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## Legislation

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## II

(Acts whose publication is not obligatory)

## COUNCIL

## COUNCIL DIRECTIVE

of 13 April 1989

on the approximation of the laws of the Member States relating to the lateral protection  
(side guards) of certain motor vehicles and their trailers

(89/297/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a 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 it is important to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992; whereas the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas the technical requirements which vehicles must satisfy pursuant to national laws relate *inter alia* to the side guards of motor vehicles and their trailers;

Whereas these requirements differ from one Member State to another; whereas it is therefore necessary that all Member States adopt the same requirements, either in addition to, or in place of, their existing rules in order, in particular, to allow the EEC type-approval procedure which was the subject of Council Directive 70/156/EEC of 6 February 1970 on the

approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers <sup>(4)</sup>, as last amended by Directive 87/403/EEC <sup>(5)</sup>, to be introduced in respect of each type of vehicle;

Whereas, in order to increase road safety, it is necessary to fit side guards to all vehicles in higher weight categories in order to offer unprotected road users (pedestrians, cyclists, motorcyclists) efficient protection against the risk of falling under the sides of such vehicles;

Whereas, for practical reasons, it is felt necessary to provide for different periods of application for new type-approvals and for all new vehicles;

Whereas the approximation of the national laws relating to motor vehicles includes the mutual recognition by the Member States of the checks carried out by each of them on the basis of common requirements,

HAS ADOPTED THIS DIRECTIVE:

Article 1

For the purposes of this Directive, 'vehicle' means any motor vehicle in categories N<sub>2</sub> and N<sub>3</sub> and trailer in categories O<sub>3</sub> and O<sub>4</sub>, as defined in Annex 1 to Directive 70/156/EEC, designed for use on the road, with or without bodywork and with a maximum design speed exceeding 25 km/h.

<sup>(1)</sup> OJ No C 265, 5. 10. 1987, p. 21.

<sup>(2)</sup> OJ No C 94, 11. 4. 1988, p. 23.

<sup>(3)</sup> OJ No C 80, 28. 3. 1988, p. 17.

<sup>(4)</sup> OJ No L 42, 23. 2. 1970, p. 1.

<sup>(5)</sup> OJ No L 220, 8. 8. 1987, p. 44.

*Article 2*

1. No Member State may, on grounds relating to lateral protection, refuse to grant EEC type-approval or national type-approval in respect of a vehicle if such vehicle meets the requirements set out in the Annex.

2. No Member State may, on grounds relating to lateral protection, refuse or prohibit the sale, registration, entry into service or use of a vehicle if such a vehicle meets the requirements set out in the Annex.

*Article 3*

A Member State which has granted EEC type-approval shall take the measures necessary to ensure that it is informed of any modification to a part or characteristic referred to in the Annex. The competent authorities of that Member State shall determine whether fresh tests should be carried out on the modified type and a fresh report drawn up. Where such tests reveal that the requirements of this Directive have not been complied with, the modification shall not be authorized.

*Article 4*

1. With effect from 1 June 1990 Member States:

- may no longer issue the document provided for in Article 10 (1), third indent, of Directive 70/156/EEC in respect of a type of vehicle of which the lateral protection devices do not meet the requirements of this Directive,
- may refuse to grant national type-approval in respect of a type of vehicle of which the lateral protection devices do not comply with the provisions of this Directive.

2. With effect from 1 May 1991 Member States may prohibit the first entry into service of vehicles of which the lateral protection devices do not comply with the provisions of this Directive.

*Article 5*

The amendments necessary in order to adapt the requirements of the Annex so as to take account of technical progress shall be adopted in accordance with the procedure laid down in Article 13 of Directive 70/156/EEC.

*Article 6*

1. Member States shall bring into force the provisions necessary in order to comply with this Directive by 30 October 1989. They shall forthwith inform the Commission thereof.

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

*Article 7*

This Directive is addressed to the Member States.

Done at Luxembourg, 13 April 1989.

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

## ANNEX

## TECHNICAL REQUIREMENTS FOR LATERAL PROTECTION

## 1. General prescriptions and definitions

- 1.1. Every vehicle of categories N<sub>2</sub>, N<sub>3</sub>, O<sub>3</sub> and O<sub>4</sub> shall be so constructed and/or equipped as to offer, when a complete entity, effective protection to unprotected road users (pedestrians, cyclists, motorcyclists) against the risk of falling under the sides of the vehicle and being caught under the wheels <sup>(1)</sup>.

The Directive does not apply to:

- tractors for semi-trailers,
- trailers specially designed and constructed for the carriage of very long loads of indivisible length, such as timber, steel bars, etc.,
- vehicles designed and constructed for special purposes where it is not possible, for practical reasons, to fit such lateral protection.

- 1.2. A vehicle shall be deemed to satisfy the requirement set out in point 1.1 if its side parts provide protection conforming to the provisions of the paragraphs below.

## 1.3. Definitions

## 1.3.1. Vehicle type for the purposes of lateral protection

The term 'vehicle type for the purposes of lateral protection' means vehicles which do not differ with respect to the following main characteristics:

width of the rear axle, structure, dimensions, shape and materials of the bodywork and chassis, characteristics of the suspension of the vehicle in so far as they have a bearing on the requirements of point 2.

- 1.3.2. 'Unladen mass' means the weight of the vehicle in running order, unoccupied and unladen but complete with fuel coolant, lubricant tools and spare wheel, if supplied by the vehicle manufacturer as standard equipment.

## 1.4. Positioning of the vehicle

When tested for compliance with the technical specifications set out in point 2, the position of the vehicle shall be as follows:

- on a horizontal and flat surface,
- the steered wheels shall be in a straight-ahead position,
- the vehicle shall be unladen,
- semi-trailers shall be positioned on their supports with the loading surface horizontal.

## 2. Lateral protection provided by a specific device (side guard)

- 2.1. The device shall not increase the overall width of the vehicle and the main part of its outer surface shall not be more than 120 mm inboard from the outermost plane (maximum width) of the vehicle. Its forward end may be turned inwards on some vehicles in accordance with points 2.4.2 and 2.4.3. Its rearward end shall not be more than 30 mm inboard from the outermost edge of the rear tyres (excluding any bulging of the tyres close to the ground) over at least the rearmost 250 mm.

- 2.2. The outer surface of the device shall be smooth, substantially flat or horizontally corrugated and so far as possible continuous from front to rear; adjacent parts may however overlap, provided that the overlapping edge faces rearwards or downwards, or a gap of not more than 25 mm measured longitudinally may be left, provided that the rearward part does not protrude outboard of the forward part; domed heads of bolts or rivets may protrude beyond the surface to a distance not exceeding 10 mm and other parts may protrude to the same extent provided that they are smooth and similarly rounded; all external edges and corners shall be rounded with a radius not less than 2,5 mm (tested as prescribed in Directive 74/483/EEC <sup>(2)</sup>).

<sup>(1)</sup> This Directive does not prevent any country from having additional requirements for the vehicle parts forward of the front wheels and rearward of the rear wheels.

