

COMMISSION OF THE EUROPEAN COMMUNITIES

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**AMENDED PROPOSAL FOR A SECOND COUNCIL DIRECTIVE
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**

(presented by the Commission pursuant to the
third paragraph of Article 149 of the EEC Treaty)

AMENDED PROPOSAL FOR A
SECOND BANKING COORDINATION DIRECTIVE

1. Explanatory memorandum

1. On the 23th of February 1988 the Commission submitted to the Council a proposal for a Second Council Directive 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⁽¹⁾.
2. The Economic and Social Committee delivered its opinion⁽²⁾ at its 258th session held in Brussels on 29 September 1988 and the European Parliament delivered its opinion at its session of 15 March 1989⁽³⁾.
3. An amended proposal has been drawn up in order to take into account the opinion delivered by these two institutions. Both the European Parliament and the Economic and Social Committee have endorsed the need for a Second Banking Coordination Directive which together with Directive on own funds of credit institutions and the proposal for a solvency ratio for credit institutions are the key components of harmonisation necessary for the achievement of mutual recognition.
4. The Commission was able to accept most of the amendments proposed by the European Parliament which clarify and strengthen the provisions regarding prudential supervision.

(1) OJ No L 322, 17.12.1977, p. 30
(2) OJ No C 318, 12.12.1988, p. 42
(3)

Recital 14

The amendment regarding the mutual recognition of financial techniques in the field of mortgage credit was asked by the European Parliament; it clarifies the purpose of this recital.

Article 4

This amendment reinforces the provision relating to the supervision of major shareholders. Thus it ensures that the banking supervisory authorities are bound to refuse the granting of a banking license if they consider that shareholders or members are not suitable persons, and could endanger the sound and prudent management of the credit institution.

Article 7

The proposed amendment to Article 7 will simplify its application and will clarify the reciprocity provisions governing the establishment in the Community of subsidiaries of banks from non-Community countries. The main elements of the revised reciprocity provisions in the banking sector are as follows:

- requests for authorisation by non-EC banks have to be notified to the Commission by Member States, but no automatic suspension is provided for during the Commission enquiries on the situation of Member countries banks in the relevant countries;
- the Commission will examine how Community banks are treated in third countries periodically with a first report before the Directive comes into effect;
- where the Commission finds that a third country is not granting the Community's credit institutions market access and competitive opportunities comparable to those granted by the Community to non-EEC banks, then the Commission may submit suitable proposals to the Council for negotiations with the third country in question.

- where it seems to the Commission that the Community's banks do not enjoy "national treatment" and the same competitive opportunities as the third countries' own credit institutions, and that the condition of effective market access has not been secured, the Commission may "limit or suspend new authorisations and acquisitions by a parent undertaking governed by the third country in question".

The new article makes clear that "national treatment" must really work in practice, ensuring effective market access in the third country. There may be situations where on the face of it the Community institution is given the same rights of establishment as a domestic bank, but is excluded from the market by other means. In these circumstances the Commission would be able to act. But any country providing genuine national treatment to Community banks would be under no threat.

Article 16 § 1

First paragraph

This amendment states clearly what was already mentioned in recital 14 of the Directive regarding the mutual recognition of financial techniques. Host Member States could, however, prohibit the provision of certain banking services or products, if they can prove that the provision of such services or products would violate the general good as it is defined in the European Court's jurisprudence.

Second paragraph

This provision is considered necessary in order to accommodate the problems encountered by a number of regional savings banks in Germany which are confined under the terms of their licences to operating within a limited geographical area. The German Government wants to retain the right of their banking authorities to impose such territorial limits and the saving banks in question apparently prefer to preserve the existing arrangements. The

derogation provided by new amendment to the general rules of Article 16 § 1, i.e. the right for credit institutions to provide services on the whole territory of the Community, is proposed subject to the provisions that (a) the local banks in question remain subject to all the prudential requirements imposed by Community legislation, (b) there are no barriers to competition from banks having their head office in other Member States.

Article 19 § 3

This amendment makes it clear that any duly authorised credit institution must be allowed full access to all the normal means of mass-advertising of its services and products, in particular all forms of television and newspapers advertisement. This would be in accordance with the jurisprudence of the European Court most recently expressed in the Bond Van Adverteerders Judgement and would remove any doubt, which might exist. It would remain open to Member States to regulate the form and content of advertisements and also to control such practices as doorstep-selling or "cold-calling", where such regulations are justified by the general good.

