

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, 73/239/EEC and 92/49/EEC in the field of non-life insurance, 79/267/EEC and 92/96/EEC in the field of life assurance, and 93/22/EEC in the field of investment firms in order to reinforce prudential supervision

(93/C 229/07)

COM(93) 363 final — SYN 468

(Submitted by the Commission on 28 July 1993)

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,

In cooperation with the European Parliament,

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

Whereas the First Council Directive 77/780/EEC ⁽¹⁾ and the Second Council Directive 89/646/EEC ⁽²⁾ on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions lay down the authorization requirements for credit institutions;

Whereas the First Council Directive 73/239/EEC ⁽³⁾, and in particular as amended by the Third Council Directive 92/49/EEC ⁽⁴⁾, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance undertakings other than life assurance lay down the authorization requirements for insurance undertakings in the field of direct non-life insurance;

Whereas the First Council Directive 79/267/EEC ⁽⁵⁾, and in particular as amended by the Third Council Directive 92/96/EEC ⁽⁶⁾, on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance lays down the authorization requirements for assurance undertakings in the field of direct life assurance;

Whereas Council Directive 93/22/EEC ⁽⁷⁾ on investment services in the securities field lays down the authorization requirements for investment firms;

Whereas the need for the reinforcement of competent authorities' powers entails amendment of the existing Directives in the sectors concerned; whereas a binding Community Directive is the sole appropriate means of meeting this need; whereas this measure restricts itself to the minimum required to achieve the desired objective and is accordingly proportional thereto;

Whereas this Directive has been the subject of consultation with the Banking Advisory Committee, which was set up by Directive 77/780/EEC, and the Insurance Committee which was set up by Council Directive 91/675/EEC ⁽⁸⁾;

Whereas the closing down of the Bank of Credit and Commerce International (BCCI) and other events have given rise to the need to strengthen the powers of the competent authorities for the supervision of credit

⁽¹⁾ OJ No L 322, 17. 12. 1977, p. 30.⁽²⁾ OJ No L 386, 30. 12. 1989, p. 1.⁽³⁾ OJ No L 228, 16. 8. 1973, p. 3.⁽⁴⁾ OJ No L 228, 11. 8. 1992, p. 1.⁽⁵⁾ OJ No L 63, 13. 3. 1979, p. 1.⁽⁶⁾ OJ No L 360, 9. 12. 1992, p. 1.⁽⁷⁾ OJ No L 141, 11. 6. 1993, p. 27.⁽⁸⁾ OJ No L 374, 31. 12. 1991, p. 32.

institutions in the Member States; whereas it is desirable to adopt similar measures in the whole financial services sector, including the competent authorities for the supervision of insurance undertakings and investment firms;

Whereas Directives 77/780/EEC, 89/646/EEC, 73/239/EEC, as amended by Directives 92/49/EEC, 79/267/EEC, as amended by Directives 92/96/EEC and 93/22/EEC ('the Directives') lay down the conditions which must be fulfilled before Member States' competent authorities may grant authorization for the taking-up of business; whereas these conditions do not include the requirement that where a credit institution, insurance undertaking or investment firms belongs to a group, the group structure must be sufficiently transparent in order to allow effective supervision;

Whereas the Directives should therefore require applications for authorization to contain sufficiently detailed information to allow the competent authorities to assess whether effective supervision can be exercised in practice;

Whereas Directives 89/646/EEC, 92/49/EEC, 92/96/EEC and 93/22/EEC already provide for information on the identity of shareholders or similar persons and of the amount of the holdings to be submitted to the competent authorities and that these competent authorities shall refuse authorization under circumstances which do not ensure the sound and prudent management;

Whereas, in the case of existing credit institutions, insurance undertakings and investment firms it should be made clear that any material change of the conditions under which the competent authorities have granted a licence should be communicated to these authorities for reconsideration in order to reassess their fulfilment with the regard to the objectives of the authorization; whereas the Directives already empower the competent authorities to withdraw an authorization if the conditions under which the authorization was granted are no longer fulfilled; whereas in the case that a group to which an existing credit institution, insurance undertaking or investment firm belongs is transformed in such a way that its financial, legal or decision-making structure, or its administrative organization lacks transparency so that it can no longer be supervised effectively, the present measures would give the necessary powers to the supervisory authorities to withdraw the authorization granted as an ultimate sanction;

