

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(88) 805 final - SYN 180

Brussels, 15 January 1989

Proposal for a  
COUNCIL REGULATION (EEC)

on guarantees issued by credit institutions or insurance undertakings

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(presented by the Commission)

EXPLANATORY MEMORANDUM

Consist

General Remarks

It follows from the Treaty and does not therefore need to be confirmed by secondary legislation that no discrimination according to the nationality or the place of establishment in the Community may be made between providers of services. The present regulation, however, goes beyond non-discrimination by imposing upon public authorities the obligation to accept guarantees emanating from credit institutions and insurance undertakings licensed under Community law and thus intends to mark more clearly the Internal Market dimension of the free provision of services.

In the context of the "White Paper on the Achievement of the Internal Market" a number of legislative measures have been taken in order to achieve a single European market for financial services, in the first place offered by credit institutions and insurance undertakings.

The First Banking Law Coordination Directive of 1977 has provided for a harmonised banking licence which will be switched to a single European licence by the Second Coordination Directive, proposed early in 1988. Already the cooperation between banking supervisory authorities is so close that, although different prudential standards are for the time being still applied (harmonising legislation has been proposed for solvency ratios, own funds, winding-up and liquidation), one can no longer speak of separate national markets. Although one is not similarly near to a European licence in the insurance field, the prudential requirements are even more extensively fixed and the cooperation between supervisory authorities has become a normal event. The process of integration is accelerating in both fields. In the case of institutional guarantors the public authorities should be obliged to demonstrate their contribution to this integration process.

The existing system of prudential control in all Member States, which is built on a Community foundation and which, with harmonisation, is developing further, operates in a way which no longer leaves room for appreciation of the creditworthiness of credit institutions or insurance undertakings by public authorities other than those actually supervising them. It goes without saying that those qualified guarantors may only act within the limits drawn by their

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supervisory rules. A credit institution or an insurance undertaking which has a licence under the harmonised Community systems has all reasons to respect these limits, because otherwise a withdrawal of the licence would appear necessary.

The proposed legislation takes the form of a Regulation, because it is important to make available immediately to those who are asked to provide a guarantee a reliable instrument, which a directive could not do. It is a horizontal regulation for which Article 100 A provides a sufficient legal base; therefore there is no need to add further legal bases specific to certain sectors such as agriculture (Art. 43) or taxation (Art. 99), even if acts adopted on these bases are concerned.

### Detailed explanations

#### Ad Article 1

This is the only operational article. It sets out the principle that a public authority must accept a guarantee from any credit institution licensed according to Directive 77/780/EEC (First Banking Law Coordination Directive) or from any insurance undertaking authorised for the class of suretyship insurance according to Directive 73/239/EEC. The guarantee will in the first place be required to secure the payment of a debt but can of course also be applied for the assurance to meet a particular obligation.

Public authority means any entity for which a Member State or the EC could be held responsible, thus including e.g. local authorities, social security institutions, law courts (including deposits to allow the temporary non-execution of civil law judgments), diplomatic representations of these authorities in third countries or with international organisations. On the other hand, representations of third countries or international organisations established in the EC would not be subject to this obligation.

The applicability of the regulation is not limited to matters dealt with by Community law; it applies therefore e.g. to local taxes as well.

Ad Article 2

Article 27 paragraph 3 of Regulation (EEC) No. 222/77 on Community transit does not conform with the principle laid down in Article 1 and should therefore be brought into line with that principle. For the sake of clarity, it appears desirable not to rely on the application of the rule "lex posterior derogat legi priori", which, of course, remains valid.

Current provision

Subject to the provisions of Article 33(2), the guarantee shall consist of the joint and several guarantee of a natural or legal third person established in the Member State in which the guarantee is provided who is approved as guarantor by that Member State.

Amended provision

Subject to the provisions of Article 33(2), the guarantee shall consist of the joint and several guarantee of either

- a credit institution licensed according to Article 3 of Directive 77/780/EEC (OJ No. L 322, 17.12.1977), or
- an insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Directive 73/239/EEC (OJ No. L 228, 16.08.1973, p. 3), or
- any other natural or legal third person established in the Community and approved as guarantor by the Member State in which the guarantee is provided.

The original regulation, although adopted under a different legal base (Article 235), may now be modified by a regulation adopted under Article 100 A. This is a consequence the amendment of the Treaty by the Single European Act : rules in the customs field would now have to be adopted under this new article.

3. There are other Community rules related to guarantees in which reference is made to a certain element of discretion on the part of the administrative authorities. It is felt that these rules need not to be modified, it being understood that the principle clearly stated in Article 1 partially limits, in the specific case of guarantees emanating from credit institutions or insurance undertakings, that discretion. The following provisions can be mentioned in this context :

Regulation (EEC) No. 612/77 (young male bovine animals - import arrangements), Article 1

"2. The security shall be lodged, at the choice of the applicant, either in cash or in the form of a guarantee given by an institutions meeting the criteria laid down by the Member State on whose territory the importation was effected."