<sup>(2)</sup> OJ No L 266, 2. 10. 1974, p. 4.

- 2.3. The device may consist of a continuous flat surface, or of one or more horizontal rails, or a combination of surface and rails; when rails are used, they shall be not more than 300 mm apart and not less than:
- 50 mm high in the case of category N<sub>2</sub> and O<sub>3</sub> vehicles,
  - 100 mm high and essentially flat in the case of N<sub>3</sub> and O<sub>4</sub> vehicles.
- Combinations of surfaces and rails shall form a continuous side guard subject, however, to the provisions of point 2.2.
- 2.4. The *forward edge* of the side guard shall be constructed as follows:
- 2.4.1. Its position shall be:
- 2.4.1.1. on a motor vehicle: not more than 300 mm to the rear of the transverse vertical plane tangential to the rearmost part of the tyre on the wheel immediately forward of the guard;
- 2.4.1.2. on a drawbar trailer: not more than 500 mm to the rear of the plane defined in point 2.4.1.1;
- 2.4.1.3. on a semi-trailer: not more than 250 mm to the rear of the transverse median plane of the support legs, if support legs are fitted, but in any case the distance of the front edge to the transverse plane passing through the centre of the kingpin in its rearmost position may not exceed 2,7 m.
- 2.4.2. Where the forward edge lies in otherwise open space, the edge shall consist of a continuous vertical member extending over the whole height of the guard; the outer and forward faces of this member shall measure at least 50 mm rearward and be turned 100 mm inwards in the case of N<sub>2</sub> and O<sub>3</sub> and at least 100 mm rearwards and be turned 100 mm inwards in the case of N<sub>3</sub> and O<sub>4</sub>.
- 2.4.3. On a motor vehicle where the 300 mm-dimension referred to in point 2.4.1.1 falls within the cab, the guard shall be so constructed as to meet the cab panels and if necessary be turned in through an angle not exceeding 45°. A longitudinal gap of 100 mm shall be permitted between the forward edge and the cab panels in the case of suspended or tilt cabs. In this case, the provisions of point 2.4.2 are not applicable.
- 2.4.4. On a motor vehicle where the 300 mm dimension referred to in point 2.4.1.1 falls behind the cab and the side guard is extended forward as indicated in point 2.4.3. as an option to the manufacturer, the provisions of point 2.4.3 must be met.
- 2.5. The *rearward edge* of the side guard shall not be more than 300 mm forward of the transverse vertical plane tangential to the foremost part of the tyre on the wheel immediately to the rear; a continuous vertical member is not required on the rear edge.
- 2.6. The *lower edge* of the side guard shall at no point be more than 550 mm above the ground.
- 2.7. The *upper edge* of the guard shall not be more than 350 mm below that part of the structure of the vehicle, cut or contacted by a vertical plane tangential to the outer surface of the tyres, excluding any bulging close to the ground, except in the following cases:
- 2.7.1. where the plane in point 2.7 does not cut the structure of the vehicle, the upper edge shall be level with the surface of the load-carrying platform, of 950 mm from the ground, whichever is the less;
- 2.7.2. where the plane in point 2.7 cuts the structure of the vehicle at a level more than 1.3 m above the ground, then the upper edge of the side guard shall not be less than 950 mm above the ground;
- 2.7.3. on a vehicle specially designed and constructed, and not merely adapted, for the carriage of a container or demountable body, the upper edge of the guard may be determined in accordance with points 2.7.1 and 2.7.2, the container or body being considered as part of the vehicle.
- 2.8. Side guards shall be essentially rigid, securely mounted (they shall not be liable to loosening due to vibration in normal use of the vehicle) and, except as regards the parts listed in point 2.9, made of metal or any other suitable material.
- The side guard shall be considered suitable if it is capable of withstanding a horizontal static force of 1 kN applied perpendicularly to any part of its external surface by the centre of a ram the face of which is circular and flat, with a diameter of 220 mm  $\pm$  10 mm, and if the deflection of the guard under load is then not more than:
- 30 mm over the rearmost 250 mm of the guard, and
  - 150 mm over the remainder of the guard.

- 2.8.1. The above requirement may be checked by means of calculations.
- 2.9. Components permanently fixed to the vehicle, e.g. battery box, air tanks, fuel tanks, lamps, reflectors, spare wheels and tool boxes, may be incorporated in the side guard, provided that they meet the dimensional requirements of the Directive. As regards gaps, the requirements set out in point 2.2 shall apply.
- 2.10. The side guard may not be used for the attachment of brake, air or hydraulic pipes.
- 3. *By derogation* from the above provisions, vehicles of the following types need comply only as indicated in each case:
  - 3.1. *An extendible trailer* shall comply with all of the requirements of point 2, when closed to its minimum length; when the trailer is extended, the side guards shall comply with points 2.6, 2.7 and 2.8, and with either 2.4 or 2.5 but not necessarily both; extension of the trailer shall not produce gaps in the length of the side guards;
  - 3.2. a *tank-vehicle* that is a vehicle designed solely for the carriage of fluid substance in a closed tank permanently fitted to the vehicle and provided with hose or pipe connections for loading or unloading, shall be fitted with side guards which comply so far as is practicable with all the requirements of point 2; strict compliance may be waived only where operational requirements make this necessary;
  - 3.3. On a vehicle fitted with *extendible legs* to provide additional stability during loading, unloading or other operations for which the vehicle is designed, the side guard may be arranged with additional gaps where these are necessary to permit extension of the legs.
  - 3.4. On a vehicle equipped with anchorage points for ro-ro transport, gaps shall be permitted within the side guard to accept the passage and tensioning of fixing lashings.
- 4. If the sides of the vehicle are so designed and/or equipped that by their shape and characteristics their component parts together meet the requirements of point 2, they may be regarded as replacing the side guards.
- 5. **Application for EEC type-approval**
  - 5.1. The application for EEC type-approval of a vehicle type with respect to lateral protection shall be submitted by the vehicle manufacturer or his authorized representative.
  - 5.2. It must be accompanied by the undermentioned documents in triplicate and the following information:
    - 5.2.1. a description of the vehicle from the standpoint of the criteria referred to in point 1.4.1, together with dimensional drawings and either photographs or exploded views of the sides of the vehicle. The numbers and/or symbols identifying the vehicle type must be quoted;
    - 5.2.2. a technical description of the parts providing lateral protection together with sufficiently detailed information.
  - 5.3. a vehicle representative of the type to be approved must be submitted to the technical service responsible for the type-approval tests.
- 6. **EEC type-approval**
  - 6.1. The EEC type-approval certificate for the vehicle type must be accompanied by an Annex drawn up in conformity with the model shown in the Appendix.

## Appendix

## MODEL

[Maximum format: A4 (210 × 297 mm)]

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( <sup>1</sup> )
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**ANNEX TO THE EEC TYPE-APPROVAL CERTIFICATE IN RESPECT OF THE LATERAL PROTECTION  
OF A TYPE OF VEHICLE**

*(Articles 4 (2) and 10 of Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of  
the Member States relating to the type-approval of motor vehicles and their trailers)*

EEC type-approval number: .....; Extension: .....

