

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(84) 730 final

Brussels, 24 January 1985

Proposal for a
COUNCIL DIRECTIVE
on the freedom of establishment and the free supply of
services in the field of mortgage credit

(submitted to the Council by the Commission)

COM(84) 730 final

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(84) 730 final /2

Brussels, 7 february 1985

CORRIGENDUM

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C O R R I G E N D U M

to the "Proposal for a Council Directive on the Freedom of Establishment and the free Supply of Services in the Field of Mortgage Credit" (Doc. COM(84) 730 final of 24-1-1985)

Chapter II. EXPLANATION OF THE ARTICLES

Page 2 - Ad Article 5 - 1st §

" This Article deals with the funding techniques ...

..... for the passive side of the general principle."

- Delete: "as described in Article 4"

PREAMBLE

Page 3 - 4th § should be read :

" Whereas, however, with respect to the supply of cross-border services and in accordance with the principle of home country control, the supervision of those credit institutions will be entrusted to the supervisory authority of the home country ; whereas the institution providing services must comply with the legal provisions in force in the host country which are justified on the grounds of the general good ;"

TITLE II - Page 4

ARTICLE 4 should be read :

" Member States shall repeal all legal or administrative provisions preventing or obstructing a credit institution, as referred to in Article 1, having its head office in their territory, from operating mortgage credit in another Member State in accordance with techniques specifically authorized within its home Member State, or shall so amend such provisions as to make the operation of such techniques possible."

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EXPLANATORY NOTE TO THE
PROPOSAL OF COUNCIL DIRECTIVE
ON THE FREEDOM OF ESTABLISHMENT AND FREE SUPPLY
OF SERVICES IN THE FIELD OF MORTGAGE CREDIT

I. GENERAL

There are no longer major obstacles within the Community to the activities exercised abroad by commercial banks authorized to undertake their activities according to the prescriptions of the First Banking Directive of 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (77/780). Such obstacles remains, however, for specialized mortgage credit institutions wanting to grant mortgage loans or to fund themselves outside their country of establishment.

These obstacles are attributable to three main elements :

- 1) protection of capital markets;
- 2) differences in civil law;
- 3) objections by the supervisory authorities because of incurring risks abroad by such credit institutions.

The Directive 77/780 also covers specialized mortgage credit institutions. But while the other credit institutions have been able to enjoy freedom of operating abroad, this group of specialized institutions is still confined to its national markets. This is not in conformity with the Treaty. This Directive supported by the general rules of the Treaty regarding the freedom of establishment and freedom to supply services, will now change the situation.

This proposal for a Directive abolishes all institutional and technical provisions preventing or obstructing a credit institution from undertaking mortgage business throughout the Community. It should be seen as a supplement to and a clarification of the Directive 77/780. The purpose of this proposal is not to coordinate the legal provisions applicable to mortgage credit in the Member States but to create a legal environment which will enable the interested credit institutions to operate mortgage

credit in the different Member States by a sort of mutual recognition of the relevant finance techniques authorized in such different Member States. The opening up of the mortgage credit market on an European basis will be of great practical benefit to mortgage credit consumers who will then have available a wide choice of mortgage credit instruments. It forms indeed a natural part of the Commission's efforts to secure the realisation of People's Europe. Whereas the objective of the Directive 77/780 is to enable banks emanating from within the Community to work on the same basis as domestic banks, this Directive provides for the different financing and lending techniques to rank *pari passu* in the market.

The proposal for a directive contains a number of principles relevant to both the freedom of establishment and the freedom to supply cross-border services. To make the above mentioned rights effective, the relevant credit institutions must be able to provide mortgage credit in accordance with the lending and funding techniques with which they are familiar. This proposal enables therefore such credit institutions to operate within the Community the funding and lending transactions with those techniques specifically authorized in their home country.

The problem of freedom of establishment is that the financing technique brought into one Member State by a credit institution from another Member State could conflict with the laws of the host country. This gives rise to the problem of the incompatibility of the specific financing techniques which may be mandatory in one Member country and prohibited in another Member country for such category of institutions or for such type of operations.

The only practical solution of the problem of incompatibility is the mutual recognition of existing systems without approximating them. Mutual recognition means that each Member State allows credit institutions from other Member States to apply their own domestic techniques in its market, even if such techniques do not in every respect comply with the rules of the host country.

