COMMISSION OF THE EUROPEAN COMMUNITIES

COM(89) 629 final - SYN 176
Brussels, 23 January 1990

Amended Proposal for a

COUNCIL DIRECTIVE

on investment services in the securities field

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. On 3 January 1989 the Commission presented to the Council a proposal for a Directive on investment services in the securities field[1]. The Directive aims at providing a European passport for the provision of a certain number of investment-related services on the basis of mutual recognition of the Home Member State authorization. A further important objective is the liberalization of access to membership in host Member States of stock exchanges and financial futures and options exchanges.

2. The Economic and Social Committee delivered its opinion on 27 September 1989. The European Parliament has completed its first reading, delivering its opinion on 25 October 1989 on the basis of the report prepared by its Legal Affairs Committee. Acting on the basis of the third paragraph of Article 149 of the Treaty, and taking account of the two opinions, the Commission hereby presents an amended version of its proposal for a Directive.

3. The opportunity has been taken to align the text more closely on the text of the Second Banking Coordination Directive, now the subject of a common position in the Council. In addition, a certain number of amendments proposed by Parliament and the Economic and Social Committee have been incorporated, in spirit if not to the letter. Moreover, a certain number of additional amendments intended to improve and clarify the scope of certain provisions, are proposed.

Article 1 (Definitions)

A definition of "investment service" is added. This is a drafting improvement.

The definition of "investment firm" is amended in such a way that only persons providing services are covered. This is designed to exclude for example persons dealing exclusively for their own account, such as industrial and commercial companies. It was never the intention that the latter category of person should be within the scope.

(1) COM(88)778 OJ No.C43 of 22 February 1989.

The definition of "home Member State" where the investment firm is a natural person now refers to the country where the principal place of business is situated, a change suggested by the Economic and Social Committee.

A definition of "members of a stock exchange or organized market" has been added at the request of the European Parliament.

Article 2 (Applicability of the Directive to Credit Institutions)

A drafting change makes this provision clearer, and also makes it possible to delete the old paragraph 5 of Article 4.

Old Article 3 (Head Office to be in the same Member State as the Registered Office)

This Article has been deleted at the suggestion of the Economic and Social Committee.

New Article 3 (Authorization Requirements)

The previous reference to persons holding qualified participations in the third indent of Article 2 has been deleted, as this point is now the subject of a separate Article (Article 4). This approach mirrors the position in Article 5 of the Second Banking Coordination Directive.

Article 6 (Consultation between Authorities where Authorization is requested for a Subsidiary)

This is a newly inserted Article which is based on Article 7 of the Second Banking Coordination Directive.

Article 7 (Reciprocity)

This text now reflects the approach retained in the Second Banking Coordination Directive (Articles 8 and 9).

Article 8 (Maintenance of Level of Initial Capital)

The wording now reflects Article 10 of the Second Banking Coordination Directive.

Article 9 (Continuing Compliance with Authorization Conditions)

The second sentence of the first paragraph has been made into a separate paragraph, which improves the clarity of the text.

Article 11 (Prudential Rules)

Paragraph 1 (list of rules)

Second indent

A distinction is made between the holding of money on behalf of clients depending on whether the investment firm is a credit institution or not. If the investment firm is a credit institution, money need not be segragated in separate accounts, although securities will have to be so segregated. The old second indent is split into two separate indents, one dealing with securities and the other with money.

Last indent

A drafting improvement is made to the last indent on conflicts of interest.

Old Paragraph 2 (Member States' power of adaptation)

This provision, criticised by both the European Parliament and the Economic and Social Committee as being too wide, has been restricted in its scope, and combined with the previous paragraph 3.

Article 13 (Access to Stock Exchange Membership)

These provisions have been made into a separate Article and have been redrafted so as to give greater clarity. In particular, it becomes clear that the benefits of membership can only be obtained if the obligations of membership are also respected.

The previous paragraph 5 has been deleted. This provided that credit institutions could during a transitional period be obliged to have access to membership via separately incorporated subsidiaries. Now credit institutions have the option of being direct members of host stock exchanges.

