

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 28 July 1993

Proposal for a

COUNCIL DIRECTIVE

amending

Council Directives 77/780/EEC and 89/646/EEC in the field of credit institutions,

Council Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance,

Council Directives 79/267/EEC and 92/96/EEC in the field of life assurance, and

Council Directive 93/22/EEC in the field of investment firms

in order to reinforce prudential supervision

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Main objectives of the proposal.

The main aim of this directive is to propose amendments to the framework directives in the financial services sector, including banking, insurance and securities activities. The proposed changes concern Directives 77/780/EEC and 89/646/EEC (First and Second Banking Coordination Directives) for the banking sector, Directives 73/239/EEC, 79/267/EEC, 92/49/EEC and 92/96/EEC (Non-Life and Life Insurance Directives) for the insurance sector and Directive 93/22/EEC (Investment Services Directive) for the securities sector. This new directive will strengthen the powers of supervisors, making them better equipped to prevent cases of fraud and other irregularities in the financial services sector.

The above-mentioned framework directives provide for authorization procedures for credit institutions, insurance undertakings and investment firms engaging in the activities covered by the scope of the respective directives. Under the principle of "mutual recognition", and on the basis of the authorization granted by the home Member State authorities, these different financial undertakings will be allowed either freely to provide financial services on a cross-border basis or to set up branches in other Member States.

A certain numbers of recent cases of fraud in the financial services sector, and in particular the case of the Bank for Credit and Commerce International (BCCI), gave

rise to the question as to whether the supervisory regime put in place by the financial services directives, based on the mutual recognition approach, was adequate. In this connection, a number of enquiries were conducted, such as the study completed by the EC Banking Advisory Committee, the Report prepared by the Basle Committee on Banking Supervision and the Bingham Report in the UK. Finally, an announcement was made by Sir Leon Brittan at the ECOFIN Council in November 1992, making reference to the major conclusions of the enquiries and stressing that although the basic approach of the financial services directives was sound there were nevertheless certain respects in which the arrangements for financial supervision should be strengthened.

Firstly, the financial services directives envisage the authorization of a credit institution, insurance undertaking or investment firm as an entity in its own right, or in other words without reference to the group in which the individual entity might be placed. The only relevant existing rule in this connection is a requirement that "qualifying" shareholders should be suitable persons, but this is not sufficient to cover all the different possibilities that could arise. In the light of this, it is proposed that where the financial undertaking is part of a group, the group structure should be sufficiently transparent as to enable the financial undertaking itself to be supervised effectively. To this end, sufficient information must be provided to the competent authorities at the moment of initial authorization, and also on the occasion of any subsequent change in the group structure.

Secondly, it was considered necessary and desirable to ensure that the head office of financial undertakings remain within the same Member State as the registered

office. This is designed to enable supervisory authorities to maintain close contact with the financial undertaking's decision-making body. This rule has already been included in the Investment Services Directive (ISD), so that on this point it is only the banking and insurance directives that need to be modified.

Thirdly, provision is made to ensure that adequate "gateways" exist so that prudential information can be transmitted backwards and forwards between competent authorities and certain other bodies which have been entrusted with specific tasks within each Member State. Exchange of confidential information for supervisory purposes is already allowed in the framework directives (1) between competent authorities and bodies involved in the liquidation of financial undertakings and (2) between competent authorities and statutory auditors. It is proposed that this possibility should be extended to the authorities which supervise the liquidators and the auditors respectively. The purpose of this extension is to enable the competent authorities to check whether the liquidators and/or auditors have been carrying out their duties correctly. It is also proposed to extend the list of potential recipients of information so as to include company law inspectors and bodies which are responsible for overseeing payment systems and settlement services. This possibility of exchanging information is important for competent authorities to be able to catch wrongdoers and should be allowed to take place provided that it is for supervisory purposes only and provided conditions of professional secrecy are strictly observed.

With reference to this issue, ISD contains (in Article 25(9)) a Commission statement to the effect that a proposal for an amendment as regards exchange of

information is to be tabled by the end of July 1993. This present proposal is intended to give effect to that stated objective

Lastly, it is considered appropriate to require that auditors engaged in the preparation of financial undertakings' statutory accounts should communicate to the competent authorities irregular circumstances which come to their notice in the course of carrying out this activity.

