COMMON POSITION (EC) No 24/2001

adopted by the Council on 5 June 2001

with a view to adopting Directive 2001/.../EC of the European Parliament and of the Council of ... 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

(2001/C 297/03)

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.

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[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 and Decision of the European Parliament of ... (not yet published in the Official Journal).
[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).
[5] OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC.

(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 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 non-member 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 unitholders 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"),

   — 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 point 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 unitholders 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

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

(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 asset 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 State belongs, 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 ... (*). 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).

(*) Twenty-four months after the entry into force of this Directive amending Directive 85/611/EEC';

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.

2. Member States may raise the 5 % limit laid down in the first sentence of paragraph 1 to a maximum of 10 %. However, the total value of the transferable securities and the money market instruments held by the UCITS in the issuing bodies in each of which it invests more than 5 % of its assets must not then exceed 40 % of the value of its assets. This limitation does not apply to deposits and OTC derivative transactions made with financial institutions subject to prudential supervision.

Notwithstanding the individual limits laid down in paragraph 1, a UCITS may not combine:

— investments in transferable securities or money market instruments issued by,

— deposits made with, and/or

— exposures arising from OTC derivative transactions undertaken with

a single body in excess of 20 % of its assets.

3. The Member States may raise the 5 % limit laid down in the first sentence of paragraph 1 to a maximum of 35 % if the transferable securities or money market instruments are issued or guaranteed by a Member State, by its local authorities, by a non-member State or by public international bodies to which one or more Member States belong.

4. Member States may raise the 5 % limit laid down in the first sentence of paragraph 1 to a maximum of 25 % in the case of certain bonds when these are issued by a credit institution which has its registered office in a Member State and is subject by law to special public supervision designed to protect bond-holders. In particular, sums deriving from the issue of these bonds must be invested in conformity with the law in assets which, during the whole period of validity of the bonds, are capable of covering claims attaching to the bonds and which, in the event of failure of the issuer, would be used on a priority basis for the reimbursement of the principal and payment of the accrued interest.

When a UCITS invests more than 5 % of its assets in the bonds referred to in the first subparagraph and issued by one issuer, the total value of these investments may not exceed 80 % of the value of the assets of the UCITS.

The Member States shall send the Commission a list of the aforementioned categories of bonds together with the categories of issuers authorised, in accordance with the laws and supervisory arrangements mentioned in the first subparagraph, to issue bonds complying with the criteria set out above. A notice specifying the status of the guarantees offered shall be attached to these lists. The Commission shall immediately forward that information to the other Member States together with any comments which it considers appropriate, and shall make the information available to the public. Such communications may be the subject of exchanges of views within the Contact Committee in accordance with the procedure laid down in Article 53(4).

5. The transferable securities and money market instruments referred to in paragraphs 3 and 4 shall not be taken into account for the purpose of applying the limit of 40 % referred to in paragraph 2.

The limits provided for in paragraphs 1, 2, 3 and 4 may not be combined, and thus investments in transferable securities or money market instruments issued by the same body or in deposits or derivative instruments made with this body carried out in accordance with paragraphs 1, 2, 3 and 4 shall under no circumstances exceed in total 35 % of the assets of the UCITS.

Companies which are included in the same group for the purposes of consolidated accounts, as defined in accordance with Directive 83/349/EEC(*) or in accordance with recognised international accounting rules, are regarded as a single body for the purpose of calculating the limits contained in this Article.

Member States may allow cumulative investment in transferable securities and money market instruments within the same group up to a limit of 20 %.

(*) Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1). Directive as last amended by the 1994 Act of Accession';

11. the following Article 22a shall be inserted:

'*Article 22*a

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 competent authorities, on the following basis:

— its composition is sufficiently diversified,

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

— it is published in an appropriate manner.

