DIRECTIVE 2001/107/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 a view to regulating management companies and simplified prospectuses

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) Council Directive 85/611/EEC of 20 December 1985 on undertakings for collective investment in transferable securities (UCITS) [4], has already contributed significantly to the achievement of the Single Market in this field, laying down — for the first time in the financial services sector — the principle of mutual recognition of authorisation and other provisions which facilitate the free circulation within the European Union of the units of the collective investment undertakings (unit trusts/common funds or as investment companies) covered by that Directive.

(2) However, Directive 85/611/EEC does not regulate to a great extent the companies which manage collective investment undertakings (so-called 'management companies'). In particular, Directive 85/611/EEC does not lay down provisions ensuring in all Member States equivalent market access rules and operating conditions for such companies. Directive 85/611/EEC does not lay down provisions regulating the establishment of branches and the free provision of services by such companies in Member States other than their home Member State.

(3) Authorisation granted in the management company's home Member State should ensure investor protection and the solvency of management companies, with a view to contributing to the stability of the financial system. The approach adopted is to ensure the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the grant of a single authorisation valid throughout the European Union and the application of the home Member State supervision.

(4) It is necessary, for the protection of investors, to guarantee the internal overview of every management company in particular by means of a two-man management and by adequate internal control mechanisms.

(5) In order to ensure that the management company will be able to fulfil the obligations arising from its activities and thus to ensure its stability, initial capital and an additional amount of own funds are required. To take account of developments, particularly those pertaining to capital charges on operational risk within the European Union and other international fora, these requirements, including the use of guarantees, will have to be reviewed within three years.

(6) By virtue of mutual recognition, management companies authorised in their home Member States should be permitted to carry on the services for which they have received authorisation throughout the European Union by establishing branches or under the freedom to provide services. The approval of the fund rules of common funds/unit trusts falls within the competence of the management company's home Member State.

(7) With regard to collective portfolio management (management of unit trusts/common funds and investment companies), the authorisation granted to a management company authorised in its home Member State should permit the company to carry on in host Member States the following activities: to distribute the units of the harmonised unit trusts/common funds managed by the company in its home Member State; to distribute the shares of the harmonised investment companies, managed by such a company; to perform all the other functions and tasks included in the activity of collective portfolio management; to manage the assets of investment companies incorporated in Member States other than its home Member State; to perform, on the basis of mandates, on behalf of management companies incorporated in Member States other than its home Member State, the functions included in the activity of collective portfolio management.

[1] OJ C 272, 1.9.1998, p. 7 and OJ C 311 E, 31.10.2000, p. 273.
[2] OJ C 116, 28.4.1999, p. 1.
[3] Opinion of the European Parliament of 17 February 2000 (OJ C 339, 29.11.2000, p. 228), Council Common Position of 5 June 2001 (OJ C 297, 23.10.2001, p. 10) 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 the Council (OJ L 290, 17.11.2000, p. 27).

(8) The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or should withdraw authorisation where factors, such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that a management company has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry on or does carry on the greater part of its activities. For the purpose of this Directive, a management company should be authorised in the Member State in which it has its registered office. In accordance with the principle of the home country control, only the Member State in which the management company has its registered office can be considered competent to approve the fund rules of unit trusts/common funds set up by such a company and the choice of the depositary. In order to prevent supervisory arbitrage and to promote confidence in the effectiveness of supervision by the home Member State authorities, a requirement for authorisation of a UCITS should be that it should not be prevented in any legal way from being marketed in its home Member State. This does not affect the free decision, once the UCITS has been authorised, to choose the Member State(s) where the units of the UCITS are to be marketed in accordance with this Directive.

(9) Directive 85/611/EEC limits the scope of management companies to the sole activity of management of unit trusts/common funds and of investment companies (collective portfolio management). In order to take into account recent developments in national legislation of Member States and to permit such companies to achieve important economies of scale, it is desirable to revise this restriction. It is therefore desirable to permit such companies to carry out also the activity of management of portfolios of investments on a client-by-client basis (individual portfolio management) including the management of pension funds as well as some specific non-core activities linked to the main business. Such an extension of the scope of the activity of the management company would not prejudge the stability of such companies. However, specific rules should be introduced preventing conflicts of interest when management companies are authorised to carry on both the business of collective and individual portfolio management.

