

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE 95/26/EC

of 29 June 1995

amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the first and third sentences of Article 57 (2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 189b of the Treaty ⁽³⁾ in the light of the joint text approved by the Conciliation Committee on 11 May 1995,

(1) Whereas certain events have shown that it is appropriate to amend in certain respects certain Council Directives, specifying the general framework within which credit institutions, insurance undertakings, investment firms and undertakings for investment in transferable securities (Ucits) may carry on their business, namely Directives 77/780/EEC ⁽⁴⁾ and 89/646/EEC, Directives 73/239/EEC ⁽⁵⁾ and 92/49/EEC, Directives 79/267/EEC ⁽⁶⁾ and 92/96/EEC, Directive 93/22/EEC ⁽⁷⁾ and Directive 85/611/EEC ⁽⁸⁾, with a view to reinforcing prudential supervision; whereas it is desirable to adopt similar measures throughout the financial services sector;

⁽¹⁾ OJ No C 229, 25. 8. 1993, p. 10.

⁽²⁾ OJ No C 52, 14. 2. 1994, p. 15.

⁽³⁾ Opinion of the European Parliament of 9 March 1994 (OJ No C 91, 28. 3. 1994, p. 61), Council common position of 6 June 1994 (OJ No C 213, 3. 8. 1994, p. 29), European Parliament Decision of 26 October 1994 (OJ No C 323, 21. 11. 1994, p. 56).

⁽⁴⁾ OJ No L 322, 17. 12. 1977, p. 30. Directive as last amended by Directive 89/646/EEC (OJ No L 386, 30. 12. 1989, p. 1).

⁽⁵⁾ OJ No L 228, 16. 8. 1973, p. 3. Directive as last amended by Directive 92/49/EEC (OJ No L 228, 11. 8. 1992, p. 1).

⁽⁶⁾ OJ No L 63, 13. 3. 1979, p. 1. Directive as last amended by Directive 92/96/EEC (OJ No L 360, 9. 12. 1992, p. 1).

⁽⁷⁾ OJ No L 141, 11. 6. 1993, p. 27.

⁽⁸⁾ OJ No L 375, 31. 12. 1985, p. 3. Directive as amended by Directive 88/220/EEC (OJ No L 100, 19. 4. 1988, p. 31).

(2) Whereas those Directives lay down, *inter alia*, the conditions which must be fulfilled before the competent authorities may grant authorization for the taking-up of business;

(3) Whereas the competent authorities should not authorize or continue the authorization of a financial undertaking where they are liable to be prevented from effectively exercising their supervisory functions by the close links between that undertaking and other natural or legal persons; whereas financial undertakings already authorized must also satisfy the competent authorities in that respect;

(4) Whereas the definition of 'close links' in this Directive lays down minimum criteria and that does not prevent Member States from applying it to situations other than those envisaged by the definition;

(5) Whereas the sole fact of having acquired a significant proportion of a company's capital does not constitute participation for the purposes of this Directive if that holding has been acquired solely as a temporary investment which does not make it possible to exercise influence over the structure or financial policy of the undertaking;

(6) Whereas the reference to the supervisory authorities' effective exercise of their supervisory functions covers supervision on a consolidated basis which must be exercised over a financial undertaking where the provisions of Community law so provide; whereas, in such cases, the authorities applied to for authorization must be able to identify the authorities competent to exercise supervision on a consolidated basis over that financial undertaking;

(7) Whereas the principles of mutual recognition and of home Member State supervision require that Member States' competent authorities should not grant or should withdraw authorization where factors such as the content of programmes of operations, the geographical distribution of the activities actually carried on indicate clearly that a financial undertaking has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it carries on or intends to carry on the greater part of its activities; whereas a