A provision has been added relating to "electronic" access to membership i.e. without the need to have a seat or physical presence on the floor of a host stock exchange. It would be open to the host stock exchange authorities, as part of the rules relating to membership, to lay down rules as to the operation of terminals from remote locations, including powers of record keeping and inspection regarding the office from which trades originate, even where such an office was in another Member State.

Article 14 (Procedure for Opening Branches)

The procedure has been aligned on that retained in the common position in the Second Banking Directive (Article 19).

Article 15 (Services)

The same is true in respect of services (see Article 20).

Article 16 (Powers of Host Authorities)

This wording now largely reflects the provisions of Article 21 of the Second Banking Directive.

Article 17 (Competent Authorities)

A technical amendment to paragraph 2 is made, at the request of the European Parliament, to improve the reference to self-regulatory organizations.

Article 20 (Professional Secrecy)

The provisions governing professional secrecy have been aligned on similar provisions in Article 16 of the Second Banking Directive.

Article 23 (Comitology)

The list of items to be covered by the "comitology" procedure has been aligned on Article 22 of the Second Banking Directive.

Section A

The Annex: Point 3 (Market Makers)

A technical improvement is made to the definition of "market makers" in order more clearly to define the scope.

Amended Proposal for a

COUNCIL DIRECTIVE

on investment services in the securities field

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 57 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

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

Whereas this Directive is to constitute an instrument which is essential for achieving the internal market, a course determined by the Single European Act and set out in timetable form in the Commission's White Paper, from the point of view of both freedom of establishment and freedom to provide financial services, in the field of investment firms;

Whereas the approach which has been adopted is to achieve only the essential harmonization necessary and sufficient to secure the mutual recognition of authorization and of prudential supervision systems, making possible the granting of a single authorization recognised throughout the Community and the application of the principle of home Member State prudential supervision;

Whereas it is necessary for reasons of fair competition, to ensure that non-bank investment firms benefit from similar freedom to create branches and provide services across frontiers as that provided for by the 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;(1)

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(1) OJ No.....

Whereas the principles of mutual recognition and of home Member State control require the competent authorities of each Member State not to grant authorization or to withdraw it where factors such as the activities programme, the geographical distribution or the activities actually carried on make it quite clear that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State in which it intends to carry on or carries on the greater part of its activities; whereas, for the purposes of this Directive, an investment firm which is a legal person shall be authorized in the Member State in which it has its registered office; whereas the Member States must require that the head office be situated in the same Member State as the registered office;

Whereas it is also necessary and appropriate to liberalize access to membership of stock exchange and financial futures and options markets in host Member States for investment firms authorized to carry out the relevant services in their home Member States;

Whereas responsibility for supervising the financial soundness of an investment firm will rest with the competent authorities of its home Member State and whereas to permit this responsibility to be assumed fully by such competent authorities a further Directive will be necessary to coordinate rules in the area of market risk;

Whereas the home Member State may also establish rules stricter than those laid down in Articles 3, 4, 10, 11 and 20 for investment firms authorized by its competent authorities;

Whereas, by virtue of mutual recognition, the approach chosen permits investment firms authorized in their home Member States to carry on, throughout the Community, any or all of the activities listed in the Annex by establishing branches or by providing services;

Whereas the carrying on of activities not listed in the Annex shall be governed by the general provisions of the Treaty concerning the right of establishment and the freedom to provide services;

Whereas, the host Member State may, in connection with the exercise of the right of establishment and the freedom to provide services, require compliance with specific provisions of its own national laws or regulations on the part of firms not authorized as investment firms in their home Member States and with regard to activities not listed in the Annex provided that, on the one hand, such provisions are compatible with Community law and are intended to protect the general good and that, on the other hand, such firms or such activities are not subject to equivalent rules under the legislation or regulations of their home Member States;

Whereas the Member States must ensure that there are no obstacles to carrying on activities receiving mutual recognition in the same manner as in the home Member State, as long as the latter do not conflict with legal provisions protecting the general good in the host Member State;

