

Amended proposal for a Directive of the European Parliament and of the Council amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ⁽¹⁾

(2000/C 311 E/21)

(Text with EEA relevance)

COM(2000) 329 final — 98/0243(COD)

(Submitted by the Commission pursuant to Article 250(2) of the EC Treaty on 30 May 2000)

⁽¹⁾ OJ C 280, 9.9.1998, p. 6.

INITIAL PROPOSAL

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF
THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

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

Acting in accordance with the procedure laid down in Article 189b of the Treaty,

(1) Whereas the scope of Council Directive 85/611/EEC ⁽¹⁾, as last amended by Directive 88/220/EEC ⁽²⁾, was confined initially to collective investment undertakings of the open-ended type which promote the sale of their units to the public in the Community and the sole object of which is investment in transferable securities (UCITS); whereas it was envisaged in the preamble to Directive 85/611/EEC that undertakings falling outside its scope would be the subject of co-ordination at a later stage;

(2) Whereas, taking into account market developments, it is desirable that the investment objective of UCITS is widened in order to permit them to invest in financial assets, other than transferable securities, which are sufficiently liquid;

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Unchanged

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

Unchanged

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

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

Whereas:

(1) The scope of Council Directive 85/611/EEC ⁽²⁾, as last amended by Directive 95/26/EC ⁽³⁾, was confined initially to collective investment undertakings of the open-ended type which promote the sale of their units to the public in the Community and the sole object of which is investment in transferable securities (UCITS); it was envisaged in the preamble to Directive 85/611/EEC that undertakings falling outside its scope would be the subject of coordination at a later stage;

(2) Taking into account market developments, it is desirable that the investment objective of UCITS is widened in order to permit them to invest in financial assets, other than transferable securities, which are sufficiently liquid; financial instruments which are eligible to be investment assets of the portfolio of the UCITS are stated in Article 19(1); the 'Securities lending' mentioned in Article 21 is not an 'instrument for investment' but a technique to improve the return of the portfolio; the investment of a portfolio according to an index is a management technique; the instruments bought in order to replicate the index are transferable securities or derivatives and are covered in Article 19(1);

⁽¹⁾ OJ L 375, 31.12.1985, p. 3.

⁽²⁾ OJ L 100, 19.4.1988, p. 31.

⁽¹⁾ OJ C 116, 28.4.1999, p. 44.

⁽²⁾ OJ L 375, 31.12.1985, p. 3.

⁽³⁾ OJ L 168, 18.7.1995, p. 7.

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- (3) Whereas the definitions of transferable securities and money market instruments included in this Directive are valid only for this Directive and consequently in no way affect the various definitions of financial instruments used in national legislation for other purposes such as taxation; whereas, furthermore, the definition of transferable securities covers negotiable instruments only; whereas, consequently, shares and other securities equivalent to shares issued by bodies, such as building societies and industrial and provident societies, the ownership of which cannot in practice be transferred except by the issuing body buying them back, are not covered by this definition;
- (4) Whereas money market instruments cover those classes of transferable instruments which are normally dealt in on the money market, for example treasury and local authority bills, certificates of deposit, commercial paper and bankers' acceptances; whereas Member States should have the option of choosing the list of eligible money market instruments on the basis of objective criteria to take account of the existing structural differences in the money markets of different countries;
- (5) Whereas it is desirable to permit a UCITS to invest its assets in units of other collective investment undertakings of the open-ended type which also invest in transferable securities and which operate on the principle of risk spreading; whereas the requirement of risk spreading for UCITS investing in other collective investment undertakings is indirectly respected since such UCITS can only invest in units issued by collective investment undertakings complying with the risk-spreading criteria of Directive 85/611/EEC; whereas, it is important that such UCITS adequately disclose to investors the fact that they invest in units of other collective investment undertakings;
- (6) Whereas to take market developments into account and in consideration of the completion of the EMU it is desirable to permit UCITS to invest in bank deposits;
- (3) The definition of transferable securities including money market instruments traded on regulated markets included in this Directive is valid only for this Directive and consequently in no way affect the various definitions of financial instruments used in national legislation for other purposes such as taxation; furthermore, the definition of transferable securities covers negotiable instruments only; consequently, shares and other securities equivalent to shares issued by bodies, such as building societies and industrial and provident societies, the ownership of which cannot in practice be transferred except by the issuing body buying them back, are not covered by this definition;
- (4) Money market instruments cover also those transferable instruments which are normally not traded on regulated markets but dealt in on the money market, for example treasury and local authority bills, certificates of deposit, commercial paper and bankers' acceptances;
- (5) It is useful to ensure that the concept of regulated markets in this directive corresponds to that in Directive 93/22/EEC ⁽¹⁾;
- (6) It is desirable to permit a UCITS to invest its assets in units of UCITS and/or other collective investment undertakings of the open-ended type which also invest in transferable securities and which operate on the principle of risk spreading; UCITS or other collective investment undertakings in which a UCITS invests should also be subject to effective supervision; investments in units of UCITS and/or other collective investment undertakings shall not result in cascades of funds; UCITS shall adequately disclose to investors if they invest in units of UCITS and/or other collective investment undertakings;
- (7) To take market developments into account and in consideration of the completion of the EMU it is desirable to permit UCITS to invest in bank deposits; to ensure adequate liquidity of the investments in deposits the terms of these deposits should include a break clause; if the deposits are made with a credit institution situated in a non-Member State, the credit institution should be subject to effective supervision;

⁽¹⁾ OJ L 141, 11.6.1993, p. 27.

