

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and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (repealed)

CHAPTER V

Section 1

Provisions against risks

Article 18

1 Institutions shall have own funds which are always more than or equal to the sum of the following:

- a the capital requirements, calculated in accordance with the methods and options laid down in Articles 28 to 32 and Annexes I, II and VI and, as appropriate, Annex V, for their trading-book business; and
- b the capital requirements, calculated in accordance with the methods and options laid down in Annexes III and IV and, as appropriate, Annex V, for all of their business activities.

2 By way of derogation from paragraph 1, the competent authorities may allow institutions to calculate the capital requirements for their trading book business in accordance with Article 75(a) of Directive 2006/48/EC and points 6, 7, and 9 of Annex II to this Directive, where the size of the trading book business meets the following requirements:

- a the trading-book business of such institutions does not normally exceed 5 % of their total business;
- b their total trading-book positions do not normally exceed EUR 15 million; and
- c the trading-book business of such institutions never exceeds 6 % of their total business and their total trading-book positions never exceed EUR 20 million.

3 In order to calculate the proportion that trading-book business bears to total business for the purposes of points (a) and (c) of paragraph 2, the competent authorities may refer either to the size of the combined on- and off-balance-sheet business, to the profit and loss account or to the own funds of the institutions in question, or to a combination of those measures. When the size of on- and off-balance-sheet business is assessed, debt instruments shall be valued at their market prices or their principal values, equities at their market prices and derivatives according to the nominal or market values of the instruments underlying them. Long positions and short positions shall be summed regardless of their signs.

4 If an institution should happen for more than a short period to exceed either or both of the limits imposed in paragraph 2(a) and (b) or either or both of the limits imposed in paragraph 2(c), it shall be required to meet the requirements imposed in paragraph 1(a) in respect of its trading-book business and to notify the competent authority thereof.

Article 19

1 For the purposes of point 14 of Annex I, subject to the discretion of the national authorities, a 0 % weighting can be assigned to debt securities issued by the entities listed in Table 1 of Annex I, where these debt securities are denominated and funded in domestic currency.

2 By way of derogation from points 13 and 14 of Annex I, Member States may set a specific risk requirement for any bonds falling within points 68 to 70 of Part 1 of Annex VI to Directive 2006/48/EC which shall be equal to the specific risk requirement for a qualifying item with the same residual maturity as such bonds and reduced in accordance with the percentages given in point 71 of Part 1 to Annex VI to that Directive.

3 If, as set out in point 52 of Annex I, a competent authority approves a third country's collective investment undertaking (CIU) as eligible, a competent authority in another Member State may make use of this approval without conducting its own assessment.

Article 20

1 Subject to paragraphs 2, 3 and 4 of this Article, and Article 34 of this Directive, the requirements in Article 75 of Directive 2006/48/EC shall apply to investment firms.

2 By way of derogation from paragraph 1, competent authorities may allow investment firms that are not authorised to provide the investment services listed in points 3 and 6 of Section A of Annex I to Directive 2004/39/EC to provide own funds which are always more than or equal to the higher of the following:

- a the sum of the capital requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC; and
- b the amount laid down in Article 21 of this Directive.

3 By way of derogation from paragraph 1, competent authorities may allow investment firms which hold initial capital as set out in Article 9, but which fall within the following categories, to provide own funds which are always more than or equal to the sum of the capital requirements calculated in accordance with the requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC and the amount laid down in Article 21 of this Directive:

- a investment firms that deal on own account only for the purpose of fulfilling or executing a client order or for the purpose of gaining entrance to a clearing and settlement system or a recognised exchange when acting in an agency capacity or executing a client order; and
- b) investment firms:
 - (i) that do not hold client money or securities;
 - (ii) that undertake only dealing on own account;
 - (iii) that have no external customers;
 - (iv) the execution and settlement of whose transactions takes place under the responsibility of a clearing institution and are guaranteed by that clearing institution.

4 Investment firms referred to in paragraphs 2 and 3 shall remain subject to all other provisions regarding operational risk set out in Annex V of Directive 2006/48/EC.

5 Article 21 shall apply only to investment firms to which paragraphs (2) or (3) or Article 46 apply and in the manner specified therein.

Article 21

Investment firms shall be required to hold own funds equivalent to one quarter of their preceding year's fixed overheads.

The competent authorities may adjust that requirement in the event of a material change in a firm's business since the preceding year.

Where a firm has not completed a year's business, starting from the day it starts up, the requirement shall be a quarter of the fixed overheads projected in its business plan, unless an adjustment to that plan is required by the competent authorities.

