

Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions

TITLE V

**PRINCIPLES AND TECHNICAL INSTRUMENTS
FOR PRUDENTIAL SUPERVISION**

CHAPTER 2

TECHNICAL INSTRUMENTS OF PRUDENTIAL SUPERVISION

Section 1

Own funds

Article 34

General principles

1 Wherever a Member State lays down by law, regulation or administrative action a provision in implementation of Community legislation concerning the prudential supervision of an operative credit institution which uses the term or refers to the concept of own funds, it shall bring this term or concept into line with the definition given in paragraphs 2, 3 and 4 and Articles 35 to 38.

2 Subject to the limits imposed in Article 38, the unconsolidated own funds of credit institutions shall consist of the following items:

- (1) capital within the meaning of Article 22 of Directive 86/635/EEC, in so far as it has been paid up, plus share premium accounts but excluding cumulative preferential shares;
- (2) reserves within the meaning of Article 23 of Directive 86/635/EEC and profits and losses brought forward as a result of the application of the final profit or loss. The Member States may permit inclusion of interim profits before a formal decision has been taken only if these profits have been verified by persons responsible for the auditing of the accounts and if it is proved to the satisfaction of the competent authorities that the amount thereof has been evaluated in accordance with the principles set out in Directive 86/635/EEC and is net of any foreseeable charge or dividend;
- (3) funds for general banking risks within the meaning of Article 38 of Directive 86/635/EEC;
- (4) revaluation reserves within the meaning of Article 33 of Directive 78/660/EEC;
- (5) value adjustments within the meaning of Article 37(2) of Directive 86/635/EEC;
- (6) other items within the meaning of Article 35;

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- (7) the commitments of the members of credit institutions set up as cooperative societies and the joint and several commitments of the borrowers of certain institutions organised as funds, as referred to in Article 36(1);
- (8) fixed-term cumulative preferential shares and subordinated loan capital as referred to in Article 36(3).

The following items shall be deducted in accordance with Article 38:

- (9) own shares at book value held by a credit institution;
- (10) intangible assets within the meaning of Article 4(9) ('Assets') of Directive 86/635/EEC;
- (11) material losses of the current financial year;
- (12) [^{F1}holdings in other credit and financial institutions amounting to more than 10 % of their capital;
- (13) subordinated claims and instruments referred to in Article 35 and Article 36(3) which a credit institution holds in respect of credit and financial institutions in which it has holdings exceeding 10 % of the capital in each case;
- (14) holdings in other credit and financial institutions of up to 10 % of their capital, the subordinated claims and the instruments referred to in Article 35 and Article 36(3) which a credit institution holds in respect of credit and financial institutions other than those referred to in points 12 and 13 of this subparagraph in respect of the amount of the total of such holdings, subordinated claims and instruments which exceed 10 % of that credit institution's own funds calculated before the deduction of items in points 12 to 16 of this subparagraph;
- (15) participations within the meaning of Article 1(9) which a credit institution holds in
 - insurance undertakings within the meaning of Article 6 of Directive 73/239/EEC, Article 6 of Directive 79/267/EEC or Article 1(b) of Directive 98/78/EC of the European Parliament and of the Council⁽¹⁾,
 - reinsurance undertakings within the meaning of Article 1(c) of Directive 98/78/EC,
 - insurance holding companies within the meaning of Article 1(i) of Directive 98/78/EC;
- (16) each of the following items which the credit institution holds in respect of the entities defined in point (15) in which it holds a participation:
 - instruments referred to in Article 16(3) of Directive 73/239/EEC,
 - instruments referred to in Article 18(3) of Directive 79/267/EEC.]

[^{F1}Where shares in another credit institution, financial institution, insurance or reinsurance undertaking or insurance holding company are held temporarily for the purposes of a financial assistance operation designed to reorganise and save that entity, the competent authority may waive the provisions on deduction referred to in points 12 to 16.

As an alternative to the deduction of the items referred to in points 15 and 16, Member States may allow their credit institutions to apply *mutatis mutandis* methods 1, 2, or 3 of Annex I to Directive 2002/87/EC. Method 1 (Accounting consolidation) shall only be applied if the competent authority is confident about the level of integrated management

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and internal control regarding the entities which would be included in the scope of consolidation. The method chosen shall be applied in a consistent manner over time.

Member States may provide that for the calculation of own funds on a stand-alone basis, credit institutions subject to supervision on a consolidated basis in accordance with Chapter 3 or to supplementary supervision in accordance with Directive 2002/87/EC, need not deduct the items referred to in points 12 to 16 which are held in credit institutions, financial institutions, insurance or reinsurance undertakings or insurance holding companies, which are included in the scope of consolidated or supplementary supervision.

This provision shall apply to all the prudential rules harmonised by Community acts.]

3 The concept of own funds as defined in points (1) to (8) of paragraph 2 embodies a maximum number of items and amounts. The use of those items and the fixing of lower ceilings, and the deduction of items other than those listed in points (9) to (13) of paragraph 2 shall be left to the discretion of the Member States. Member States shall nevertheless be obliged to consider increased convergence with a view to a common definition of own funds.