An approximation of the existing regulations would be a cumbersome and difficult exercise and it would serve no purpose.

Most particularly it would not serve the main objective of this Directive which is to provide the EC citizens with a wider offer of financing possibilities. This can only be achieved through mutual recognition of the specific techniques of institutions of other Member States, which will enable these institutions to extend their activities into the other Member States, without losing their original character.

This development presupposes that the national supervisory authorities are confident that the said institutions are properly licensed and properly supervised. Supervision of branches will mainly be undertaken by the host country authorities. A close cooperation with the competent authorities of the home country will however be necessary especially with regard to aspects such as the imported financing techniques. When it comes to the supply of cross-border services the home country will have to assume a more important role.

This proposal for a Directive will be accompanied in due course by a special directive based on Article 67 of the Treaty in order to liberalize those capital movements which are related to the operations mentioned in the present proposal. A similar procedure has been followed with regard to the proposal of directive concerning the UCITS. (1)

(1) UCITS : Undertakings for collective investment in transferable securities.

COM/76/152 as amended by COM/77/227

II. EXPLANATION OF THE ARTICLES

Ad Article 1

This Article dealing with the field of application limits the scope of the Directive to the activities of those institutions falling under the scope of the First Directive of 1977 which receive funds and grant loans in order to engage in mortgage credit business. It covers activities consisting essentially in the granting of credits secured by mortgage for the purpose of building or acquiring residential property.

Ad Article 2

This Article defines "home Member State" and "host Member State", which are key notions of this Directive.

Ad Article 3

One of the main obstacles to the exercise of freedom of establishment and freedom to supply services by credit institutions operating mortgage credit arises from the prohibition in several Member States by national legislation to grant credit on mortgage on real property situated abroad. This Article eliminates this obstacle and makes it possible to grant mortgage credit secured on real property situated in a Member State other than the home Member State.

Ad Article 4

This Article intends to enable credit institutions to operate mortgage in other Member States according to the financing techniques authorized in their home countries. This Article is a key provision of the Directive. If freedom of establishment and freedom of services are to assume their proper meaning, mortgage credit institutions must be able to operate mortgage in accordance with the techniques with which they are familiar.

This is true particularly in the mortgage credit business, contrary to commercial banking, because there is a fundamental link between the funding techniques and the financing techniques which cannot be severed without endangering the normal way of doing business by the relevant institutions.

In case of establishment this means an essential difference with the principles of the First Directive of 1977 that branches should be governed by the legislation of the host country.

Ad Article 5

This Article deals with the funding techniques in the field of mortgage credit institutions and is an illustration for the passive side of the general principle as described in Article 4.

This Article enables credit institutions originating in another Member State to fund themselves in the host country, according to the techniques of the home country. It also provides the possibility for the credit institutions to extend loans in one Member State financed by funds raised in another Member State. If the introduction of a funding technique authorized in another Member State gives rise to a distortion in the conditions of competition on the market of mortgage credit in a host Member State, that Member State shall in such situations allow credit institutions working in the same field in its territory by any form of establishment, to operate under similar conditions.

However, having regard to the large number of types of bonds secured by mortgage issued under very different conditions in the various Member States and pending further coordination in this field, the host Member State may require that bonds shall be issued under the conditions of the relevant provisions of that Member State.

Ad Article 6

It will be necessary to introduce a special Directive designed to liberalize the relevant capital movements because the operations concerned are still subject to exchange control restrictions in some Member States. In the first stage the host country will be empowered to require that both the funding and the lending operations be in the currency of that country. The institutions concerned may however always use the ECU as an alternative. The home Member State may on its hand require matching between assets and liabilities in each national currency in order to avoid that the institution under its supervision incurs in a foreign exchange risk. The institutions concerned may choose to meet the matching requirement in ECU.

Ad Article 7

This Article, in line with the principles of the Treaty, clarifies that the condition of nationality is not admitted as condition for being entitled to receive assistance and aids granted for special types of savings, or investments related to mortgage credit, including tax incentives.

This Article is worded quite generally since a wide range of national regulations, rules and laws must be covered.

