

Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (repealed)

DIRECTIVE 2006/49/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

of 14 June 2006

on the capital adequacy of investment firms and credit institutions (recast) (repealed)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee⁽¹⁾,

Having regard to the Opinion of the European Central Bank⁽²⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions⁽⁴⁾ has been significantly amended on several occasions. Now that new amendments are being made to the said Directive, it is desirable, in order to clarify matters, that it should be recast.
- (2) One of the objectives of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁽⁵⁾ is to allow investment firms authorised by the competent authorities of their home Member State and supervised by the same authorities to establish branches and provide services freely in other Member States. That Directive accordingly provides for the coordination of the rules governing the authorisation and pursuit of the business of investment firms.
- (3) Directive 2004/39/EC does not, however, establish common standards for the own funds of investment firms nor indeed does it establish the amounts of the initial capital of such firms or a common framework for monitoring the risks incurred by them.
- (4) It is appropriate to effect only the essential harmonisation that is necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems; in order to achieve mutual recognition within the framework of the internal financial market, measures should be laid down to coordinate the definition of the own funds of investment firms, the establishment of the amounts of their initial capital and the establishment of a common framework for monitoring the risks incurred by investment firms.

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- (5) Since the objectives of this Directive, namely the establishment of the capital adequacy requirements applying to investment firms and credit institutions, the rules for their calculation and the rules for their prudential supervision, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and the effects of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.
- (6) It is appropriate to establish different amounts of initial capital depending on the range of activities that investment firms are authorised to undertake.
- (7) Existing investment firms should be permitted, under certain conditions, to continue their business even if they do not comply with the minimum amount of initial capital fixed for new investment firms.
- (8) Member States should be able to establish rules stricter than those provided for in this Directive.
- (9) The smooth operation of the internal market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States.
- (10) The Commission Communication of 11 May 1999 entitled ‘Implementing the framework for financial markets: Action Plan’ listed a number of goals that need to be achieved in order to complete the internal market in financial services. The Lisbon European Council of 23 and 24 March 2000 set the goal of implementing the action plan by 2005. Recasting of the provisions on own funds is a key element of the action plan.
- (11) Since investment firms face in respect of their trading book business the same risks as credit institutions, it is appropriate for the pertinent provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions⁽⁶⁾ to apply equally to investment firms.
- (12) The own funds of investment firms or credit institutions (hereinafter referred to collectively as ‘institutions’) can serve to absorb losses which are not matched by a sufficient volume of profits, to ensure the continuity of institutions and to protect investors. The own funds also serve as an important yardstick for the competent authorities, in particular for the assessment of the solvency of institutions and for other prudential purposes. Furthermore, institutions, engage in direct competition with each other in the internal market. Therefore, in order to strengthen the Community financial system and to prevent distortions of competition, it is appropriate to lay down common basic standards for own funds.
- (13) For the purposes of recital (12), it is appropriate for the definition of own funds as laid down in Directive 2006/48/EC to serve as a basis, and to provide for supplementary specific rules which take into account the different scope of market risk related capital requirements.

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- (14) As regards credit institutions, common standards have already been established for the supervision and monitoring of different types of risks by Directive 2000/12/EC.
- (15) In that respect, the provisions on minimum capital requirements should be considered in conjunction with other specific instruments which also harmonise the fundamental techniques of the supervision of institutions.
- (16) It is necessary to develop common standards for market risks incurred by credit institutions and provide a complementary framework for the supervision of the risks incurred by institutions, in particular market risks, and more especially position risks, counterparty/settlement risks and foreign-exchange risks.
- (17) It is necessary to provide for the concept of a ‘trading book’ comprising positions in securities and other financial instruments which are held for trading purposes and which are subject mainly to market risks and exposures relating to certain financial services provided to customers.
- (18) With a view to reducing the administrative burden for institutions with negligible trading-book business in both absolute and relative terms, such institutions should be able to apply Directive 2006/48/EC, rather than the requirements laid down in Annexes I and II to this Directive.
- (19) It is important that monitoring of settlement/delivery risks should take account of the existence of systems offering adequate protection reducing those risks.
- (20) In any case, institutions should comply with this Directive as regards the coverage of the foreign-exchange risks on their overall business. Lower capital requirements should be imposed for positions in closely correlated currencies, whether statistically confirmed or arising out of binding intergovernmental agreements.
- (21) The capital requirements for commodity dealers, including those dealers currently exempt from the requirements of Directive 2004/39/EC, will be reviewed as appropriate in conjunction with the review of that exemption as set out in Article 65(3) of that Directive.
- (22) The goal of liberalisation of gas and electricity markets is both economically and politically important for the Community. With this in mind, the capital requirements and other prudential rules to be applied to firms active in those markets should be proportionate and should not unduly interfere with achievement of the goal of liberalisation. This goal should, in particular, be kept in mind when the reviews referred to in recital 21 are carried out.
- (23) The existence of internal systems for monitoring and controlling interest-rate risks on all business of institutions is a particularly important way of minimising such risks. Consequently, such systems should be supervised by the competent authorities.
- (24) Since Directive 2006/48/EC does not establish common rules for the monitoring and control of large exposures in activities which are principally subject to market risks, it is therefore appropriate to provide for such rules.