1. Trade mark or name of vehicle: .....
2. Type of vehicle and category: .....
3. Name and address of manufacturer: .....  
.....
4. Name and address of manufacturer's authorized representative (if any): .....  
.....
5. Characteristics of the parts providing lateral protection: .....  
.....
6. Vehicle submitted for EEC type-approval on: .....  
.....
7. Technical service responsible for EEC type-approval tests: .....  
.....
8. Date of test report issued by the technical service: .....
9. Number of test report issued by the technical service: .....
10. Reason(s) for the extension of the EEC type-approval applicable): .....  
.....
11. EEC type approval/extension has been granted/refused (<sup>2</sup>) in respect of the lateral protection.
12. Place: .....
13. Date: .....
14. Signature: .....
15. Annexed is a list of documents making up the EEC type-approval file, deposited with the competent authority which granted approval; a copy can be obtained on request.
16. Remarks (if any): .....  
.....  
.....

<sup>(1)</sup> Name of administration.<sup>(2)</sup> Delete as appropriate.

*Example***DIRECTIVE 89/297/EEC****EEC TYPE-APPROVAL/EXTENSION NO: . . . .****TYPE: . . . .****Summary of annexed documents**

Total number of pages of the file: 9  
Number of pages of the description: 4  
Number of pages of drawing: 4  
Number of photographs: 1

	Pages
— General .....	1
— General description of vehicle .....	2
— Weights and dimensions .....	2
— Description of side guard .....	3

**Drawings and photographs provided:**

- drawing(s) of installation of the device: 031.3.046 (2 pages A4)  
031.3.047 (2 pages A5)
- photograph(s): 031.13.027 (1)

All documents, drawings and photographs shall bear the EEC type-approval/extension number.

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## COUNCIL DIRECTIVE

of 17 April 1989

coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus  
to be published when transferable securities are offered to the public

(89/298/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 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 investment in transferable securities, like any other form of investment, involves risks; whereas the protection of investors requires that they be put in a position to make a correct assessment of such risks so as to be able to take investment decisions in full knowledge of the facts;

Whereas the provision of full, appropriate information concerning transferable securities and the issuers of such securities promotes the protection of investors;

Whereas, moreover, such information is an effective means of increasing confidence in transferable securities and thus contributes to the proper functioning and development of transferable securities markets;

Whereas a genuine Community information policy relating to transferable securities should therefore be introduced; whereas, by virtue of the safeguards that it offers investors and its impact on the proper functioning of transferable securities markets, such an information policy is capable of promoting the interpenetration of national transferable securities markets and thus encouraging the creation of a genuine European capital market;

Whereas Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing <sup>(4)</sup>, as last amended by Directive 87/345/EEC <sup>(5)</sup>, represents an important step in the implementation of such a

Community information policy; whereas that Directive coordinates the information to be published when securities are admitted to stock exchange listing concerning the nature of the securities offered and the issuers of such securities, so as to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of issuers and of the rights attaching to such securities;

Whereas such an information policy also requires that when transferable securities are offered to the public for the first time in a Member State, whether by, or on behalf of the issuer or a third party, whether or not they are subsequently listed, a prospectus containing information of this nature must be made available to investors; whereas it is also necessary to coordinate the contents of that prospectus in order to achieve equivalence of the minimum safeguards afforded to investors in the various Member States;

Whereas, so far, it has proved impossible to furnish a common definition of the term 'public offer' and all its constituent parts;

Whereas, in cases where a public offer is of transferable securities which are to be admitted to official listing on a stock exchange, information similar to that required by Directive 80/390/EEC, whilst being adapted to the circumstances of the public offer, must be supplied; whereas, for public offers of transferable securities that are not to be admitted to official stock exchange listing, less detailed information can be required so as not to burden small and medium-sized issuers unduly; whereas, for public offers of transferable securities that are to be admitted to official stock exchange listing, the degree of coordination achieved is such that a prospectus approved by the competent authorities of a Member State can be used for public offers of the same securities in another Member State on the basis of mutual recognition; whereas mutual recognition should also apply where public offer prospectuses comply with the basic standards laid down in Directive 80/390/EEC and are approved by the competent authorities even in the absence of a request for admission to official stock exchange listing;

Whereas in order to ensure that the purposes of this Directive will be fully realized it is necessary to include within the scope of this Directive transferable securities issued by companies or firms governed by the laws of third countries;

<sup>(1)</sup> OJ No C 226, 31. 8. 1982, p. 4.

<sup>(2)</sup> OJ No C 125, 17. 5. 1982, p. 176 and OJ No C 69, 20. 3. 1989.

<sup>(3)</sup> OJ No C 310, 30. 11. 1981, p. 50.

<sup>(4)</sup> OJ No L 100, 17. 4. 1980, p. 1.

<sup>(5)</sup> OJ No L 185, 4. 7. 1987, p. 81.

Whereas it is advisable to provide for the extension, by means of agreements to be concluded by the Community with third countries, of the recognition of prospectuses from those countries on a reciprocal basis:

HAS ADOPTED THIS DIRECTIVE:

## SECTION I

### General provisions

#### Article 1

1. This Directive shall apply to transferable securities which are offered to the public for the first time in a Member State provided that these securities are not already listed on a stock exchange situated or operating in that Member State.

2. Where an offer to the public is for part only of the transferable securities from a single issue, the Member States need not require that another prospectus be published if the other part is subsequently offered to the public.

#### Article 2

This Directive shall not apply:

1. to the following types of offer:

- (a) where transferable securities are offered to persons in the context of their trades, professions or occupations, and/or
- (b) where transferable securities are offered to a restricted circle of persons, and/or
- (c) where the selling price of all the transferable securities offered does not exceed ECU 40 000, and/or
- (d) where the transferable securities offered can be acquired only for a consideration of at least ECU 40 000 per investor;

2. to transferable securities of the following types:

- (a) to transferable securities offered in individual denominations of at least ECU 40 000;
- (b) to units issued by collective investment undertakings other than of the closed-end type;
- (c) to transferable securities issued by a State or by one of a State's regional or local authorities or by public international bodies of which one or more Member States are members;
- (d) to transferable securities offered in connection with a take-over bid;
- (e) to transferable securities offered in connection with a merger;

- (f) to shares allotted free of charge to the holders of shares;
- (g) to shares or transferable securities equivalent to shares offered in exchange for shares in the same company if the offer of such new securities does not involve any overall increase in the company's issued shares capital;
- (h) to transferable securities offered by their employer or by an affiliated undertaking to or for the benefit of serving or former employees;
- (i) to transferable securities resulting from the conversion of convertible debt securities or from the exercise of the rights conferred by warrants or to shares offered in exchange for exchangeable debt securities, provided that a public offer prospectus or listing particulars relating to those convertible or exchangeable debt securities or those warrants were published in the same Member State;
- (j) to transferable securities issued, with a view to their obtaining the means necessary to achieve their disinterested objectives, by associations with legal status or non-profit-making bodies, recognized by the State;
- (k) to shares or transferable securities equivalent to shares, ownership of which entitles the holder to avail himself of the services rendered by bodies such as 'building societies', 'Crédits populaires', 'Genossenschaftsbanken', or 'Industrial and Provident Societies', or to become a member of such a body;
- (l) to Euro-securities which are not the subject of a generalized campaign of advertising or canvassing.