Section 2

Application of requirements on a consolidated basis

Article 22

1 The competent authorities required or mandated to exercise supervision of groups covered by Article 2 on a consolidated basis may waive, on a case-by-case basis, the application of capital requirements on a consolidated basis provided that:

- a each EU investment firm in such a group uses the calculation of own funds set out in Article 16;
- b all investment firms in such a group fall within the categories in Article 20(2) and (3);
- c each EU investment firm in such a group meets the requirements imposed in Articles 18 and 20 on an individual basis and at the same time deducts from its own funds any contingent liability in favour of investment firms, financial institutions, asset management companies and ancillary services undertakings, which would otherwise be consolidated and;
- d any financial holding company which is the parent financial holding company in a Member State of any investment firm in such a group holds at least as much capital, defined here as the sum of points (a) to (h) of Article 57 of Directive 2006/48/EC, as the sum of the full book value of any holdings, subordinated claims and instruments as referred to in Article 57 of that Directive in investment firms, financial institutions, asset management companies and ancillary services undertakings which would otherwise be consolidated, and the total amount of any contingent liability in favour of investment firms, financial institutions, asset management companies and ancillary services undertakings which would otherwise be consolidated.

Where the criteria in the first subparagraph are met, each EU investment firm shall have in place systems to monitor and control the sources of capital and funding of all financial holding companies, investment firms, financial institutions, asset management companies and ancillary services undertakings within the group.

2 By way of derogation from paragraph 1, competent authorities may permit financial holding companies which are the parent financial holding company in a Member State of an investment firm in such a group to use a value lower than the value calculated under paragraph 1(d), but no lower than the sum of the requirements imposed in Articles 18 and 20 on an individual basis to investment firms, financial institutions, asset management companies and ancillary services undertakings which would otherwise be consolidated and the total amount of any contingent liability in favour of investment firms, financial institutions, asset management companies and ancillary services undertakings which would otherwise be consolidated. For the purposes of this paragraph, the capital requirement for investment undertakings of third countries, financial institutions, asset management companies and ancillary services undertakings is a notional capital requirement.

Article 23

The competent authorities shall require investment firms in a group which has been granted the waiver provided for in Article 22 to notify them of the risks which could undermine their financial positions, including those associated with the composition and sources of their capital and funding. If the competent authorities then consider that

the financial positions of those investment firms is not adequately protected, they shall require them to take measures including, if necessary, limitations on the transfer of capital from such firms to group entities.

Where the competent authorities waive the obligation of supervision on a consolidated basis provided for in Article 22, they shall take other appropriate measures to monitor the risks, namely large exposures, of the whole group, including any undertakings not located in a Member State.

Where the competent authorities waive the application of capital requirements on a consolidated basis provided for in Article 22, the requirements of Article 123 and Chapter 5 of Title V of Directive 2006/48/EC shall apply on an individual basis, and the requirements of Article 124 of that Directive shall apply to the supervision of investment firms on an individual basis.

Article 24

1 By way of derogation from Article 2(2), competent authorities may exempt investment firms from the consolidated capital requirement established in that Article, provided that all the investment firms in the group are covered by Article 20(2) and the group does not include credit institutions.

2 Where the requirements of paragraph 1 are met, a parent investment firm in a Member State shall be required to provide own funds at a consolidated level which are always more than or equal to the higher of the following two amounts, calculated on the basis of the parent investment firm's consolidated financial position and in compliance with Section 3 of this Chapter:

- a the sum of the capital requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC; and
- b the amount prescribed in Article 21 of this Directive.

3 Where the requirements of paragraph 1 are met, an investment firm controlled by a financial holding company shall be required to provide own funds at a consolidated level which are always more than or equal to the higher of the following two amounts, calculated on the basis of the financial holding company's consolidated financial position and in compliance with Section 3 of this Chapter:

- a the sum of the capital requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC; and
- b the amount prescribed in Article 21 of this Directive.

Article 25

By way of derogation from Article 2(2), competent authorities may exempt investment firms from the consolidated capital requirement established in that Article, provided that all the investment firms in the group fall within the investment firms referred to in Article 20(2) and (3), and the group does not include credit institutions.

Where the requirements of the first paragraph are met, a parent investment firm in a Member State shall be required to provide own funds at a consolidated level which are always more than or equal to the sum of the requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC and the amount prescribed in Article 21 of this Directive, calculated on the basis of the parent investment firm's consolidated financial position and in compliance with Section 3 of this Chapter.

Where the requirements of the first paragraph are met, an investment firm controlled by a financial holding company shall be required to provide own funds at a consolidated level which are always more than or equal to the sum of the requirements contained in points (a) to (c) of Article 75 of Directive 2006/48/EC and the amount prescribed in Article 21 of this Directive, calculated on the basis of the financial holding company's consolidated financial position and in compliance with Section 3 of this Chapter.

