

## 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 <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

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 <sup>(4)</sup>, as last amended by Directive 86/524/EEC <sup>(5)</sup>, Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis <sup>(6)</sup>, Council Directive 86/635/EEC of 8 December 1986 on the annual and consolidated accounts

of banks and other financial institutions <sup>(7)</sup> and Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions <sup>(8)</sup>;

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

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

<sup>(1)</sup> OJ No C 84, 31. 3. 1988, p. 1.

<sup>(2)</sup> OJ No C 96, 17. 4. 1989, p. 33 and Decision of 22 November 1989 (not yet published in the Official Journal).

<sup>(3)</sup> OJ No C 318, 17. 12. 1988, p. 42.

<sup>(4)</sup> OJ No L 322, 17. 12. 1977, p. 30.

<sup>(5)</sup> OJ No L 309, 4. 11. 1986, p. 15.

<sup>(6)</sup> OJ No L 193, 18. 7. 1983, p. 18.

<sup>(7)</sup> OJ No L 372, 31. 12. 1986, p. 1.

<sup>(8)</sup> OJ No L 124, 5. 5. 1989, p. 16.

<sup>(9)</sup> OJ No L 33, 4. 2. 1987, p. 10.

<sup>(10)</sup> 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 that 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<sup>(1)</sup>, 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 intended 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

<sup>(1)</sup> 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 negotiating 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 <sup>(1)</sup>,

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 <sup>(2)</sup>, 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 <sup>(3)</sup> 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;

<sup>(2)</sup> OJ No L 193, 18. 7. 1983, p. 1.

<sup>(3)</sup> OJ No L 348, 17. 12. 1988, p. 62.

<sup>(1)</sup> OJ No L 197, 18. 7. 1987, p. 33.

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<sup>(1)</sup>.

#### 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 shall 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.

<sup>(2)</sup> See p. 14 of this Official Journal.

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.

*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.

This obligation to provide information shall lapse whenever an agreement is reached with the third country referred to in paragraph 3 or 4 or when the measures referred to in the second and third subparagraphs of paragraph 4 cease to apply.

6. Measures taken pursuant to this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking-up and pursuit of the business of credit institutions.

#### TITLE IV

### Harmonization of the conditions governing pursuit of the business of credit institutions

#### Article 10

1. A credit institution's own funds may not fall below the amount of initial capital required pursuant to Article 4 at the time of its authorization.

2. The Member States may decide that credit institutions already in existence when the Directive is implemented, the own funds of which do not attain the levels prescribed for initial capital in Article 4, may continue to carry on their activities. In that event, their own funds may not fall below the highest level reached after the date of the notification of this Directive.

3. If control of a credit institution falling within the category referred to in paragraph 2 is taken by a natural or legal person other than the person who controlled the institution previously, the own funds of that institution must attain at least the level prescribed for initial capital in Article 4.

4. However, in certain specific circumstances and with the consent of the competent authorities, where there is a merger of two or more credit institutions falling within the category referred to in paragraph 2, the own funds of the institution resulting from the merger may not fall below the total own funds of the merged institutions at the time of the merger, as long as the appropriate levels pursuant to Article 4 have not been attained.

5. However, if, in the cases referred to in paragraphs 1, 2 and 4, the own funds should be reduced, the competent authorities may, where the circumstances justify it, allow an institution a limited period in which to rectify its situation or cease its activities.

#### Article 11

1. The Member States shall require any natural or legal person who proposes to acquire, directly or indirectly a

qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of the intended holding. Such a person must likewise inform the competent authorities if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20 %, 33 % or 50 % or so that the credit institution would become his subsidiary.

Without prejudice to the provisions of paragraph 2 the competent authorities shall have a maximum of three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the credit institution, they are not satisfied as to the suitability of the person referred to in the first subparagraph. If they do not oppose the plan referred to in the first subparagraph, they may fix a maximum period for its implementation.

2. If the acquirer of the holdings referred to in paragraph 1 is a credit institution authorized in another Member State or the parent undertaking of a credit institution authorized in another Member State or a natural or legal person controlling a credit institution authorized in another Member State and if, as a result of that acquisition, the institution in which the acquirer proposes to acquire a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be the subject of the prior consultation referred to in Article 7.

3. The Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a credit institution first to inform the competent authorities, telling them of the size of his intended holding. Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital held by him would fall below 20 %, 33 % or 50 % or so that the credit institution would cease to be his subsidiary.

