in the list in the Annex and any activities which are ancillary thereto may be pursued in their territories, in accordance with the provisions of Articles 11, 12 and 13, either by the establishment of a branch or by way of the provision of services, by an investment firm authorized to engage in such activities under this Directive by the competent authorities of its home Member State.

2. Host Member States may not make the establishment of a branch or the provision of services under paragraph 1 subject to an authorization requirement or to a requirement to provide endowment capital or any measure having equivalent effect.

3. Host Member States shall ensure that investment firms which are authorized to provide broking, dealing or market-making services in their home Member States can enjoy the full range of trading privileges normally reserved to members of the stock exchanges and organized securities markets of host Member States where similar services are provided.

4. In order to meet their obligation set out in paragraph 3, host Member States shall ensure that the investment firms referred to in that paragraph have the option to become members of host Member States' stock exchanges or organized securities markets by setting up either a branch or a subsidiary in the host Member State which complies with rules governing the structure and organization of the relevant host stock exchange or organized securities market or by the acquisition of an existing member firm.

5. Pending further harmonization, host Member States which do not accept credit institutions as members of their stock exchanges or organized securities market are not required to accept, as members, branches of those investment firms referred to in paragraph 3 which are credit institutions.

6. Host Member States shall likewise ensure that investment firms which are authorized to deal in financial futures and options in their home Member State can enjoy the full range of trading facilities on financial futures and options exchanges in the host Member State under the same conditions as are set out in paragraphs 3, 4 and 5.

Article 11

1. An investment firm wishing to establish a branch in the territory of another Member State shall give notification thereof to the competent authorities of the home Member State and relevant host Member State. At the same time it must send the latter authorities:

(a) an attestation by the competent authorities of the home Member State to the effect that the investment firm is duly authorized there in respect of the investment service proposed to be provided and that it otherwise fulfils the conditions imposed by this Directive;

(b) a programme of operations setting out *inter alia* the types of business envisaged and the structural organization of the branch;

(c) the names of the managers of the branch;

(d) the address in the host Member State from which documents can be obtained.

2. An investment firm may establish a branch in the other Member State one month after the notification referred to in paragraph 1.

3. An investment firm wishing to change any of the matters notified pursuant to paragraph 1 shall give written notice of the proposed change to the competent authorities in the host Member State at least one month before making the change. If necessary those authorities may decide whether it will not be possible, in the interest of the public good, for the investment firm to engage in any additional activities which it may envisage which are not precluded under the conditions of authorization in its home Member State and which are not contained on the list in the Annex.

Article 12

1. Any investment firm wishing to exercise the freedom to supply services in the territory of another Member State for the first time shall notify the competent authorities of the home and host Member States of the activities included in the list in the Annex which it intends to undertake.

2. The investment firm may begin to provide such services and any activities which are ancillary thereto in the host Member State one month after notification.

Article 13

1. If the competent authorities of the host Member State ascertain that an investment firm having a branch or providing services in the territory of that Member State is not complying with the legal provisions in force therein which are justified on the the grounds of the public good, those authorities shall request the investment firm concerned to put an end to the irregular situation.

2. If the investment firm concerned fails to take the necessary steps, the competent authorities of the host Member State shall inform the competent authorities of the Member State accordingly. The authorities of the home Member State shall take, in the shortest time possible, all appropriate measures to ensure that the investment firm concerned puts an end to the irregular situation. The nature of those measures shall be communicated to the competent authorities of the host Member State.

3. If, despite the measures taken by the home Member State pursuant to paragraph 2, or because such measures prove inadequate or are not taken by the Member State in question, the investment firm persists in violating the legal rules referred to in paragraph 1 in force in the host Member State, the latter State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent further irregularities including, in so far as is necessary, the prevention of the initiation of further transactions by that investment firm within its territory. Member States shall ensure that within their territory it is possible to serve the legal documents necessary for those measures on investment firms.

4. Any measures adopted pursuant to paragraphs 1, 2 and 3 involving penalties or restrictions on the provision of services must be properly justified and communicated to the investment firm concerned. Every such measure shall be subject to a right to apply to the courts in the Member State whose authorities adopted it.

5. Before following the procedure set out in paragraphs 1, 2 and 3 the competent authorities of the host Member State may, in exceptional circumstances, take measures necessary to protect the interests of investors and others to whom services are provided. The Commission and the other Member States shall be informed of such measures in the shortest possible time. In this event the Commission may, after consulting the Member States concerned, decide that the Member State in question shall amend or abolish the measures.

6. In the event of withdrawal of authorization the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the investment firm concerned from undertaking further transactions in the territory of that Member State.

7. Member States shall inform the Commission of the number and type of cases in each Member State in which measures have been taken in accordance with the provisions of paragraph 3. Every two years, the Commission shall submit a report summarizing such cases to the committee set up under Article 20.

TITLE V

Provisions concerning the authorities responsible for authorization and supervision

Article 14

1. The Member States shall designate the authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.

2. The authorities referred to in paragraph 1 must be public authorities or bodies appointed by public authorities.

3. The authorities concerned must be granted all the powers necessary to carry out their task.

Article 15

1. Where there are several competent authorities in the same Member State they shall collaborate closely in order to supervise the activities of investment firms operating there.

2. Member States shall also permit such collaboration to take place between such competent authorities and public authorities responsible for the supervision of credit and other financial institutions and insurance companies as regards the respective entities supervised by them.

3. Where investment services are provided on a services basis across frontiers or by the establishment of branches in one or more Member States other than the home Member State the competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of the investment firms concerned. They shall supply one another on request with all information concerning the management and ownership of such investment firms that is likely to facilitate their supervision and the examination of the conditions for their authorization and all information likely to facilitate the monitoring of such firms.