Whereas effective supervision of a credit institution, insurance undertaking or investment firm could be hampered if the competent authorities can not maintain effective contact with the management because its head

office is located in a different country than its registered office; whereas for this reason the head office of a credit institution, insurance undertaking or investment firm must be located in the same country as that of the registered office; whereas Directive 93/22/EEC already lays down this requirement for investment firms;

Whereas Directives 89/646/EEC, 92/49/EEC, 92/96/EEC and 93/22/EEC already provide for a restricted list of bodies to whom information may be passed on by the competent authorities; whereas in order to maintain confidentiality the list of recipients of information should remain narrowly limited; whereas, however, in the light of the BCCI affair and other events it is considered desirable to include in that narrow list certain bodies which play a key role when investigations into a credit institution, an insurance undertaking or an investment firm might be necessary in order to support the supervisory objectives;

Whereas Directives 89/646/EEC, 92/49/EEC, 92/96/EEC and 93/22/EEC give provisions for the exchange of confidential information between the competent authorities and persons responsible for carrying out statutory audits of the accounts of credit institutions, insurance undertakings and investment firms; whereas, due to auditors' access to material essential to credit institutions', insurance undertakings' and investment firms' fulfilment of their obligations, and in the interest of protecting the depositors, policyholders and investors, the auditors should be obliged to pass on certain relevant information to the competent authorities; whereas this obligation should only be triggered by a narrowly defined set of circumstances;

Whereas in the case of a credit institution, insurance undertaking or investment firm with branches operating in more than one country, or which is part of a group of credit institutions, insurance undertakings or investment firms which is established in more than one country, it is desirable to have a single auditor for the organization and coordination of the separate audits wherever possible; whereas it is however not appropriate to lay this down as an obligation in this Directive;

Whereas it is desirable that the competent authorities have the right to veto the appointment or reappointment of persons responsible for carrying out the statutory audits of accounts, for example if they have failed to cooperate with the competent authorities or if they have otherwise performed unsatisfactorily from those authorities' point of view; whereas in view of the present situation of Member States' laws and regulations concerning the relationship between competent authorities, auditors and shareholders, it is not appropriate to provide for this in this Directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Definition

- To Article 1 of Directive 77/780/EEC, a new fifth indent,
- to Article 1 of Directive 92/49/EEC, a new letter (l),
- to Article 1 of Directive 92/96/EEC, a new letter (m), and
- to Article 1 of Directive 93/22/EEC, a new number 15,

shall be added which reads as follows:

“group” means a situation where two or more undertakings are linked directly or indirectly by way of:

- (a) “participation” which shall mean the ownership, direct or indirect, of 20 % or more of the voting rights or capital of an undertaking; or
- (b) “control” which shall mean the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC⁽¹⁾, or a similar relationship between any natural or legal person and an undertaking

⁽¹⁾ OJ No L 193, 18. 7. 1983, p. 1.’

Article 2

Group structures

- 1. — To Article 3 (2) of Directive 77/780/EEC, a fourth indent, and
- to Article 3 (3) of Directive 92/22/EEC, a third indent,

shall be added which reads as follows:

‘— where a financial undertaking is part of a group, the competent authorities must satisfy themselves that the structure of the group and in particular the proposed relationships between the financial undertaking and other entities in the group are such as to enable the financial undertaking to be supervised effectively.’

- 2. — To Article 3 (4) of Directive 77/780/EEC, after the first sentence, and
- to Article 3 (4) of Directive 93/22/EEC, after the first sentence,

the following sentence shall be added which reads as follows:

‘Where a financial undertaking is part of a group, information about the structural organization of the

group must be provided including sufficient details on the structure of the group and proposed relationships between the financial undertaking and the other entities of the group to allow the competent authorities to assess whether the financial undertaking can be supervised effectively.’

- 3. — To Article 8 (1) of Directive 73/239/EEC, as amended by Directive 92/49/EEC, and
- to Article 8 (1) of Directive 79/267/EEC, as amended by Directive 92/96/EEC,

a new paragraph 1 (a) shall be added which reads as follows:

‘(a) Where an insurance undertaking is part of a group the competent authorities shall satisfy themselves that the structure of the group and in particular the proposed relationships between the insurance undertaking and other entities in the group are such as to enable the insurance undertaking to be supervised effectively. The insurance undertaking concerned shall provide information about the structural organization of the group including sufficient details on the structure of the group and proposed relationships between the insurance undertaking and the other entities of the group.’