The need for a directive to attain the objectives stated above is justified by the fact that the financial services directives represent essential instruments to achieve the European market for financial services and fall within the exclusive competence of the Community. Therefore, this directive, which puts forward amendments to strengthen supervisory powers in the three sectors in a horizontal manner, must fall within the EEC competence, according to Article 57 of the EEC Treaty. Since there is a need for coordination within the Community on a cross-border basis, a directive constitutes the most appropriate form of attaining the desired objectives.

II. Comments on individual articles.

Article 1

This is a definition article, which clarifies the concept of "group". The two elements of the definition are derived from the definition of "participation", set out in Article 1 of Directive 92/30/EEC, and "control", as defined in Article 1 of

Directive 89/646/EEC, Directive 92/49/EEC, Directive 92/96/EEC and Directive 93/22/EEC.

Article 2

This article contains general provisions, with the objective of ensuring greater transparency of group structures and to prevent the creation of non-transparent relationships: competent authorities are empowered to refuse authorization if they feel it is difficult to carry out effective supervision of financial undertakings because of opaque relationships between different entities; furthermore, authorities will receive detailed information by the undertakings about the structural organization of the group; finally, information must also be provided in case of changes in the structure of the groups.

Article 3

This article requires financial undertakings to locate their head offices and registered offices in the same Member State, so that competent authorities may have effective contact with the decision-making bodies of institutions and thus achieve a more direct control. This rule is already contained in the ISD as regards investment firms and will be extended to credit institutions and insurance undertakings.

Article 4

This article represents an extension of provisions contained in the directives regulating the three financial sectors, which already allow some exchange of confidential information between different authorities, in the same country and in different countries, and between competent authorities and certain other bodies. This exchange of information will now also be made possible with the authorities which supervise such bodies, such as authorities responsible to supervise procedures of liquidation and bankruptcy of institutions and in charge of the approval of statutory auditors. Furthermore, other specific professions have been considered as potential recipients of confidential information, e.g. those which detect breaches of company law or supervise payment systems.

Article 5

Considering auditors' access to financial undertakings' accounts and other essential material, they are in a position to play an important role in the overall supervisory process. This article sets out an obligation for statutory auditors of the accounts of companies to inform the competent authorities if they become aware of irregularities in the financial undertakings' affairs.

Article 6

This article requires that Member States should implement the present directive by 1 July 1995. This date is aligned with the date of implementation of the ISD.

Article 7

This is not a definition article, but a simple means for an efficient drafting of this directive, making reference to all the institutions defined in the framework directives.

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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 Commission¹,

In cooperation with the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas the First Council Directive 77/780/EEC of 12 December 1977⁴ and the Second Council Directive 89/646/EEC of 15 December 1989⁵ on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions lay down the authorization requirements for credit institutions;

1 OJ N° C ..., 199., p.
2 OJ N° C ..., 199., p.
3 OJ N° C ..., 199., p.
4 OJ N° L 322, 17.12.1977, p. 30
5 OJ N° L 386, 30.12.1989, p. 1

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Whereas the First Council Directive 73/239/EEC of 24 July 1973⁶, and in particular as amended by the Third Council Directive 92/49/EEC of 18 June 1992⁷ on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance undertakings other than life assurance lay down the authorization requirements for insurance undertakings in the field of direct non-life insurance;

Whereas the First Council Directive 79/267/EEC of 5 March 1979⁸, and in particular as amended by the Third Council Directive 92/96/EEC of 10 November 1992⁹ on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance lays down the authorization requirements for assurance undertakings in the field of direct life assurance;

Whereas Directive 93/22/EEC of 10 May 1993¹⁰ on investment services in the securities field lays down the authorization requirements for investment firms;

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

Whereas this Directive has been the subject of consultation with the Banking Advisory Committee, which was set up by Council Directive 77/780/EEC, and the Insurance Committee which was set up by Council Directive 91/675/EEC¹¹

6 OJ N° L 228, 16.08.1973, p. 3

7 OJ N° L 228, 11.08.1992, p. 1

8 OJ N° L 63, 13.03.1979, p. 1

9 OJ N° L 360, 09.12.1992, p. 1

10 OJ N° L 141, 11.06.1993, p. 27

11 OJ N° L 374, 31.12.1991, p. 32

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Whereas the closing down of the Bank for Credit and Commerce International (BCCI) and other events have given rise to the need to strengthen the powers of the competent authorities for the supervision of credit institutions in the Member States; whereas it is desirable to adopt similar measures in the whole financial services sector, including the competent authorities for the supervision of insurance undertakings and investment firms;