Ad Article 8

With regard to establishment, branches of mortgage credit institutions having their head office in another Member State will be supervised by the competent authorities of the host country according to the regulations of that country, in close cooperation with the competent authorities of the home country.

Ad Article 9

This Article deals with the provisions related to preliminary duties which must be carried out before commencing the supply of cross-border services by the institutions concerned.

Provision of services across national borders will be subject to a notification from the institution concerned to the same authority of the home country which granted the general operating authorization. The institution concerned will have to inform this authority as to the Member State into which it intends to supply services, the nature of the business it intends to undertake and the conditions under which funds will be raised and loans granted.

If the supervisory authority, after getting the above mentioned information, has assessed the financial soundness of the institutions concerned, this authority shall send a declaration confirming the financial situation of this institution together with the relevant information to the authority of the host country. After receiving all these documents, the supervisory authorities of the host country shall have some time to prepare themselves before the institution concerned can start its activities into that country.

Adequate measures of recourse are provided to the institution concerned if the competent supervisory authorities does not consider its financial situation as sufficiently sound to allow it to supply cross border services.

Ad Article 10

The main supervisory role with respect to the supply of cross-border services shall be carried out, in accordance with the principle of home country control, by the authorities of their home country. The supervisory authority of the host country, however, also has an important voice in the chapter. The relevant institution is required to report regularly on its operations in the host country to the competent authorities of that country.

The institution thus providing services must comply with the legal provisions in force in that Member State insofar as they are justified on the grounds of the public interest and insofar as the institution in question is not already subjected to similar provisions in the home Member State. The responsibility of the enforcement of such provisions must rest with the supervisory authority of the host country and this requires close cooperation between such authority and the competent authority of the home country so as to insure a comprehensive supervision of the relevant transactions.

There is a facility in this Article for the supervisory authority of the host country, with regard to a credit institution which breaches local provision justified on the grounds of the public interest, to put an end to this situation. The host country authorities will have to complain to the home country authorities of the institution concerned, which will have the obligation to take remedial action if appropriate. If the institution concerned still persist in violating the above mentioned legal rules the host country authorities may, after informing the home country authorities, take all appropriate measures to prevent further irregularities.

Ad Article 11

This Article gives Member States the possibility to limit for a certain period of time the mortgage operations of the credit institutions working according to the home country rules and supervised by its home supervisory authorities through a branch or by supplying cross-border services. Due to the fact that the supervisory authorities do not have sufficient experience in supervising transactions carried out abroad by credit institutions working in the field of mortgage credit, it is appropriate to allow them for a transitional period to limit the volume of such transactions.

Ad Article 12 and 13

These are standard provisions.

Proposal for a
COUNCIL DIRECTIVE

ON THE FREEDOM OF ESTABLISHMENT AND THE FREE SUPPLY
OF SERVICES IN THE FIELD OF MORTGAGE CREDIT

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas, pursuant to the Treaty, any discriminatory or restrictive treatment with regard to establishment and to the provision of services, based either on nationality or on the fact that an undertaking is not established in the Member States where the services are provided, is prohibited from the end of the transitional period;

Whereas, pursuant to the Treaty, with reference to Articles 52 and 59, the prohibition of any restrictive treatment with regard to freedom of establishment and the freedom to supply services means that all undertakings have the right to establish themselves and to provide services on the whole territory of the Community;

Whereas, in order to facilitate the effective exercise of such freedom in the field of credit institutions, the Council adopted Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions,¹⁾ which has secured a first approximation of the laws of the Member States as regards the rules to which these institutions are subject;

1) OJ No L 322, 17 December 1977, p.30

Whereas, however, there are still obstacles standing in the way of the exercise of freedom of establishment and freedom to supply services by credit institutions operating mortgage credit;

Whereas, these obstacles arise, on the one hand, from the prohibition on the granting of credit on mortgage on real property situated in another Member State and, on the other hand, from the differences in conditions under which such credit institutions in the various Member States are allowed to undertake mortgage credit activity;

Whereas the elimination of such obstacles can be achieved by making it possible to grant mortgage credit secured on real property situated in a Member State other than the home Member State and by making it possible to operate mortgage credit in a host Member State in accordance with the specific lending and funding techniques authorized in the home Member State;