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- (7) Whereas, in addition to the case in which a UCITS invests in bank deposits according to its fund rules or instruments of incorporation, it may be necessary to allow all UCITS to hold ancillary liquid assets, such as bank deposits at sight and/or cash; whereas the holding of such ancillary liquid assets may be justified, for example, in the following cases: in order to cover current or unexpected payments; in the case of sales, for the time necessary to reinvest in transferable securities and/or in other financial assets provided for by this Directive; for a period of time strictly necessary when, because of unfavourable market conditions, the investment in transferable securities and in other financial assets needs to be suspended;
- (8) Whereas, for prudential reasons, UCITS should avoid assuming an excessive concentration in deposits with a single credit institution;
- (9) Whereas UCITS should be permitted to invest their assets in standardised options and futures contracts dealt in on regulated derivatives markets; whereas, in order to ensure that the risks involved are adequately covered, it is necessary that such UCITS hold at any time assets of sufficient value and of the right kind (i.e. securities, if the exposure is in terms of securities; cash or securities which are, or, on being turned into money in the right currency, if the exposure is in terms of money); whereas, such UCITS too have to operate on the principle of risk spreading; whereas, considering that the value of the portfolio of such UCITS may fluctuate widely, such UCITS should address only experienced investors or investors whose financial situation allows them to bear the risks involved in the investment in units of such UCITS; whereas the risks involved should be adequately disclosed to the investing public in the UCITS' prospectuses and in any promotional literature;
- (10) Whereas new portfolio management techniques for collective investment undertakings investing primarily in shares are based on the replication of stock-indices; whereas it is desirable to permit UCITS to replicate well-known and recognised stock-indices; whereas therefore it is necessary to introduce more flexible risk-spreading rules for UCITS investing in shares; whereas in order to ensure transparency of the stock-indices which the Member States consider to be replicable by harmonised UCITS and a wide acceptance of such indices, it is desirable to provide for adequate publication of the list of replicable stock-indices;

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- (8) In addition to the case in which a UCITS invests in bank deposits according to its fund rules or instruments of incorporation, it may be necessary to allow all UCITS to hold ancillary liquid assets, such as bank deposits at sight and/or cash; the holding of such ancillary liquid assets may be justified, for example, in the following cases: in order to cover current or unexpected payments; in the case of sales, for the time necessary to reinvest in transferable securities and/or in other financial assets provided for by this Directive; for a period of time strictly necessary when, because of unfavourable market conditions, the investment in transferable securities and in other financial assets needs to be suspended;
- (9) For prudential reasons, UCITS should avoid assuming an excessive concentration in deposits with a single credit institution or with institutions belonging to the same group;
- (10) UCITS should be explicitly permitted to invest, as part of their general investment policy and/or for hedging purposes, in standardised and over-the-counter (OTC) financial derivative instruments; in regard to the OTC derivatives, additional requirements must be set in terms of the eligibility of counter-parties and instruments, liquidity and on-going assessment of the position; the purpose of such additional requirements is to ensure an adequate level of investor protection which is close to that of derivatives dealt in on regulated markets;
- (11) New portfolio management techniques for collective investment undertakings investing primarily in shares are based on the replication of stock-indices and/or indices on debt securities; it is desirable to permit UCITS to replicate well-known and recognised stock-indices and/or debt indices; therefore it is necessary to introduce more flexible risk-spreading rules for UCITS investing in shares and/or debt securities; in order to ensure transparency of the indices which the Member States consider to be replicable by harmonised UCITS and a wide acceptance of such indices, it is desirable to provide for adequate publication of the list of replicable indices and an indication about where updated information can be obtained, possibly by electronic means; UCITS may also replicate the index by appropriate investments in other instruments, such as standardised derivatives; UCITS tracking an index may also dedicate a part of their portfolio to counteract adverse movements of the replicated index in accordance with their disclosed investment objectives and within the limit set by this Directive;