List of banking activities

The amendments regarding some items of the list are considered necessary in order to clarify the text and to bring it more closely in line with the list of services annexed to the proposal for an Investment Services Directive which are more and more frequently also performed by banks in most of the Member States.

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AND AMENDING DIRECTIVE 77/780/EEC

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Preamble and recitals 1 to 13 unchanged

Recital 14

Whereas, the Member States should ensure that there are no obstacles to the activities benefiting from mutual recognition being undertaken using the financial techniques of the home Member State, as long as the latter are not in violation of the legal provisions governing the public good in the host Member State;

Recital 14

Whereas, the Member States should ensure that there are no obstacles to the activities benefiting from mutual recognition being undertaken using the financial techniques of the home Member State, as long as the latter are not in violation of the legal provisions governing the general good in the host Member State. In this respect the present directive should be seen in conjunction with the Council Directive on the freedom of establishment and the right to provide services in the field of mortgage credit, which lays down provisions regarding the mutual recognition of financial techniques;

Remainder of the recitals unchanged

HAS ADOPTED THIS DIRECTIVE:

Articles 1 to 3 unchanged

Article 4

Competent authorities shall not grant authorization permitting the taking-up of the business of a credit institution before they have been informed of the identity of shareholders or members, whether direct or indirect, be they physical or legal persons, holding a qualified participation and of the amount of such participations. The competent authorities shall appraise the suitability of the abovementioned shareholders or members.

Article 4

Competent authorities shall not grant authorization permitting the taking-up of the business of a credit institution before they have been informed of the identity of shareholders or members, whether direct or indirect, be they physical or legal persons, holding a qualified participation and of the amount of such participations. The competent authorities shall not grant authorization if, taking into account the need to assure a sound and prudent management of the credit institution, they are not satisfied as to the suitability of the abovementioned shareholders or members.

Articles 5 and 6 unchanged

TITLE 2 A
Reciprocity

Article 7

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

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

Article 7

1. The competent authorities of the Member States shall inform the Commission (a) of any request for authorization of a subsidiary whose parent undertaking or undertakings is governed by the laws of a third country and of the identity of the ultimate parent, or (b) whenever such an undertaking acquires participation in a credit institution of the Community, so that the latter would become its subsidiary. The Commission shall inform the other Member States.

When authorization is granted to a subsidiary the identity of the ultimate parent undertaking or undertakings must be specified in the notification which the competent authorities must address to the Commission, according to Article 3, paragraph 7, of the Directive 77/780/EEC.

2. The Member States shall inform the Commission of any general difficulties encountered by their credit institutions in establishing or carrying out banking activities in any third country.

3. In the same manner, when informed, according to the provisions of Article 9, that an undertaking governed by the laws of a third country is considering the acquisition of a participation in a credit institution such that the latter would become its subsidiary, the competent authorities of the relevant Member State shall inform the competent authorities of the other Member States and the Commission.

4. The competent authorities of the Member State concerned must suspend their decision regarding requests as referred to in paragraphs 2 and 3 until the procedure provided for in paragraphs 5 and 6 is completed.

3. The Commission shall, initially not later than six months before the Directive enters into force and then periodically, draw up a report examining the treatment of Community credit institutions, in the terms referred to in paragraphs 4 and 5 below, regarding the establishment and carrying out of banking activities, and the acquisition of participations in credit institutions of third countries. The Commission shall submit these reports to the Council of Ministers.

4. Where it appears to the Commission, either on the basis of the report referred to in paragraph 3 or at any other time, that a third country is not granting to credit institutions of the Community effective market access and competitive opportunities comparable to those accorded by the Community to credit institutions of that third country, the Commission may submit suitable proposals to the Council with a view to achieving such comparable access and competitive opportunities through negotiations between the Community and the third country in question.

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

5. Where it appears to the Commission, either on the basis of the reports referred to in paragraph 3 or at any other time, that credit institutions of the Community do not enjoy national treatment and the same competitive opportunities as domestic credit institutions in a third country and that the condition of effective market access has not been secured, the Commission may in addition to the proposals for negotiations referred to in paragraph 4 decide that the competent authorities of the Member States shall limit or suspend their decisions regarding requests for new authorizations and acquisitions by a parent undertaking governed by the third country in question, using the procedure provided for in Article 20.

The duration of the measures concerned may not exceed one year, though the Commission may propose their renewal.

