

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(90) 567 final - SYN 180

Brussels, 25 January 1991

Amended proposal for a

COUNCIL REGULATION (EEC)

to the amended proposal for a Regulation (EEC) on securities given
by credit institutions or insurance undertakings

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

General points

Subsequent to the "legislative resolution" of the European Parliament adopted on 14 February 1990 and in line with the oral commitment of the Commission in the European Parliament sitting of 12 February 1990 a modified proposal is presented. Apart from drafting adaptations and improvements it includes the substance of most of the modifications asked for by the European Parliament.

As announced in the European Parliament on 12 February 1990, the Commission feels that the marriage of a basic principle of law, i.e. the free choice of a partner for a contract, with the requirement to promote the internal market should be effected in a way which avoids imposing an obligation to accept a guarantor whose continued solvency can reasonably be put into doubt. In addition, it appears inappropriate to extend the obligation to accept a guarantor to central banks when they act in the context of their functions as a monetary authority.

Specific points

The term guarantee has been replaced by security which is to comprise guarantees and indemnities, as defined in Article 1.

Recital 2

Courts acting for their own account (e.g. fees for judicial procedures) are included in the definition of public authorities. Where, however, courts require guarantees to secure payment between private parties, the basic concept of the regulation, i.e. requiring public authorities to give a positive example for the functioning of the internal market, does not apply.

Recital 10

The Treaty freedom to provide services within the Community (Art. 59) does not apply to branches of institutions from third countries.

Recital 12

The Regulation applies indistinctly to operations within one Member State and those involving parties from different Member States.

Article 1

The negative conditions added in paragraph 1 will exclude the general obligation in cases where it would be unreasonable to impose it. If, for example, an acceptable reference is not confirmed on a request being addressed to the supervisory authority of the Member State of the guarantor (if need be, channelled through the respective authority of the Member State of the public authority requiring the security), the proposed guarantor would not need to be accepted. Nor does the regulation intend to limit the freedom of the public authorities to negotiate the terms and conditions of the proposed security and to apply their standard terms and conditions where appropriate. This means that a guarantor will have to meet these requirements on terms and conditions when claiming that he must be accepted.

Since the activities of Central Banks in the implementation of their monetary policy may require a specific performance of banks, this should not be compromised by the proposed regulation.

Original Article 2 (Amendment of existing legislation)

Article 27(3) of Council Regulation (EEC) No 222/77 on Community transit has been replaced with effect from 1.1.1993 by Article 24(3) of Council Regulation (EEC) No 2726/90 of 17 September 1990 (OJ L 262 of 26.9.1990, p. 1) which reads as follows:

"3. Subject to Article 29(2), the guarantee shall consist of the joint and several guarantee of any natural or legal third person who shall:

- be normally resident or established in the Community, and
- subject to the provisions on freedom to provide services, have been approved by the competent authority of the Member State in which the guarantee is provided. Such approval may be subject, inter alia, to the condition that the guarantor shall be a person whose main or secondary professional activities involve the provision of such services."

The approval mentioned in that paragraph will, in the case of the institutions to which the securities regulation would apply, only have a very limited scope of application. Its main effect would be to permit the control of whether the amount secured is within the prudential capacity of the guarantor.

New Article 2 and recital 7

The legal system applicable to the guarantee will be that of the Member State in which the debt is secured, which is likely always to be that under which the public authority is normally acting.

COM (88)805 final

Proposal for a

**COUNCIL REGULATION (EEC) No/89
of1989
on guarantees issued by credit
Institutions or Insurance
undertakings**

**THE COUNCIL OF THE EUROPEAN
COMMUNITIES**

- Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 a thereof;
- Having regard to the proposal from the Commission⁽¹⁾;
- In cooperation with the European Parliament⁽²⁾;
- Having regard to the opinion of the Economic and Social Committee⁽³⁾;
- (1) Whereas the Treaty, in Article 59, enshrines the principle of freedom to provide services;
- (2) Whereas many public authorities, when demanding guarantees, ask for guarantees issued by a resident of their national territory, which conflicts with that principle;
- (3) Whereas the Treaty principle of non-discrimination is directly applicable and does not require implementing legislation;
- (4) Whereas public authorities have a certain discretion in judging the acceptability of the guarantor;

(1) OJ
(2) OJ
(3) OJ

Amended proposal for a

**COUNCIL REGULATION (EEC) No .../..
of
on securities given by credit
institutions or Insurance undertakings**

THE COUNCIL OF THE EUROPEAN COMMUNITIES

- Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 a thereof;
- Having regard to the proposal from the Commission⁽¹⁾;
- In cooperation with the European Parliament⁽²⁾;
- Having regard to the opinion of the Economic and Social Committee⁽³⁾;
- (1) Whereas the Treaty, in Article 59, enshrines the principle of freedom to provide services;
- (2) Whereas many public authorities, when demanding a security, ask for a security given by a resident of their national territory, which conflicts with that principle;
- (3) Whereas the Treaty principle of non-discrimination is directly applicable and does not require implementing legislation;
- (4) Whereas public authorities have a certain discretion in judging the acceptability of the guarantor;

(1) OJ No C 51, 28.02.1989, p. 6.
(2) European Parliament: 1st reading 14.02.1990, OJ No C 68, 19.03.90, p. 86; 2nd reading Common position of the Council;
(3) OJ No C 159, 26.06.1989, p. 4.