4. On becoming aware of them, credit institutions shall inform the competent authorities of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in paragraphs 1 and 3.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at the annual general meetings of shareholders and members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

5. The Member States shall require that, where the influence exercised by the persons referred to in paragraph 1

is likely to operate to the detriment of the prudent and sound management of the institution, the competent authorities shall take appropriate measures to put an end to that situation. Such measures may consist for example in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information, as laid down in paragraph 1. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

#### Article 12

1. No credit institution may have a qualifying holding the amount of which exceeds 15% of its own funds in an undertaking which is neither a credit institution, nor a financial institution, nor an undertaking carrying on an activity referred to in the second subparagraph of Article 43 (2) (f) of Directive 86/635/EEC.

2. The total amount of a credit institution's qualifying holdings in undertakings other than credit institutions, financial institutions or undertakings carrying on activities referred to in the second subparagraph of Article 43 (2) (f) of Directive 86/635/EEC may not exceed 60% of its own funds.

3. The Member States need not apply the limits laid down in paragraphs 1 and 2 to holdings in insurance companies as defined in Directive 73/239/EEC<sup>(1)</sup>, as last amended by Directive 88/357/EEC<sup>(2)</sup>, and Directive 79/267/EEC<sup>(3)</sup>, as last amended by the Act of Accession of 1985.

4. Shares held temporarily during a financial reconstruction or rescue operation or during the normal course of underwriting or in an institution's own name on behalf of others shall not be counted as qualifying holdings for the purpose of calculating the limits laid down in paragraphs 1 and 2. Shares which are not financial fixed assets as defined in Article 35 (2) of Directive 86/635/EEC shall not be included.

5. The limits laid down in paragraphs 1 and 2 may be exceeded only in exceptional circumstances. In such cases, however, the competent authorities shall require a credit

institution either to increase its own funds or to take other equivalent measures.

6. Compliance with the limits laid down in paragraphs 1 and 2 shall be ensured by means of supervision and monitoring on a consolidated basis in accordance with Directive 83/350/EEC.

7. Credit institutions which, on the date of entry into force of the provisions implementing this Directive, exceed the limits laid down in paragraphs 1 and 2 shall have a period of 10 years from that date in which to comply with them.

8. The Member States may provide that the competent authorities shall not apply the limits laid down in paragraph 1 and 2 if they provide that 100% of the amounts by which a credit institution's qualifying holdings exceed those limits must be covered by own funds and that the latter shall not be included in the calculation of the solvency ratio. If both the limits laid down in paragraphs 1 and 2 are exceeded, the amount to be covered by own funds shall be the greater of the excess amounts.

#### Article 13

1. The prudential supervision of a credit institution, including that of the activities it carries on in accordance with Article 18, shall be the responsibility of the competent authorities of the home Member State, without prejudice to those provisions of this Directive which give responsibility to the authorities of the host Member State.

2. Home Member State competent authorities shall require that every credit institution have sound administrative and accounting procedures and adequate internal control mechanisms.

3. Paragraphs 1 and 2 shall not prevent supervision on a consolidated basis pursuant to Directive 83/350/EEC.

#### Article 14

1. In Article 7 (1) of Directive 77/780/EEC, the end of the second sentence is hereby replaced by the following: 'and all information likely to facilitate the monitoring of such institutions, in particular with regard to liquidity, solvency, deposit guarantees, the limiting of large exposures, administrative and accounting procedures and internal control mechanisms'.

2. Host Member States shall retain responsibility in cooperation with the competent authorities of the home Member State for the supervision of the liquidity of the branches of credit institutions pending further coordination. Without prejudice to the measures necessary for the reinforcement of the European Monetary System, host Member States shall retain complete responsibility for the

<sup>(1)</sup> OJ No L 228, 16. 8. 1973, p. 3.

<sup>(2)</sup> OJ No L 172, 4. 7. 1988, p. 1.

<sup>(3)</sup> OJ No L 63, 13. 3. 1979, p. 1.

measures resulting from the implementation of their monetary policies. Such measures may not provide for discriminatory or restrictive treatment based on the fact that a credit institution is authorized in another Member State.

3. Without prejudice to further coordination of the measures designed to supervise the risks arising out of open positions on markets, where such risks result from transactions carried out on the financial markets of other Member States, the competent authorities of the latter shall collaborate with the competent authorities of the home Member State to ensure that the institutions concerned take steps to cover those risks.

#### Article 15

1. Host Member States shall provide that, where a credit institution authorized in another Member State carries on its activities through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the host Member State, carry out themselves or through the intermediary of persons they appoint for that purpose on-the-spot verification of the information referred to in Article 7 (1) of Directive 77/780/EEC.

2. The competent authorities of the home Member State may also, for purposes of the verification of branches, have recourse to one of the other procedures laid down in Article 5 (4) of Directive 83/350/EEC.