2. Member States may raise the limit laid down in paragraph 1 to a maximum of 35 % where that proves to be justified by exceptional market conditions in particular in regulated markets where certain transferable securities or money market instruments are highly dominant. The investment up to this limit is only permitted for a single issuer';

12. In Article 23(1), the words 'and money market instruments' shall be added after the words 'transferable securities';

13. Article 24 shall be replaced by the following:

'*Article 24*

1. A UCITS may acquire the units of UCITS and/or other collective investment undertakings referred to 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 %.

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 for the purposes of the limits laid down in Article 22.

3. When a UCITS invests in the units of other UCITS and/or other collective investment undertakings that are managed, directly or by delegation, 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, that management company or other company may not charge subscription or redemption fees on account of the UCITS' investment in the units of such other UCITS and/or collective investment undertakings.

A UCITS that invests a substantial proportion of its assets in other UCITS and/or collective investment undertakings shall disclose in its prospectus the maximum level of the management fees that may be charged to both to the UCITS itself and to the other UCITS and/or collective investment undertakings in which it intends to invest. In its annual report it shall indicate the maximum proportion of management fees charged both to the UCITS itself and to the UCITS and/or other collective investment undertaking in which it invests';

14. the following Article 24a shall be inserted:

'*Article 24a*

1. The prospectus shall indicate in which categories of assets a UCITS is authorised to invest. It shall mention if transactions in financial derivative instruments are authorised; in this event, it must include a prominent statement indicating if these operations may be carried out for the purpose of hedging or with the aim of meeting investment goals, and the possible outcome of the use of financial derivative instruments on the risk profile.

2. When a UCITS invests principally in any category of assets defined in Article 19 other than transferable securities and money market instruments or replicates a stock or debt securities index in accordance with Article 22a, its prospectus and, where necessary, any other promotional literature must include a prominent statement drawing attention to the investment policy.

3. When the net asset value of a UCITS is likely to have a high volatility due to its portfolio composition or the portfolio management techniques that may be used, its prospectus and, where necessary, any other promotional literature must include a prominent statement drawing attention to this characteristic.

4. On request of an investor, the management company must also provide supplementary information relating to the quantitative limits that apply in the risk management of the UCITS, to the methods chosen to this end and to the recent evolution of the main instrument categories' risks and yields';

15. In Article 25(2):

1. the third indent shall be replaced by the following:

'— 25 % 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)',

2. the following indent shall be added:

'— 10 % of the money market instruments of any single issuing body',

16. 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';

17. in Article 25(3), (a), (b) and (c) the words 'and money market instruments' shall be added after the words 'transferable securities';

18. 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';

19. Article 26(1) shall be replaced by the following:

'1. UCITS need not comply with the limits laid down in this section when exercising subscription rights attaching to transferable securities or money market instruments which form part of their assets.

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

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

'2. Paragraph 1 shall not prevent such undertakings from acquiring transferable securities, money market instruments or other financial instruments referred to in Article 19(1)(e), (g), and (h) which are not fully paid';

21. 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, money market instruments or other financial instruments referred to in Article 19(1)(e), (g), and (h)';

22. after Article 53 the following Article shall be inserted:

'*Article 53*a

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:

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

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

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

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

3. The Committee shall adopt its rules of procedure.

(*) OJ L 184, 17.7.1999, p. 23.'

Article 2

No later than ....(*) Member States shall adopt the laws, regulations and administrative provisions necessary for them to comply with this Directive. They shall forthwith inform the Commission thereof.

They shall apply these measures no later than ....(**).

When Member States adopt these measures they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 3

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 4

This Directive is addressed to the Member States.

Done at ...

For the European Parliament	*For the Council*
The President	*The President*

(*) Eighteen months after the date of entry into force of this Directive.
(**) Twenty-four months after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 17 July 1998, the Commission put forward a proposal [1] for a Directive of the European Parliament and of the Council 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) [2].

2. The Economic and Social Committee adopted its opinion at its session on 24 and 25 February 1999 [3]. The European Central Bank gave its opinion on 16 March 1999 [4]. On 17 February 2000, the European Parliament adopted 24 amendments at first reading [5]. On 30 May 2000, the Commission put forward its amended proposal [6].