Whereas, the implementing of such a possibility implies the adoption of the principle, by the supervisory authorities, of the mutual recognition of the supervisory regulations which monitor the financial soundness of the relevant mortgage credit institutions;

Whereas, in order to ensure that the introduction of a new funding or lending technique on the market for mortgage credit in a Member State does not give rise to a distortion of the conditions of competition, that Member State must in such situations allow credit institutions working in the same field in its territory, in whatever form they are established, to operate mortgage credit under similar conditions;

Whereas, pending the achievement of complete freedom of capital movements, Member States may require matching between assets and liabilities of the currencies related to mortgage credit operations; whereas they must at all events allow the possibility of conducting such operations in ECU;

Whereas, at all events, the effective exercise of the activities mentioned in the Directive requires the removal of some of the existing restrictions on capital movements; whereas a specific directive will deal with such restrictions;

Whereas, any type of State intervention or other public assistance related to the granting of mortgage credit must be granted in a non-discriminatory way, so as to be equally applicable to transactions undertaken within the framework of this Directive;

Whereas, pending further coordination of the supervisory regulations, branches of mortgage credit institutions having their head office in another Member State will be supervised by the competent authorities of the host country in close cooperation with the competent authorities of the home country;

Whereas, however, with respect to the supply of cross-border services and the supervision of those credit institutions will be entrusted to the supervisory authority of the home country; whereas the institution providing services must comply with the legal provisions in force in the host country which are justified on the grounds of the general good;

Whereas, the surveillance of such provisions must rest with the supervisory authority of the host country, which requires close cooperation between that authority and the competent authority of the home country for comprehensive supervision of the relevant transactions;

Whereas, taking into account the fact that the supervisory authorities do not have sufficient experience with regard to surveillance of transactions conducted abroad by mortgage credit institutions, it is appropriate, for a transitional period, to allow them to limit the volume of such transactions,

HAS ADOPTED THIS DIRECTIVE :

TITLE I

Definitions and scope

ARTICLE 1

This Directive applies to the credit institutions falling within the ambit of Directive 77/780/EEC the activities of which consist in receiving funds from the public collected in the form of deposits or the proceeds from mortgage bonds or reimbursable shares and in granting loans to the public secured by mortgage on real property for the purpose of acquiring or retaining property rights in building land or in existing or projected buildings or for renovating or improving buildings.

ARTICLE 2

For the purposes of this Directive :

- "home Member State" shall mean the Member State where a credit institution as referred to in Article 1 has its head office,
- "host Member State" shall mean the Member State where a credit institution as referred to in Article 1 has a branch or into which it supplies services.

TITLE II

General provisions to facilitate exercise of the right of
establishment and the right to supply services

ARTICLE 3

Member States shall authorize credit institutions as referred to in Article 1 to grant mortgage credit secured by mortgages on real property situated in another Member State.

ARTICLE 4

Member States shall repeal all legal or administrative provisions preventing or obstructing a credit institution, as referred to in Article 1, having its head office in another Member State, from operating mortgage credit in their territory in accordance with techniques specifically authorized within its home Member State, or shall so amend such provisions as to make the operation of such techniques possible.

ARTICLE 5

1. Each Member State shall allow within its territory a credit institution, as referred to in Article 1, having its head office in another Member State, to fund and, in particular, refinance itself subject to the provisions of paragraph 2, according to the techniques of financing which are authorized in its home Member State, in order to grant loans secured by mortgage for the purposes referred to in Article 1.

Where the introduction of such new techniques in a Member State gives rise to distortion of the conditions of competition in that Member State, that Member State shall authorize all credit institutions established in its territory to adopt similar techniques or take equivalent measures.

2. Pending further coordination relating to bonds secured by mortgage, the host Member State may require that issues of such bonds on its territory shall be in conformity with the relevant provisions in force in that Member State.

ARTICLE 6

The host Member State may require that both funding and lending transactions be in its currency; the institution in question may however always use the ECU as an alternative. The home Member State may require matching between assets and liabilities in each national currency; the institution in question may however always choose to meet the matching requirement in ECU.