- financial undertaking which is a legal person must be authorized in the Member State in which it has its registered office; whereas a financial undertaking which is not a legal person must have its head office in the Member State in which it has been authorized; whereas, in addition, Member States must require that a financial undertaking's head office always be situated in its home Member State and that it actually operates there;
- (8) Whereas it is appropriate to provide for the possibility of exchanges of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system; whereas, in order to preserve the confidential nature of the information forwarded, the list of addressees must remain within strict limits;
- (9) Whereas certain behaviour, such as fraud and insider offenses, is liable to affect the stability, including integrity, of the financial system, even when involving undertakings other than financial ones;
- (10) Whereas it is necessary to specify the conditions under which such exchanges of information are authorized;
- (11) Whereas, where it is stipulated that information may be disclosed only with the express agreement of the competent authorities, these may, where appropriate, make their agreement subject to compliance with strict conditions;
- (12) Whereas exchanges of information between, on the one hand, the competent authorities and, on the other, central banks and other bodies with a similar function in their capacity as monetary authorities and, where appropriate, other public authorities responsible for supervising payment systems should also be authorized;
- (13) Whereas the same obligation of professional secrecy on the authorities responsible for authorizing and supervising Ucits and the undertakings that take part in those activities and the same possibilities for exchanging information as those granted to the authorities responsible for authorizing and supervising credit institutions, investment firms and insurance undertakings, should be included in Directive 85/611/EEC;
- (14) Whereas this Directive coordinates all the provisions governing information exchanges between authorities for the entire financial sector as provided for in Directive 93/22/EEC;
- (15) Whereas, for the purpose of strengthening the prudential supervision of financial undertakings and protection of clients of financial undertakings, it should be stipulated that an auditor must have a duty to report promptly to the competent authorities, wherever, as provided for by this Directive, he becomes aware, while carrying out his tasks, of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organization of a financial undertaking;
- (16) Whereas, having regard to the aim in view, it is desirable for Member States to provide that such a duty should apply in all circumstances where such facts are discovered by an auditor during the performance of his tasks in an undertaking which has close links with a financial undertaking;
- (17) Whereas the duty of auditors to communicate, where appropriate, to the competent authorities certain facts and decisions concerning a financial undertaking which they discover during the performance of their tasks in a non-financial undertaking does not in itself change the nature of their tasks in that undertaking nor the manner in which they must perform those tasks in that undertaking;
- (18) Whereas adopting this Directive is the most appropriate means of achieving the objectives in view, and in particular of reinforcing the powers of the competent authorities; whereas this Directive restricts itself to the minimum required to achieve those objectives and does not go beyond what is necessary for that purpose,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Wherever the term 'financial undertaking' is used in this Directive, it shall be replaced by:

- 'credit institution' where this Directive amends Directives 77/780/EEC and 89/646/EEC;
- 'insurance undertaking' where this Directive amends Directives 73/239/EEC and 92/49/EEC, and 'life assurance undertaking' where this Directive amends Directives 79/267/EEC and 92/96/EEC;
- 'investment firm' where this Directive amends Directive 93/22/EEC;
- 'undertaking for collective investment in transferable securities (Ucits) or an undertaking contributing towards its business activity' where this Directive amends Directive 85/611/EEC.

Article 2

1. — In Article 1 of Directive 77/780/EEC, a fifth indent,
- in Article 1 of Directive 92/49/EEC, a point (l),

- in Article 1 of Directive 92/96/EEC, a point (m), and
- in Article 1 of Directive 93/22/EEC, a point 15,

shall be added containing the following definition:

“close links” shall mean a situation in which two or more natural or legal persons are linked by:

- (a) “participation”, which shall mean the ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking or
- (b) “control”, which shall mean the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1 (1) and (2) of Directive 83/349/EEC (*), or a similar relationship between any natural or legal person and an undertaking; any subsidiary undertaking of a subsidiary undertaking shall also be considered a subsidiary of the parent undertaking which is at the head of those undertakings.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

(*) OJ No L 193, 18. 7. 1983, p. 1. Directive as last amended by Directive 90/605/EEC (OJ No L 317, 16. 11. 1990, p. 60).’

2. The following subparagraphs shall be added at the end of:

- Article 3 (2) of Directive 77/780/EEC,
- Article 3 (3) of Directive 93/22/EEC,
- Article 8 (1) of Directive 73/239/EEC,
- Article 8 (1) of Directive 79/267/EEC:

‘Moreover, where close links exist between the financial undertaking and other natural or legal persons, the competent authorities shall grant authorization only if those links do not prevent the effective exercise of their supervisory functions.

The competent authorities shall also refuse authorization if the laws, regulations or administrative provisions of a non-member country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of their supervisory functions.

The competent authorities shall require financial undertakings to provide them with the information

they require to monitor compliance with the conditions referred to in this paragraph on a continuous basis.’

Article 3

1. The following paragraph shall be inserted in Article 8 of Directive 73/239/EEC and in Article 8 of Directive 79/267/EEC:

‘1a. Member States shall require that the head offices of insurance undertakings be situated in the same Member State as their registered offices.’

2. The following paragraph shall be inserted in Article 3 of Directive 77/780/EEC:

‘2a. Each Member State shall require that:

- any credit institution which is a legal person and which, under its national law, has a registered office have its head office in the same Member State as its registered office,
- any other credit institution have its head office in the Member State which issued its authorization and in which it actually carries on its business.’

