DIRECTIVE 2001/108/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 January 2002

amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS

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 [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) The scope of Council Directive 85/611/EEC [4] 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 collective investment 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 be widened in order to permit them to invest in financial instruments, other than transferable securities, which are sufficiently liquid. The financial instruments which are eligible to be investment assets of the portfolio of the UCITS are listed in this Directive. The selection of investments for a portfolio by means of an index is a management technique.

(3) The definition of transferable securities included in this Directive is valid only for this Directive and in no way affects the various definitions used in national legislation for other purposes such as taxation. 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 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, medium-term notes and bankers' acceptances.

(5) It is useful to ensure that the concept of regulated market in this Directive corresponds to that in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [5].

(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 liquid financial assets mentioned in this Directive and which operate on the principle of risk spreading. It is necessary that UCITS or other collective investment undertakings in which a UCITS invests be subject to effective supervision.

(7) The development of opportunities for a UCITS to invest in UCITS and in other collective investment undertakings should be facilitated. It is therefore essential to ensure that such investment activity does not diminish investor protection. Owing to the enhanced possibilities for UCITS to invest in the units of other UCITS and/or collective investment undertakings, it is necessary to lay down certain rules on quantitative limits, the disclosure of information and prevention of the cascade phenomenon.

(8) To take market developments into account and in consideration of the completion of economic and monetary union it is desirable to permit UCITS to invest in bank deposits. To ensure adequate liquidity of investments in deposits, these deposits are to be repayable on demand or have the right to be withdrawn. If the deposits are made with a credit institution the registered office of which is located in a non-Member State, the credit institution should be subject to prudential rules equivalent to those laid down in Community legislation.

(9) 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. The holding of such ancillary liquid assets may be justified, for example, in the following cases: in order to cover current or exceptional payments; in the case of sales, for the time necessary to reinvest in transferable

[1] OJ C 280, 9.9.1998, p. 6 and OJ C 311 E, 31.10.2000, p. 302.
[2] OJ C 116, 28.4.1999, p. 44.
[3] Opinion of the European Parliament of 17 February 2000 (OJ C 339, 29.11.2000, p. 220), Council Common Position of 5 June 2001 (OJ C 297, 23.10.2001, p. 35) and Decision of the European Parliament of 23 October 2001. Council Decision of 4 December 2001.
[4] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).
[5] OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC.

securities, money market instruments and/or in other financial assets provided for in this Directive; for a period of time strictly necessary when, because of unfavourable market conditions, the investment in transferable securities, money market instruments and in other financial assets must be suspended.

(10) For prudential reasons it is necessary to avoid excessive concentration by a UCITS in investments which expose them to counterparty risk to the same entity or to entities belonging to the same group.

(11) UCITS should be explicitly permitted, as part of their general investment policy and/or for hedging purposes in order to reach a set financial target or the risk profile indicated in the prospectus, to invest in financial derivative instruments. In order to ensure investor protection, it is necessary to limit the maximum potential exposure relating to derivative instruments so that it does not exceed the total net value of the UCITS's portfolio. In order to ensure constant awareness of the risks and commitments arising from derivative transactions and to check compliance with investment limits, these risks and commitments will have to be measured and monitored on an ongoing basis. Finally, in order to ensure investor protection through disclosure, UCITS should describe their strategies, techniques and investment limits governing their derivative operations.

(12) With regard to over-the-counter (OTC) derivatives, additional requirements should be set in terms of the eligibility of counterparties and instruments, liquidity and ongoing assessment of the position. The purpose of such additional requirements is to ensure an adequate level of investor protection, close to that which they obtain when they acquire derivatives dealt in on regulated markets.

(13) Operations in derivatives may never be used to circumvent the principles and rules set out in this Directive. With regard to OTC derivatives, additional risk-spreading rules should apply to exposures to a single counterparty or group of counterparties.

(14) Some portfolio management techniques for collective investment undertakings investing primarily in shares and/or debt securities are based on the replication of stock indices and/or debt-security indices. It is desirable to permit UCITS to replicate well-known and recognised stock indices and/or debt-security indices. It may therefore be necessary to introduce more flexible risk-spreading rules for UCITS investing in shares and/or debt securities to this end.

(15) Collective investment undertakings falling within the scope of this Directive should 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 have subsidiaries only when necessary to carry out effectively on behalf of that UCITS certain activities, also defined in this Directive. It is necessary to ensure an effective supervision of UCITS. Therefore the establishment of a subsidiary of a UCITS in a third country should be permitted only in the cases and under the conditions identified in the Directive. The general obligation to act solely in the interests of unit-holders and, in particular, the objective of increasing cost efficiencies, never justify a UCITS undertaking measures which may hinder the competent authorities from exercising effectively their supervisory functions.

(16) There is a 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 and does not go beyond what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty.

(17) 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 [1].

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

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 85/611/EEC is hereby 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 referred to in Article 19(1) of capital raised from the public and which operates on the principle of risk-spreading and';

2. in Article 1 the following paragraphs shall be added:

   '8. For the purposes 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"),

[1] OJ L 184, 17.7.1999, p. 23.

— 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.