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- (11) Whereas the employment of techniques and instruments for the purpose of efficient portfolio management may never be permitted if they do not comply with the principles enshrined in the Directive and if they hinder the competent authorities from exercising effectively their supervisory functions;
- (12) Whereas, considering the new portfolio management techniques which have been developed in recent years, it is desirable to permit UCITS to make use of all sorts of derivative instruments for an efficient portfolio management; whereas, in order to ensure investor protection, it is necessary to provide for a harmonised framework for the utilisation of financial derivatives and for an adequate cover for exposure deriving from such transactions; whereas, transactions on financial derivatives, not dealt in on specialised derivatives markets (over-the-counter derivatives) involve counter-party risks; whereas therefore the counter-parties for such transactions shall be chosen only among qualified institutions approved by the UCITS' competent authorities;
- (13) Whereas, notwithstanding Article 41 of Directive 85/611/EEC, it is desirable to permit UCITS to enter into securities lending transactions for the purposes of efficient portfolio management; whereas, in order to limit the risks involved in such transactions, it is necessary to regulate the conditions under which a UCITS may be permitted to act as a lender in securities lending transactions;
- (12) Operations in derivatives may never be used to circumvent the principles and regulations set out in this Directive; in particular to ensure risk-spreading, limits must apply to derivatives on the basis of the underlying; concerning OTC derivatives additional risk-spreading rules must apply to exposures to a single counter-party or group of counter-parties; finally, in order to ensure constant awareness of the risks and commitments arising from derivative transactions and to check compliance with investment limits, a UCITS will have to measure and monitor risks and commitments arising from derivatives transactions on an ongoing basis;
- (13) In order to ensure investor protection, it is necessary to limit a UCITS' commitments arising from financial derivatives so that they do not exceed certain percentages in terms of the total net value of the UCITS' portfolio; in order to ensure investor protection through disclosure, UCITS shall describe their strategies, techniques and investment limits governing derivatives operations in the relevant documents available to the public and to the competent authorities; furthermore UCITS investing in derivatives shall make it clear in a risk-warning to the potential investors that a proportion of the UCITS will be invested in OTC derivatives thereby allowing investors to make an informed decision as regards the level of risk involved with the investment in units of such UCITS;
- (14) Notwithstanding Article 41 of Directive 85/611/EEC, it is desirable to permit UCITS to enter into securities lending transactions; in order to limit the risks involved in such transactions, it is necessary to regulate the conditions under which a UCITS may be permitted to act as a lender in securities lending transactions; considering the need for liquidity of a UCITS' portfolio, securities lending transactions shall only be carried out on parts of the portfolio and on a temporary basis;
- (15) The development of opportunities for a UCITS to invest in UCITS and other collective investment undertakings should be facilitated; it is therefore essential to ensure that such investment activity does not diminish investor protection; taking into account the nature of investments in sufficiently diversified collective investment undertakings, it may be necessary to restrict the possibility for a UCITS to combine its direct investments in a liquid financial asset with the investments made through these UCITS and/or other collective investment undertakings; because of the enhanced possibilities for UCITS to invest in units of other UCITS and/or collective investment undertakings, it is necessary to lay down certain rules on quantitative limits and disclosure of information to prevent the cascade phenomenon;

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(14) Whereas collective investment undertakings falling within the scope of this Directive shall not be used for purposes other than the collective investment of the money raised from the public according to the rules laid down in this Directive; whereas, in the cases identified by this Directive, a UCITS may hold subsidiaries only when necessary to carry out effectively on behalf of that UCITS certain activities, also identified by this Directive; whereas it is necessary to ensure an effective supervision of UCITS; whereas therefore the establishment of a UCITS' subsidiary in third countries should be permitted only in the cases and under the conditions identified in the Directive; whereas the general obligation to act solely in the interest of unit-holders and, in particular, the objective to increase cost efficiencies, never justify a UCITS undertaking measures which may hinder the competent authorities from exercising effectively their supervisory functions;

(15) Whereas the depositary of the assets of a UCITS carries out crucial controlling functions over the compliance of a UCITS with the law and its fund rules or instruments of incorporation; whereas therefore it is important to ensure an effective independence between the management company and the depositary; whereas when both the management company and the depositary belong to the same economic group or when the depositary has a qualifying holding in the management company's capital, or vice versa, or in all other cases in which the depositary may exercise a significant influence over the management company, or vice versa, it is necessary to undertake all measures assuring the independence between the two entities; whereas, when a management company, acting on behalf of the common funds or investment companies it manages, is permitted to enter into transactions with the depositary, arrangements have to be made preventing conflicts of interests and ensuring the compliance of the transaction with the law and the UCITS' fund rules or instruments of incorporation;

(16) Whereas, considering the depositary's liabilities towards the management company and the unit-holders and the complexity of its controlling functions, only institutions which have adequate financial resources and an adequate organisational structure and which are subject to prudential supervision should fall within the categories of institutions eligible to be depositaries;

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(16) Collective investment undertakings falling within the scope of this Directive shall not be used for purposes other than the collective investment of the money raised from the public according to the rules laid down in this Directive; in the cases identified by this Directive, a UCITS may hold subsidiaries only when necessary to carry out effectively on behalf of that UCITS certain activities, also identified by this Directive; it is necessary to ensure an effective supervision of UCITS; therefore the establishment of a UCITS' subsidiary in third countries should be permitted only in the cases and under the conditions identified in the Directive; the general obligation to act solely in the interest of unit-holders and, in particular, the objective to increase cost efficiencies, never justify a UCITS undertaking measures which may hinder the competent authorities from exercising effectively their supervisory functions;

(17) For prudential reasons, a UCITS should, whether its chosen investment policy is to invest in a variety of liquid financial assets or to specialise in a certain category of such assets, avoid assuming an excessive concentration in liquid financial assets issued by and/or made with a single body;

(18) The depositary of the assets of a UCITS carries out crucial controlling functions over the compliance of a UCITS with the law and its fund rules or instruments of incorporation; therefore it is important to ensure an effective independence between the management company and the depositary; when both the management company and the depositary belong to the same economic group or when the depositary has a qualifying holding in the management company's capital, or vice versa, or in all other cases in which the depositary may exercise a significant influence over the management company, or vice versa, it is necessary to undertake all measures assuring the independence between the two entities; when a management company, acting on behalf of the common funds or investment companies it manages, is permitted to enter into transactions with the depositary, arrangements have to be made preventing conflicts of interests and ensuring the compliance of the transaction with the law and the UCITS' fund rules or instruments of incorporation;