Article 4

1. In Article 16 of Directive 92/49/EEC and in Article 15 of Directive 92/96/EEC, the following paragraph shall be inserted:

‘5a. Notwithstanding paragraphs 1 to 4, Member States may authorize exchanges of information between the competent authorities and:

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of financial undertakings and other similar procedures, or
- the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions, or
- independent actuaries of insurance undertakings carrying out legal supervision of those undertakings and the bodies responsible for overseeing such actuaries.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- this information shall be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph,
- information received in this context will be subject to the conditions of professional secrecy imposed in paragraph 1,

- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Member States shall communicate to the Commission and to the other Member States the names of the authorities, person and bodies which may receive information pursuant to this paragraph.'

2. In Article 12 of Directive 77/780/EEC and in Article 25 of Directive 93/22/EEC, the following paragraph shall be inserted:

'5a. Notwithstanding paragraphs 1 to 4, Member States may authorize exchanges of information between, the competent authorities and:

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of financial undertakings and other similar procedures, or
- the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- the information shall be for the purpose of performing the task of overseeing referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Member States shall communicate to the Commission and to the other Member States the names of the authorities which may receive information pursuant to this paragraph.'

3. In Article 12 of Directive 77/780/EEC, in Article 16 of Directive 92/49/EEC, in Article 25 of Directive 93/22/EEC and in Article 15 of Directive 92/96/EEC, the following paragraph shall be inserted:

'5b. Notwithstanding paragraphs 1 to 4, Member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorize the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- the information shall be for the purpose of performing the task referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Where, in a Member State, the authorities or bodies referred to in the first subparagraph perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector, the possibility of exchanging information provided for in the first subparagraph may be extended to such persons under the conditions stipulated in the second subparagraph.

In order to implement the final indent of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information, the names and precise responsibilities of the persons to whom it is to be sent.

Member States shall communicate to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to this paragraph.

Before 31 December 2000, the Commission shall draw up a report on the application of the provisions of this paragraph.'

4. In Article 12 of Directive 77/780/EEC and in Article 25 of Directive 93/22/EEC, paragraph 6 shall be replaced by the following:

'6. This Article shall not prevent a competent authority from transmitting:

- to central banks and other bodies with a similar function in their capacity as monetary authorities,
- where appropriate, to other public authorities responsible for overseeing payment systems,

information intended for the performance of their task, nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of paragraph 4. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.'

5. In Article 16 of Directive 92/49/EEC and in Article 15 of Directive 92/96/EEC, the following shall be inserted:

'5c. Member States may authorize the competent authorities to transmit:

- to central banks and other bodies with a similar function in their capacity as monetary authorities,
- where appropriate, to other public authorities responsible for overseeing payment systems,

information intended for the performance of their task and may authorize such authorities or bodies to communicate to the competent authorities such information as they may need for the purposes of paragraph 4. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.'

6. The following paragraph 8 shall be added to Article 12 of Directive 77/780/EEC:

'8. This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 1 to 4 to a clearing house or other similar body recognized under national law for the provision of clearing or settlement services for one of their Member States' markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants. The information received in this context shall be subject to the conditions of professional secrecy referred to in paragraph 1. The Member States shall, however, ensure that information received under paragraph 2 may not be disclosed in the circumstances referred to in this paragraph without the express consent of the competent authorities which disclosed it.'

7. In Article 50 of Directive 85/611/EEC, paragraphs 2, 3 and 4 shall be replaced by the following:

'2. Member States shall provide that all persons who work or who have worked for the competent authorities, as well as auditors and experts instructed by the competent authorities, shall be bound by the obligation of professional secrecy. Such secrecy implies that no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that Ucits and management companies and depositaries (hereinafter referred to as undertakings contributing towards their business activity) cannot be individually identified, without prejudice to cases covered by criminal law.

Nevertheless, when an Ucits or an undertaking contributing towards its business activity has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in rescue attempts may be divulged in civil or commercial proceedings.

3. Paragraph 2 shall not prevent the competent authorities of the various Member States from exchanging information in accordance with this Directive or other Directives applicable to Ucits or to undertakings contributing towards their business activity. That information shall be subject to the conditions of professional secrecy imposed in paragraph 2.

4. Member States may conclude cooperation agreements providing for exchanges of information with the competent authorities of third countries only if the information communicated is covered by guarantees of professional secrecy at least equivalent to those provided for in this Article.

5. Competent authorities receiving confidential information under paragraphs 2 or 3 may use it only in the course of their duties:

- to check that the conditions governing the taking-up of the business of Ucits or of undertakings contributing towards their business activity are met and to facilitate the monitoring of the conduct of that business, administrative and accounting procedures and internal-control mechanisms,
- to impose sanctions,
- in administrative appeals against decisions by the competent authorities, or
- in court proceedings initiated under Article 51 (2).