9. For the purposes of this Directive "money market instruments" shall mean instruments normally dealt in on the money market which are liquid, and have a value which can be accurately determined at any time.';

3. Article 19(1)(a) shall be replaced by the following:

'(a) transferable securities and money market instruments admitted to or dealt in on a regulated market within the meaning of Article 1(13) of the ISD, and/or';

4. in Article 19(1)(b) and (c), the words 'and money market instruments' shall be added after the words 'transferable securities';

5. in Article 19(1):

— the terms 'and/or' shall be added to the end of point (d),

— the following points shall be added:

'(e) units of UCITS authorised according to this Directive and/or other collective investment undertakings within the meaning of the first and second indent of Article 1(2), should they be situated in a Member State or not, provided that:

— such other collective investment undertakings are authorised under laws which provide that they are 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 unit-holders in the other collective investment undertakings is equivalent to that provided for unit-holders in a UCITS, and in particular that the rules on assets segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments are equivalent to the requirements of this Directive,

— the business of the other collective investment undertakings 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,

— no more than 10 % of the UCITS' or the other collective investment undertakings' assets, whose acquisition is contemplated, can, according to their fund rules or instruments of incorporation, be invested in aggregate in units of other UCITS or other collective investment undertakings, 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) financial derivative instruments, including equivalent cash-settled instruments, dealt in on a regulated market referred to in subparagraphs (a), (b) and (c); and/or financial derivative instruments dealt in over-the-counter ("OTC derivatives"), provided that:

— the underlying consists of instruments covered by this paragraph, 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,

— the counterparties to OTC derivative transactions are institutions subject to prudential supervision, and belonging to the categories approved by the UCITS' competent authorities, and

— the OTC derivatives are subject to reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the UCITS' initiative, and/or

(h) money market instruments other than those dealt in on a regulated market, which fall under Article 1(9), if the issue or issuer of such instruments is itself regulated for the purpose of protecting investors and savings, and provided that they are:

— issued or guaranteed by a central, regional or local authority or 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 dealt in on regulated markets referred to in subparagraphs (a), (b) or (c), or

— issued or guaranteed by an establishment subject to prudential supervision, in accordance with criteria defined by Community law, or by an establishment which is subject to and complies with prudential rules considered by the competent authorities to be at least as stringent as those laid down by Community law; or

— issued by other bodies belonging to the categories approved by the UCITS' competent authorities provided that investments in such instruments are subject to investor protection equivalent to that laid down in the first, the second or the third indent and provided that the issuer is a company whose capital and reserves amount to at least EUR 10 million and which presents and publishes its annual accounts in accordance with Directive 78/660/EEC (*), is an entity which, within a group of companies which includes one or several listed companies, is dedicated to the financing of the group or is an entity which is dedicated to the financing of securitisation vehicles which benefit from a banking liquidity line.

(*) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 1999/60/EC (OJ L 162, 26.6.1999, p. 65).';

6. in Article 19(2)(a), the words 'and money market instruments' shall be added after the words 'transferable securities';

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

8. Article 20 shall be deleted;

9. Article 21 shall be replaced by the following:

'*Article 21*

1. The management or investment company must employ a risk-management process which enables it to monitor and measure at any time the risk of the positions and their contribution to the overall risk profile of the portfolio; it must employ a process for accurate and independent assessment of the value of OTC derivative instruments. It must communicate to the competent authorities regularly and in accordance with the detailed rules they shall define, the types of derivative instruments, the underlying risks, the quantitative limits and the methods which are chosen in order to estimate the risks associated with transactions in derivative instruments regarding each managed UCITS.

2. The Member States may authorise UCITS to employ techniques and instruments relating to transferable securities and money market instruments under the conditions and within the limits which they lay down provided that such techniques and instruments are used for the purpose of efficient portfolio management. When these operations concern the use of derivative instruments, these conditions and limits shall conform to the provisions laid down in this Directive.

Under no circumstances shall these operations cause the UCITS to diverge from its investment objectives as laid down in the UCITS' fund rules, instruments of incorporation or prospectus.

3. A UCITS shall ensure that its global exposure relating to derivative instruments does not exceed the total net value of its portfolio.

The exposure is calculated taking into account the current value of the underlying assets, the counterparty risk, future market movements and the time available to liquidate the positions. This shall also apply to the following subparagraphs.

A UCITS may invest, as a part of its investment policy and within the limit laid down in Article 22(5), in financial derivative instruments provided that the exposure to the underlying assets does not exceed in aggregate the investment limits laid down in Article 22. The Member States may allow that, when a UCITS invests in index-based financial derivative instruments, these investments do not have to be combined to the limits laid down in Article 22.

When a transferable security or money market instrument embeds a derivative, the latter must be taken into account when complying with the requirements of this Article.

4. The Member States shall send the Commission full information and any subsequent changes in their regulation concerning the methods used to calculate the risk exposures mentioned in paragraph 3, including the risk exposure to a counterparty in OTC derivative transactions, no later than 13 February 2004. The Commission shall forward that information to the other Member States. Such information will be the subject of exchanges of views within the Contact Committee in accordance with the procedure laid down in Article 53(4).';

10. Article 22 shall be replaced by the following:

'*Article 22*

1. A UCITS may invest no more than 5 % of its assets in transferable securities or money market instruments issued by the same body. A UCITS may not invest more than 20 % of its assets in deposits made with the same body.

The risk exposure to a counterparty of the UCITS in an OTC derivative transaction may not exceed:

— 10 % of its assets when the counterpart is a credit institution referred to in Article 19(1)(f), or

— 5 % of its assets, in other cases.