(19) Considering the depositary's liabilities towards the management company and the unit-holders and the complexity of its controlling functions, only institutions which have adequate financial resources and an adequate organisational structure and which are subject to prudential supervision should fall within the categories of institutions eligible to be depositaries;

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(17) Whereas, considering the need to ensure the free cross-border marketing of the units of a wider range of collective investment undertakings, while providing a uniform minimum level of investor protection; whereas, therefore, only a binding Community Directive laying down agreed minimum standards can achieve the desired objectives; whereas this Directive effects only the minimum harmonisation required,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 85/611/EEC is amended as follows:

1. In Article 1(2), the first indent shall be replaced by the following:

‘— the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets mentioned in Article 19 of this Directive of capital raised from the public and which operates on the principle of risk-spreading.’;

2. In Article 1 the following paragraph shall be added:

‘8. For the purpose of this Directive

(a) transferable securities shall mean:

- shares in companies and other securities equivalent to shares in companies,
- bonds and other forms of securitised debt,

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(20) Considering the need to ensure the free cross-border marketing of the units of a wider range of collective investment undertakings, while providing a uniform minimum level of investor protection; therefore, only a binding Community Directive laying down agreed minimum standards can achieve the desired objectives; this Directive effects only the minimum harmonisation required;

(21) The measures necessary for the implementation of this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred to the Commission ⁽¹⁾, they should be adopted by use of the regulatory procedure provided for in Article 5 of that Decision;

(22) The Commission may consider proposing codification in due time after adoption of the proposals,

Unchanged

‘— the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets mentioned in Article 19(1) of this Directive of capital raised from the public and which operates on the principle of risk-spreading, and’;

Unchanged

For the purpose of this Directive

transferable securities shall mean

- shares in companies and other securities equivalent to shares in companies (“shares”),
- bonds and other forms of securitised debt (“debt securities”),
- money market instruments normally dealt in on regulated markets within Article 19(1)(a), (b) or (c), and

⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

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- any other negotiable securities which carry the right to acquire any such transferable securities by subscription or exchange,

excluding the techniques and instruments referred to in Article 21;

- (b) money market instruments, which, for the purposes of this Directive shall be regarded as transferable securities, shall mean those classes of transferable instruments normally dealt in on the money market which Member States consider to:

- be liquid, and
- have a value which can be accurately determined at any time or at least with the frequency stipulated in Article 34, excluding the techniques and instruments referred to in Article 21.;

3. In Article 19 the following shall be added to paragraph 1:

- ‘(e) units of other collective investment undertakings within the meaning of the first and second indent of Article 1(2)

- and/or

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- any other negotiable securities which carry the right to acquire any such transferable securities by subscription or exchange.’

Deleted

3. In Article 19 paragraph 1, subparagraph (a) shall be replaced by the following:

- ‘(a) transferable securities admitted to or dealt in on a regulated market within the meaning of Article 1(13) of Directive 93/22/EEC in a Member State; and/or’

4. In Article 19 the following shall be added to paragraph 1:

- ‘(e) units of UCITS and/or other collective investment undertakings within the meaning of the first and second indent of Article 1(2) provided that the latter:

- is authorised under laws which provide that it is subject to supervision considered by the UCITS’ competent authorities to be equivalent to that laid down in Community law, and that cooperation between authorities is sufficiently ensured;

- the level of protection for unitholders in the other collective investment undertaking is equivalent to that provided for unit-holders in a UCITS, and in particular that the rules on borrowing, lending, and uncovered sales of transferable securities are equivalent to the requirements of this Directive;

- the business of the other collective investment undertaking is reported in half-yearly and annual reports to enable an assessment to be made of the assets and liabilities, income and operations over the reporting period; and/or

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(f) deposits with credit institutions and/or

(f) deposits with credit institutions which are repayable on demand or have the right to be withdrawn, and maturing in no more than 12 months, provided that the credit institution has its registered office in a Member State or, if the registered office of the credit institution is situated in a non-Member State, provided that it is subject to prudential rules considered by the UCITS' competent authorities as equivalent to those laid down in Community law; and/or

(g) standardised financial-futures contracts, including equivalent cash-settled instruments, dealt in on a regulated market mentioned in the previous sub-paragraphs (b) and (c); and/or

(g) standardised financial derivative instruments, including equivalent cash-settled instruments, dealt in on a regulated market mentioned in the previous sub-paragraphs (a), (b) and (c) ("standardised derivatives"); this category includes, in particular, options on currency and on interest rates dealt in on the mentioned markets; and/or

(h) standardised options to acquire or dispose of any instruments falling within this Article, including equivalent cash-settled instruments, dealt in on a regulated market mentioned in the previous subparagraphs (b) and (c). This category includes, in particular, options on currency and on interest rates,

(h) financial derivative instruments dealt in over-the-counter ("OTC derivatives"), provided that

