



European Communities

EUROPEAN PARLIAMENT**WORKING DOCUMENTS**

English Edition

1986-87

26 November 1986

SERIES A

DOCUMENT A 2-163/86

REPORT

drawn up on behalf of the Committee on Legal Affairs and
Citizens' Rights

on the proposal from the Commission of the European
Communities to the Council for a directive amending
Directive 85/611/EEC as regards jurisdiction in disputes
arising from the marketing of units of undertakings for
collective investment in transferable securities (UCITS)
(COM(86) 193 final - Doc. C 2-33/86)

Rapporteur: Mr K. DE GUCHT

WG(VS1)/5243E
Fr.-rah.

PE 107.286/fin.
Or. Fr.

By letter of 12 May 1986, the President of the Council of the European Communities requested the European Parliament to deliver an opinion, pursuant to Article 57(2) of the Treaty establishing the European Economic Community, on the proposal from the Commission of the European Communities to the Council for a directive amending Directive 85/611/EEC as regards jurisdiction in disputes arising from the marketing of units of undertakings for collective investment in transferable securities (UCITS).

On 9 June 1986, the President of the European Parliament referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible. No committee was asked for an opinion.

At its meeting of 17 September 1986, the Committee on Legal Affairs and Citizens' Rights appointed Mr DE GUCHT rapporteur.

The committee considered the Commission's proposal and the draft report at its meeting of 18 and 19 November 1986. At that meeting, on 19 November 1986, it adopted the sole amendment to the Commission's proposal by 5 votes in favour with 3 abstentions and decided unanimously to recommend to Parliament that it approve the Commission's proposal thus amended.

The committee then unanimously adopted the motion for a resolution as a whole.

The following took part in the vote: Mrs VAYSSADE, chairman; Mr DE GUCHT, rapporteur; Mr MEGAHY, Mr PRICE, Mr VERDE I ALDEA, Mr VETTER, Mr ULBURGHES and Mr WIJSENBECK.

The report was tabled on 21 November 1986.

The deadline for the tabling of amendments to this report will appear in the draft agenda for the part-session at which it will be debated.

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The Committee on Legal Affairs and Citizens' Rights hereby submits to the European Parliament the following amendment to the Commission's proposal for a directive and motion for a resolution together with explanatory statement:

Text proposed by the Commission
of the European Communities

Amendment tabled by the Committee on
Legal Affairs and Citizens' Rights

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

unchanged

Sole amendment

The following text is added to the
preamble:

Having regard to the Convention on
Jurisdiction and the Enforcement of
Judgments in Civil and Commercial
Matters, as amended by the Convention
of Accession to that Convention of
9 October 1978, particularly Article
57(2)¹ thereof,

Remainder of the proposal for a directive unchanged

¹OJ No. L 304 of 30.10.1978, p. 77

MOTION FOR A RESOLUTION

closing the procedure for the consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive amending Council Directive 85/661/EEC as regards jurisdiction in disputes arising from the marketing of units of undertakings for collective investment in transferable securities (UCITS)

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council¹,
 - having been consulted by the Council pursuant to Article 57(2) of the Treaty establishing the EEC (Doc. C 2-33/86),
 - having regard to Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)²,
 - having regard to the resolution of the European Parliament of 22 October 1986 on a Council directive amending for the third time the first directive for the implementation of Article 67 of the Treaty establishing the European Economic Community (COM(86) 326 final - Doc. C 2-54/86)³,
 - having regard to the report of the Committee on Legal Affairs and Citizens' Rights (Doc. A 2-163/86),
 - having regard to the result of the vote on the Commission's proposal,
1. Considers that the Commission proposal to add a new Article 48a to Section VIII of Council Directive 85/611/EEC of 20 December 1985 is appropriate in view of the terms of the provisions contained in the section in question adopted by the Council;

¹ OJ No. C 129 of 28.5.1986, p. 5.

² OJ No. L 375 of 31.12.1985, pp. 3 et seq.

³ See minutes of the sitting of 22 October 1986, PE 109.503, p. 1.

2. Notes with regret that the Council has not adopted the proposals put forward by the Commission and approved by Parliament in its resolution of 8 February 1977⁴ on measures to ensure the best possible coordination of the rules relating to the marketing of UCITS units in Member States other than those in which they are situated;
3. Deplores this situation in so far as it constitutes a clear retrograde step in relation to the objectives laid down in Article 57(2) of the EEC Treaty and the proposals put forward by the Commission with a view to the adoption of Council Directive 85/611/EEC of 20 December 1985;
4. Draws the Commission's attention to paragraph 8 of the abovementioned resolution of the European Parliament of 22 October 1986 in which Parliament 'deplores the interruption of the process of liberalizing capital movements in the Community initiated by the Council Directives of 11 May 1960 and 18 December 1962⁵' and refers to paragraph 9 of the abovementioned resolution, asking the Commission to increase its efforts to propose specific measures to begin the coordination of the provisions relating to capital movements in the Community Member States;
5. Instructs its President to forward to the Council and Commission, as Parliament's opinion the Commission's proposal as voted by Parliament and the corresponding resolution.