#### Article 3

For the purposes of this Directive:

- (a) 'collective investment undertakings other than of the closed-end type' shall mean unit trusts and investment companies:
  - the object of which is the collective investment of capital provided by the public, and which operate on the principle of risk spreading, and
  - the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those undertakings. Action taken by such undertakings to ensure that the stock exchange value of their units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption;
- (b) 'units of a collective investment undertaking' shall mean transferable securities issued by a collective investment undertaking representing the rights of the participants in such an undertaking over its assets;

- (c) 'issuers' shall mean companies and other legal persons and any undertakings the transferable securities of which are offered to the public;
- (d) 'credit institution' shall mean an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account, including credit institutions such as referred to in Article 2 of Directive 77/780/EEC <sup>(1)</sup>, as last amended by Directive 86/524/EEC <sup>(2)</sup>;
- (e) 'transferable securities' shall mean shares in companies and other transferable securities equivalent to shares in companies, debt securities having a maturity of at least one year and other transferable securities equivalent to debt securities, and any other transferable security giving the right to acquire any such transferable securities by subscription or exchange;
- (f) 'Euro-securities' shall mean transferable securities which:
  - are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different States, and
  - are offered on a significant scale in one or more States other than that of the issuer's registered office, and
  - may be subscribed for or initially acquired only through a credit institution or other financial institution.
- in carrying on their business, benefit from State monopolies, and
- are set up or governed by a special law or pursuant to such a law or whose borrowings are unconditionally and irrevocably guaranteed by a Member State or one of a Member State's regional or local authorities;
- (c) debt securities issued by legal persons, other than companies, which are nationals of a Member State, and
  - were set up by special law, and
  - whose activities are governed by that law and consist solely in
    - (i) raising funds under state control through the issue of debt securities; and
    - (ii) financing production by means of the resources which they have raised and resources provided by a Member State and/or acquiring a holding in such production, and
  - the debt securities of which are, for the purposes of admission to official listing, considered by national law as debt securities issued or guaranteed by the State.

#### Article 4

Member States shall ensure that any offer of transferable securities to the public within their territories is subject to the publication of a prospectus by the person making the offer.

#### Article 5

Member States may provide for partial or complete exemption from the obligation to publish a prospectus where the transferable securities being offered to the public are:

- (a) debt securities or other transferable securities equivalent to debt securities issued in a continuous or repeated manner by credit institutions or other financial institutions equivalent to credit institutions which regularly publish their annual accounts and which, within the Community, are set up or governed by a special law or pursuant to such a law, or are subject to public supervision intended to protect savings;
- (b) debt securities or other transferable securities equivalent to debt securities issued by companies and other legal persons which are nationals of a Member State and which:

#### Article 6

If a full prospectus has been published in a Member State within the previous 12 months, the following prospectus drawn up by the same issuer in the same State, but relating to different transferable securities, may indicate only those changes likely to influence the value of the securities which have occurred since publication of the full prospectus.

However, that prospectus may be made available only accompanied by the full prospectus to which it relates or by a reference thereto.

### SECTION II

**Contents and arrangements for the scrutiny and distribution of the prospectus for transferable securities for which admission to official stock exchange listing is sought**

#### Article 7

Where a public offer relates to transferable securities which at the time of the offer are the subject of an application for admission to official listing on a stock exchange situated or operating within the same Member State, the contents of the prospectus and the procedures for scrutinizing and distributing it shall, subject to adaptations appropriate to the circumstances of a public offer, be determined in accordance with Directive 80/390/EEC.

<sup>(1)</sup> OJ No L 322, 17. 12. 1977, p. 30.

<sup>(2)</sup> OJ No L 309, 4. 11. 1986, p. 15.

*Article 8*

1. Where a public offer is made in one Member State and admission is sought to official listing on a stock exchange situated in another Member State, the person making the public offer shall have the possibility in the Member State in which the public offer is to be made of drawing up a prospectus the contents and procedures for scrutiny and distribution of which shall, subject to adaptations appropriate to the circumstances of a public offer, be determined in accordance with Directive 80/390/EEC.

2. Paragraph 1 shall apply only in those Member States which in general provide for the prior scrutiny of public offer prospectuses.

*Article 9*

A prospectus must be published or made available to the public not later than the time when an offer is made to the public.

*Article 10*

1. Where a prospectus in accordance with Article 7 or 8 is or is to be published, the advertisements, notices, posters and documents announcing the public offer must be communicated in advance to the competent authorities. The aforementioned documents must mention that there is a prospectus and state where the prospectus is published.

2. If the Member States authorize the distribution of the documents referred to in paragraph 1 before the prospectus is available, those documents must state that a prospectus will be published and indicate where members of the public will be able to obtain it.

3. The prospectus must be published either:

- by insertion in one or more newspapers circulated throughout the Member State in which the public offer is made, or
- in the form of a brochure to be made available, free of charge, to the public in the Member State in which the public offer is made and at the registered office of the person making the public offer and at the offices of the financial organizations retained to act as paying agents of the latter in the Member State where the offer is made.

4. In addition, either the complete prospectus or a notice stating where the prospectus has been published and where it may be obtained by the public must be inserted in a publication designated by the Member State in which the public offer is made.

## SECTION III

**Contents and arrangements for the distribution of the prospectus for transferable securities for which admission to official stock-exchange listing is not sought**

*Article 11*

1. Where a public offer relates to transferable securities other than those referred to in Articles 7 and 8, the prospectus must contain the information which, according to the particular nature of the issuer and of the transferable securities offered to the public, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities.