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

6. Measures taken under this article shall be subject to their conformity with the Community's obligations under any international agreements, whether bilateral or multinational, which cover the operation of credit institutions.

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

Articles 8 to 15 unchanged

Article 16

1. Member States shall ensure that at least the activities set out on the list in the Annex may be pursued in any Member State, in accordance with the provisions of Articles 17 to 19, 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 the home Member State, in accordance with the provisions of this Directive, whose authorization permits the pursuit of such activities.

Article 16

1. Member States shall ensure that (two words deleted) the activities set out in the list in the Annex may be pursued in any Member State, in accordance with the provisions of Articles 17 to 19, 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 the home Member State, in accordance with the provisions of this Directive, provided that such activities are covered by the authorization. Member States shall permit these activities to be undertaken by credit institutions using the financial techniques of the home Member State as long as the latter are not in violation of the legal provisions governing the general good in the host Member State.

However, Member States may limit the scope of the authorization to only a part of their territory with regard to public credit institutions whose business is guaranteed by a regional government or local authority. Such limitation shall not exempt such credit institutions from provisions in other EEC Directives related to credit institutions.

2. Member States shall also provide that at least the activities set out on the list in the Annex may be pursued in any Member State in accordance with the provisions of Article 17 to 19, either by the establishment of a branch or by way of the provision of services by any financial institution being a subsidiary of a credit institution, or such a subsidiary belonging to several credit institutions, whose articles of association do not prevent the pursuit of those activities and which meets each of the following conditions:

- the parent undertaking or undertakings are authorized as credit institutions in the Member State by whose law the subsidiary is governed,
- the parent undertaking or undertakings hold 90% or more of the shares in the subsidiary,

2. unchanged

- the parent undertaking or undertakings have declared that they jointly and severally guarantee the commitments entered into by the subsidiary,
- the subsidiary is effectively included, in particular for the activities in question, in the consolidated supervision of its parent undertaking, or of each of its parent undertakings, in accordance with Directive 83/350/EEC, notably for the calculation of the solvency ratio, for the control of large exposures and for the purposes of limiting participations in accordance with Article 10 of this Directive.

Conformity with these conditions must be verified by the competent authority of the home Member State and the latter must supply the subsidiary with a certificate of compliance which must form part of the notification envisaged in Articles 17 and 18.

The competent authority of the home Member State must ensure the supervision of the subsidiary in accordance with the provisions of Articles 8(1), 9, 11, 12(2), 13, 14 and 15 of this Directive, as well as those of Article 7(1) of Directive 77/780/EEC.

The provisions mentioned in this paragraph shall be applicable to subsidiaries subject to the necessary modifications. In particular, "credit institution" should read "financial institution, conforming to the conditions laid down in Article 16(2)", and "authorization" as "articles of association". In Article 17(2), point (c) should read "the amount of own funds of the subsidiary financial institution and the consolidated solvency ratio of the credit institution which is the parent undertaking".

If the financial institutions benefitting from the provisions of this paragraph should cease to meet any of the requisite conditions, the host Member State may bring an end to the pursuit, under the provisions of this Directive, of the activities in question on its territory.

Articles 17 and 18 unchanged

Article 19

1. Responsibility for the supervision of a credit institution, including supervision of activities undertaken according to the provisions of Article 16, shall rest with the competent authorities of the home Member State.

Article 19

1. unchanged

2. Host Member States may require, for statistical purposes, that all credit institutions having branches in their territories shall report quarterly on their operations in the host Member State to the competent authority of that host Member State.

In order to conform with the responsibilities laid down in Article 12(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 their national credit institutions for that purpose.

3. If the competent authority of the host Member State ascertains that an institution having a branch or providing services in its territory is not complying with the legal provisions in force in that Member State which are justified on the grounds of the public good, or pursuant to the provisions of this Directive, on the powers of the host Member State, that authority shall request the institution concerned to put an end to the irregular situation.

2. Host Member States may require, for statistical purposes, that all credit institutions having branches in their territories shall report regularly on their operations in the host Member State to the competent authority of that host Member State.

3. If the competent authority of the host Member State ascertains that an institution having a branch or providing services in its territory is not complying with the legal provisions in force in that Member State which are justified by the general good, or pursuant to the provisions of this Directive, on the powers of the host Member State, that authority shall request the institution concerned to put an end to the irregular situation. Nothing in this paragraph shall prevent credit institutions having their head office in another Member State 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 justified by the general good.