⁴OJ No. C 57, 7.3.1977, p. 31

⁵OJ English Special Edition 1959-1962, p. 49 and
OJ English Special Edition 1963-1964, p.5

EXPLANATORY STATEMENTI. INTRODUCTION

1. The proposal for a directive¹ which is the subject matter of this report supplements Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)². As explained in the explanatory memorandum to the Commission's proposal, during the discussion leading to the adoption by the Council of Directive 85/611/EEC, the latter expressed the wish 'that an article be inserted in the directive concerning jurisdiction in disputes arising from the marketing of UCITS units in a Member State other than that in which the UCITS is situated'³.

For that purpose, the Commission proposes, by means of its proposal for a directive, to add to Section VIII of Directive 85/611/EEC (Articles 44 to 48) a new Article 48a worded as follows:

- '1. A person who has acquired UCITS units in a Member State other than that in which the UCITS is situated may bring disputes relating to compliance with the provisions contained in this Section before the courts of the Member State in whose territory he acquired those units, whether he acquired them direct from the UCITS or through a representative or agent of that UCITS.
2. The right of a person acquiring units referred to in paragraph 1 may not be the subject of a waiver agreement, even if provided for by a clause inserted in the contract relating to the acquisition of the units, unless such a waiver occurs after the dispute has arisen.

¹See Doc. C 2-33/86 - COM(86) 193 final

²OJ No. L 375, 31.12.1985, p.3

³See COM(86) 193 final, p. 1

3. The provisions of paragraphs 1 and 2 shall not apply if the acquisition of the units falls within the scope of the 'professional activities of the person acquiring them'.

3. In short, this new provision aims to guarantee to purchasers of UCITS units who are not acting in a professional capacity the right in all cases to bring disputes relating to the marketing of those units before the courts of the Member State in which the units were purchased. This supplement, as regards jurisdiction, to Directive 85/661/EEC of 20 December 1985 requires, in the first place, to be examined in conjunction with the provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters⁴ in as much as that convention would be capable of being regarded as the appropriate legal basis of the proposal for a directive (PART II). Secondly, it would also be useful to consider the addition of the new Article 48a from the point of view of its incorporation in Section VIII of Directive 85/611/EEC as a whole, that section containing special provisions applicable to the UCITS which market their units in Member States other than those in which they are situated; this might enable us to discover the particular significance of the terms of that new provision having regard to the overall context of Directive 85/611/EEC, especially Section VIII (PART III) thereof.

II. THE PROVISIONS OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 AS THE LEGAL BASIS OF THE COMMISSION'S PROPOSAL FOR A DIRECTIVE

4. The Commission observes in its explanatory memorandum that 'Article 48a introduces a rule of jurisdiction which partly derogates from the provisions of the Brussels Convention of 28 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters'⁵. Article 2(1) thereof in fact provides that 'persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State'.

⁴ OJ No. L 305, 30.10.1978, p.77

⁵ See COM(86) 193 final, pp. 1 and 2

In addition to this general rule that the court of the place in which the defendant is domiciled has jurisdiction, the Commission's proposal aims to introduce, by means of Article 48a, optional jurisdiction designed to 'protect the contracting party who is deemed to be economically weaker and on whom unfavourable contractual clauses may be imposed by the other, stronger, contracting party'⁶, whilst avoiding subjecting that 'economically weaker' contracting party to a jurisdiction which is not necessarily in his interest, which might be the case if jurisdiction were exclusive.

5. The solution of optional jurisdiction is, moreover, that which departs as little as possible from the rules laid down in the 1968 Brussels Convention, given that the latter (as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to that convention⁷) provides for such optional jurisdiction in Article 13 et seq. thereof with regard to contracts concluded by consumers. Taking into account, moreover, the existence of Article 5(1) of the same convention, under which the applicant may also bring an action before the court for the place where the contractual obligation in dispute is to be performed, it should be recognized that the Commission's proposal designed to add an Article 48a to Section VIII of Directive 85/611/EEC extends considerably the number of courts before which persons who have acquired UCITS units can bring actions. There are three choices which can be summarized as follows:

- the dispute is brought before the court of the place in which the UCITS has its head office (Article 2 of the 1968 Brussels Convention);
- the dispute is brought before the court of the place where the contractual obligation relating to the marketing of UCITS units was to be performed (Article 5(1) of the 1968 Brussels Convention); or
- the dispute is brought before the court of the place in which the UCITS units were acquired (Commission's proposal for a directive designed to add an Article 48a to Directive 85/661/EEC).