Whereas the procedures for the authorization of branches of investment firms authorized in third countries will continue to apply to such firms; whereas those branches will not enjoy the freedom to provide services under the second paragraph of Article 59 of the Treaty or the freedom of establishment in Member States other than those in which they are established; whereas, however, requests for the authorization of subsidiaries or of the acquisition of holdings made by undertakings governed by the laws of third countries are subject to a procedure intended to ensure that Community investment firms receive reciprocal treatment in the third countries in question;

Whereas, the authorizations granted to investment firms by the competent national authorities pursuant to this Directive will have Community-wide, and no longer merely nationwide, application, and whereas existing reciprocity clauses will henceforth have no effect; whereas a flexible procedure is therefore needed to make it possible to assess reciprocity on a Community basis; whereas the aim of this procedure is not to close the Community's financial markets but rather, as the Community intends to keep its financial markets open to the rest of the world, to improve the liberalization of the global financial markets in third countries; whereas, to that end, this Directive provides for procedures for negotiating with third countries and, as a last resort, for the possibility of taking

measures involving the suspension of new applications for authorization or the restriction of new authorizations;

Whereas the smooth operation of the internal market in investment services will require not only legal rules but also close and regular co-operation between the competent authorities of the Member States; whereas for the consideration of problems concerning individual investment firms the Contact Committee constituted under this Directive is the most appropriate forum; whereas that committee is a suitable body for the mutual exchange of information provided for in this Directive;

Whereas that mutual information procedure will not in any case replace the bilateral collaboration established by this Directive; whereas the competent host Member State authorities can, without prejudice to their powers of control proper, continue, either in an emergency, on their own initiative or following the initiative of the competent home Member State authorities, to verify that the activities of an investment firm established within their territories comply with the relevant laws and with the principles of sound administrative and accounting procedures and adequate internal control;

Whereas technical modifications to the detailed rules laid down in this Directive may from time to time be necessary to take account of new developments in the investment services sector; whereas the Commission shall accordingly make such modifications as are necessary, after consulting the committee constituted under this Directive.

HAS ADOPTED THIS DIRECTIVE:

TITLE I

Definitions and scope

Article 1

For the purpose of this Directive:

(1) "credit institution" shall mean a credit institution as defined with the first indent of Article 1 of Council Directive 77/780/EEC[1] other than the institutions referred to in Article 2(2) thereof;

(2) "investment service" shall mean any of the services relating to any of the instruments set out in the list in the Annex;

(3) "investment firm" shall mean any natural or legal person whose business it is to provide any investment service;

(4) "home Member State" shall mean:
(a) where the investment firm is a natural person, the Member State where that person has his principal place of business;
(b) where the investment firm is a legal person, the Member State where its registered office is situated or if it has no registered office then the Member State where its head office is situated;

(5) "host Member State" shall mean the Member State where an investment firm has a branch or in which it supplies services;

(6) "branch" shall mean a place of business which forms a legally dependent part of an investment firm and which provides an investment service for which the investment firm has been authorized;

(1) OJ No L 322, 17.12.1977, p.30.

(7) "qualifying holding" shall mean a direct or indirect holding in an investment firm which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the investment firm in which a holding subsists.

For the purpose of this definition, in the context of Articles 4 and 10 and of the other levels of holding referred to in Article 10, the voting rights referred to in Article 7 of Council Directive 88/627/EEC[1] shall be taken into consideration;

(8) "parent undertaking" shall mean a parent undertaking as defined in Articles 1 and 2 of Council Directive 83/349/EEC[2];

(9) "subsidiary" shall mean a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC; any subsidiary of a subsidiary undertaking shall also be regarded as a subsidiary of the parent undertaking which is at the head of those undertakings;

(10) "members of a stock exchange or organized market" shall mean any natural or legal person recognized by the relevant authorities of each organized market of the said country and placed under their supervision.

Article 2

This Directive shall apply to all investment firms. However, only Articles 9(2), 11 and 13 shall apply to investment firms that are credit institutions authorized by their banking licence to engage in securities business.