2. In order to fulfil the obligation referred to in paragraph 1, the prospectus shall, subject to the possibilities for exemption provided for in Articles 5 and 13, contain in as easily analysable and comprehensible a form as possible, at least the information listed below:

- (a) those responsible for the prospectus (names, functions and declarations by them that to the best of their knowledge the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import);
- (b) the offer to the public and the transferable securities being offered (nature of the securities being offered, the amount and purpose of the issue, the number of securities issued and the rights attaching to them; the income tax withheld at source; the period during which the offer is open; the date on which entitlement to dividends or interest arises; the persons underwriting or guaranteeing the offer; any restrictions on the free transferability of the securities being offered and the markets on which they may be traded; the establishments serving as paying agents; if known, the price at which the securities are offered, or else, if national rules so provide, the procedure and timetable for fixing the price if it is not known when the prospectus is being drawn up; methods of payment; the procedure for the exercise of any right of pre-emption and the methods of and time-limits for delivery of the securities);
- (c) the issuer (name, registered office; its date of incorporation, the legislation applicable to the issuer and the issuer's legal form, its objects, indication of the register and of the entry number therein) and its capital (amount of the subscribed capital, the number and main particulars of the securities of which the capital consists and any part of the capital still to be paid up; the amount of any convertible debt securities, exchangeable debt securities or debt securities with warrants and the procedures for conversion, exchange or subscription; where appropriate, the group of undertakings to which the issuer belongs; in the case of shares, the following additional information must be supplied: any shares not representing capital, the amount of the authorized capital and the duration of the authorization; in so far as

they are known, indication of the shareholders who directly or indirectly exercise or could exercise a determining role in the management of the issuer);

- (d) the issuer's principal activities (description of its principal activities, and, where appropriate, any exceptional factors which have influenced its activities; any dependence on patents, licences or contracts if these are of fundamental importance; information regarding investments in progress where they are significant; any legal proceedings having an important effect on the issuer's financial position);
- (e) the issuer's assets and liabilities, financial position and profits and losses (own accounts and, where appropriate, consolidated accounts; if the issuer prepares consolidated annual accounts only, it shall include those accounts in the prospectus; if the issuer prepares both own and consolidated accounts, it shall include both types of account in the prospectus; however, the issuer may include only one of the two, provided that the accounts which are not included do not provide any significant additional information); interim accounts if any have been published since the end of the previous financial year; the name of the person responsible for auditing the accounts; if that person has qualified them or refused an audit report, the fact must be stated and the reasons given;
- (f) the issuer's administration, management and supervision (names, addresses, functions; in the case of an offer to the public of shares in a limited-liability company, remuneration of the members of the issuer's administrative, management and supervisory bodies);
- (g) to the extent that such information would have a significant impact on any assessment that might be made of the issuer, recent developments in its business and prospects (the most significant recent trends concerning the development of the issuer's business since the end of the preceding financial year, information on the issuer's prospects for at least the current financial year).

3. Where a public offer relates to debt securities guaranteed by one or more legal persons, the information specified in paragraph 2 (c) to (g) must also be given with respect to the guarantor or guarantors.

4. Where a public offer relates to convertible debt securities, exchangeable debt securities or debt securities with warrants or to the warrants themselves, information must also be given with regard to the nature of the shares or debt securities to which they confer entitlement and the conditions of and procedures for conversion, exchange or subscription. Where the issuer of the shares or debt securities is not the issuer of the debt securities or warrants the information specified in paragraph 2 (c) to (g) must also be given with respect to the issuer of the shares or debt securities.

5. If the period of existence of the issuer is less than any period mentioned in paragraph 2, the information need be provided only for the period of the issuer's existence.

6. Where certain information specified in paragraph 2 is found to be inappropriate to the issuer's sphere of activity or its legal form or to the transferable securities being offered, a prospectus giving equivalent information must be drawn up.

7. Where shares are offered on a pre-emptive basis to shareholders of the issuer on the occasion of their admission to dealing on a stock exchange market, the Member States or bodies designated by them may allow some of the information specified in paragraph 2 (d), (e) and (f) to be omitted, provided that investors already possess up-to-date information about the issuer equivalent to that required by Section III as a result of stock exchange disclosure requirements.

8. Where a class of shares has been admitted to dealing on a stock exchange market, the Member States or bodies designated by them may allow a partial or complete exemption from the obligation to publish a prospectus if the number or estimated market value or the nominal value or, in the absence of a nominal value, the accounting par value of the shares offered amounts to less than 10 % of the number or of the corresponding value of shares of the same class already admitted to dealing, provided that investors already possess up-to-date information about the issuer equivalent to that required by Section III as a result of stock exchange disclosure requirements.

#### Article 12

1. However, the Member States may provide that the person making a public offer shall have the possibility of drawing up a prospectus the contents of which shall, subject to adaptations appropriate to the circumstances of a public offer, be determined in accordance with Directive 80/390/EEC.

2. The prior scrutiny of the prospectus referred to in paragraph 1 must be carried out by the bodies designated by the Member States even in the absence of a request for admission to official stock-exchange listing.

#### Article 13

1. The Member States or the bodies designated by them may authorize the omission from the prospectus referred to in Article 11 of certain information prescribed by this Directive:

- (a) if that information is of minor importance only and is not likely of influence assessment of the issuer's assets and liabilities, financial position, profits and losses and prospects; or
- (b) if disclosure of that information would be contrary to the public interest or seriously detrimental to the issuer,

provided that, in the latter case, omission would not be likely to mislead the public with regard to facts and circumstances essential for assessment of the transferable securities.

2. Where the initiator of an offer is neither the issuer nor a third party acting on the issuer's behalf, the Member States or the bodies designated by them may authorize omission from the prospectus of certain information which would not normally be in the initiator's possession.

3. The Member States or the bodies designated by them may provide for partial or complete exemption from the obligation to publish a prospectus where the information which those making the offer are required to supply by law, regulation or rules made by bodies enabled to do so by national laws is available to investors not later than the time when the prospectus must be or should have been published or made available to the public; in accordance with this Directive, in the form of documents giving information at least equivalent to that required by Section III.

#### *Article 14*

A prospectus must be communicated, before its publication, to the bodies designated for that purpose in each Member State in which the transferable securities are offered to the public for the first time.

#### *Article 15*

A prospectus must be published or made available to the public in the Member State in which an offer to the public is made in accordance with the procedures laid down by that Member State.

#### *Article 16*

A prospectus must be published or made available to the public not later than the time when an offer is made to the public.

#### *Article 17*

1. When a prospectus complying with Article 11 or 12 is or must be published, the advertisements, notices, posters and documents announcing the public offer distributed or made available to members of the public by the person making the public offer, must be communicated in advance to the bodies designated in accordance with Article 14, if such bodies carry out prior scrutiny of public offer prospectuses. In such a case, the latter shall determine whether the documents concerned should be checked before publication. Such documents must state that a prospectus exists and indicate where it is published.

2. If Member States authorize the dissemination of the documents referred to in paragraph 1 before the prospectus is available, those documents must state that a prospectus will be published and indicate where members of the public will be able to obtain it.

#### *Article 18*

Any significant new factor or significant inaccuracy in a prospectus capable of affecting assessment of the transferable securities which arises or is noted between the publication of the prospectus and the definitive closure of a public offer must be mentioned or rectified in a supplement to the prospectus, to be published or made available to the public in accordance with at least the same arrangements as were applied when the original prospectus was disseminated or in accordance with procedures laid down by the Member States or by the bodies designated by them.

### SECTION IV

#### Cooperation between Member States

#### *Article 19*

The Member States shall designate the bodies, which may be the same as those referred to in Article 14, which shall cooperate with each other for the purposes of the proper application of this Directive and shall use their best endeavours, within the framework of their responsibilities, to exchange all the information necessary to that end. Member States shall inform the Commission of the bodies thus designated. The Commission shall communicate that information to the other Member States.

Member States shall ensure that the bodies designated have the powers required for the accomplishment of their task.