3. On 5 June 2001, in accordance with Article 251 establishing the Treaty of the European Community the Council adopted its Common Position and these reasons.

II. AIM OF THE PROPOSAL

Market developments have exposed a need to modernise UCITS through an extension of the list of assets in which an undertaking for collective investment may invest, such as other collective investment undertakings, money market instruments, deposits and financial derivative instruments. The principal objective of the Commission proposal, which is fully shared by the Council, is to extend this list and to ensure cross-border marketing of units in UCITS while providing a uniform level of investor protection. The proposal further aims to update and clarify certain provisions of the UCITS Directive.

III. ANALYSIS OF THE COMMON POSITION

While in general terms supporting the aforementioned amended proposal from the Commission, the Council has in a number of cases opted for different solutions, which are further explained below. This has been done mainly to render the provisions more transparent and coherent and to give UCITS added flexibility in their investment policy while at the same time safeguarding investor protection.

The Council has also changed the title of the Directive in order to clarify the relationship between this amending Directive and the other Directive which also amends Directive 85/611/EEC but with a view to regulating management companies and simplified prospectuses.

1. **Definitions — Article 1**

The Council's Common Position makes several references to Article 19 of Directive 85/611/EEC, which lists the investments open to UCITS, consistently using the phrase 'referred to in Article 19 of this Directive' which the Council considers more precise than the European Parliament's 'covered by this Directive'. The Council therefore prefers Article 1(2) to read along the lines of the Commission's amended proposal rather than as drafted in amendment 8 of the European Parliament.

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[1] OJ C 280, 9.9.1998, p. 6.
[2] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2000/64/EC of 7 November 2000 (OJ L 290, 17.11.2000, p. 27).
[3] OJ C 116, 28.4.1999, p. 44.
[4] OJ C 285, 7.10.1999, p. 9.
[5] OJ C 339, 29.11.2000, p. 220.
[6] OJ C 311 E, 31.10.2000, p. 302.

The Council furthermore prefers to make it clear that the term 'transferable securities' defined in Article 1(8) does not include the techniques and instruments referred to in Article 21 (derivative instruments).

Since money market instruments are not generally considered to be transferable securities (for instance, Directive 93/22/EEC on investment services contains two separate definitions) and since the text of the Directive in a number of instances distinguishes between transferable securities and money market instruments, the Council has decided to introduce a separate definition of the term 'money market instruments' in Article 1(9). The text of the Common Position has been modified accordingly.

2. **Provisions extending the list of assets — Article 19**

(a) The Council agrees that it is useful to introduce into Article 19 the concept of regulated markets in the sense of Directive 93/22/EEC and has therefore, by largely taking over the Commission's amended proposal of the, incorporated amendment 9 of the European Parliament in its Common Position.

The substance of amendment 1 relating to the recitals has been included in recital 5 of the Common Position.

(b) The Council furthermore shares the view of the European Parliament and of the Commission that UCITS ought to be allowed to buy units of other UCITS and/or other collective investment undertakings. The Common Position therefore includes Article 19(1)(e) as proposed by the Commission in its amended proposal with the modification that the 'cascade rule' has been included in Article 19(1)(e) as proposed by the European Parliament, and not in Article 24(3), as in the amended Commission proposal. The Council has made two further minor changes as compared with the amended Commission proposal: it has specified that the conditions set out apply to all collective investment undertakings not authorised as UCITS, regardless of where they are situated, and rules on asset segregation have been included among those rules which must be respected by other collective investment undertakings. The Common Position thus includes the main part of amendment 44.

The Council has also partly included amendments 2 and 5 concerning recitals 6 and 7 of the Common Position.

(c) Regarding deposits, the Council fully endorses the ideas of the European Parliament and of the Commission in its amended proposal, and amendment 11 is thus included in Article 19(1)(f) of the Common Position.