Section 3

Calculation of consolidated requirements

Article 26

1 Where the waiver provided for in Article 22 is not exercised, the competent authorities may, for the purpose of calculating the capital requirements set out in Annexes I and V and the exposures to clients set out in Articles 28 to 32 and Annex VI on a consolidated basis, permit positions in the trading book of one institution to offset positions in the trading book of another institution according to the rules set out in Articles 28 to 32 Annexes I, V and VI.

In addition, the competent authorities may allow foreign-exchange positions in one institution to offset foreign-exchange positions in another institution in accordance with the rules set out in Annex III and/or Annex V. They may also allow commodities positions in one institution to offset commodities positions in another institution in accordance with the rules set out in Annex IV and/or Annex V.

2 The competent authorities may permit offsetting of the trading book and of the foreign-exchange and commodities positions, respectively, of undertakings located in third countries, subject to the simultaneous fulfilment of the following conditions:

- a such undertakings have been authorised in a third country and either satisfy the definition of credit institution set out in Article 4(1) of Directive 2006/48/EC or are recognised third-country investment firms;
- b such undertakings comply, on an individual basis, with capital adequacy rules equivalent to those laid down in this Directive; and
- c no regulations exist in the third countries in question which might significantly affect the transfer of funds within the group.

3 The competent authorities may also allow the offsetting provided for in paragraph 1 between institutions within a group that have been authorised in the Member State in question, provided that:

- a there is a satisfactory allocation of capital within the group; and
- b the regulatory, legal or contractual framework in which the institutions operate is such as to guarantee mutual financial support within the group.

4 Furthermore, the competent authorities may allow the offsetting provided for in paragraph 1 between institutions within a group that fulfil the conditions imposed in paragraph 3 and any institution included in the same group which has been authorised in another Member State provided that that institution is obliged to fulfil the capital requirements imposed in Articles 18, 20 and 28 on an individual basis.

Article 27

1 In the calculation of own funds on a consolidated basis Article 65 of Directive 2006/48/EC shall apply.

2 The competent authorities responsible for exercising supervision on a consolidated basis may recognise the validity of the specific own-funds definitions applicable to the institutions concerned under Chapter IV in the calculation of their consolidated own funds.

Section 4

Monitoring and control of large exposures

Article 28

1 Institutions shall monitor and control their large exposures in accordance with Articles 106 to 118 of Directive 2006/48/EC.

2 By way of derogation from paragraph 1, institutions which calculate the capital requirements for their trading-book business in accordance with Annexes I and II, and, as appropriate, Annex V to this Directive, shall monitor and control their large exposures in accordance with Articles 106 to 118 of Directive 2006/48/EC subject to the amendments laid down in Articles 29 to 32 of this Directive.

3 By 31 December 2007, the Commission shall submit to the European Parliament and to the Council a report on the functioning of this Section, together with any appropriate proposals.

Article 29

1 The exposures to individual clients which arise on the trading book shall be calculated by summing the following items:

- a the excess — where positive — of an institution's long positions over its short positions in all the financial instruments issued by the client in question, the net position in each of the different instruments being calculated according to the methods laid down in Annex I;
- b the net exposure, in the case of the underwriting of a debt or an equity instrument; and
- c the exposures due to the transactions, agreements and contracts referred to in Annex II with the client in question, such exposures being calculated in the manner laid down in that Annex, for the calculation of exposure values.

For the purposes of point (b), the net exposure is calculated by deducting those underwriting positions which are subscribed or sub-underwritten by third parties on the basis of a formal agreement reduced by the factors set out in point 41 of Annex I.

For the purposes of point (b), pending further coordination, the competent authorities shall require institutions to set up systems to monitor and control their underwriting exposures between the time of the initial commitment and working day one in the light of the nature of the risks incurred in the markets in question.

For the purposes of point (c), Articles 84 to 89 of Directive 2006/48/EC shall be excluded from the reference in point 6 of Annex II to this Directive.

2 The exposures to groups of connected clients on the trading book shall be calculated by summing the exposures to individual clients in a group, as calculated in paragraph 1.

Article 30

1 The overall exposures to individual clients or groups of connected clients shall be calculated by summing the exposures which arise on the trading book and the exposures which arise on the non-trading book, taking into account Article 112 to 117 of Directive 2006/48/EC.

In order to calculate the exposure which arises on the non-trading book, institutions shall take the exposure arising from assets which are deducted from their own funds by virtue of point (d) of the second subparagraph of Article 13(2) to be zero.

2 Institutions' overall exposures to individual clients and groups of connected clients calculated in accordance with paragraph 4 shall be reported in accordance with Article 110 of Directive 2006/48/EC.

Other than in relation to repurchase transactions, securities or commodities lending or borrowing transactions, the calculation of large exposures to individual clients and groups of connected clients for reporting purposes shall not include the recognition of credit risk mitigation.