- (25) Operational risk is a significant risk faced by institutions and requires coverage by own funds. It is essential to take account of the diversity of institutions in the EU by providing alternative approaches.
- (26) Directive 2006/48/EC states the principle of consolidation. It does not establish common rules for the consolidation of financial institutions which are involved in activities principally subject to market risks.
- (27) In order to ensure adequate solvency of institutions within a group, it is essential that the minimum capital requirements apply on the basis of the consolidated financial situation of the group. In order to ensure that own funds are appropriately distributed within the group and are available to protect investments where needed, the minimum capital requirements should apply to individual institutions within a group, unless this objective can be effectively achieved by other means.
- (28) Directive 2006/48/EC does not apply to groups which include one or more investment firms but no credit institutions. A common framework for the introduction of the supervision of investment firms on a consolidated basis should therefore be provided for.
- (29) Institutions should ensure that they have internal capital which, having regard to the risks to which they are or might be exposed, is adequate in quantity, quality and distribution. Accordingly, institutions should have strategies and processes in place for assessing and maintaining the adequacy of their internal capital.
- (30) Competent authorities should evaluate the adequacy of own funds of institutions, having regard to the risks to which the latter are exposed.
- (31) In order for the internal banking market to operate effectively, the Committee of European Banking Supervisors should contribute to the consistent application of this Directive and to the convergence of supervisory practices throughout the Community, and should report on a yearly basis to the Community Institutions on progress made.
- (32) In order for the internal market to operate with increasing effectiveness it is essential that there should be significantly enhanced convergence in the implementation and application of the provisions of harmonising Community legislation.
- (33) For the same reason, and to ensure that Community institutions which are active in several Member States are not disproportionately burdened as a result of the continued responsibilities of individual Member State competent authorities for authorisation and supervision, it is essential significantly to enhance the cooperation between competent authorities. In this context the role of the consolidating supervisor should be strengthened.
- (34) In order for the internal market to operate with increasing effectiveness and for citizens of the Union to be afforded adequate levels of transparency, it is necessary that competent authorities disclose publicly and in a way which allows for meaningful comparison the manner in which the requirements of this Directive are implemented.

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- (35) In order to strengthen market discipline and stimulate institutions to improve their market strategy, risk control and internal management organisation, appropriate public disclosures by institutions should be provided for.
- (36) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽⁷⁾.
- (37) In its Resolution of 5 February 2002 on the implementation of financial services legislation⁽⁸⁾, the Parliament requested that the Parliament and the Council should have an equal role in supervising the way in which the Commission exercises its executive role in order to reflect the legislative powers of Parliament under Article 251 of the Treaty. In the solemn declaration made before the Parliament the same day, by its President, the Commission supported this request. On 11 December 2002, the Commission proposed amendments to Decision 1999/468/EC and then submitted an amended proposal on 22 April 2004. The Parliament considers that this proposal does not preserve its legislative prerogatives. In the Parliament's view, the Parliament and the Council should have the opportunity of evaluating the conferral of implementing powers on the Commission within a determined period. It is therefore appropriate to limit the period during which the Commission may adopt implementing measures.
- (38) The Parliament should be given a period of three months from the first transmission of draft amendments and implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, it should be possible to shorten this period. If, within that period, a resolution is adopted by the Parliament, the Commission should re-examine the draft amendments or measures.
- (39) In order to avoid disruption to markets and to ensure continuity in overall levels of own funds, it is appropriate to provide for specific transitional arrangements.
- (40) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law.
- (41) The obligation to transpose this Directive into national law should be confined to those provisions that represent a substantive change compared to earlier directives. The obligation to transpose the provisions that remain unchanged exists under the earlier directives.
- (42) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Part B of Annex VIII,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 234, 22.9.2005, p. 8.](#)
- (2) [OJ C 52, 2.3.2005, p. 37.](#)
- (3) Opinion of the European Parliament of 28 September 2005 (not yet published in the OJ) and Decision of the Council of 7 June 2006.
- (4) [OJ L 141, 11.6.1993, p. 1.](#) Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council ([OJ L 79, 24.3.2005, p. 9.](#))
- (5) [OJ L 145, 30.4.2004, p. 1.](#)
- (6) See page 1 of this official Journal
- (7) [OJ L 184, 17.7.1999, p. 23.](#)
- (8) [OJ C 284 E, 21.11.2002, p. 115.](#)