ARTICLE 7

In cases of State intervention or other public assistance of any type in the field of mortgage credit related activities, including the saving of funds with and the granting of mortgage credits by credit institutions as referred to in Article 1, similar measures shall apply to transactions undertaken within the scope of this Directive. Such measures shall be non-discriminatory as between nationals of Member States.

TITLE III

Provisions relating to the freedom of establishment

ARTICLE 8

Until the conditions for home country control are fulfilled, supervision of any form of establishment in another Member State of a credit institution, as referred to in Article 1, shall be exercised by the supervisory authority of that host Member State in close cooperation with the supervisory authority of the home Member State.

TITLE IV

Provisions relating to freedom to supply services

ARTICLE 9

1. A credit institution, as referred to in Article 1, wishing to extend its activities by way of the exercise of freedom to supply services in the field of mortgage credit into the territory of another Member State, shall give notification thereof to the supervisory authority of the home Member State which has granted the authorization pursuant to Article 3 of Directive 77/780/EEC.
2. Member States shall require the notification to be accompanied by the following information from the credit institution concerned:
 - (a) the Member State into whose territory it intends to supply services;
 - (b) the types of business it intends to carry out on the territory of that host Member State;
 - (c) the general and specific conditions under which funds will be received and loans granted.
3. Where the supervisory authority of the home Member State confirms the financial soundness of the credit institution concerned, it shall, within three months of the notification referred to in paragraph 1, send the information mentioned in paragraph 2 to the supervisory authority of the host country, together with a declaration assessing the financial situation of the credit institution.
4. Where the supervisory authority of the home Member State refuses to confirm the financial soundness of a credit institution, reasons shall be given to the institution concerned within three months of receipt of the information mentioned in paragraph 2.
5. Before the credit institution commences its activities the supervisory authority of the host country shall, within a period of three months following receipt of the information and of the declaration mentioned in paragraph 3, prepare for the constant supervision of the credit institution pursuant to Article 10.

ARTICLE 10

1. A credit institution exercising freedom to supply services into the territory of another Member State shall report quarterly on its operations in the host Member State to the supervisory authority of that Member State.
2. If the supervisory authority of a host Member State ascertains that an institution providing services into its territory is not complying with the legal provisions in force in that Member State which are justified on the grounds of the general good, that authority shall request the institution concerned to put an end to the irregular situation.
3. If the institution concerned fails to take the necessary steps, the supervisory authority of the host Member State shall inform the supervisory authority of the home Member State accordingly. The authority of the home Member State shall take all appropriate measures to ensure that the institution concerned puts an end to the irregular situation. The nature of those measures shall be communicated to the authority of the host Member State.
4. If, despite the measures taken by the home Member State pursuant to paragraph 3, or because such measures prove inadequate or are lacking in the Member State in question, the institution 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 supervisory authority of the home Member State, take appropriate measures to prevent further irregularities, including, insofar as it is strictly necessary, the prevention of the further conclusion of mortgage contracts by that institution by way of provision of services within its territory. The Member States shall ensure that within their territory it is possible to serve the legal documents necessary for these measures.

5. Any measure adopted pursuant to paragraphs 2, 3 and 4 involving penalties or restrictions on the provision of services must be properly justified and communicated to the institution concerned. Every such measure shall be subject to the right to apply to the courts in the Member State in which the authorities adopted it.

6. In the event of withdrawal of authorization the supervisory authority of the host Member State shall be informed of such action and shall take appropriate measures to prevent the institution concerned from continuing to conclude mortgage contracts by way of provision of services within the territory of that State.

7. Every two years the Commission shall submit to the Council a report summarizing the number and type of cases in which in each Member State, decisions recording non-confirmation of financial soundness have been communicated under Article 9 or measures have been taken in accordance with the provisions of paragraph 4. Member States shall co-operate with the Commission by providing it with the information required for this report.

TITLE V

Transitional and final provisions

ARTICLE 11

The home Member State may, for a maximum period of five years after notification of this Directive limit the transactions of a credit institution in the field of mortgage credit carried on either through branches in other Member States or by way of the provision of services to 25% of the total mortgage lending of the relevant credit institution.

ARTICLE 12

1. Member States shall bring into force the measures necessary to comply with this Directive by
..... They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the main laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

ARTICLE 13

This Directive is addressed to the Member States.