- the counter-parties to OTC derivative transactions are institutions subject to prudential supervision, and belonging to the categories approved by the UCITS' competent authorities,
- the underlying consists of instruments covered by Article 19(1), financial indices, interest rates, foreign exchange rates or currencies, in which the UCITS may invest according to its investment objectives as stated in the UCITS' fund rules or instruments of incorporation, and
- the OTC derivatives are subject to reliable and verifiable valuation and can be sold or liquidated on a daily basis;

and/or

and/or

(i) money market instruments which are not dealt in on a regulated market, unless the issue of such instruments is itself regulated for the purpose of protecting investors and savings, and provided that they are:

(i) money market instruments other than those dealt in on a regulated market, which fall under Article 1(8) third indent, unless the issue of such instruments is itself regulated for the purpose of protecting investors and savings, and provided that they are:

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- issued by a central, regional or local authority, a central bank of a Member State, the European Central Bank, the European Union or the European Investment Bank, a non-Member State or, in the case of a Federal State, by one of the members making up the federation, or by a public international body to which one or more Member States belong, or
- issued by an undertaking any securities of which are admitted to official listing on a stock exchange or are dealt in on other regulated markets which operate regularly, are recognised and are open to the public, or
- issued or guaranteed by an establishment subject to prudential supervision, in accordance with criteria defined by Community law or by an establishment which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down by Community law;'

4. Article 19(2)(b), and (3) shall be deleted;

5. Article 20 shall be deleted;

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- issued by an undertaking any securities of which are admitted to official listing on a stock be dealt in on other regulated markets mentioned in sub-paragraphs (a), (b) or (c), or

Unchanged

5. Article 19(2)(b), and (3) shall be deleted;

6. Article 20 shall be replaced by the following:

'1. The Member States shall send to the Commission in due time all information which is required to be provided according to the relevant Articles of this Directive. They shall also furnish any amendments to the information concerned and shall indicate a source where up-to-date information can be obtained or accessed. Information covered by this Article shall be disclosed to the public on request by any holder of the information if it is not made public on a general basis.

2. The Commission shall forward the received information to the other Member States together with any comments which it considers appropriate. Such communications may be the subject of exchanges of view within the Contact Committee in accordance with the procedure laid down in Article 53(4). The Commission shall publish the received information and updated thereto in an adequate form in the Official Journal of the European Communities or make such information publicly available in an appropriate manner.'

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6. In Article 21, the following paragraphs shall be added:

'3. In this context, a UCITS may carry out transactions in financial derivative instruments, also other than those mentioned in Article 24b, provided that the exposure relating to such instruments is covered according to the rules laid down in Article 24b.

If the UCITS carries out transactions in financial derivative instruments which are not dealt in on a regulated market (over-the-counter derivatives), the counter-parties to such transactions must be qualified institutions belonging to the categories approved by the UCITS' competent authorities.'

4. Further, in the context of efficient portfolio management, a UCITS may enter into securities lending transactions in which it acts as a lender, provided that the following conditions are fulfilled:

- (a) securities lending transactions may be concluded only with a recognised securities clearing house or exchange, or with a counter-party which is an authorised person specialised in that type of transaction and subject to prudential supervision at Community level; or is a Zone A credit institution as defined in Directive 89/647/EEC or an investment firm as defined in Directive 93/22/EEC; or is a recognised third country investment firm which is subject to and complies with prudential rules considered by the UCITS' competent authorities to be at least as stringent as those laid down in Directive 93/6/EEC;
- (b) in relation to each securities lending transaction appropriate collateral shall be given covering the risk of default of the borrower. The value of collateral must be, during the entire period of the contract, at least equal to the total value of the financial instruments lent

When a UCITS is permitted to conclude securities lending transactions with the depositary which performs for that UCITS the duties mentioned in Articles 7 and 14 of this Directive, the competent authorities shall ensure that the collateral is entrusted, during the entire period of the contract, with a third party custodian and that measures are undertaken preventing the depositary from using it.;

7. Article 21 shall be replaced by the following:

Deleted

'On a limited basis prescribed by the Member States, a UCITS may enter into securities lending transactions in which it acts as a lender, provided that the following conditions are fulfilled:

- (a) securities lending transactions may be concluded only with a recognised securities clearing house or exchange, or with a counter-party which is an authorised person specialised in that type of transaction and subject to prudential supervision at Community level; or is a Zone A credit institution as defined in Directive 89/647/EEC ⁽¹⁾ or an investment firm as defined in Directive 93/22/EEC; or is a recognised third country investment firm which is subject to and complies with prudential rules considered by the UCITS' competent authorities to be at least as stringent as those laid down in Directive 93/6/EEC ⁽²⁾;
- (b) in relation to each securities lending transaction appropriate collateral shall be given covering the risk of default of the borrower. The value of collateral must be, during the entire period of the contract, at least equal to the total value of the financial instruments lent and must be kept as collateral,
- (c) if the securities lending transaction is carried out by recognised security clearing houses and/or exchanges, collateral must be provided in accordance with the relevant rules of these entities; the collateral must be kept as collateral and may not be used by the UCITS for further investments,

Unchanged

⁽¹⁾ OJ L 386, 30.12.1989, p. 14.

⁽²⁾ OJ L 141, 11.6.1993, p. 1.

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7. The following Article 22a shall be inserted:

'Article 22a

1. Without prejudice to the limits laid down in Article 25, the Member States may raise the limits laid down in Article 22 to a maximum of 35 % for investment in shares issued by the same body when, according to the fund rules or instruments of incorporation, the aim of the UCITS' investment policy is to replicate the composition of a certain stock index.