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

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

Whereas Directive 89/646/EEC, Directive 92/49/EEC, Directive 92/96/EEC and Directive 93/22/EEC already provide for information on the identity of shareholders or similar persons and of the amount of the holdings to be submitted to the competent authorities and that these competent authorities shall refuse

authorization under circumstances which do not ensure the sound and prudent management;

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

Whereas effective supervision of a credit institution, insurance undertaking or investment firm could be hampered if the competent authorities can not maintain effective contact with the management because its head office is located in a different country than its registered office; whereas for this reason the head office of a credit institution, insurance undertaking or investment firm must be located in the same country as that of the registered office; whereas Directive 93/22/EEC already lays down this requirement for investment firms;

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

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

Whereas in the case of a credit institution, insurance undertaking or investment firm with branches operating in more than one country, or which is part of a group of credit institutions, insurance undertakings or investment firms which is established in more than one country, it is desirable to have a single auditor for the

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organization and coordination of the separate au. s wherever possible; whereas it is however not appropriate to lay this down as an obligation in this Directive;

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

HAS ADOPTED THIS DIRECTIVE

ARTICLE 1

Definition

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

" *'group'* means a situation where two or more undertakings are linked directly or
indirectly by way of

- (a) *'participation'* which shall mean the ownership, direct or indirect, of 20% or more
of the voting rights or capital of an undertaking or
- (b) *'control'* which shall mean the relationship between a parent undertaking and a
subsidiary, as defined in Article 1 of Directive 83/349/EEC¹², or a similar
relationship between any natural or legal person and an undertaking."

ARTICLE 2

Group structures

1. To Article 3(2) of Directive 77/780/EEC, a fourth indent, and
to Article 3(3) of Directive 93/22/EEC, a third indent
shall be added which reads:

¹² OJ N° L 193, 18.7.1983, p. 1

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

2. To Article 3(4) of Directive 77/780/EEC, after the first sentence, and to Article 3(4) of Directive 93/22/EEC, after the first sentence, the following sentence shall be added which reads:

"Where a financial undertaking is part of a group, information about the structural organization of the group must be provided including sufficient details on the structure of the group and proposed relationships between the financial undertaking and the other entities of the group to allow the competent authorities to assess whether the financial undertaking can be supervised effectively."

3. To Article 8(1) of Directive 73/239/EEC, as amended by Directive 92/49/EEC, and to Article 8(1) of Directive 79/267/EEC, as amended by Directive 92/96/EEC, a new paragraph 1 a) shall be added which reads:

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

ARTICLE 3**Head office and Registered office**

To Article 3(2) of Directive 77/780/EEC and to Article 6(a) of Directive 73/239/EEC, as amended by Directive 92/49/EEC, and to Article 6(a) of Directive 79/267/EEC, as amended by Directive 92/96/EEC, the following indent shall be added which reads:

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

ARTICLE 4**Exchange of information**

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

- (a) The second indent shall read:

"- bodies involved in the liquidation and bankruptcy of the financial undertaking and in other similar procedures and the authorities competent to supervise such bodies,"

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(b) The third indent shall read:

"- persons responsible for carrying out statutory audits of the accounts of the financial undertaking and the authorities which are responsible for the approval of statutory auditors,"

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

"- bodies responsible for the detection and investigation of breaches of company law, in particular laws relating to the rights and obligations of shareholders and of members of the administrative, managerial and supervisory bodies of companies, and to take-over bids and the persons appointed by such responsible bodies to carry out specific tasks."

- 2. To Article 12(5) of Directive 77/780/EEC, as amended by Article 16 of Directive 89/646/EEC, and to Article 25(5)(b) of Directive 93/22/EEC, a new fifth indent shall be added which reads:

"- departments of central banks or other bodies responsible for the oversight of payment systems,"

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

"This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 1 to 4 to a clearing house or other similar body recognized under national law for the provision of clearing or settlement services to one of its markets if they consider that it is necessary to communicate

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the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults on the market. The information received shall be subject to the conditions of professional secrecy imposed in paragraph 1. The Member States shall, however, ensure that information received under paragraph 2 may never be disclosed in the cases referred to in this paragraph except with the express consent of the competent authorities which disclosed the information."