(1) OJ No L 348, 17.12.1988, p. 62.
(2) OJ No L 193, 18.7.1983, p. 1.

TITLE II

Harmonization of authorization conditions

Article 3

1. Investment firms shall obtain authorization in their home Member State before commencing to provide investment services. Such authorization shall be granted by the home Member State's competent authorities designated in accordance with Article 17. Following the granting of authorization the investment service in question may be engaged in forthwith by the investment firm, together with any activities that are ancillary thereto.

2. Without prejudice to other conditions of general application laid down by national law, the competent authorities shall not grant authorization unless:

   - the investment firm has sufficient initial capital in accordance with the rules prescribed in Directive/../EEC having regard to the nature of the investment service in question;

   - the persons who effectively direct the business of the investment firm are of sufficiently good repute and experience.

3. Member States shall also require applications for authorization to be accompanied by a programme of operations setting out inter alia the types of business envisaged and the structural organization of the investment firm.

4. The applicant shall be notified within three months of submission of a complete application whether or not authorization is granted. Reasons shall be given whenever an authorization is refused. If no decision is notified within six months of submission of the complete application this shall be deemed to be a refusal.

5. The competent authorities may withdraw the authorization issued to an investment firm subject to this Directive only where the investment firm:

a) does not make use of the authorization within 12 months, expressly renounces the authorization or has ceased to engage in investment business for more than six months, if the Member State concerned has made no provision for the authorization to lapse in such cases;

b) has obtained the authorization through false statements or any other irregular means;

c) no longer fulfils the conditions under which authorization was granted;

d) no longer possesses sufficient financial resources or can no longer be relied upon to fulfil its obligations towards its creditors, and in particular no longer provides security for the assets entrusted to it;

e) falls within one of the other cases where national law provides for withdrawal of authorization.

Article 4

The competent authorities shall not grant authorization for the taking up of the business of investment firms before they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.

The competent authorities shall refuse authorization if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the above-mentioned shareholders or members.

Article 5

Member States shall not apply to branches of investment firms having their registered office outside the Community, when commencing or carrying on their business, provisions that result in more favourable treatment than that accorded to branches of investment firms having their registered office in a Member State.

Article 6

There must be prior consultation with the competent authorities of the other Member State involved on the authorization of an investment firm which is:

- a subsidiary of an investment firm authorized in another Member State, or

- a subsidiary of the parent undertaking of an investment firm authorized in another Member State, or

- controlled by the same persons, whether natural or legal, as control an investment firm authorized in another Member State.

TITLE III

Relations with third countries

Article 7

1. The competent authorities of the Member States shall inform the Commission:

   a) of any authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of a third country. The Commission shall inform the committee constituted under Article 23 accordingly;

   b) whenever such a parent undertaking acquires a holding in a Community investment firm such that the latter would become its subsidiary. The Commission shall inform the committee constituted under Article 23 accordingly.

   When authorization is granted to the direct or indirect subsidiary of one or more parent undertakings governed by the law of third countries, the structure of the group shall be specified in the notification which the competent authorities shall address to the Commission.

2. The Member States shall inform the Commission of any general difficulties encountered by their investment firms in establishing themselves or carrying on activities in a third country.

3. Initially no later than six months before the application of this Directive and thereafter periodically, the Commission shall draw up a report examining the treatment accorded to Community investment firms in third countries, in the terms referred to in paragraphs 4 and 5, as regards establishment and the carrying on of investment activities, and the acquisition of holdings in third-country investment firms. The Commission shall submit those reports to the Council, together with any appropriate proposals.

4. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 3 or on the basis of other information, that a third country is not granting Community investment firms effective market access comparable to that granted by the Community to investment firms from that third country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community investment firms. The Council shall decide by a qualified majority.

5. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 3 or on the basis of other information, that Community investment firms in a third country do not receive national treatment offering the same competitive opportunities as are available to domestic investment firms and that the conditions of effective market access are not fulfilled, the Commission may initiate negotiations in order to remedy the situation.