8. Article 22(1), (2) and the second sub-paragraph of (5) shall be replaced by the following:

'1. A UCITS may invest no more than 5 % of its assets in each of the following instruments issued by or made with the same body or to which the same body is the counter-party:

- transferable securities,
- money market instruments according to Article 19(1)(i),
- deposits,
- OTC financial derivative instruments.

Member States may allow to cumulate investments in different instruments with the same body/counter-party up to a limit of 15 %. Companies within the same group are regarded as a single body for the purpose of calculating the limits contained in this Article.

2. The Member States may raise the limit laid down in paragraph 1 sentence 1 to a maximum of 10 %, and in case of group investments to a maximum of 15 %; paragraph 1 sentence 2 does not apply. However, the total value of the UCITS' investments in the instruments mentioned in paragraph 1 with one body/counter-party/group in each of which it invests more than 5 % of its assets must not then exceed 40 % of the value of its assets.

5. (. . .)

The limits provided for in paragraphs 1, 2, 3 and 4 may not be combined, and thus investments in the instruments mentioned in Article 19(1) with one body/counter-party/group carried out in accordance with paragraphs 1, 2, 3 and 4 shall under no circumstances exceed in total 35 % of the assets of a UCITS.'

9. The following Article 22a shall be inserted:

Unchanged

1. Without prejudice to the limits laid down in Article 25, the Member States may raise the limits laid down in Article 22 to a maximum of 20 % for investment in shares and/or debt securities issued by the same body when, according to the fund rules or instruments of incorporation, the aim of the UCITS' investment policy is to replicate the composition of a certain stock or debt securities index which is recognised by the UCITS' competent authorities, on the following basis:

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2. Replicable stock indices shall be indices which Member States consider to:

— have a composition which is sufficiently diversified,

— be easy to replicate,

— represent an adequate benchmark for the equity market to which they refer,

— be published in an appropriate manner.

3. Each Member State shall send to the Commission the list of stock-indices which they consider replicable by UCITS, together with details of the characteristics of such stock-indices. A similar communication shall be effected in respect of each change to the aforementioned list. The Commission shall publish the complete list of replicable stock-indices and updates thereto in the *Official Journal of the European Communities* at least once a year. This list may be subject to exchanges of views within the Contact Committee in accordance with the procedure laid down in Article 53(4).

4. The UCITS fund rules or instruments of incorporation, its prospectuses and any promotional literature shall describe the characteristics of the replicated stock-index.

These documents shall also contain a prominent statement drawing attention to the fact that the aim of the UCITS' investment policy is to replicate a certain stock-index and that therefore it may invest a relevant part of its assets in shares issued by the same issuer;

8. Article 24 shall be replaced by the following:

'Article 24

1. A UCITS may acquire the units of other collective investment undertakings within the meaning of the first and second indent of Article 1(2), provided that it invests no more than 10 % of its own assets in units of a single UCITS.

Deleted

— its investment policy reflects the composition of that index,

— its composition is sufficiently diversified,

Deleted

— the index represents an adequate benchmark for the market to which it refers,

— it is published in an appropriate manner.

2. As laid down in Article 20(1), each Member State shall send to the Commission for the purpose of information and with a view to facilitate a common approach to which indices are recognised, a list of the indices which they consider replicable by UCITS, together with details of the characteristics of such indices. The procedure laid down in Article 20(2) shall apply.'

Deleted

10. Article 24 shall be replaced by the following:

Unchanged

1. A UCITS may acquire the units of UCITS and/or other collective investment undertakings mentioned in Article 19(1)(e), provided that no more than 10 % of its assets are invested in units of a single UCITS or other collective investment undertaking. The Member States may raise the limit to a maximum of 20 %.

INITIAL PROPOSAL

2. The Member States may raise the limit laid down in paragraph 1 to a maximum of 35 %. However, in that case the UCITS must invest in at least five different collective investment undertakings mentioned in paragraph 1.

3. A UCITS may not invest in units of a collective investment undertaking within the meaning of the first and second indent of Article 1(2), which invests more than 10 % of its own assets in units of other collective investment undertakings.

4. Investment in the units of a unit trust managed by the same management company or by any other company with which the management company is linked by common management or control, or by a substantial direct or indirect holding, shall be permitted only in the case of a unit trust which, in accordance with its rules, has specialised in investment in a specific geographical area or economic sector, and provided that such investment is authorised by the competent authorities. Authorisation shall be granted only if the unit trust has announced its intention of making use of that option and if that option has been expressly stated in its rules.

A management company may not charge any fees or costs on account of transactions relating to a unit trust's units where some of a unit trust's assets are invested in the units of another unit trust managed by the same management company or by any other company with which the management company is linked by common management or control or by a substantial direct or indirect holding.

5. Paragraph 4 shall also apply where an investment company acquires units in another investment company to which it is linked within the meaning of the previous subparagraph.

Paragraph 4 shall also apply where an investment company acquires units of a unit trust to which it is linked or where a unit trust acquires units of an investment company to which it is linked.

6. The UCITS' fund rules or instruments of incorporation, its prospectuses and any promotional literature shall describe the characteristics of the other collective investment undertakings in the units of which the UCITS is authorised to invest.