(10) The activity of management of portfolios of investments is an investment service already covered by Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [1]. In order to ensure a homogeneous regulatory framework in this area, it is desirable to subject management companies, the authorisation of which also covers that service, to the operating conditions laid down in that Directive.

(11) A home Member State may, as a general rule, establish rules stricter than those laid down in this Directive, in particular as regards authorisation conditions, prudential requirements and the rules on reporting and the full prospectus.

(12) It is desirable to lay down rules defining the preconditions under which a management company may delegate, on the basis of mandates, specific tasks and functions to third parties so as to increase the efficiency of the conduct of its business. In order to ensure the correct functioning of the principles of mutual recognition of the authorisation and of the home country control, Member States permitting such delegations should ensure that the management company to which they granted an authorisation does not delegate globally its functions to one or more third parties, so as to become a letter box entity, and the existence of mandates does not hinder an effective supervision over the management company. However, the fact that the management company has delegated its own functions should in no case affect the liabilities of that company and of the depositary vis-à-vis the unit holders and the competent authorities.

(13) To safeguard shareholders' interests and to secure a level playing field in the market for harmonised collective investment undertakings, an initial capital is required for investment companies. However, investment companies which have designated a management company will be covered through the management company's additional amount of own funds.

(14) Articles 5g and 5h should always be complied with by authorised investment companies, either by the company directly according to Article 13b or indirectly, due to the fact that if an authorised investment company chooses to designate a management company, that management company should be authorised in accordance with the Directive and thus obliged to comply with Articles 5g and 5h.

(15) To take into account developments of information techniques, it is desirable to revise the current information framework provided for in Directive 85/611/EEC. In particular, it is desirable to introduce, in addition to the existing full prospectus, a new type of prospectus for UCITS (simplified prospectus). Such a new prospectus should be designed to be investor-friendly and should therefore represent a source of valuable information for the average investor. Such a prospectus should give key information about the UCITS in a clear, concise and easily understandable way. However, the investor should always be informed, by an appropriate statement to be included in the simplified prospectus, that more detailed information is contained in the full prospectus and in the UCITS' yearly and half-yearly report, which can be obtained free of charge at his/her request. The simplified prospectus should always be offered free of charge to subscribers before the conclusion of the contract. This should be a sufficient precondition to meet the legal obligation under this Directive to provide information to subscribers before the conclusion of the contract.

[1] OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC.

(16) There is a need to ensure a level playing field among intermediaries in the financial services area when providing the same services and to ensure a harmonised minimum degree of investor protection. A harmonised minimum degree of harmonisation of the conditions for taking up business and operating conditions represents the essential precondition for achieving the internal market for these operators. Therefore, only a binding Community Directive laying down agreed minimum standards in this respect 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 Commission may consider proposing codification in due time after adoption of the proposals,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 85/611/EEC is hereby amended as follows:

1. the following Article 1a shall be inserted:

'*Article 1a*

For the purposes of this Directive:

1. "depositary" shall mean any institution entrusted with the duties mentioned in Articles 7 and 14 and subject to the other provisions laid down in Sections IIIa and IVa;

2. "management company" shall mean any company, the regular business of which is the management of UCITS in the form of unit trusts/common funds and/or of investment companies (collective portfolio management of UCITS); this includes the functions mentioned in Annex II;

3. a "management company's home Member State" shall mean the Member State, in which the management company's registered office is situated;

4. a "management company's host Member State" shall mean the Member State, other than the home Member State, within the territory of which a management company has a branch or provides services;

5. a "UCITS home Member State" shall mean:

   (a) with regard to a UCITS constituted as unit trust/common fund, the Member State in which the management company's registered office is situated,