#### *Article 20*

1. Where, for the same transferable securities, public offers are made simultaneously or within a short interval of one another in two or more Member States and where a public offer prospectus is drawn up in accordance with Article 7, 8 or 12, the authority competent for the approval of the prospectus shall be that of the Member State in which the issuer has its registered office if the public offer or any application for admission to official listing on a stock exchange is made in that Member State.

2. However, if the Member State referred to in paragraph 1 does not provide in general for the prior scrutiny of public offer prospectuses and if only the public offer or an application for admission to listing is made in that Member State, as well as in all other cases, the person making the public offer must choose the supervisory authority from

those in the Member States in which the public offer is made and which provide in general for the prior scrutiny of public offer prospectuses.

## SECTION V

### Mutual recognition

#### Article 21

1. If approved in accordance with Article 20, a prospectus must, subject to translation if required, be recognized as complying or be deemed to comply with the laws of the other Member States in which the same transferable securities are offered to the public simultaneously or within a short interval of one another, without being subject to any form of approval there and without those States being able to require that additional information be included in the prospectus. Those Member States may, however, require that the prospectus include information specific to the market of the country in which the public offer is made concerning in particular the income tax system, the financial organizations retained to act as paying agents for the issuer in that country, and the way in which notices to investors are published.

2. A prospectus approved by the competent authorities within the meaning of Article 24a of Directive 80/390/EEC must be recognized as complying or be deemed to comply with the laws of another Member State in which the public offer is made, even if partial exemption or partial derogation has been granted pursuant to this Directive, provided, however, that:

- (a) the partial exemption or partial derogation in question is of a type that is recognized in the rules of the other Member State concerned; and
- (b) the circumstances that justify the partial exemption or partial derogation also exist in the other Member State concerned.

Even if the conditions laid down in (a) and (b) of the first subparagraph are not fulfilled, the Member State concerned may deem a prospectus approved by the competent authorities within the meaning of Article 20 to comply with its laws.

3. The person making the public offer shall communicate to the bodies designated by the other Member States in which the public offer is to be made the prospectus that it intends to use in that State. That prospectus must be the same as the prospectus approved by the authority referred to in Article 20.

4. The Member States may restrict the application of this Article to prospectuses concerning transferable securities of issuers who have their registered office in a Member State.

## SECTION VI

### Cooperation

#### Article 22

1. The competent authorities shall cooperate wherever necessary for the purpose of carrying out their duties and shall exchange any information required for that purpose.

2. Where a public offer concerning transferable securities giving a right to participate in company capital, either immediately or at the end of a maturity period, is made in one or more Member States other than that in which the registered office of the issuer of the shares to which those securities give entitlement is situated, while that issuer's shares have already been admitted to official listing in that Member State, the competent authorities of the Member State of the offer may act only after having consulted the competent authorities of the Member State in which the registered office of the issuer of the shares in question is situated in cases where the public offer prospectus is scrutinized.

#### Article 23

1. Member States shall provide that all persons then or previously employed by the authorities referred to in Article 20 shall be bound by the obligation of professional secrecy. This shall mean that they may not divulge any confidential information received in the course of their duties to any person or authority whatsoever, except by virtue of provisions laid down by law.

2. Paragraph 1 shall not prevent the various Member State authorities referred to in Article 20 from forwarding information as provided for in this Directive. The information thus exchanged shall be covered by the obligation of professional secrecy applying the persons employed then or previously by the authority receiving such information.

3. Without prejudice to cases covered by criminal law, the authorities referred to in Article 20 receiving information pursuant to Article 21 may use it only to carry out their functions or in the context of an administrative appeal or in court proceedings relating to the carrying out of those functions.

## SECTION VII

### Negotiations with non-member countries

#### Article 24

The Community may, by means of agreements with one or more non-member countries concluded pursuant to the Treaty, recognize public offer prospectuses drawn up and scrutinized in accordance with the rules of the non-member

country or countries concerned as meeting the requirements of this Directive, subject to reciprocity, provided that the rules concerned give investors protections equivalent to that afforded by this Directive, even if those rules differ from the provisions of this Directive.

#### SECTION VIII

##### Contact Committee

###### Article 25

1. The Contact Committee set up by Article 20 of Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of transferable securities to official stock-exchange listing <sup>(1)</sup>, as last amended by Directive 82/148/EEC <sup>(2)</sup>, shall also have as its function:

- (a) to facilitate, without prejudice to Articles 169 and 170 of the Treaty, the harmonized implementation of this Directive through regular consultations on any practical problems arising from its application on which exchanges of views are deemed useful;
- (b) to facilitate consultation between the Member States on the supplements and improvements to prospectuses which they are entitled to require or recommend at national level;
- (c) to advise the Commission, if necessary, on any additions or amendments to be made to this Directive.

- 2. It shall not be the function of the Contact Committee to appraise the merits of decisions taken in individual cases.

#### SECTION IX

##### Final provisions

###### Article 26

- 1. Member States shall take the measures necessary for them to comply with this Directive by 17 April 1989. They shall forthwith inform the Commission thereof.
- 2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive.

###### Article 27

This Directive is addressed to the Member States.

Done at Luxembourg, 17 April 1989.

*For the Council*  
*The President*  
C. SOLCHAGA CATALAN

<sup>(1)</sup> OJ No L 66, 16. 3. 1979, p. 1.

<sup>(2)</sup> OJ No L 62, 5. 3. 1982, p. 22.



**COUNCIL DIRECTIVE**  
**of 17 April 1989**  
**on the own funds of credit institutions**  
**(89/299/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 common basic standards for the own funds of credit institutions are a key factor in the creation of an internal market in the banking sector since own funds serve to ensure the continuity of credit institutions and to protect savings; whereas such harmonization will strengthen the supervision of credit institutions and contribute to further coordination in the banking sector, in particular the supervision of major risks and solvency ratios;

Whereas such standards must apply to all credit institutions authorized in the Community;

Whereas the own funds of a credit institution can serve to absorb losses which are not matched by a sufficient volume of profits; whereas the own funds also serve as an important yardstick for the competent authorities, in particular for the assessment of the solvency of credit institutions and for other prudential purposes;

Whereas credit institutions in a common banking market engage in direct competition with each other, and the definitions and standards pertaining to own funds must therefore be equivalent; whereas, to that end, the criteria for determining the composition of own funds must not be left solely to Member States; whereas the adoption of common basic standards will be in the best interests of the Community in that it will prevent distortions of competition and will strengthen the Community banking system;

Whereas the definition laid down in this Directive provides for a maximum of items and qualifying amounts, leaving it to the discretion of each Member State to use all or some of such items or to adopt lower ceilings for the qualifying amounts;

Whereas this Directive specifies the qualifying criteria for certain own funds items, and the Member States remain free to apply more stringent provisions;

Whereas at the initial stage common basic standards are defined in broad terms in order to encompass all the items making up own funds in the different Member States;

Whereas, according to the nature of the items making up own funds, this Directive distinguishes between on the one hand, items constituting original own funds and, on the other, those constituting additional own funds;