ARTICLE 5

Role of statutory auditors

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

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

to Article 25 of Directive 93/22/EEC, a new paragraph 10 shall be added which reads:

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

ARTICLE 6
FINAL PROVISIONS

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

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

ARTICLE 7

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

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

ARTICLE 8

This Directive is addressed to the Member States.

IMPACT ON COMPETITIVENESS AND EMPLOYMENT

I. What is the main justification for the measure ?

The purpose of the Directive is to amend existing Directives in order to reinforce supervision in the banking, insurance and investment services sectors.

II. Characteristics of the enterprises concerned

The enterprises concerned under this Directive are not only credit institutions, financial institutions, assurance undertakings, insurance undertakings and investment firms, but also statutory auditors, authorised in the Community.

III. What are the obligations imposed directly on enterprises ?

Firstly, according to the proposal, Member States' competent authorities may impose on the enterprises concerned to provide information on their group structure so that they can be supervised effectively.

Secondly, statutory auditors shall have the duty to report, under certain circumstances, serious irregularities to the authorities competent for the prudential supervision.

IV. What obligations are likely to be imposed indirectly on enterprises through local authorities ?

None.

V. Are there special measures for SMEs ? If so, of what kind ?

None.

VI. What is the anticipated effect on:

(a) the competitiveness of enterprises ?

(b) employment ?

(a) By reinforcing supervision of the afore-mentioned enterprises, it is ensured that these can engage in direct competition in common banking, insurance and investment services markets.

(b) An adequate supervision of the enterprises concerned serves to ensure the continuity and therefore to protect the afore-mentioned sectors.

VII. Have the social partners been consulted ? What are their views ?

No. The measure proposed has no impact on the industrial relationship and the level of employment.

**MOTIVATION OF THE "BCCI FOLLOW-UP DIRECTIVE"
IN RESPECT OF THE PRINCIPLE OF SUBSIDIARITY**

The aim of this directive is to modify the existing key directives in the three relevant financial sectors. These directives govern the activities of credit institutions (First and Second Banking Coordination Directives), of insurance undertakings (Third Non-life Insurance Directive and Third Life Assurance Directive) and of firms offering investment services (Investment Services Directive). These texts aim "to constitute the essential instrument for the achievement of internal market, a course determined by the Single European Act and set out in timetable form in the Commission's White Paper, from the point of view of both the freedom of establishment and the freedom to provide financial services" in the three sectors mentioned above. They introduce the "European passport" for institutions in the three financial sectors by means of the mechanism of mutual recognition of authorisation and the essential harmonization of the prudential control systems, in applying the principle of control by home Member State. The present proposal for a directive aims to strengthen the prudential control systems and covers in particular cross-border aspects following the problems encountered recently in international financial markets. In this way, it falls under the obligations which arise to the Community according to Article 57 of the EEC Treaty.

The measures under consideration in this directive have to apply to all the institutions concerned in the Community. They also aim in particular at financial groups located in several Member States requiring cooperation and exchanges of information between

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prudential authorities of various countries in which such information is covered by rules on confidentiality. Certain Member States have already included in their national legislation certain aspects of these measures, or are doing so. In other Member States, the adoption of European legislation on this subject is awaited.

In order to be applied in a coherent manner, it is desirable that this legislation is coordinated at Community level. The absence of common rules affects the mutual confidence between authorities responsible for prudential supervision. The limits of the exchange of prudential information between these authorities has in particular to be circumscribed in a precise way.

The envisaged measures bring considerable value to the strengthening of the prudential supervision of institutions in the financial sectors, which contributes to the stability of financial markets as a precondition to a robust economy in general.

A directive amending the directives referred to above forms the only possible method of sufficiently constraining legal action for the Community. A recommendation would be insufficient.

The directive will make it possible to apply the general principles of reinforcement of prudential supervision of the companies referred to above in banking, insurance and investment services sectors. A uniform regulation is required insofar as it is absolutely necessary in this directive (in terms of the definition, refusal or withdrawal of authorisation in the event of financial institutions forming part of non-transparent groups, and the limits of the exchange of prudential information). A certain degree of flexibility

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can be accepted for the additional rules to be adopted at the national level (e.g. a single auditor for the group, the right of veto against reappointment of auditors given to prudential authorities, etc.). Concrete application measures, drawn up by the Member States, will be able to supplement this directive.

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