   (b) with regard to a UCITS constituted as investment company, the Member State in which the investment company's registered office is situated;

6. a "UCITS host Member State" shall mean the Member State, other than the UCITS home Member State, in which the units of the common fund/unit trust or of the investment company are marketed;

7. "branch" shall mean a place of business which is a part of the management company, which has no legal personality and which provides the services for which the management company has been authorised; all the places of business set up in the same Member State by a management company with headquarters in another Member State shall be regarded as a single branch;

8. "competent authorities" shall mean the authorities which each Member State designates under Article 49 of this Directive;

9. "close links" shall mean a situation as defined in Article 2(1) of Directive 95/26/EC (*);

10. "qualifying holdings" shall mean any direct or indirect holding in a management company which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the management company in which that holding subsists.

    For the purpose of this definition, the voting rights referred to in Article 7 of Directive 88/627/EEC (**) shall be taken into account;

11. "ISD" shall mean Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (***);

12. "parent undertaking" shall mean a parent undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC (****);

13. "subsidiary" shall mean a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC; any subsidiary of a subsidiary undertaking shall also be regarded as a subsidiary of the parent undertaking which is the ultimate parent of those undertakings;

14. "initial capital" shall mean capital as defined in items 1 and 2 of Article 34(2) of Directive 2000/12/EC (*****);

15. "own funds" shall mean own funds as defined in Title V, Chapter 2, Section 1 of Directive 2000/12/EC; this definition may, however, be amended in the circumstances described in Annex V of Directive 93/6/EEC (******).

(*) OJ L 168, 18.7.1995, p. 7.
(**) OJ L 348, 17.12.1988, p. 62.
(***) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC (OJ L 290, 17.11.2000, p. 27).
(****) OJ L 193, 18.7.1983, p. 1. Directive as last amended by the 1994 Act of Accession.
(*****) OJ L 126, 26.5.2000, p. 1. Directive as amended by Directive 2000/28/EC of the European Parliament and of the Council (OJ L 275, 27.10.2000, p. 37).
(******) OJ L 141, 11.6.1993, p. 1. Directive as last amended by Directive 98/33/EC of the European Parliament and of the Council (OJ L 204, 21.7.1998, p. 29).';

2. Article 4(3) shall be replaced by the following:

'3. The competent authorities may not authorise a UCITS if the management company or the investment company do not comply with the preconditions laid down in this Directive, in Sections III and IV respectively.

Moreover the competent authorities may not authorise a UCITS if the directors of the depositary are not of sufficiently good repute or are not sufficiently experienced also in relation to the type of UCITS to be managed. To that end, the names of the directors of the depositary and of every person succeeding them in office must be communicated forthwith to the competent authorities.

Directors shall mean those persons who, under the law or the instruments of incorporation, represent the depositary, or who effectively determine the policy of the depositary.

3a. The competent authorities shall not grant authorisation if the UCITS is legally prevented (e.g. through a provision in the fund rules or instruments of incorporation) from marketing its units or shares in its home Member State.';

3. the title of Section III and Articles 5 and 6 shall be replaced by the following:

'SECTION III

Obligations regarding management companies

Title A

Conditions for taking up business

Article 5

1. Access to the business of management companies is subject to prior official authorisation to be granted by the home Member State's competent authorities. Authorisation granted under this Directive to a management company shall be valid for all Member States.

2. No management company may engage in activities other than the management of UCITS authorised according to this Directive except the additional management of other collective investment undertakings which are not covered by this Directive and for which the management company is subject to prudential supervision but which cannot be marketed in other Member States under this Directive.

The activity of management of unit trusts/common funds and of investment companies includes, for the purpose of this Directive, the functions mentioned in Annex II which are not exhaustive.

3. By way of derogation from paragraph 2, Member States may authorise management companies to provide, in addition to the management of unit trusts/common funds and of investment companies, the following services:

(a) management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Section B of the Annex to the ISD,

(b) as non-core services:

— investment advice concerning one or more of the instruments listed in Section B of the Annex to the ISD,

— safekeeping and administration in relation to units of collective investment undertakings.