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

#### Article 16

Article 12 of Directive 77/780/EEC is hereby replaced by the following:

##### 'Article 12

1. The Member States shall provide that all persons working or who have worked for the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy. This means that no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form, such that individual institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be divulged in civil or commercial proceedings.

2. Paragraph 1 shall not prevent the competent authorities of the various Member States from exchanging information in accordance with the Directives applicable to credit institutions. That information shall be subject to the conditions of professional secrecy 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 disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Article.

4. Competent authorities receiving confidential information under paragraphs 1 or 2 may use it only in the course of their duties:

- to check that the conditions governing the taking-up of the business of credit institutions are met and to facilitate monitoring, on a non-consolidated or consolidated basis, of the conduct of such business, especially with regard to the monitoring of liquidity, solvency, large exposures, and administrative and accounting procedures and internal control mechanisms, or
- to impose sanctions, or
- in an administrative appeal against a decision of the competent authority, or
- in court proceedings initiated pursuant to Article 13 or to special provisions provided for in the Directives adopted in the field of credit institutions.

5. Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or between Member States, between competent authorities and:

- authorities responsible for the supervision of other financial organizations and insurance companies and the authorities responsible for the supervision of financial markets,
- bodies involved in the liquidation and bankruptcy of credit institutions and in other similar procedures,
- persons responsible for carrying out statutory audits of the accounts of credit institutions and other financial institutions,

in the discharge of their supervisory functions, and the disclosure to bodies which administer deposit-guarantee schemes of information necessary to the exercise of their functions. The information received shall be subject to the conditions of professional secrecy indicated in paragraph 1.

6. Nor shall the provisions of this Article preclude a competent authority from disclosing to those central banks which do not supervise credit institutions

individually such information as they may need to act as monetary authorities. Information received in this context shall be subject to the conditions of professional secrecy indicated in paragraph 1.

7. In addition, notwithstanding the provisions referred to in paragraphs 1 and 4, the Member States may, by virtue of provisions laid down by law, authorize the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies and to inspectors acting on behalf of those departments.

However, such disclosures may be made only where necessary for reasons of prudential control.

However, the Member States shall provide that information received under paragraphs 2 and 5 and that obtained by means of the on-the-spot verification referred to in Article 15 (1) and (2) of Directive 89/646/EEC<sup>(1)</sup> 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 or of the competent authorities of the Member State in which on-the-spot verification was carried out.

<sup>(1)</sup> OJ No L 386, 30. 12. 89, p.1.

#### Article 17

Without prejudice to the procedures for the withdrawal of authorizations and the provisions of criminal law, the Member States shall provide that their respective competent authorities may, as against credit institutions or those who effectively control the business of credit institutions which breach laws, regulations or administrative provisions concerning the supervision or pursuit of their activities, adopt or impose in respect of them penalties or measures aimed specifically at ending observed breaches or the causes of such breaches.

#### TITLE V

#### Provisions relating to the freedom of establishment and the freedom to provide services

#### Article 18

1. The Member States shall provide that the activities listed in the Annex may be carried on within their territories, in accordance with Articles 19 to 21, either by the establishment of a branch or by way of the provision of services, by any credit institution authorized and supervised by the competent authorities of another Member State, in accordance with this Directive, provided that such activities are covered by the authorization.

2. The Member States shall also provide that the activities listed in the Annex may be carried on within their territories, in accordance with Articles 19 to 21, either by the

establishment of a branch or by way of the provision of services, by any financial institution from another Member State, whether a subsidiary of a credit institution or the jointly-owned subsidiary of two or more credit institutions, the memorandum and articles of association of which permit the carrying on of those activities and which fulfils each of the following conditions:

- the parent undertaking or undertakings must be authorized as credit institutions in the Member State by the law of which the subsidiary is governed,
- the activities in question must actually be carried on within the territory of the same Member State,
- the parent undertaking or undertakings must hold 90% or more of the voting rights attaching to shares in the capital of the subsidiary,
- the parent undertaking or undertakings must satisfy the competent authorities regarding the prudent management of the subsidiary and must have declared, with the consent of the relevant home Member State competent authorities, that they jointly and severally guarantee the commitments entered into by the subsidiary,
- the subsidiary must be effectively included, for the activities in question in particular, in the consolidated supervision of the parent undertaking, or of each of the parent undertakings, in accordance with Directive 83/350/EEC, in particular for the calculation of the solvency ratio, for the control of large exposures and for purposes of the limitation of holdings provided for in Article 12 of this Directive.