The substance of amendment 3, which relates to the recitals, is included in recital 8 of the Common Position, reinforced by the alignment of the text on amendment 11 and Article 19(1)(f).

(d) The Council is in favour of extending Article 19 to financial derivative instruments and agrees with the European Parliament that it makes sense to cover all financial derivative instruments in paragraph 1(g) thereof.

In comparison with the Commission's amended proposal and the European Parliament's amendment, the Council has strengthened this provision by extending the provision in paragraph 1(g) relating to the underlying assets to exchange traded derivatives by merging subparagraphs (g) and (h) in the Commission proposal.

The Common Position includes the OTC counterparty requirements and the idea behind the valuation, sale and liquidation requirements contained in the amended proposal of the Commission and in amendment 37. However, the Council believes that the latter requirements should be further strengthened by specifying that sale and liquidation can take place at any time at the initiative of the UCITS and at the fair value of the OTC derivative instrument. Furthermore, the Council has added to sale and liquidation the possibility of closing the position by an offsetting transaction.

On the other hand, the European Parliament's idea that only derivative instruments with a high rating based on a recognised rating scale be included is unacceptable to the Council since no such universally recognised rating scale exists.

The main part of amendment 37 is thus included.

(e) Finally, the Council agrees with the European Parliament and the Commission that UCITS should be permitted to invest in money market instruments other than those traded on a regulated market as long as the issuer is regulated and falls into one of the categories listed in Article 19(1)(h) of the Common Position. The Common Position to a large extent follows the amended proposal of the Commission except on three points.

Firstly, the Council believes that authorities, central banks, the ECB, the EU, the EIB, non-member States and States in a federation could act not only as issuers but also as guarantors. Secondly, it is made clear that the second indent concerns issuing undertakings that have their securities dealt in on regulated markets. Thirdly, the Council has added a fourth category to the three set out in the Commission's amended proposal, namely money market instruments issued by undertakings whose securities are not dealt in on regulated markets, provided that a number of specific conditions are met.

Amendment 13 of the European Parliament is included in Article 19(1)(h) of the Common Position.

3. **Articles 20 to 24 — Investment limits**

(a) Article 20 has been deleted from the Common Position. The provisions in Article 20 of the existing Directive concerning exchange of information which remain valid have been included in Article 22(4) of the Common Position. The Council finds this drafting clearer and the procedure laid down in the Common Position simpler than the one proposed by the Commission in Article 20 of its amended proposal. The Council believes that the concerns of the European Parliament which led it to propose the reintroduction of Article 20 have thus been met and that the spirit of amendment 14 has thus been included in the Common Position.

(b) Since the adoption of the existing Directive in 1985, the use of financial derivative instruments has become considerably more widespread and refined to meet the needs of the market and the supervisory methods to deal with these instruments have developed accordingly. The Council therefore considered the existing Article 21 inadequate to respond to current regulatory needs. The Council agrees to a large extent with the content of Article 24b of the Commission's amended proposal and the amendments proposed by the European Parliament, but finds that a regrouping of all provisions relating to the use of derivative instruments in one article improves the transparency of the text. For these reasons the Council preferred to restructure and redraft all such provisions in Article 21 of the Common Position. The provisions relating to disclosure are however set out in a general article, Article 24a of the Common Position (see below).

The elements aiming at investor protection contained in the amended Commission proposal are included in the Common Position, namely the provisions requiring that:

— global exposure relating to derivative instruments does not exceed the total net value of the UCITS's portfolio (Article 21(3) first subparagraph of the Common Position),

— exposure to the issuing body of the underlying assets does not exceed the investment limits laid down in Article 22 (third subparagraph of Article 21(3) of the Common Position). Thus the Council has included the substance of Amendment 43,

— the investment objectives stated in the UCITS' fund rules or prospectuses must be respected, (second subparagraph of Article 21(2) of the Common Position).