AMENDED PROPOSAL

2. Investments made in units of collective investment undertakings other than UCITS may not exceed, in aggregate, 30 % of the assets of the UCITS.

The Member States may allow that, when a UCITS has acquired units of UCITS and/or other collective investment undertakings, the assets of the respective UCITS or other collective investment undertaking do not have to be combined to the limits laid down in Article 22.

3. A UCITS may not invest in units of another UCITS and/or other collective investment undertaking which invests itself more than 10 % in units of other UCITS and/or other collective investment undertakings.

Unchanged

Deleted

INITIAL PROPOSAL

These documents shall also contain a prominent statement drawing attention to the fact that the UCITS invests a part of or all its assets in units of other collective investment undertakings.';

9. The following Articles 24a and 24b shall be inserted:

'Article 24a

1. Notwithstanding the provision laid down in Article 19(4), a UCITS may invest its assets in deposits with credit institutions furnishing sufficient financial and professional guarantees, provided that the UCITS places not more than 10 % of its assets in deposits with the same credit institution or with credit institutions within the same group.

2. Member States may raise the limit laid down in paragraph 1 to a maximum of 35 %. However, in that case a UCITS must invest in deposits with at least five different credit institutions. For the purpose of this rule, credit institutions belonging to the same group are considered to be one single institution.

3. The UCITS' fund rules or instruments of incorporation, its prospectuses and any promotional literature must include a prominent statement drawing attention to the fact that the UCITS invests all or a part of its assets in deposits with credit institutions.

4. Member States shall not permit UCITS to invest in deposits with a credit institution which performs for that UCITS the duties of a depositary mentioned in Articles 7 and 14.

AMENDED PROPOSAL

11. The following Articles 24a and 24b shall be inserted:

Unchanged

If the UCITS' intends to invest its assets in instruments other than transferable securities, the UCITS' fund rules or instruments of incorporation, its prospectuses and any promotional literature shall

— in the case of investments according to Article 22a: describe the characteristics of the replicated index and contain a prominent statement drawing attention to the fact that the aim of the UCITS' investment policy is to replicate a certain index and that therefore it may invest a relevant part of its assets in securities issued by the same issuer,

— in the case of investments according to Article 24: include a clear statement drawing the attention to the fact that the UCITS invests in units of UCITS and/or other collective investment undertakings and describe the characteristics of the other UCITS or other collective investment undertakings in the units of which the UCITS is authorised to invest,

— in the case of investments according to Article 24b: include a clear statement drawing attention to the fact that the UCITS invests in standardised and/or OTC derivatives and contain a warning that those investments may be more risky and therefore are only suitable for experienced investors and for investors whose financial situation allows them to bear the risks involved in the investment in units of such UCITS,

— in the case of investments in deposits: include a prominent statement drawing attention to the fact that the UCITS invests all or a part of its assets in deposits with credit institutions,

— in case the net asset value of a UCITS is likely to have a high volatility due to its portfolio composition or the management techniques used: include a clear statement referring to this feature of the UCITS.

INITIAL PROPOSAL

AMENDED PROPOSAL

Article 24b

1. Notwithstanding the provisions laid down in Article 21, a UCITS may invest, as a part of its general investment policy, in financial-futures contracts and options mentioned in Article 19(1)(g) and (h), provided that the maximum potential exposure relating to the conclusion of each such derivative transaction is covered, during the entire period of the contract, by assets belonging to the UCITS of the right kind and sufficient in value

2. The UCITS' fund rules or instruments of incorporation, its prospectuses and any promotional literature must include a prominent statement drawing attention to the fact that the UCITS invests, as a part of its general investment policy, in the financial-futures contracts and options.

These documents shall also contain a warning that the investment in the units of such a UCITS is only suitable for experienced investors and for investors whose financial situation allows them to bear the risks involved in the investment in units of such UCITS.'

Unchanged

1. A UCITS may invest, as a part of its general investment policy and/or for hedging purposes, in financial derivative instruments mentioned in Article 19(1)(g) and (h), provided that

- the management or investment company has a risk-management process which enables it to daily monitor and measure the material risk of the positions and their contribution to the overall risk profile of the portfolio,
- the management or investment company has a process for accurate and independent assesment of the value of OTC derivative instruments.

2. When a UCITS intends to invest, as part of its general investment policy and/or for hedging operations, in the financial derivative instruments mentioned in Article 19(1)(g) and (h), it must disclose this intention in the documents referred to in Article 24a. In particular, it must list which instruments can be dealt in and the derivatives' contribution to the risks and returns of the entire portfolio. Information must also be given on quantitative limits, as provided for either in this directive or in the UCITS' investment objectives, for daily exposure in such instruments, and the methodologies used to calculate such limits.

3. In any case:

- the amount of all the commitments entered into by the UCITS through financial derivatives operations must not exceed the total net value of the UCITS' portfolio. In calculating the value of the commitments, reference must be made to the current value of the underlying; and,
- the amount of all the commitments entered into by the UCITS through OTC derivatives operations must not exceed 30 % of the total net value of the UCITS' portfolio. When calculating on a daily basis the value of such commitments, reference must be made to the current value of the underlying.