Whereas it is recognized that due to the special nature of the fund for general banking risks, this item is to be included provisionally in own funds without limit; whereas, however, a decision on its final treatment will have to be taken as soon as possible after the implementation of the Directive; whereas that decision will have to take into account the results of discussions in international fora;

Whereas, to reflect the fact that items constituting additional own funds are not of the same nature as those constituting original own funds, the amount of the former included in own funds must not exceed the original own funds; whereas, moreover, the amount of certain items of additional own funds included must not exceed one-half of the original own funds;

Whereas, in order to avoid distortions of competition, public credit institutions must not include in their own funds guarantees granted them by the Member States or local authorities; whereas, however, the Kingdom of Belgium should be granted a transitional period up to 31 December 1994 in order to permit the institutions concerned to adjust to the new conditions by reforming their statutes;

Whereas whenever in the course of supervision it is necessary to determine the amount of the consolidated own funds of a group of credit institutions, that calculation shall be effected in accordance with Council Directive 83/350/EEC of 13 June 1983 on the supervision of credit institutions on a consolidated basis <sup>(4)</sup>; whereas that Directive leaves the Member States scope to interpret the technical details of its application, and that scope should be in keeping with the spirit of this Directive; whereas the former Directive is currently being revised to achieve greater harmonization;

<sup>(1)</sup> OJ No C 243, 27. 9. 1986, p. 4 and

OJ No C 32, 5. 2. 1988, p. 2.

<sup>(2)</sup> OJ No C 246, 14. 9. 1987, p. 72 and OJ No C 96, 17. 4. 1989.

<sup>(3)</sup> OJ No C 180, 8. 7. 1987, p. 51.

<sup>(4)</sup> OJ No L 193, 18. 7. 1983, p. 18.

Whereas the precise accounting technique to be used for the calculation of own funds must take account of the provisions of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions<sup>(1)</sup>, which incorporates certain adaptations of the provisions of Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts<sup>(2)</sup>; whereas pending transposition of the provisions of the abovementioned Directives into the national laws of the Member States, the use of a specific accounting technique for the calculation of own funds should be left to the discretion of the Member States;

Whereas this Directive forms part of the wider international effort to bring about approximation of the rules in force in major countries regarding the adequacy of own funds;

Whereas measures to comply with the definitions in this Directive must be adopted no later than the date of entry into force of the measures implementing the future directive harmonizing solvency ratios;

Whereas the Commission will draw up a report and periodically examine this Directive with the aim of tightening its provisions and thus achieving greater convergence on a common definition of own funds; whereas such convergence will allow the alignment of Community credit institutions' own funds;

Whereas it will probably be necessary to make certain technical and terminological adjustments to the directive to take account of the rapid development of financial markets; whereas pending submission by the Commission of a proposal which takes account of the special characteristics of the banking sector and which permits the introduction of a more suitable procedure for the implementation of this Directive, the Council reserves the right to take such measures.

HAS ADOPTED THIS DIRECTIVE:

#### Article 1

##### Scope

1. Wherever a Member State lays down by law, regulation or administrative action a provision in implementation of Community legislation concerning the prudential supervision of an operative credit institution which uses the term or refers to the concept of own funds, it

shall bring this term or concept into line with the definition given in the following Articles.

2. For the purposes of this Directive, 'credit institutions' shall mean the institutions to which Directive 77/780/EEC<sup>(3)</sup>, as last amended by Directive 86/524/EEC<sup>(4)</sup>, applies.

#### Article 2

##### General principles

1. Subject to the limits imposed in Article 6, the unconsolidated own funds of credit institutions shall consist of the following items:

- (1) capital within the meaning of Article 22 of Directive 86/635/EEC, in so far as it has been paid up, plus share premium accounts but excluding cumulative preferential shares;
- (2) reserves within the meaning of Article 23 of Directive 86/635/EEC and profits and losses brought forward as a result of the application of the final profit or loss. The Member States may permit inclusion of interim profits before a formal decision has been taken only if these profits have been verified by persons responsible for the auditing of the accounts and if it is proved to the satisfaction of the competent authorities that the amount thereof has been evaluated in accordance with the principles set out in Directive 86/635/EEC and is net of any foreseeable charge or dividend;
- (3) revaluation reserves within the meaning of Article 33 of Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies<sup>(5)</sup>, as last amended by Directive 84/569/EEC<sup>(6)</sup>;
- (4) funds for general banking risks within the meaning of Article 38 of Directive 86/635/EEC;
- (5) value adjustments within the meaning of Article 37 (2) of Directive 86/635/EEC;
- (6) other items within the meaning of Article 3;
- (7) the commitments of the members of credit institutions set up as cooperative societies and the joint and several commitments of the borrowers of certain institutions organized as funds, as referred to in Article 4 (1);
- (8) fixed-term cumulative preferential shares and subordinated loan capital as referred to in Article 4 (3).

<sup>(3)</sup> OJ No L 322, 17. 12. 1977, p. 30.

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

<sup>(5)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(6)</sup> OJ No L 314, 4. 12. 1984, p. 28.

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

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

The following items shall be deducted in accordance with Article 6:

- (9) own shares at book value held by a credit institution;
- (10) intangible assets within the meaning of Article 4 (9) ('assets') of Directive 86/635/EEC;
- (11) material losses of the current financial year;
- (12) holdings in other credit and financial institutions amounting to more than 10% of their capital, subordinated claims and the instruments referred to in Article 3 which a credit institution holds in respect of credit and financial institutions in which it has holdings exceeding 10% of the capital in each case.

Where shares in another credit or financial institution are held temporarily for the purposes of a financial assistance operation designed to reorganize and save that institution, the supervisory authority may waive this provision;

- (13) holdings in other credit and financial institutions of up to 10% of their capital, the subordinated claims and the instruments referred to in Article 3 which a credit institution holds in respect of credit and financial institutions other than those referred to in point 12 in respect of the amount of the total of such holdings, subordinated claims and instruments which exceed 10% of that credit institution's own funds calculated before the deduction of items 12 and 13.

Pending subsequent coordination of the provisions on consolidation, Member States may provide that, for the calculation of unconsolidated own funds, parent companies subject to supervision on a consolidated basis need not deduct their holdings in other credit institutions or financial institutions which are included in the consolidation. This provision shall apply to all the prudential rules harmonized by Community acts.

2. The concept of own funds as defined in points 1 to 8 of paragraph 1 embodies a maximum number of items and amounts. The use of those items and the fixing of lower ceilings, and the deduction of items other than those listed in items 9 to 13 of paragraph 1 shall be left to the discretion of the Member States. Member States shall nevertheless be obliged to consider increased convergence with a view to a common definition of own funds.

To that end, the Commission shall, not more than three years after the date referred to in Article 9 (1), submit a report to the European Parliament and to the Council on the application of this Directive, accompanied, where appropriate, by such proposals for amendment as it shall deem necessary. Within five years of the date referred to in Article 9 (1), the Council shall, acting by qualified majority on a proposal from the Commission, in cooperation with the European Parliament and after consultation of the Economic

and Social Committee, examine the definition of own funds with a view to the uniform application of the common definition.