- (5) Whereas public authorities also have a particular responsibility for the establishment and functioning of the Internal Market;
- (6) Whereas this responsibility calls for a limitation of the discretion of public authorities in the case of a specific financial service provided by institutions supervised on the basis of Community rules;
- (7) Whereas the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions⁽⁴⁾ as last amended by Directive 86/524⁽⁵⁾, provides for a Community system for licensing and supervising credit institutions;
- (8) Whereas the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance⁽⁶⁾ as last amended by Directive 87/344/EEC⁽⁷⁾, provides for a Community system for licensing and supervising insurance undertakings;
- (5) Whereas public authorities also have a particular responsibility for the establishment and functioning of the Internal Market;
- (6) Whereas, in the case of a specific financial service provided by institutions already supervised on the basis of Community rules, a positive measure is needed to limit the discretion of public authorities which accept a security;
- (7) Whereas it does not appear reasonable for an authority to be subject without its consent to the law and jurisdiction of another Member State;
- (8) Whereas the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions⁽⁴⁾ as last amended by Directive 89/646/EEC⁽⁵⁾, provides for a Community system for licensing and supervising credit institutions;
- (9) Whereas the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance⁽⁶⁾ as last amended by Directive 88/357/EEC⁽⁷⁾, provides for a Community system for licensing and supervising insurance undertakings;

(4) OJ No L 322, 17.12.1977, p. 30.
(5) OJ No L 309, 04.11.1986, p. 15.
(6) OJ No L 228, 16.08.1973, p. 3.
(7) OJ No L 185, 04.07.1987, p. 77.

(4) OJ No L 322, 17.12.1977, p. 30.
(5) OJ No L 386, 30.12.1989, p. 1.
(6) OJ No L 228, 16.08.1973, p. 3.
(7) OJ No L 172, 04.07.1988, p. 1.

- (9) Whereas it appears inappropriate that authorities other than those in charge of prudential supervision of these institutions judge the credit-worthiness of credit institutions or insurance companies acting as guarantors;
- (10) Whereas branches of credit institutions from non-Member States are authorised in the Community only in respect of national territories and therefore have no right to cross-border acceptance of their security;
- (11) Whereas it appears inappropriate that authorities other than those in charge of prudential supervision of credit institutions or insurance companies judge the credit-worthiness of such institutions when the latter are acting as guarantors;
- (12) Whereas, given the operational requirements of the Single Market, this should apply to security from both the domestic Member State and other Member States;

HAS ADOPTED THIS REGULATION:

Article 1
Obligation to accept guarantees issued by credit institutions or insurance undertakings

A public authority which requires to be secured for payment of an actual or potential debt or for respect of any other obligation shall be bound to accept a guarantee issued by any credit institution licensed according to Article 3 of Directive 77/780/EEC or by any insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Directive 73/239/EEC.

HAS ADOPTED THIS REGULATION:

Article 1
Obligation to accept security given by credit institutions or insurance undertakings

- (1) A public authority which requires to be secured for payment of an actual or potential debt or for respect of any other obligation shall be bound to accept security given by any credit institution licensed according to Article 3 of Directive 77/780/EEC or by any insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Directive 73/239/EEC unless
 - the public authority has reason to doubt the soundness of the guarantor, notably if fact are known that cast doubt on his continued solvency;
 - the offer does not meet the conditions normally required by that public authority;
- (2) Paragraph 1 shall not apply to central banks in the context of their operations in the implementation of monetary policy.

Article 2
Applicable law and court of jurisdiction

The legislation applicable to the security and the court of jurisdiction shall be determined by the debt secured unless the authority accepts another arrangement.

[suppressed because modified by Article 24 of Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit]

Article 2
Amendment of existing legislation

Article 27(3) of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit⁽⁸⁾ is hereby replaced by the following:

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

- a credit institution licensed according to Article 3 of Council Directive 77/780/EEC⁽⁹⁾, or
- an insurance undertaking authorised for the class of suretyship insurance according to Articles 6 and 7 of Council Directive 73/239/EEC⁽¹⁰⁾, or
- any other natural or legal third person established in the Community and approved as guarantor by the Member State in which the guarantee is provided.

Article 3
Entry into force

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

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

Done at Brussels,

For the Council

Article 3 [unchanged]

[unchanged]

(8) OJ No L 38, 09.02.1977, p. 1
 (9) OJ No L 322, 17.12.1977, p. 30
 (10) OJ No L 228, 16.08.1973, p. 3

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DOCUMENTS

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