4. When the underlying of a financial derivative instrument consists of instruments for which the Directive sets quantitative limits, the underlying must be taken into account in the calculation of such limits. When a transferable security embeds a derivative, the latter must be taken into account when complying with the requirements of this Article.

INITIAL PROPOSAL

AMENDED PROPOSAL

5. Under no circumstances:
- shall the use of derivatives cause the UCITS to diverge from its investment objectives as laid down in the UCITS' prospectus,
 - shall the UCITS carry out deals in the financial derivative instruments mentioned in Article 19(1)(g) and (h), which correspond to uncovered sales of transferable securities.
6. For the purpose of calculating the limits set out in Article 22 for counter-party risk, the management or investment company must calculate a UCITS' counter-party exposure for OTC financial derivatives according to the methodology described in annex II, paragraph 5 of Directive 93/6/EEC as amended by Directive 98/33/EC⁽¹⁾, without application of the weightings for counter-party-risk.;
10. In Article 25(2), the following indent shall be added:
- 10 % of the money market instruments of any single issuing body.;
11. In Article 25(2), the second sentence shall be replaced by the following:
- 'The limits laid down in the second and fourth indents may be disregarded at the time of acquisition if at that time the gross amount of the debt securities or of the money market instruments, or the net amount of the securities in issue cannot be calculated.;
12. Article 25(3)(e) shall be replaced by the following:
- 'e) shares held by an investment company in the capital of subsidiary companies incorporated in a Member State carrying on the business of management, advice or marketing exclusively on its behalf.;
12. In Article 25(2), the third indent shall be replaced and the following fourth indent shall be added:
- 10 % of the units of any single UCITS and/or other collective investment undertaking within the meaning of the first and second indent of Article 1(2);
- 10 % of the money market instruments according to Article 19(1)(i) of any single issuing body.;
13. In Article 25(2), the second sentence shall be replaced by the following:
- 'The limits laid down in the second, third and fourth indents may be disregarded at the time of acquisition if at that time the gross amount of the debt securities or of the money market instruments, or the net amount of the securities in issue cannot be calculated.;
14. Article 25(3)(e) shall be replaced by the following:
- 'e) shares held by an investment company or investment companies in the capital of subsidiary companies carrying on only the business of management, advice or marketing in the country where the subsidiary is located, in regard to the repurchase of units at unit-holders' request exclusively on its or their behalf.;

⁽¹⁾ OJ L 204, 21.7.1998, p. 29.

INITIAL PROPOSAL

13. Article 26(1), second sentence shall be replaced by the following:

‘While ensuring observance of the principle of risk spreading, the Member States may allow recently authorised UCITS to derogate from Articles 22, 22a, 23, 24, 24a and 24b for six months following the date of their authorisation.’;

14. Article 41(2), shall be replaced by the following:

‘2. Paragraph 1 shall not prevent such undertakings from acquiring transferable securities or other financial instruments mentioned in Article 19(1)(e), (g), (h) and (i) which are not fully paid.’;

15. Article 42 shall be replaced by the following:

‘Article 42

Neither

— an investment company, nor

— a management company or depositary acting on behalf of a unit trust

may carry out uncovered sales of transferable securities or of other financial instruments mentioned in Article 19(1)(e), (g), (h) and (i).’;

16. After Article 53 the following Article 53a is inserted:

‘Article 53a

The technical modifications to be made to this Directive in the following areas shall be adopted in accordance with the procedure to be regulated at a later stage by a Directive amending this Directive:

— clarification of the definitions in order to ensure uniform application of this Directive throughout the Community,

— adaptation of the ceilings referred to in Section V and in Article 36(2) in order to take account of developments on financial markets, where such adaptations will not lead to stricter requirements for the UCITS,

— alignment of terminology on and the framing of definitions in accordance with subsequent acts on UCITS and related matters.’

AMENDED PROPOSAL

15. Article 26(1), second sentence shall be replaced by the following:

‘While ensuring observance of the principle of risk spreading, the Member States may allow recently authorised UCITS to derogate from Articles 22, 22a, 23, 24 and 24b for six months following the date of their authorisation.’;

16. Article 41(2), shall be replaced by the following:

Unchanged

17. Article 42 shall be replaced by the following:

Unchanged

18. After Article 53 the following Article 53a is inserted:

Unchanged

1. In addition to its functions provided for in Article 53(1), the Contact Committee may also meet as a Regulatory Committee within the meaning of Article 5 of Decision 1999/468/EC to assist the Commission in regard to the technical modifications to be made to this Directive in the following areas:

Unchanged

Deleted

— alignment of terminology on and the framing of definitions in accordance with subsequent acts on UCITS and related matters.

INITIAL PROPOSAL

AMENDED PROPOSAL

2. The regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, in compliance with Article 7(3) and Article 8 thereof.

3. The period provided for in Article 5(6) of Decision 1999/468/EC shall be three months.'

Article 2

Unchanged

No later than 30 June 2002 Member States shall adopt the laws, regulations and administrative provisions necessary for them to comply with this Directive.

These provisions shall enter into force no later than 31 December 2002. The Member States shall forthwith inform the Commission thereof.

When Member States adopt these provisions they shall include a reference to this Directive or accompany them with such a reference on the occasion of their official publication. The manner in which such references are to be made shall be laid down by the Member States.

Article 3

This Directive shall enter into force 20 days after the date of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.