Article 16

1. Host Member States shall ensure that, where an investment firm authorized in another Member State conducts its business there through a branch, the competent authorities of the home Member State are able, after having first informed the competent authorities of the host Member State, to carry out themselves on-the-spot verification of the information referred to in Article 15 (3).

2. This Article shall not affect the right of the competent authorities of the host Member State to carry out on-the-spot verification of branches established in their territory in the discharge of their responsibilities under this Directive.

Article 17

1. Member States shall ensure that all persons now or in the past employed by the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, are bound by the obligation of professional secrecy. This means that any confidential information which they may receive in the course of their duties may not be divulged to any person or authority, without prejudice to cases covered by criminal law.

2. Notwithstanding paragraph 1, the competent authorities of the various Member States and the public authorities responsible for the supervision of credit and other financial institutions shall be authorized to exchange information in accordance with the provisions of this Directive where appropriate for the efficient discharge of their respective responsibilities. This information shall be subject to the same conditions of professional secrecy as those indicated in paragraph 1.

3. Member States may conclude cooperation agreements, providing for exchanges of information, with the competent authorities of third countries only if the information communicated is subject to guarantees of professional secrecy equivalent to those referred to in this Article.

4. The authorities receiving information under paragraphs 1 or 2 shall use it only:

— to examine the conditions for the taking-up of the business of the entities supervised by them and to facilitate monitoring of the pursuit of such business, the administrative and accounting procedures and mechanisms of internal control, or

— when the decisions of the authorities are the subject of an administrative appeal, or

— in court proceedings initiated pursuant to Article 18.

5. Paragraphs 1 and 4 shall not preclude within a Member State or between Member States the exchange of information between the competent authorities and persons responsible for carrying out statutory audits of the accounts of investment firms.

The authorities and institutions to which such information is sent shall use it only in the discharge of their supervisory functions. The information received shall fall within the professional secrecy rules by which those authorities and institutions are bound.

6. Notwithstanding paragraph 1, Member States may authorize, by virtue of provisions laid down by law, the disclosure, when it is necessary for reasons of prudential control, of certain information to other departments of their central government administration. Member States shall ensure that information received in accordance with paragraph 2 is not disclosed in such cases, except where there is the explicit consent of the authorities which have communicated the information.

7. Member States shall ensure that the professional secrecy provisions laid down by this Article shall apply to information given by the competent authorities to persons responsible for carrying out statutory audits of the accounts of investment firms.

Article 18

Member States shall ensure that decisions taken in respect of an investment firm in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive may be subject to the right to apply to the courts. The same shall apply where an application for authorization is deemed to be refused in accordance with Article 4 (4).

Article 19

Member States shall ensure that their respective competent authorities may adopt, as against investment firms or those who effectively control the business of such firms which breach legislative, regulatory or administrative provisions concerning the control of their businesses or the pursuit of their activities, penalties or measures aimed specifically at ending observed breaches or the causes of such breaches. Those penalties shall include procedures for the suspension or withdrawal of authorizations.

TITLE VI

Final provisions

Article 20

1. Technical amendments to this Directive in the following areas:

— extension of the activities on the list set out in the Annex,

— the fields in which the competent authorities must exchange information, as enumerated in Article 15,

shall be made according to the procedure set out in paragraph 2.

2. The Commission shall be assisted by a committee composed of representatives of the Member States and chaired by a representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States in the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period to be laid down in each act to be adopted by the Council under this paragraph but which may in no case exceed three months from the day of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 21

1. Investment firms already authorized to provide investment services in their home Member State before the entry into force of the provisions adopted in implementation of this Directive shall be deemed to be authorized for the purposes of this Directive provided that the authorization was given under equivalent conditions to those set out in Article 4 (2).

2. Branches which have commenced their activities, in accordance with the provisions in force in the host Member State, before the entry into force of the provisions adopted in implementation of this Directive are presumed to have been subject to the procedures envisaged in Article 11 (1), (2) and (3). They shall be governed, from the date of entry into force of the provisions adopted in implementation of this Directive, by the provisions of Articles 10, 11 (3) and 13.

3. Article 12 shall not adversely affect rights acquired before the entry into force of the provisions adopted in implementation of this Directive by investment firms operating through the supply of services.

Article 22

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

2. Member States shall communicate to the Commission the texts of the main laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 23

This Directive is addressed to the Member States.

ANNEX

INVESTMENT ACTIVITIES COMING WITHIN THE SCOPE OF THIS DIRECTIVE

SECTION A

Activities

1. Brokerage, i.e. the acceptance of investors' orders relating to any or all of the instruments referred to in Section B below and/or the execution of such orders on an exchange or market on an agency basis against payment of commission.

2. Dealing as principal, i.e. the purchase and sale of any or all of the instruments referred to in Section B below for own account and at own risk with a view to profiting from the margin between bid and offer prices.

3. Market making, i.e. maintenance of a market in any or all of the instruments referred to in Section B below by dealing in such instruments.

4. Portfolio management, i.e. the management against payment of portfolios composed of any or all of the instruments referred to in Section B below undertaken for investors otherwise than on a collective basis.

5. Arranging or offering underwriting services in respect of issues of the instruments referred to in point 1 of Section B below and distribution of such issues to the public.

6. Professional investment advice given to investors on an individual basis or on the basis of private subscription in connection with any or all of the instruments referred to in Section B below.

7. Safekeeping and administration of any of the instruments referred to in Section B below otherwise than in connection with the management of a clearing system.

SECTION B

Instruments

1. Transferable securities including units in undertakings for collective investment in transferable securities.

2. Money market instruments (including certificates of deposit and Eurocommercial paper).

3. Financial futures and options.

4. Exchange rate and interest rate instruments.