The drafting has been strengthened and made more precise and new provisions have been added concerning, in particular, the procedures a UCITS must follow in relation to the management of risk linked to the use of derivative instruments and exchange of information between the competent authorities:

— the provisions relating to the risk management process employed by the UCITS have been strengthened as have the rules regarding disclosure to the competent authorities (Article 21(1) of the Common Position),

— a new provision relating to exchange of information between Member States and the Commission concerning the methods used to calculate risk exposures has been introduced in Article 21(4) of the Common Position to replace Article 24b of the Commission's amended proposal.

The Council considers the provisions in the Common Position adequate to ensure the protection of the investors while at the same time sufficiently flexible to ensure that the UCITS can invest optimally to pursue its investment objectives. The Council has consequently decided not to set a specific limit to UCITS' investment in OTC derivative instruments as proposed by the European Parliament in amendment 39 and by the Commission in Article 24b(3) of its amended proposal.

The Council finds it unnecessary to include a specific provision relating to securities lending in the Common Position and amendment 16 is consequently not included in the Common Position.

(c) The Council shares the view of the European Parliament and of the Commission that the quantitative limits in Article 22 governing a UCITS' investment in various assets need to be adjusted to the extended investment possibilities, and that these rules should as far as possible be set out in one article, Article 22, to make the text as transparent as possible.

The Council agrees with the European Parliament, and the Commission in its amended proposal, that a separate article on deposits is not necessary and amendment 20, deleting most of Article 24a of the original Commission proposal, is thus included in the Common Position.

It also shares the view of the European Parliament and of the Commission that as a general rule UCITS should not invest more than 5 % of their assets in transferable securities or money market instruments issued by the same body (Article 22(1)). Concerning OTC derivative instruments, the Council agrees with the European Parliament and the Commission that the risk exposure to a single counterparty should not exceed 5 % of the assets of the UCITS, unless the counterparty is a credit institution, in which case the Council has opted for the higher exposure limit of 10 % in view of the lower risk involved. The Council disagrees with the European Parliament and the Commission over the appropriate investment limit for deposits, which the Council believes should be 20 % in view of the low risk.

Concerning the option for Member States to raise the 5 % limit to 10 % in Article 22(2), the Council finds that it should apply to transferable securities and money market instruments. The Council agrees with the Commission that the overall proportion of such investments should not normally exceed 40 % of the assets of a UCITS. However, the Council has excluded OTC derivative instruments where the counterparty is a supervised institution and deposits with credit institutions from the calculation of this limit. In Article 22(2) of the Common Position the Council has taken over the 'single body' limit the Commission proposed in Article 22(1) of its amended proposal, but with a limit of 20 % rather than 15 % as proposed by the Commission.

The Council agrees with the Commission that Article 22(3) of the existing Directive, which the European Parliament had proposed to delete, should be maintained. It has therefore not taken on board amendment 42. A new provision on certain bonds has been introduced in Article 22(4) following the deletion of Article 20, see above.

As the Council agrees with the European Parliament and the Commission that it is also necessary to introduce a limit for investments in the same group and a definition is set out in Article 22(5) of the Common Position, in fact, two definitions of the term 'group' are included in order to take account of companies outside the EU: one definition of a group is aligned on Directive 83/349/EEC, the other refers to recognised international accounting rules. The 35 % global limit, already contained in Directive 85/611/EC, as previously amended, for all kinds of investment is maintained and a 20 % limit for cumulative investment in transferable securities and money market instruments with the same group is introduced. This means that a UCITS may, for instance, invest 15 % of its assets in money market instruments, 5 % in transferable securities and 15 % of its assets in bonds, covered by paragraphs 3 and 4, issued by companies belonging to the same group.

Thus, the Council has been able to accept parts of amendments 36 and 45.

The substance of amendment 6 relating to the recitals has been included in recital 10 of the Common Position, where it has been strengthened and extended to groups.