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

4. unchanged

5. If, despite the measures taken by the home Member State pursuant to paragraph 4, or because such measures prove inadequate or are not taken by the Member State in question, the institution persists in violating the legal rules referred to in paragraph 3 in force in the host Member State, the latter State may, after informing the competent authority of the home Member State, take appropriate measures to prevent further irregularities including, insofar, as is necessary, the prevention of the initiation of further transactions by that institution within its territory. The Member States shall ensure that within their territory it is possible to serve the legal documents necessary for these measures on credit institutions.

5. unchanged

6. Any measure adopted pursuant to paragraphs 3, 4 and 5 involving penalties or restrictions on the provision of 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 whose authorities adopted it.

6. unchanged

7. Before following the procedure set out in paragraphs 3, 4 and 5, the competent authorities of the host Member State, may, in exceptional circumstances, take measures necessary to protect the interests of depositors, investors and others to whom services are provided. The Commission and the other Member States shall be informed of such measures in the shortest possible time. In this event the Commission may, after consulting the Member States concerned, decide that the Member State in question shall amend or abolish the measures.

7. unchanged

8. In the event of withdrawal of authorization the competent authority of the host Member State shall be informed and shall take appropriate measures to prevent the institution concerned from undertaking further transactions in its territory.

8. unchanged

9. Member States shall inform the Commission of the number and type of cases in each Member State in which there has been a refusal pursuant to Article 17 or in which measures have been taken in accordance with the provisions of paragraph 5 of this Article. Every two years, the Commission shall submit a report summarizing such cases to the Advisory Committee set up under Article 11 of Directive 77/780/EEC.

9. unchanged

Remainder of Articles unchanged

ANNEX

Business which is integral to banking and shall be included
within the scope of mutual recognition

- | | |
|---|---|
| 1. Deposit-taking and other forms of borrowing | 1. Deposit-taking and other forms of borrowing |
| 2. Lending ⁽¹⁾ | 2. Lending ⁽¹⁾ |
| 3. Financial leasing | 3. Financial leasing |
| 4. Money transmission services | 4. Money transmission services |
| 5. Issuing and administering means of payment (credit cards, travellers cheques and bankers drafts) | 5. Issuing and administering means of payment (credit cards, travellers cheques and bankers drafts) |
| 6. Guarantees and commitments | 6. Guarantees and commitments |
| 7. Trading for own account or for account of the customers in | 7. Trading for own account or for account of the customers in <u>foreign exchange</u> |
| (a) money market instruments (cheques, bills, CDs, etc.) | |
| (b) foreign exchange | |
| (c) financial futures and options | |
| (d) exchange and interest rate instruments | |
| (e) securities | |
| 8 Participations in securities issues and the provision of services related to such issues | 8. <u>Investment activities² (trading for own account or account of the customers)</u> |

(a) Brokerage, i.e. the acceptance of investors' orders relating to any or all of the instruments referred to in footnote 2 and/or the execution of such orders on an exchange or market on an agency basis against payment of commission.

(1) Including in particular:

- consumer credit,
- mortgage lending,
- factoring and invoice discounting,
- trade finance (including forfeiting).

(2) Instruments

- Transferable securities including units in undertakings for collecting investment in transferable securities.
- Money market instruments (including certificates of deposit and Euro-commercial paper)
- Financial futures and options.
- Exchange rate and interest rate instruments.

- (b) Dealing as principal, i.e. the purchase and sale of any or all of the instruments referred to in footnote 2 for own account and at own risk with a view to profiting from the margin between bid and offer prices.
- (c) Market making, i.e. maintenance of a market in any or all of the instruments referred to in footnote 2 by dealing in such instruments.
- (d) Portfolio management, i.e. the management against payment of portfolios composed of any or all of the instruments referred to in footnote 2 undertaken for investors otherwise than on a collective basis.
- (e) Arranging or offering underwriting services in respect of issues of the instruments referred to in footnote 2 and distribution of such issues to the public.
- (f) Professional investment advice given to investors on an individual basis or on the basis of private subscription in connection with any or all of the instruments referred to in footnote 2.
- (g) Safekeeping and administration of any of the instruments referred to in footnote 2 otherwise than in connection with the management of a clearing system.

9. Money broking

10. Portfolio management and advice

11. Safekeeping of securities

12. Credit reference services

13. Safe custody services

9. Money broking

10. Credit reference services

11. Safe custody services