6. Paragraphs 2 and 5 shall not preclude the exchange of information:

- (a) within a Member State, where there are two or more competent authorities; or
- (b) within a Member State or between Member States, between competent authorities; and
 - authorities with public responsibility for the supervision of credit institutions, investment undertakings, insurance undertakings and other financial organizations and the authorities responsible for the supervision of financial markets,
 - bodies involved in the liquidation or bankruptcy of Ucits and other similar procedures and of undertakings contributing towards their business activity,
 - persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment undertakings and other financial institutions,

in the performance of their supervisory functions, or the disclosure to bodies which administer compensation schemes of information necessary for the performance of their functions. Such information shall be subject to the conditions of professional secrecy imposed in paragraph 2.

7. Notwithstanding paragraphs 2 to 5, Member States may authorize exchanges of information between the competent authorities and:

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of financial undertakings and other similar procedures, or
- the authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- the information shall be for the purpose of performing the task of overseeing referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Member States shall communicate to the Commission and to the other Member States the names of the authorities which may receive information pursuant to this paragraph.

8. Notwithstanding paragraphs 2 to 5, Member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorize the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- the information shall be for the purpose of performing the task referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities

which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Where, in a Member State, the authorities or bodies referred to in the first subparagraph perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector the possibility of exchanging information provided for in the first subparagraph may be extended to such persons under the conditions stipulated in the second subparagraph.

In order to implement the final indent of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information the names and precise responsibilities of the persons to whom it is to be sent.

Member States shall communicate to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to this paragraph.

Before 31 December 2000, the Commission shall draw up a report on the application of this paragraph.

9. This Article shall not prevent a competent authority from transmitting to central banks and other bodies with a similar function in their capacity as monetary authorities information intended for the performance of their tasks, nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of paragraph 5. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article.

10. This Article shall not prevent the competent authorities from communicating the information referred to in paragraphs 2 to 5 to a clearing house or other similar body recognized under national law for the provision of clearing or settlement services for one of their Member State's markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants. The information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 2. Member States shall, however, ensure that information received under paragraph 3 may not be disclosed in the circumstances referred to in this paragraph without the express consent of the competent authorities which disclosed it.

11. In addition, notwithstanding the provisions referred to in paragraphs 2 and 5, 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 Ucits and of undertakings contributing towards their business activity, credit institutions, financial institutions, investment undertakings and insurance undertakings and to inspectors instructed by those departments.

Such disclosures may, however, be made only where necessary for reasons of prudential control.

Member States shall, however, provide that information received under paragraphs 3 and 6 may never be disclosed in the circumstances referred to in this paragraph except with the express agreement of the competent authorities which disclosed the information.'

Article 5

The following shall be incorporated:

- in Directive 77/780/EEC, an Article 12a,
- in Directive 92/49/EEC, an Article 16a,
- in Directive 92/96/EEC, an Article 15a,
- in Directive 93/22/EEC, an Article 25a,
- and in Directive 85/611/EEC, an Article 50a,

reading as follows:

'1. Member States shall provide at least that:

- (a) any person authorized within the meaning of Directive 84/253/EEC (*), performing in a financial undertaking the task described in Article 51 of Directive 78/660/EEC (**), Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which he has become aware while carrying out that task which is liable to:

- constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorization or which specifically govern pursuit of the activities of financial undertakings, or
- affect the continuous functioning of the financial undertaking, or
- lead to refusal to certify the accounts or to the expression of reservations;

- (b) that person shall likewise have a duty to report any facts and decisions of which he becomes aware in the course of carrying out a task as described in (a) in an undertaking having close links resulting from a control relationship with the financial undertaking within which he is carrying out the abovementioned task.

2. The disclosure in good faith to the competent authorities, by persons authorized within the meaning of Directive 84/253/EEC, of any fact or decision referred to in paragraph 1 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision and shall not involve such persons in liability of any kind.

(*) OJ No L 126, 12. 5. 1984, p. 20.

(**) OJ No L 222, 14. 8. 1978, p. 11. Directive as last amended by Directive 90/605/EEC (OJ No L 317, 16. 11. 1990, p. 60).'

Article 6

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 18 July 1996. They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

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

Article 7

This Directive is addressed to the Member States.

Done at Brussels, 29 June 1995.

*For the
European Parliament*

The President

K. HÄNSCH

For the Council

The President

M. BARNIER