In the circumstances described in the first subparagraph, it may also be decided at any time, and in addition to initiating negotiations, in accordance with the procedure laid down in Article 23, that the competent authorities of the Member States must limit or suspend their decisions regarding requests pending at the moment of the decision or future requests for authorizations and the acquisition of holdings by direct or indirect parent undertakings governed by the laws of the third country in question. The duration of the measures referred to may not exceed six months.

Before the end of that six-month period, and in the light of the results of the negotiations, the Council may, acting on a proposal from the Commission, decide by a qualified majority whether the measures shall be continued.

Such limitations or suspension may not apply to the setting up of subsidiaries by investment firms duly authorized in the Community or by their subsidiaries, or to the acquisition of holdings in Community investment firms by such firms or subsidiaries.

6. Whenever it appears to the Commission that one of the situations described in paragraphs 4 and 5 obtains, the Member States shall inform it at its request:

(a) of any request for the authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of the third country in question;

(b) whenever they are informed in accordance with Article 10 that such an undertaking proposes to acquire a holding in a Community investment firm such that the latter would become its subsidiary.

This obligation to provide information shall lapse whenever an agreement is reached with the third country referred to in paragraph 4 or 5 or when the measures referred to in the second and third subparagraphs of paragraph 5 cease to apply.

7. Measures taken under this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking up and pursuit of the business of investment firms.

TITLE IV

Harmonization of the conditions governing pursuit of the business of investment firms

Article 8

1. An investment firm's own funds may not fall below the amount of initial capital required pursuant to Article 3 at the time of its authorization.

2. The Member States may decide that investment firms already in existence when the Directive is implemented, the own funds of which do not attain the levels for initial capital referred to in Article 3, may continue to carry on their activities. In that event, their own funds may not fall below the highest level reached after the date of the notification of this Directive.

3. If control of an investment firm falling within the category referred to in paragraph 2 is taken by a natural or legal person other than the person who controlled it previously, its own funds must attain at least the level for initial capital referred to in Article 3.

4. However, where there is a merger of two or more investment firms falling within the category referred to in paragraph 2, in certain specific circumstances and with the consent of the competent authorities, the own funds of the new investment firm resulting from the merger need not attain the level of initial capital referred to in Article 3. However, the own funds of the new investment firm may not fall below the total own funds of the merged firms at the time of the merger, as long as the appropriate levels referred to in Article 3 have not been obtained.

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

Article 9

1. The competent authorities of the home Member State shall require continuing compliance by an investment firm authorized by them with the conditions referred to in Article 3 (2).

2. The competent authorities of the home Member State shall require that investment firms authorized by them make sufficient provision against market risk in accordance with the rules prescribed in Directive/../EEC.

3. The supervision of compliance with the conditions referred to in Articles 3 (2) and 4 shall be within the exclusive regulatory competence of the home Member State's competent authorities irrespective of whether or not the investment firm establishes a branch or provides services in another Member State.

Article 10

1. The Member States shall require any natural or legal person who proposes to acquire, directly or indirectly, a qualifying holding in an investment firm first to inform the competent authorities, telling them of the size of the intended holding. Such a person must likewise inform the competent authorities if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital held by him would reach or exceed 20%, 33% or 50% or so that the investment firm would become his subsidiary.

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

2. If the acquirer of the holdings referred to in paragraph 1 is an investment firm authorized in another Member State or the parent undertaking of an investment firm authorized in another Member State or a natural or legal person controlling an investment firm authorized in another Member State and if, as a result of that acquisition, the firm in which the acquirer proposes to acquire a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be the subject of the prior consultation referred to in Article 6.