- 4. (a) — To Article 3 of Directive 77/780/EEC, and
- to Article 3 of Directive 93/22/EEC,

a new paragraph 8 shall be added which reads as follows:

‘8. Member States shall require that a financial undertaking shall notify to the competent authorities:

- when it becomes part of a group,
- when the structure of the group to which it belongs changes;

under these circumstances paragraph 4 applies.’

- (b) — To Article 8 of Directive 73/239/EEC, as amended by Directive 92/49/EEC, and
- to Article 8 of Directive 79/267/EEC, as amended by Directive 92/96/EEC,

a new paragraph 5 shall be added which reads as follows:

‘5. Member States shall require that a financial undertaking shall notify to the competent authorities:

- when it becomes part of a group,

— when the structure of the group to which it belongs changes;

under these circumstances paragraph 1 (a) applies.'

Article 3

Head office and registered office

- To Article 3 (2) of Directive 77/780/EEC,
- to Article 6 (a) of Directive 73/239/EEC, as amended by Directive 92/49/EEC, and
- to Article 6 (a) of Directive 79/267/EEC, as amended by Directive 92/96/EEC,

the following indent shall be added which reads:

'— the head office of the financial undertaking must be in the same Member State as its registered office and that in which the authorization is being requested.'

Article 4

Exchange of information

1. — Article 12 (5) of Directive 77/780/EEC, as amended by Article 16 of Directive 89/646/EEC,
- Article 16 (5) of Directive 92/49/EEC,
- Article 15 (5) of Directive 92/96/EEC, and
- Article 25 (5) (b) of Directive 93/22/EEC,

shall be amended as follows:

(a) the second indent shall read:

'— bodies involved in the liquidation and bankruptcy of the financial undertaking and in other similar procedures and the authorities competent to supervise such bodies;'

(b) the third indent shall read:

'— persons responsible for carrying out statutory audits of the accounts of the financial undertaking and the authorities which are responsible for the approval of statutory auditors;'

(c) a new fourth indent shall be added which reads:

'— bodies responsible for the detection and investigation of breaches of company law, in particular laws relating to the rights and obli-

gations of shareholders and of members of the administrative, managerial and supervisory bodies of companies, and to take-over bids and the persons appointed by such responsible bodies to carry out specific tasks.'

2. — To Article 12 (5) of Directive 77/780/EEC, as amended by Article 16 of Directive 89/646/EEC, and

— to Article 25 (5) (b) of Directive 93/22/EEC,

a new fifth indent shall be added which reads as follows:

'— departments of central banks or other bodies responsible for the oversight of payment systems.'

3. To Article 12 (5) of Directive 77/780/EEC, as amended by Article 16 of Directive 89/646/EEC, a new paragraph 8 shall be added which reads as follows:

'8. This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 1 to 4 to a clearing house or other similar body recognized under national law for the provision of clearing or settlement services to one of its markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults on the market. The information received shall be subject to the conditions of professional secrecy imposed in paragraph 1. The Member States shall, however, ensure that information received under paragraph 2 may never be disclosed in the cases referred to in this paragraph except with the express consent of the competent authorities which disclosed the information.'

Article 5

Role of statutory auditors

- To Article 12 of Directive 77/780/EEC, as amended by Article 16 of Directive 89/646/EEC, a new paragraph 9,

— to Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EEC a new paragraph 7, and

— to Article 25 of Directive 93/22/EEC, a new paragraph 10,

shall be added which reads as follows:

'The Member States shall provide that any person responsible for carrying out statutory audits of the

accounts of the financial undertaking shall have the duty to report immediately to the competent authorities for prudential supervision if in the course of this work, he becomes aware of facts which are likely to lead to a serious qualification or refusal of the certificate of audit; endanger the existence of the financial undertaking; or gravely impair its development or imperil the protection of clients, or which indicate that the principles of sound management have been seriously violated.'

Article 6

Final provisions

No later than 1 July 1995 Member States shall adopt the laws, regulations and administrative provisions necessary for them to comply with this Directive.

These provisions shall enter into force no later than 31 December 1995. The Member States shall forthwith inform the Commission thereof.

Article 7

Whenever the words 'financial undertaking' are used in the Directive they shall be replaced by:

- 'credit institution' when this Directive amends Directives 77/780/EEC and 89/646/EEC,
- 'insurance undertaking' when this Directive amends Directives 73/239/EEC, 92/49/EEC, 79/267/EEC and 92/96/EEC,
- 'investment firm' when this Directive amends Directive 93/22/EEC.

Article 8

This Directive is addressed to the Member States.