Compliance with these conditions must be verified by the competent authorities of the home Member State and the latter must supply the subsidiary with a certificate of compliance which must form part of the notification referred to in Articles 19 and 20.

The competent authorities of the home Member State shall ensure the supervision of the subsidiary in accordance with Articles 10 (1), 11, 13, 14 (1), 15 and 17 of this Directive and Articles 7 (1) and 12 of Directive 77/780/EEC.

The provisions mentioned in this paragraph shall be applicable to subsidiaries, subject to the necessary modifications. In particular, the words 'credit institution' should be read as 'financial institution fulfilling the conditions laid down in Article 18 (2)' and the word 'authorization' as 'memorandum and articles of association'.

The second subparagraph of Article 19 (3) shall read:

'The home Member State competent authorities shall also communicate the amount of own funds of the subsidiary financial institution and the consolidated solvency ratio of the credit institution which is its parent undertaking.'

If a financial institution eligible under this paragraph should cease to fulfil any of the conditions imposed, the home

Member State shall notify the competent authorities of the host Member State and the activities carried on by that institution in the host Member State shall become subject to the legislation of the host Member State.

#### Article 19

1. A credit institution wishing to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State.

2. The Member State shall require every credit institution wishing to establish a branch in another Member State to provide the following information when effecting the notification referred to in paragraph 1:

- (a) the Member State within the territory of which it plans to establish a branch;
- (b) a programme of operations setting out *inter alia* the types of business envisaged and the structural organization of the branch;
- (c) the address in the host Member State from which documents may be obtained;
- (d) the names of those responsible for the management of the branch.

3. Unless the competent authorities of the home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged, they shall within three months of receipt of the information referred to in paragraph 2 communicate that information to the competent authorities of the host Member State and shall inform the institution concerned accordingly.

The home Member State competent authorities shall also communicate the amount of own funds and the solvency ratio of the credit institution and, pending subsequent coordination, details of any deposit-guarantee scheme which is intended to ensure the protection of depositors in the branch.

Where the competent authorities of the home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the host Member State, they shall give reasons for their refusal to the institution concerned within three months of receipt of all the information. That refusal or failure to reply shall be subject to a right to apply to the courts in the home Member State.

4. Before the branch of a credit institution commences its activities the competent authorities of the host Member State shall, within two months of receiving the information mentioned in paragraph 3, prepare for the supervision of the credit institution in accordance with Article 21 and if necessary indicate the conditions under which, in the interest of the general good, those activities must be carried on in the host Member State.

5. On receipt of a communication from the competent authorities of the host Member State, or in the event of the

expiry of the period provided for in paragraph 4 without receipt of any communication from the latter, the branch may be established and commence its activities.

6. In the event of a change in any of the particulars communicated pursuant to paragraph 2 (b), (c) or (d) or in the deposit-guarantee scheme referred to in paragraph 3 a credit institution shall give written notice of the change in question to the competent authorities of the home and host Member States at least one month before making the change so as to enable the competent authorities of the home Member State to take a decision pursuant to paragraph 3 and the competent authorities of the host Member State to take a decision on the change pursuant to paragraph 4.

#### Article 20

1. Any credit institution wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State of the activities on the list in the Annex which it intends to carry on.

2. The competent authorities of the home Member State shall, within one month of receipt of the notification mentioned in paragraph 1, send that notification to the competent authorities of the host Member State.

#### Article 21

1. Host Member State may, for statistical purposes, require that all credit institutions having branches within their territories shall report periodically on their activities in those host Member States to the competent authorities of those host Member States.

In discharging the responsibilities imposed on them in Article 14 (2) and (3), host Member States may require that branches of credit institutions from other Member States provide the same information as they require from national credit institutions for that purpose.

2. Where the competent authorities of a host Member State ascertain that an institution having a branch or providing services within its territory is not complying with the legal provisions adopted in that State pursuant to the provisions of this Directive involving powers of the host Member State competent authorities, those authorities shall require the institution concerned to put an end to that irregular situation.

3. If the institution concerned fails to take the necessary steps, the competent authorities of the host Member State shall inform the competent authorities of the home Member State accordingly. The competent authorities of the home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the institution concerned puts an end to that irregular situation. The nature of those measures shall be communicated to the competent authorities of the host Member State.

4. If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the institution persists in violating the legal rules referred to in paragraph 2 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 or to punish further irregularities and, insofar as is necessary, to prevent that institution from initiating further transactions within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for these measures on credit institutions.

5. The foregoing provisions shall not affect the power of host Member States to take appropriate measures to prevent or to punish irregularities committed within their territories which are contrary to the legal rules they have adopted in the interest of the general good. This shall include the possibility of preventing offending institutions from initiating any further transactions within their territories.