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

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

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

5. The Member States shall require that, where the influence exercised by the persons referred to in paragraph 1 is likely to operate to the detriment of the prudent and sound management of the investment firm, the competent authorities shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions against directors and managers, or the suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

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

Article 11

1. Member States shall draw up prudential rules to be observed on a continuing basis by investment firms authorized by their competent authorities. Supervision of such prudential rules shall be within the exclusive competence of the home Member State's competent authorities irrespective of whether or not the investment firm establishes a branch or provides services in another Member State. Such rules shall require that the investment firm

- has sound administrative and accounting procedures and internal control mechanisms;

- arranges for securities belonging to investors to be kept separately from its own securities;

- except in the case of investment firms that are credit institutions, arranges for money belonging to investors to be placed in an account or in accounts which are separate and distinct from the firm's own account;

- is either a member of a general compensation scheme designed to protect investors who are prevented from having claims satisfied because of the bankruptcy or default of the investment firm or makes individual arrangements which provide investors with equivalent protection. Pending further harmonization of compensation schemes branches of investment firms shall be subject to the compensation scheme in force in the host Member State provided that payment or contribution to such a compensation scheme shall be calculated by reference to their income in respect of investment activity carried out in that State;

- provides the competent authorities of the home Member State with such information on request and at such intervals as they may determine (but not less frequently than quarterly) in order that they may assess its financial soundness, including the adequacy of its provision in respect of market risk;

- arranges for adequate records to be kept relating to executed transactions which shall be at least sufficient to enable the home Member State's authorities to monitor compliance with prudential rules which they are responsible for applying, including rules relating to market risk. Such records shall be retained for periods to be laid down by the competent authorities;

- is organized in such a way that conflicts of interest between the firm and its clients or between one of its clients and another do not result in clients' interests being prejudiced.

2. Member States may provide that the rules set out in the second, third and fourth indents of paragraph 1 shall not apply where the service is provided to business or professional investors or where the investment service does not involve the investment firm in handling any money or securities on behalf of clients.

TITLE V

Freedom of establishment and freedom to provide services

Article 12

1. Host Member States shall ensure that any investment service and any activities which are ancillary thereto may be provided in their territories, in accordance with the provisions of Articles 14, 15 and 16, either by the establishment of a branch or by way of the provision of services, by an investment firm authorized to provide the relevant service under this Directive by the competent authorities of its home Member State.

2. Host Member States may not make the establishment of a branch or the provision of services under paragraph 1 subject to an authorization requirement or to a requirement to provide endowment capital or any measure having equivalent effect.

Article 13

1. Without prejudice to the exercise of the freedom of establishment and the freedom of services referred to in Article 12, host Member States shall ensure that investment firms which are authorized to provide broking, dealing or market-making services by the competent authorities of their home Member State can have access, either directly or indirectly, to membership of stock exchanges and organized securities markets of host Member States where similar services are provided and also to membership of clearing and settlement systems there which are available to members of such exchanges and markets.

2. In order to meet their obligation set out in paragraph 1, host Member States shall ensure that the investment firms referred to in that paragraph have the option to become either:

- direct members of host Member States' stock exchanges or organized securities markets by setting up a branch in the host Member State; or

- indirect members by setting up a subsidiary in the host Member State or by the acquisition of an existing member firm.

In these cases membership shall be on the basis that the rules governing the structure and organization of the relevant host stock exchange or organized securities market and clearing and settlement systems are complied with.

3. Where the stock exchange or organized securities market of the host Member State operates without any requirement for a physical presence the investment firms referred to in paragraph 1 may become members of it on a similar basis without having any establishment in the host Member State. Home Member States shall allow host stock exchanges or markets to provide appropriate facilities within the home Member States' territory so as to permit their investment firms to become members of the host exchange or market in accordance with this paragraph.

4. Host Member States shall likewise ensure that investment firms which are authorized to deal in financial futures and options by the competent authorities of their home Member State can have access to membership of financial futures and options exchanges and membership of clearing houses in the host Member State under the same conditions as are set out in paragraphs 1, 2 and 3.

Article 14

1. In addition to meeting the obligations set out in Article 3, an investment firm wishing to establish a branch in the territory of another Member State shall notify the competent authorities of its home Member State.

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

a) the Member State within the territory of which it plans to establish a branch;

b) a programme of operations setting out inter alia the types of business envisaged and the structural organization of the branch;

c) the address in the host Member State from which documents may be obtained;

d) the names of the managers of the branch.

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

The competent authorities of the home Member State shall also communicate the amount of own funds of the investment firm.