(d) As far as index-tracking funds are concerned, the Council has fully accepted the Commission's amended proposal for Article 22a(1), except for the requirement in the first indent that the investment policy reflect the composition of the index in question, which the Council thinks is superfluous in the light of the text preceding that indent. In so doing, the Council has also largely incorporated amendment 4 relating to the recitals in recital 14 of the Common Position, and the first half of amendment 18.

On the other hand, the Council has not accepted the information requirements laid down in Article 22a(2) of the Commission's amended proposal and the second half of amendment 18, considering that such a requirement would place an unduly heavy administrative burden on Member States without according any extra protection to the investor.

In paragraph 2 the Council has added a new paragraph giving Member States the possibility of raising the 20 % limit to 35 % when justified by exceptional market conditions in order to take account of the fact that for certain small stock exchanges, securities issued by one issuer may in fact represent more than 20 % of the stock index.

(e) In accepting the first two paragraphs of Article 24 on investment in the units of UCITS and/or other collective undertakings as proposed by the Commission in its amended proposal, the Council has also accepted the corresponding parts of amendment 19.

The third paragraph proposed by the European Parliament has not been included in Article 24 but in Article 19(1)(e), (see above) where the Council has already incorporated the corresponding part of amendment 44. The last paragraph of amendment 19 has been included, in a modified form, in Article 24a(2) of the Common Position, (see below).

As regards paragraphs 4 and 5 of Article 24 in the amended Commission proposal, the Council found the restrictions on investment set out in the first subparagraph of Article 24(4) of the amended Commission proposal unnecessary. On the other hand, the Council supports the idea that no fees may be charged when UCITS invest in units of other UCITS managed by the same management company or by a management company within the same group, and has included this in Article 24(3) of the Common Position. Also in the context of fees and to enhance

transparency, in the second subparagraph of Article 24(3) the Council has added an obligation for UCITS investing substantially in units of other UCITS to disclose their fee structure.

4. **Other provisions**

As in the amended Commission proposal, the Common Position regroups the information requirements in Article 24a, but with different wording. Article 24a of the Common Position covers essentially the same elements as Article 24a of the Commission proposal, but with some modifications. The prospectus, and where necessary other promotional literature, is considered the main vehicle for investor information and the provisions therefore do not refer to the fund rules. The disclosure requirements are less detailed since the Council believes that they would place an unnecessary administrative burden on management companies. The Council has, however, added a new paragraph 4 to Article 24a which requires the management company to furnish supplementary information at the request of an investor.

Concerning the question of how large a share of another company or institution a UCITS may own, regulated in Article 25, the Common Position broadly follows the amended Commission proposal. The only exception is that the Council considers that there is no reason to restrict ownership of the units of any single UCITS and/or other collective investment undertaking to 10 % of its units, but that a limit of 25 % is more appropriate since the ownership of such units generally does not give the authorised UCITS a controlling interest in any individual company.

Articles 26 and 42 follow the amended Commission proposal.

Finally, the Council fully supports the new Article 53a as proposed by the Commission in its amended proposal, the aim of which is to redefine the responsibilities of the Contact Committee. In taking on board Article 53a as proposed by the Commission, the Council has also accepted amendment 21.

5. **The recitals**

The recitals have been adapted in line with the amendments to the enacting terms. The extent to which the European Parliament's amendments to the recitals relating to amendments concerning the enacting terms have been included in the Common Position is explained above.

The Council fully endorses the idea of a possible future codification of the Directive, amendment 7, but in recital 18 has opted for the wording of the Commission's amended proposal which it believes better complies with the latter institution's right of initiative.

IV. **CONCLUSION**

In its Common Position, the Council has been able to include fully, partly or in essence 20 of the 24 European Parliament first-reading amendments.

The Council considers that all its amendments are fully in line with the aim of the proposed Directive and that the Common Position constitutes a balanced text, in particular when seen against the backdrop of the Common Position on the other proposal which aims to amend the UCITS Directive, (the Common Position with a view to adopting the 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 UCITS with a view to regulating management companies and simplified prospectuses).