Regulation (EEC) No. 1091/80 (private storage aid for beef and veal), Article 4

"2, ...

The security ... shall be furnished in the form of a guarantee meeting the requirements laid down by the Member State concerned."

Regulation (EEC) No. 2220/85 (securities for agricultural products), Article 16

"1. The guarantor must have his normal residence or an establishment in the Community and, subject to the provisions of the Treaty concerning freedom to supply services, must be approved by the competent authority of the Member State in which the security is given..."

Regulation (EEC) No. 3599/82 (temporary importation), Article 3

"1. ... the competent authorities ... shall determine ... the form of guarantee to be provided."

Directive 85/362/EEC (17th VAT Directive), Article 3

"2. For goods imported temporarily from one Member State to another, if security is required, the person to whom the benefit of temporary importation exemption has been granted may choose whether it shall be given by :

- (a) making a cash deposit in the currency of the Member State in which security is required;
- (b) a guarantor who has his normal residence or an establishment in the Member State in which security is required and who is approved by the competent authorities of that Member State; or
- (c) any other guarantee acceptable to the competent authorities of the Member State in which security is required."

Ad Article 3

The regulation could be applied immediately after its adoption. For the sake of clarity of the legal order in general, it is, however, proposed to fix the date of application as the first day of the month following the date of adoption. That date should be inserted immediately prior to the adoption of the text by the Council (e.g. if the Council were to adopt on 12 September 1989, then the date 1 October 1989 should be inserted in the text).

Proposal for a  
COUNCIL REGULATION (EEC) No ..../89  
of .....1989  
on guarantees issued by credit institutions or insurance undertakings

THE COUNCIL OF THE EUROPEAN COMMUNITIES

- Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 a 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>;
- (1) Whereas the Treaty, in Article 59, enshrines the principle of freedom to provide services;
- (2) Whereas many public authorities, when demanding guarantees, ask for guarantees issued by a resident of their national territory, which conflicts with that principle;
- (3) Whereas the Treaty principle of non-discrimination is directly applicable and does not require implementing legislation;
- (4) Whereas public authorities have a certain discretion in judging the acceptability of the guarantor;
- (5) Whereas public authorities also have a particular responsibility for the establishment and functioning of the Internal Market;

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(1) OJ N° C ■■■■■■

(2) Legislative Resolution of ..... (OJ N° C ■■■■■■) and Decision of .....  
(OJ N° C ■■■■■■)

(3) OJ N° C ■■■■■■

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- (6) Whereas this responsibility calls for a limitation of the discretion of public authorities in the case of a specific financial service provided by institutions supervised on the basis of Community rules;
- (7) Whereas the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions <sup>(4)</sup> as last amended by Directive 86/524 <sup>(5)</sup>, provides for a Community system for licensing and supervising credit institutions;
- (8) Whereas the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance <sup>(6)</sup> as last amended by Directive 87/344/EEC <sup>(7)</sup>, provides for a Community system for licensing and supervising insurance undertakings;
- (9) Whereas it appears inappropriate that authorities other than those in charge of prudential supervision of these institutions judge the creditworthiness of credit institutions or insurance companies acting as guarantors;

HAS ADOPTED THIS REGULATION:

#### Article 1

#### Obligation to accept guarantees issued by credit institutions or insurance undertakings

A public authority which requires to be secured for payment of an actual or potential debt or for respect of any other obligation shall be bound to accept a guarantee issued by any credit institution licensed according to Article 3

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(4) OJ N° L 322, 17.12.1977, p. 30

(5) OJ N° L 309, 04.11.1986, p. 15

(6) OJ N° L 228, 16.08.1973, p. 3

(7) OJ N° L 185, 04.07.1987, p. 77

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of Directive 77/780/EEC or by any insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Directive 73/239/EEC.

## Article 2

### Amendment of existing legislation

Article 27(3) of Council Regulation (EEC) N° 222/77 of 13 December 1976 on Community transit<sup>(8)</sup> is hereby replaced by the following:

"3. Subject to Article 33(2), the guarantee shall consist of the joint and several guarantee of either

- a credit institution licensed according to Article 3 of Council Directive 77/780/EEC (1), or
- an insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Council Directive 73/239/EEC (2), or
- any other natural or legal third person established in the Community and approved as guarantor by the Member State in which the guarantee is provided.

(1) OJ N° L 322, 17.12.1977, p. 30

(2) OJ N° L 228, 16.8.1973, p. 23"

## Article 3

### Entry into force

This Regulation shall enter into force on ..... (the first day of the month following the adoption).

This Regulation shall be binding in its entirety  
and directly applicable in all Member States.

Done at

For the Council

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(8) OJ N° L 38, 9.2.1977, p. 1