⁶ See COM(86) 193 final, pp.2 and 3

⁷ OJ No. L 304 of 30 October 1978, p. 7 et seq.

6. This partial derogation from the provisions of the 1968 Brussels Convention, particularly Article 2 thereof, is based on Article 57(2) of the same convention, as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to that Convention⁸. In accordance with that provision, the Convention 'shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts'.

7. However, that provision does not appear as the legal basis of the proposal for a directive submitted by the Commission. The Commission, which is at pains to propose, rightly, moreover, that Article 57(2) of the EEC Treaty, the legal basis of Directive 85/611/EEC, should be the legal basis of the proposal for a directive, has two reasons for this:

- first, Article 57(2) of the 1968 Brussels Convention is not yet in force, since the 1978 Convention of Accession has not yet been ratified by a sufficient number of States (however, according to the Commission, the last ratifications would be deposited during the first half of 1986);
- secondly, the provision laid down in Article 57(2) of the 1968 Brussels Convention is not 'one which directly and specifically confers a power upon the Council'⁹.

8. Whilst considering that the arguments put forward by the Commission in this respect are well-founded, we are tempted to express doubts as to the exemplary nature of the solution adopted. It should be recalled that the text of the 1968 Brussels Convention already constitutes, in its original form, and will constitute, in its amended version, after the 1978 Convention of Accession comes into force, 'Community law' rather than international law, since it was negotiated in implementation of the EEC Treaty, particularly

⁸ OJ No. L 304, 30.10.1978, p. 7 et seq.

⁹ See COM(86) 193 final, p. 2

Article 220(4) thereof. What is more, the Member States, under a protocol signed on 3 June 1971¹⁰, gave the Court of Justice of the European Communities jurisdiction to interpret that Convention, which brings it even closer to the system governing the unilateral acts of the Community authorities. Since, consequently, Article 57(2) of the 1968 Brussels Convention, as amended by the Convention of Accession of 9 October 1978, derogates from a provision relating to jurisdiction which takes the place of a general rule of jurisdiction in Community Law, it might be advisable to take account of this in the text of the proposal for a directive once, of course, the provision in question has come into force. The cohesion of Community law and the principle of legal certainty would be better assured in this way.

III. ARTICLE 48a PROPOSED BY THE COMMISSION IN THE CONTEXT OF THE PROVISIONS OF SECTION VIII OF DIRECTIVE 85/611/EEC

9. As indicated above, once the proposal for a directive has been adopted by the Council, Article 48a will form part of Section VIII of Directive 85/611/EEC, which contains special provisions applicable to UCITS which market their units in Member States other than those in which they are situated.

10. The rules relating to the marketing of UCITS units are extremely complex, as was discovered during the work preceding the adoption by the Council of Directive 85/611/EEC. The following passage shows, significantly, the difficulties encountered in this respect when attempting to make the UCITS situated in a Member State subject to a single legal order, an attempt which was begun by Directive 85/611/EEC: 'It is so difficult to achieve coordination in this field (the marketing of UCITS units) that the Commission preferred to solve this problem in the overall context of free movement of capital within the Community, and thus as part of future directives. There is no doubt that, in the absence of a common policy in this field, harmonization of the rules relating to the operation and supervision of undertakings for collective investment would be illusory because of the differences continuing to exist from one Member State to another as regards the regulation of capital which could result in putting national UCITS at a disadvantage compared with the UCITS of other Member States.'

¹⁰ OJ No. L 204 of 2.8.1975.

¹¹ See 'Undertakings for collective investment in transferable securities', Directorate-General for Research and Documentation, 9 November 1976, p. 12

11. This shows the lacunae in the Community rules on this subject, as Parliament had already pointed out in its resolution of 8 February 1977 which, winding up the debate on the report drawn up by Lord ARWICK on behalf of the Legal Affairs Committee on the Commission proposal for a directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (Doc. 532/76)¹² contained, in paragraph 3 thereof, the following observation:

'.....the coordination measures contained in the proposed directive are incomplete, as each Member State will continue to apply its own marketing regulations to units of UCITS marketed on its territory'¹³.

11a. However, we should stress the undeniable progress represented by the deletion, in Section VIII of Directive 85/611/EEC, of the provision contained in Article 54(2) of the Commission's proposal for a directive (Doc. 532/76) which obliged UCITS intending to market their units in a Member State other than that in which they were situated to 'possess financial facilities in the other Member State through which the unit-holders may exercise their rights'.