3 The sum of the exposures to an individual client or group of connected clients in paragraph 1 shall be limited in accordance with Articles 111 to 117 of Directive 2006/48/EC.

4 By derogation from paragraph 3 competent authorities may allow assets constituting claims and other exposures on recognised third-country investment firms and recognised clearing houses and exchanges in financial instruments to be subject to the same treatment accorded to those on institutions laid out in Articles 113(3)(i), 115(2) and 116 of Directive 2006/48/EC.

Article 31

The competent authorities may authorise the limits laid down in Articles 111 to 117 of Directive 2006/48/EC to be exceeded if the following conditions are met:

- (a) the exposure on the non-trading book to the client or group of clients in question does not exceed the limits laid down in Articles 111 to 117 of Directive 2006/48/EC, those limits being calculated with reference to own funds as specified in that Directive, so that the excess arises entirely on the trading book;
- (b) the institution meets an additional capital requirement on the excess in respect of the limits laid down in Article 111(1) and (2) of Directive 2006/48/EC, that additional capital requirement being calculated in accordance with Annex VI to that Directive;
- (c) where 10 days or less has elapsed since the excess occurred, the trading-book exposure to the client or group of connected clients in question shall not exceed 500 % of the institution's own funds;
- (d) any excesses that have persisted for more than 10 days must not, in aggregate, exceed 600 % of the institution's own funds; and
- (e) institutions shall report to the competent authorities every three months all cases where the limits laid down in Article 111(1) and (2) of Directive 2006/48/EC have been exceeded during the preceding three months.

In relation to point (e), in each case in which the limits have been exceeded the amount of the excess and the name of the client concerned shall be reported.

Article 32

1 The competent authorities shall establish procedures to prevent institutions from deliberately avoiding the additional capital requirements that they would otherwise incur, on exposures exceeding the limits laid down in Article 111(1) and (2) of Directive 2006/48/EC once those exposures have been maintained for more than 10 days, by means of temporarily transferring the exposures in question to another company, whether within the same group or

not, and/or by undertaking artificial transactions to close out the exposure during the 10-day period and create a new exposure.

The competent authorities shall notify the Council and the Commission of those procedures.

Institutions shall maintain systems which ensure that any transfer which has the effect referred to in the first subparagraph is immediately reported to the competent authorities.

2 The competent authorities may permit institutions which are allowed to use the alternative determination of own funds under Article 13(2) to use that determination for the purposes of Articles 30(2), 30(3) and 31 provided that the institutions concerned are required to meet all of the obligations set out in Articles 110 to 117 of Directive 2006/48/EC, in respect of the exposures which arise outside their trading books by using own funds as defined in that Directive.

Section 5

Valuation of positions for reporting purposes

Article 33

1 All trading book positions shall be subject to prudent valuation rules as specified in Annex VII, Part B. These rules shall require institutions to ensure that the value applied to each of its trading book positions appropriately reflects the current market value. The former value shall contain an appropriate degree of certainty having regard to the dynamic nature of trading book positions, the demands of prudential soundness and the mode of operation and purpose of capital requirements in respect of trading book positions.

2 Trading book positions shall be re-valued at least daily.

3 In the absence of readily available market prices, the competent authorities may waive the requirement imposed in paragraphs 1 and 2 and shall require institutions to use alternative methods of valuation provided that those methods are sufficiently prudent and have been approved by competent authorities.

Section 6

Risk management and capital assessment

Article 34

Competent authorities shall require that every investment firm, as well as meeting the requirements set out in Article 13 of Directive 2004/39/EC, shall meet the requirements set out in Articles 22 and 123 of Directive 2006/48/EC, subject to the provisions on level of application set out in Articles 68 to 73 of that Directive.

Section 7

Reporting requirements

Article 35

1 Member States shall require that investment firms and credit institutions provide the competent authorities of their home Member States with all the information necessary for the assessment of their compliance with the rules adopted in accordance with this Directive. Member States shall also ensure that internal control mechanisms and administrative and accounting procedures of the institutions permit the verification of their compliance with such rules at all times.

2 Investment firms shall report to the competent authorities in the manner specified by the latter at least once every month in the case of firms covered by Article 9, at least once every three months in the case of firms covered by Article 5(1) and at least once every six months in the case of firms covered by Article 5(3).

3 Notwithstanding paragraph 2, investment firms covered by Articles 5(1) and 9 shall be required to provide the information on a consolidated or sub-consolidated basis only once every six months.

4 Credit institutions shall be obliged to report in the manner specified by the competent authorities as often as they are obliged to report under Directive 2006/48/EC.

5 The competent authorities shall oblige institutions to report to them immediately any case in which their counter parties in repurchase and reverse repurchase agreements or securities and commodities-lending and securities and commodities-borrowing transactions default on their obligations.