6. Any measure adopted pursuant to paragraphs 3, 4 and 5 involving penalties or restrictions on the exercise of the freedom to provide services must be properly justified and communicated to the institution concerned. Every such measure shall be subject to a right of appeal to the courts in the Member State the authorities of which adopted it.

7. Before following the procedure provided for in paragraphs 2 to 4, the competent authorities of the host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of depositors, investors and others to whom services are provided. The Commission and the competent authorities of the other Member States concerned must be informed of such measures at the earliest opportunity.

The Commission may, after consulting the competent authorities of the Member States concerned, decide that the Member State in question must amend or abolish those measures.

8. Host Member States may exercise the powers conferred on them under this Directive by taking appropriate measures to prevent or to punish irregularities committed within their territories. This shall include the possibility of preventing institutions from initiating further transactions within their territories.

9. In the event of the withdrawal of authorization the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the institution concerned from initiating further transactions within its territory and to safeguard the interests of depositors. Every two years the Commission shall submit a report on such cases to the Banking Advisory Committee.

10. The Member States shall inform the Commission of the number and type of cases in which there has been a refusal

pursuant to Article 19 or in which measures have been taken in accordance with paragraph 4. Every two years the Commission shall submit a report on such cases to the Banking Advisory Committee.

11. Nothing in this Article shall prevent credit institutions with head offices in other Member States from advertising their services through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good.

## TITLE VI

### Final provisions

#### Article 22

1. The technical adaptations to be made to this Directive in the following areas shall be adopted in accordance with the procedure laid down in paragraph 2:

- expansion of the content of the list referred to in Article 18 and set out in the Annex or adaptation of the terminology used in that list to take account of developments on financial markets,
- alteration of the amount of initial capital prescribed in Article 4 to take account of developments in the economic and monetary field,
- the areas in which the competent authorities must exchange information as listed in Article 7(1) of Directive 77/780/EEC,
- clarification of the definitions in order to ensure uniform application of this Directive throughout the Community,
- clarification of the definitions in order to take account in the implementation of this Directive of developments on financial markets,
- the alignment of terminology on and the framing of definitions in accordance with subsequent acts on credit institutions and related matters.

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 Commission representative 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 concerning the measures to be taken. The Council shall act by a qualified majority.

If the Council does not act within three months of the referral to it the Commission shall adopt the measures proposed, unless the Council has decided against those measures by a simple majority.

#### *Article 23*

1. Branches which have commenced their activities, in accordance with the provisions in force in their host Member States, before the entry into force of the provisions adopted in implementation of this Directive shall be presumed to have been subject to the procedure laid down in Article 19 (1) to (5). They shall be governed, from the date of that entry into force, by Articles 15, 18, 19 (6) and 21. They shall benefit pursuant to Article 6 (3).

2. Article 20 shall not affect rights acquired by credit institutions providing services before the entry into force of the provisions adopted in implementation of this Directive.

#### *Article 24*

1. Subject to paragraph 2, the Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by the later of the two dates laid down for the adoption of measures to comply with Directives 89/299/EEC and 89/647/EEC and at the latest by 1 January 1993. They shall forthwith inform the Commission thereof.

2. The Member States shall adopt the measures necessary for them to comply with Article 6 (2) by 1 January 1990.

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

#### *Article 25*

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1989.

*For the Council*  
*The President*  
P. BÉRÉGOVOY

## ANNEX

## LIST OF ACTIVITIES SUBJECT TO MUTUAL RECOGNITION

1. Acceptance of deposits and other repayable funds from the public.
2. Lending <sup>(1)</sup>.
3. Financial leasing.
4. Money transmission services.
5. Issuing and administering means of payment (e.g. credit cards, travellers' cheques and bankers' drafts).
6. Guarantees and commitments.
7. Trading for own account or for account of customers in:
  - (a) money market instruments (cheques, bills, CDs, etc.);
  - (b) foreign exchange;
  - (c) financial futures and options;
  - (d) exchange and interest rate instruments;
  - (e) transferable securities.
8. Participation in share issues and the provision of services related to such issues.
9. Advice to undertakings on capital structure, industrial strategy and related questions and advice and services relating to mergers and the purchase of undertakings.
10. Money broking.
11. Portfolio management and advice.
12. Safekeeping and administration of securities.
13. Credit reference services.
14. Safe custody services.

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<sup>(1)</sup> Including *inter alia*:

- consumer credit,
- mortgage credit,
- factoring, with or without recourse,
- financing of commercial transactions (including forfaiting).