The retention of that provision might have given rise to a situation contrary to Articles 59 and 60 of the EEC Treaty and we must therefore welcome its deletion (see, incidentally, with this in mind, as regards insurance, which also comes within the chapter on services, the opinion of the advocate-general delivered on 20 March 1986 in Cases 220/83, 252/83, 205/84 and 206/84 pending before the Court of Justice).

12. A comparison between the text of the abovementioned Commission proposal (Doc. 114/76) and that of Directive 85/611/EEC shows that the latter is a retrograde step in relation to the text which was proposed by the Commission and on which Parliament had delivered its opinion by means of the resolution contained in Lord ARDWICK's report (Doc. 532/86). In fact, Article 55(1) of the Commission's proposal, which corresponds to Article 44(1) of Directive 85/611/EEC, enabled a Member State to 'apply its own marketing regulations to UCITS situated in other Member States and marketing or intending to market their units in its territory'. In contrast to this relatively flexible wording, the text of Article 44(1) of Directive 85/611/EEC reads as follows:

¹² Which became Directive 85/611/EEC after its adoption by the Council

¹³ OJ NO. C 57 of 7.3.1977, p. 31

'A UCITS which markets its units in another Member State must comply with the laws, regulations and administrative provisions in force in that State which do not fall within the field governed by this directive'.

13. The difference in meaning is sufficiently clear even though the last phrase ('do not fall within the field governed by this directive') may still give rise to doubts as to whether or not the marketing rules, which form part of Section VIII of Directive 85/611/EEC, come within the field governed by the directive in question. The remarks quoted in points 10 and 11 above tend rather to dispel those doubts, since they correctly assess the difficulties encountered in coordinating the rules on the marketing of UCITS units in the Member States. However, Directive 85/611/EEC is much more precise in this respect and defines very clearly the jurisdiction of the Member States with regard to marketing. Article 45, in this case, reads as follows:

'In the case referred to in Article 44 the UCITS must, inter alia, in accordance with the laws, regulations and administrative provisions in force in the Member State of marketing, take the measures necessary to ensure that facilities are available in that State for making payments to unit holders, repurchasing or redeeming units or making available the information which UCITS are obliged to provide'.

14. Having regard to the provisions of Article 45, the insertion in Section VIII of Directive 85/611/EEC of a new Article 48a as suggested in the Commission proposal takes on its full value and completely justifies the latter's argument concerning better protection of a contracting party who is deemed to be economically weaker. In fact, Article 48a will be an essential supplement to Article 45, which requires UCITS which market units on the territory of a Member State to comply unconditionally, if we may be allowed to use that word, with the laws, regulations and administrative provisions in force in that Member State. There is no doubt that it would be inconceivable to make a UCITS subject to such a body of laws and regulations in force in the State in which it is marketing its units without, for all that, guaranteeing those who have purchased these units the opportunity of invoking the same provisions, in disputes between them and another contracting party over the acquisition of UCITS units, before the courts responsible most of all for enforcing them.

15. It should therefore be said, before we conclude, that although the Commission's proposal which is the subject-matter of this report is intended to give fair treatment to 'economically weaker' contracting parties, this is within a framework which is somewhat static or even a retrograde step in relation to the objectives laid down in Article 57(2) of the EEC Treaty and to the hopes expressed at that time in the Commission's proposal for a directive (Doc. 532/76) which was subsequently to lead to the adoption by the Council of Directive 85/611/EEC. In fact, there is reason to fear that the insertion of this new Article 48a will, contrary to the Commission's avowed intentions, reinforce a situation in which Article 45 of Directive 85/611/EEC takes precedence. The terms of that article might, in the longer term, be a check on any attempt to coordinate the special provisions on the marketing of UCITS units in Member States other than those in which those UCITS are situated.

IV. CONCLUSIONS

16. In view of the foregoing, the Committee on Legal Affairs and Citizens' Rights is in favour of the proposal for a directive aiming to insert a new Article 48a in Section VIII of Directive 85/611/EEC. However, that opinion is favourable only to the extent that the article ensures that the rights of persons who have acquired UCITS units, who might in fact be deemed to be 'economically weaker' contracting parties, are better safeguarded. On this occasion, the committee wishes to express its concern over the fact that, despite the Commission's proposals and Parliament's viewpoint as expressed in its resolution of 8 February 1977¹⁴, the provisions of Section VIII of Directive 85/611/EEC, especially those of Article 45 thereof, do not reflect a clear intention to make progress towards coordination in that matter, as advocated by Article 57(2) of the EEC Treaty. It therefore emphasizes the fact that the insertion of this new Article 48a should not be interpreted in such a way that this de facto situation is deemed to have been reinforced.

¹⁴ See footnote 13 above.