Management companies may in no case be authorised under this Directive to provide only the services mentioned in this paragraph or to provide non-core services without being authorised for the service referred to in point (a).

4. Article 2(4), Article 8(2), Articles 10, 11 and 13 of the ISD shall apply to the provision of the services mentioned in paragraph 3 of this Article by management companies.

Article 5a

1. Without prejudice to other conditions of general application laid down by national law, the competent authorities shall not grant authorisation to a management company unless:

(a) the management company has an initial capital of at least EUR 125 000:

— When the value of the portfolios of the management company, exceeds EUR 250 000 000, the management company shall be required to provide an additional amount of own funds. This additional amount of own funds shall be equal to 0,02 % of the amount by which the value of the portfolios of the management company exceeds EUR 250 000 000. The required total of the initial capital and the additional amount shall not, however, exceed EUR 10 000 000.

— For the purpose of this paragraph, the following portfolios shall be deemed to be the portfolios of the management company:

(i) unit trusts/common funds managed by the management company including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation;

(ii) investment companies for which the management company is the designated management company;

(iii) other collective investment undertakings managed by the management company including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation.

— Irrespective of the amount of these requirements, the own funds of the management company shall never be less than the amount prescribed in Annex IV of Directive 93/6/EEC.

— Member States may authorise management companies not to provide up to 50 % of the additional amount of own funds referred to in the first indent if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking. The credit institution or insurance undertaking must have its registered office in a Member State, or in a non-Member State provided that it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Community law.

— No later than 13 February 2005, the Commission shall present a report to the European Parliament and the Council on the application of this capital requirement, accompanied where appropriate by proposals for its revision;

(b) the persons who effectively conduct the business of a management company are of sufficiently good repute and are sufficiently experienced also in relation to the type of UCITS managed by the management company. To that end, the names of these persons and of every person succeeding them in office must be communicated forthwith to the competent authorities. The conduct of a management company's business must be decided by at least two persons meeting such conditions;

(c) the application for authorisation is accompanied by a programme of activity setting out, *inter alia*, the organisational structure ofhe management company;

(d) both its head office and its registered office are located in the same Member State.

2. Moreover where close links exist between the management company and other natural or legal persons, the competent authorities shall grant authorisation only if those do not prevent the effective exercise of their supervisory functions.

The competent authorities shall also refuse authorisation if the laws, regulations or administrative provisions of a non-member country governing one or more natural or legal persons with which the management company has close links, or difficulties involved in their enforcement, prevent the effective exercise of their supervisory functions.

The competent authorities shall require management companies to provide them with the information they require to monitor compliance with the conditions referred to in this paragraph on a continuous basis.

3. An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted. Reasons shall be given whenever an authorisation is refused.

4. A management company may start business as soon as authorisation has been granted.

5. The competent authorities may withdraw the authorisation issued to a management company subject to this Directive only where that company:

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive more than six months previously unless the Member State concerned has provided for authorisation to lapse in such cases;

(b) has obtained the authorisation by making false statements or by any other irregular means;

(c) no longer fulfils the conditions under which authorisation was granted;

(d) no longer complies with Directive 93/6/EEC if its authorisation also covers the discretionary portfolio management service referred to in Article 5(3)(a) of this Directive;

(e) has seriously and/or systematically infringed the provisions adopted pursuant to this Directive; or

(f) falls within any of the cases where national law provides for withdrawal.

Article 5b

1. The competent authorities shall not grant authorisation to take up the business of management companies until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of a management company, they are not satisfied as to the suitability of the aforementioned shareholders or members.

2. In the case of branches of management companies that have registered offices outside the European Union and are starting or carrying on business, the Member States shall not apply provisions that result in treatment more favourable than that accorded to branches of management companies that have registered offices in Member States.

3. The competent authorities of the other Member State involved shall be consulted beforehand on the authorisation of any management company which is:

(a) a subsidiary of another management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State,

(b) a subsidiary of the parent undertaking of another management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State, or