To that end, the Commission shall, by 1 January 1996 at the latest, submit a report to the European Parliament and to the Council on the application of this Article and Articles 35 to 39, accompanied, where appropriate, by such proposals for amendment as it shall deem necessary. Not later than 1 January 1998, the European Parliament and the Council shall, acting in accordance with the procedure laid down in Article 251 of the Treaty and after consultation of the Economic and Social Committee, examine the definition of own funds with a view to the uniform application of the common definition.

4 The items listed in points (1) to (5) of paragraph 2 must be available to a credit institution for unrestricted and immediate use to cover risks or losses as soon as these occur. The amount must be net of any foreseeable tax charge at the moment of its calculation or be suitably adjusted in so far as such tax charges reduce the amount up to which these items may be applied to cover risks or losses.

Textual Amendments

F1 Substituted by [Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council.](#)

Article 35

Other items

1 The concept of own funds used by a Member State may include other items provided that, whatever their legal or accounting designations might be, they have the following characteristics:

- a they are freely available to the credit institution to cover normal banking risks where revenue or capital losses have not yet been identified;
- b their existence is disclosed in internal accounting records;

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- c their amount is determined by the management of the credit institution, verified by independent auditors, made known to the competent authorities and placed under the supervision of the latter.
- 2 Securities of indeterminate duration and other instruments that fulfil the following conditions may also be accepted as other items:
- a they may not be reimbursed on the bearer's initiative or without the prior agreement of the competent authority;
 - b the debt agreement must provide for the credit institution to have the option of deferring the payment of interest on the debt;
 - c the lender's claims on the credit institution must be wholly subordinated to those of all non-subordinated creditors;
 - d the documents governing the issue of the securities must provide for debt and unpaid interest to be such as to absorb losses, whilst leaving the credit institution in a position to continue trading;
 - e only fully paid-up amounts shall be taken into account.

To these may be added cumulative preferential shares other than those referred to in point 8 of Article 34(2).

Article 36

Other provisions concerning own funds

1 The commitments of the members of credit institutions set up as cooperative societies referred to in point 7 of Article 34(2), shall comprise those societies' uncalled capital; together with the legal commitments of the members of those cooperative societies to make additional non-refundable payments should the credit institution incur a loss, in which case it must be possible to demand those payments without delay.

The joint and several commitments of borrowers in the case of credit institutions organised as funds shall be treated in the same way as the preceding items.

All such items may be included in own funds in so far as they are counted as the own funds of institutions of this category under national law.

2 Member States shall not include in the own funds of public credit institutions guarantees which they or their local authorities extend to such entities.

3 Member States or the competent authorities may include fixed-term cumulative preferential shares referred to in point (8) of Article 34(2) and subordinated loan capital referred to in that provision in own funds, if binding agreements exist under which, in the event of the bankruptcy or liquidation of the credit institution, they rank after the claims of all other creditors and are not to be repaid until all other debts outstanding at the time have been settled.

Subordinated loan capital must also fulfil the following criteria:

- a only fully paid-up funds may be taken into account;
- b the loans involved must have an original maturity of at least five years, after which they may be repaid; if the maturity of the debt is not fixed, they shall be repayable only subject to five years' notice unless the loans are no longer considered as own funds or unless the prior consent of the competent authorities is specifically required for early repayment. The competent authorities may grant permission for the early repayment of

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- such loans provided the request is made at the initiative of the issuer and the solvency of the credit institution in question is not affected;
- c the extent to which they may rank as own funds must be gradually reduced during at least the last five years before the repayment date;
 - d the loan agreement must not include any clause providing that in specified circumstances, other than the winding-up of the credit institution, the debt will become repayable before the agreed repayment date.

Article 37

Calculation of own funds on a consolidated basis

1 Where the calculation is to be made on a consolidated basis, the consolidated amounts relating to the items listed under Article 34(2) shall be used in accordance with the rules laid down in Articles 52 to 56. Moreover, the following may, when they are credit ('negative') items, be regarded as consolidated reserves for the calculation of own funds:

- any minority interests within the meaning of Article 21 of Directive 83/349/EEC, where the global integration method is used,
- the first consolidation difference within the meaning of Articles 19, 30 and 31 of Directive 83/349/EEC,
- the translation differences included in consolidated reserves in accordance with Article 39(6) of Directive 86/635/EEC,
- any difference resulting from the inclusion of certain participating interests in accordance with the method prescribed in Article 33 of Directive 83/349/EEC.

2 Where the above are debit ('positive') items, they must be deducted in the calculation of consolidated own funds.

Article 38

Deductions and limits

1 The items referred to in points (4) to (8) of Article 34(2), shall be subject to the following limits:

- a the total of the items in points (4) to (8) may not exceed a maximum of 100 % of the items in points (1) plus (2) and (3) minus (9), (10) and (11);
- b the total of the items in points (7) and (8) may not exceed a maximum of 50 % of the items in points (1) plus (2) and (3) minus (9), (10) and (11);
- c the total of the items in points (12) and (13) shall be deducted from the total of the items.

2 The competent authorities may authorise credit institutions to exceed the limit laid down in paragraph 1 in temporary and exceptional circumstances.

Article 39

Provision of proof to the competent authorities

Compliance with the conditions laid down in Article 34(2), (3) and (4) and Articles 35 to 38 must be proved to the satisfaction of the competent authorities.

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(1) [^{F1}OJ L 330, 5.12.1998, p. 1.]

Textual Amendments

- F1** Substituted by [Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council.](#)