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

4. Before the branch of an investment firm commences its activities the competent authorities of the host Member State shall, within

two months of receiving the information mentioned in paragraph 3, prepare for the supervision of the investment firm in accordance with Article 16 and, if necessary, indicate the conditions under which, in the interest of the general good, those activities must be carried on in the host Member State.

5. On receipt of a communication from the competent authorities of the host Member State, or in the event of the expiry of the period provided for in paragraph 4 without receipt of any communication from the latter, the branch may be established and commence its activities.

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

Article 15

1. Any investment firm wishing to exercise the freedom to provide services by carrying on its activities within the territory of another Member State for the first time shall notify the competent authorities of the home Member State of the investment service or services which it intends to carry on.

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

Article 16

1. Host Member States may, for statistical purposes, require that all investment firms having branches within their territories shall

report periodically on their activities in those host Member States to the competent authorities of those host Member States.

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

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

4. If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the investment firm persists in violating the legal rules referred to in paragraph 2 in force in the host Member State, the latter State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to punish further irregularities and, insofar as is necessary, to prevent that investment firm from initiating further transactions within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for these measures on investment firms.

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

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

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

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

8. In the event of withdrawal of authorization the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the investment firm concerned from initiating further transactions within its territory and to safeguard the interests of investors. Every two years the Commission shall submit a report on such cases to the committee constituted under Article 23.

9. The Member States shall inform the Commission of the number and type of cases in which there has been a refusal pursuant to Article 14 or measures have been taken in accordance with the provisions of paragraph 4. Every two years, the Commission shall submit a report on such cases to the committee constituted under Article 23.

10. Nothing in this Article shall prevent investment firms authorized in other Member States from advertising their services through all available means of communication in the host Member State, subject to any rules governing the form and the content of such advertising adopted in the interest of the general good.

TITLE VI

The authorities responsible for authorization and supervision

Article 17

1. The Member States shall designate the authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.

2. The authorities referred to in paragraph 1 must be public authorities or bodies officially recognized by national law or by public authorities to be part of the supervisory system prevailing in the relevant Member State.

3. The authorities concerned must be granted all the powers necessary to carry out their task.

Article 18

1. Where there are several competent authorities in the same Member State they shall collaborate closely in order to supervise the activities of investment firms operating there.

2. Member States shall also permit such collaboration to take place between such competent authorities and public authorities responsible for the supervision of credit and other financial institutions and insurance companies as regards the respective entities supervised by them.

3. Where investment services are provided on a services basis across frontiers or by the establishment of branches in one or more Member States other than the home Member State the competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of the investment firms concerned.

They shall supply one another on request with all information concerning the management and ownership of such investment firms that is likely to facilitate their supervision and the examination of the conditions for their authorization and all information likely to facilitate the monitoring of such firms.

Article 19

1. Host Member States shall ensure that, where an investment firm authorized in another Member State carries on its activities there through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the host Member State, carry out themselves or through the intermediary of persons they appoint for that purpose on-the-spot verification of the information referred to in Article 18(3).

2. The competent authorities of the home Member States may also ask the competent authorities of the host Member State for this verification to be carried out. The authorities which have received such a request must, within the framework of their competence, act upon it either by carrying out the verification themselves, or by allowing the authorities who made the request to carry it out, or by allowing an auditor or expert to carry it out.

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

Article 20

1. The Member States shall provide that all persons working or who have worked for the competent authorities, as well as auditors or experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy. This means that

no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form such that individual investment firms cannot be identified, without prejudice to cases covered by criminal law.

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

2. Notwithstanding paragraph 1, the competent authorities of the various Member States and the public authorities responsible for the supervision of credit and other financial institutions shall be authorized to exchange information in accordance with the provisions of Article 18 where appropriate for the efficient discharge of their respective responsibilities. This information shall be subject to the conditions of professional secrecy referred to in paragraph 1.

3. Member States may conclude cooperation agreements, providing for exchanges of information, with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Article.