3. The items listed in points 1 to 5 must be available to a credit institution for unrestricted and immediate use to cover risks or losses as soon as these occur. The amount must be net of any foreseeable tax charge at the moment of its calculation or be suitably adjusted in so far as such tax charges reduce the amount up to which these items may be applied to cover risks or losses.

### Article 3

#### Other items referred to in Article 2 (1) (6)

1. The concept of own funds used by a Member State may include other items provided that, whatever their legal or accounting designations might be, they have the following characteristics:

- (a) they are freely available to the credit institution to cover normal banking risks where revenue or capital losses have not yet been identified;
- (b) their existence is disclosed in internal accounting records;
- (c) their amount is determined by the management of the credit institution, verified by independent auditors, made known to the competent authorities and placed under the supervision of the latter. With regard to verification, internal auditing may be considered as provisionally meeting the aforementioned requirements until such time as the Community provisions making external auditing mandatory have been implemented.

2. Securities of indeterminate duration and other instruments that fulfil the following conditions may also be accepted as other items:

- (a) they may not be reimbursed on the bearer's initiative or without the prior agreement of the supervisory authority;
- (b) the debt agreement must provide for the credit institution to have the option of deferring the payment of interest on the debt;
- (c) the lender's claims on the credit institution must be wholly subordinated to those of all non-subordinated creditors;
- (d) the documents governing the issue of the securities must provide for debt and unpaid interest to be such as to absorb losses, whilst leaving the credit institution in a position to continue trading;
- (e) only fully paid-up amounts shall be taken into account.

To these may be added cumulative preferential shares other than those referred to in Article 2 (1) (8).

*Article 4*

1. The commitments of the members of credit institutions set up as cooperative societies referred to in Article 2 (1) (7), shall comprise those societies' uncalled capital, together with the legal commitments of the members of those cooperative societies to make additional non-refundable payments should the credit institution incur a loss, in which case it must be possible to demand those payments without delay.

The joint and several commitments of borrowers in the case of credit institutions organized as funds shall be treated in the same way as the preceding items.

All such items may be included in own funds in so far as they are counted as the own funds of institutions of this category under national law.

2. Member States shall not include in the own funds of public credit institutions guarantees which they or their local authorities extend to such entities.

However, the Kingdom of Belgium shall be exempt from this obligation until 31 December 1994.

3. Member States or the competent authorities may include fixed-term cumulative preferential shares referred to in Article 2 (1) (8) and subordinated loan capital referred to in that provision in own funds, if binding agreements exist under which, in the event of the bankruptcy or liquidation of the credit institution, they rank after the claims of all other creditors and are not to be repaid until all other debts outstanding at the time have been settled.

Subordinated loan capital must also fulfil the following criteria:

- (a) only fully paid-up funds may be taken into account;
- (b) the loans involved must have an original maturity of at least five years, after which they may be repaid; if the maturity of the debt is not fixed, they shall be repayable only subject to five years' notice unless the loans are no longer considered as own funds or unless the prior consent of the competent authorities is specifically required for early repayment. The competent authorities may grant permission for the early repayment of such loans provided the request is made at the initiative of the issuer and the solvency of the credit institution in question is not affected;
- (c) the extent to which they may rank as own funds must be gradually reduced during at least the last five years before the repayment date;
- (d) the loan agreement must not include any clause providing that in specified circumstances, other than the winding up of the credit institution, the debt will become repayable before the agreed repayment date.

*Article 5*

Until further coordination of the provisions on consolidation, the following rules shall apply.

1. Where the calculation is to be made on a consolidated basis, the consolidated amounts relating to the items listed under Article 2 (1) shall be used in accordance with the rules laid down in Directive 83/350/EEC. Moreover, the following may, when they are credit ('negative') items, be regarded as consolidated reserves for the calculation of own funds:
  - any minority interests within the meaning of Article 21 of Directive 83/349/EEC, where the global integration method is used,
  - the first consolidation difference within the meaning of Articles 19, 30 and 31 of Directive 83/349/EEC,
  - the translation differences included in consolidated reserves in accordance with Article 39 (6) of Directive 86/635/EEC,
  - any difference resulting from the inclusion of certain participating interests in accordance with the method prescribed in Article 33 of Directive 83/349/EEC.
2. Where the above are debit ('positive') items, they must be deducted in the calculation of consolidated own funds.

*Article 6***Deductions and limits**

1. The items referred to in Article 2 (1), points 3 and 5 to 8, shall be subject to the following limits:
  - (a) the total of items 3 and 5 to 8 may not exceed a maximum of 100 % of items 1 plus 2 minus 9, 10 and 11;
  - (b) the total of items 7 and 8 may not exceed a maximum of 50 % of items 1 plus 2 minus 9, 10 and 11;
  - (c) the total of items 12 and 13 shall be deducted from the total of all items.
2. The item referred to in Article 2 (1) (4) shall constitute a separate category. Provisionally, it shall be included in own funds without limit, but shall not be included when the basis of the limit for the items referred to in points 3 and 5 to 8 is fixed. Within six months of the implementation of this Directive the Commission shall, in accordance with the procedure provided for in Article 8, propose the final treatment for this item either in original own funds or in additional own funds.
3. The limits referred to in paragraph 1 must be complied with as from the date of the entry into force of the implementing measures for the Council Directive on a solvency ratio for credit institutions and by 1 January 1993 at the latest.

Credit institutions exceeding those limits must gradually reduce the extent to which the items referred to in Article 2 (1), points 3 and 5 to 8, are taken into account so that they comply with those limits before the aforementioned date.

4. The competent authorities may authorize credit institutions to exceed the limit laid down in paragraph 1 in temporary and exceptional circumstances.

#### *Article 7*

Compliance with the conditions laid down in Articles 2 to 6 must be proved to the satisfaction of the competent authorities.

#### *Article 8*

Without prejudice to the report referred to in Article 2 (2), second subparagraph, technical adaptations deemed to be necessary to this Directive to:

- clarify the definitions to ensure uniform application of the said Directive throughout the Community,
- clarify the definitions to take account, in implementing the said Directive, of developments on the financial markets,
- bring the terminology and wording of the definitions into line with that of subsequent acts concerning credit institutions and related areas,

shall be adopted by the Council acting by a qualified majority on a Commission proposal.

#### *Article 9*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive no later than the date laid down for the entry into force of the implementing measures of the Council directive on a solvency ratio for credit institutions, and by 1 January 1993 at the latest. They shall forthwith inform the Commission thereof.

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

3. The communication referred to in paragraph 2 must also include a statement, accompanied by an explanatory text, notifying the Commission of the specific provisions adopted and the items selected by the Member States' respective competent authorities as comprising own funds.

#### *Article 10*

This Directive is addressed to the Member States.

Done at Luxembourg, 17 April 1989.

*For the Council*

*The President*

C. SOLCHAGA CATALAN