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

- to check that the conditions governing the taking up of the business of the entities supervised by them are met and to facilitate the monitoring of the conduct of such business, the administrative and accounting procedures and the mechanisms of internal control; or

- to impose sanctions; or

- in an administrative appeal against a decision of the competent authority; or

- in court proceedings instituted pursuant to Article 21.

5. Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State, or between Member States, between competent authorities and

- authorities responsible for the supervision of financial markets;

- bodies involved in the liquidation and bankruptcy of investment firms and in other similar procedures;

- persons responsible for carrying out statutory audits of the accounts of investment firms and other financial institutions,

in the discharge of their supervisory functions, and the disclosure to bodies which administer compensation schemes of information necessary to the exercise of their functions. This information shall be subject to the conditions of professional secrecy referred to in paragraph 1.

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

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

However, the Member States shall provide that information received under paragraphs 2 and 5 and that obtained by means of the on-the-spot verification referred to in Article 19 may never be disclosed in the cases referred to in this paragraph except with the express consent of the competent authorities which disclosed the information or of the competent authorities of the Member State in which on-the-spot verification was carried out.

Article 21

Member States shall ensure that decisions taken in respect of an investment firm in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive may be subject to the right to apply to the courts. The same shall apply where an application for authorization is deemed to be refused in accordance with Article 3(4).

Article 22

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

TITLE VII

Final provisions

Article 23

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

- expansion of the content of the list in the Annex or adaptation of the terminology used in that list to take account of developments on financial markets;

- alteration of the amount of initial capital referred to in Article 3 to take account of developments in the economic and monetary field;

- the areas in which the competent authorities must exchange information as listed in Article 18;

- clarification of the definitions in order to ensure uniform application of this Directive throughout the Community;

- clarification of the definitions in order to take account in the implementation of this Directive of developments on financial markets;

- the alignment of terminology on and the framing of definitions in accordance with subsequent measures on investment firms and related matters.

2. The Commission shall be assisted by a committee composed of representatives of the Member States and chaired by a representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 24

1. Investment firms already authorized to provide investment services in their home Member State before the entry into force of the provisions adopted in implementation of this Directive shall be deemed to be authorized for the purposes of this Directive provided that the authorization was given under equivalent conditions to those set out in Articles 3(2) and 4.

2. Branches which have commenced their activities, in accordance with the provisions in force in their host Member States, before the entry into force of the provisions adopted in implementation of this Directive shall be presumed to have been subject to the procedures envisaged in Article 14(1), (2) and (3). They shall be governed, from the date of that entry into force, by the provisions of Articles 12, 14(6), 16 and 19.

3. Article 15 shall not affect rights acquired before the entry into force of the provisions adopted in implementation of this Directive by investment firms providing services.

Article 25

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1993. They shall forthwith inform the Commission thereof.

The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

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

Article 26

This Directive is addressed to the Member States.

Done at Brussels, For the Council

The President

ANNEX

Investment services coming within the scope of this Directive

Section A: Services

1. Brokerage i.e. the acceptance of investors' orders relating to any or all of the instruments referred to in Section B below and/or the execution of such orders on an exchange or market on an agency basis against payment of commission;

2. dealing as principal i.e. the purchase and sale of any or all of the instruments referred to in Section B below for own account and at own risk with a view to profiting from the margin between bid and offer prices;

3. market making i.e. maintenance of a market in any or all of the instruments referred in Section B below by dealing in such instruments on the basis of a commitment to make two-way prices;

4. portfolio management i.e. the management against payment of portfolios composed of any or all of the instruments referred to in Section B below undertaken for investors otherwise than on a collective basis;

5. arranging or offering underwriting services in respect of issues of the instruments referred to in point 1 of Section B below and distribution of such issues to the public;

6. 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 Section B below;

7. safekeeping and administration of any of the instruments referred to in Section B below otherwise than in connection with the management of a clearing system.

Section B: Instruments

1. Transferable securities including units in undertakings for collective investment in transferable securities;

2. money market instruments (including certificates of deposit and Eurocommercial paper);

3. financial futures and options;

4. exchange rate and interest rate instruments.

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