

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(91) 301 final - SYN 363

Brussels, 12 November 1991

Proposal for a

COUNCIL DIRECTIVE

relating to the freedom of management and investment of funds
held by institutions for retirement provision

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. INTRODUCTION - GENERAL CONSIDERATIONS

A number of matters have combined in recent years to make retirement provision the subject of much interest and debate.

Perhaps the most important of these matters is the effect of social and demographic changes, common to almost all Member States of the Community, which are likely to result in a significant increase in the ratio of retired people to working people over the next 20-30 years. Whilst this proposal for a directive does not directly address these developments, it is nevertheless against this background that it must be seen.

At the same time developments within the Community and progress towards the Single Market, particularly the adoption of the Capital Movements Directive (88/361/EEC) and the 2nd Life Assurance Directive (90/619/EEC), have highlighted various problems that exist in occupational retirement provision at a European level.

Institutions for retirement provision and their members do have various rights which can be derived directly from the treaty or from existing legislation. Although there is relatively little legislation at Community level which refers specifically to such institutions, the treaty provisions on freedom of services and free movement of capital, together with the Capital Movements Directive are of course of direct relevance to them.

The various directives relative to other financial institutions are also of indirect relevance in that these institutions offer services to institutions for retirement provision, particularly the services of investment management and custody of assets.

Some comparison with the provisions of these directives is also inevitable in that the benefits provided by institutions for retirement provision

can also often be provided by other financial institutions, particularly life assurance companies.

The main provisions of this proposal for a directive are concerned with the effective application of the rights which in principle are already guaranteed by the treaty and existing legislation.

In addressing the problems which exist at Community level, the Commission's services have identified three principal objectives which were outlined and developed in a working paper issued to Member States in October 1990 and discussed subsequently in a series of consultation meetings with Member States' experts. These objectives aim to implement effectively the Treaty given freedoms of services and capital movements for institutions for retirement provision. They have been discussed under the headings of:

- freedom of cross-border investment management
- freedom of cross-border investment
- freedom of cross-border membership of such institutions.

These objectives themselves are simply the expression of the treaty principles of freedom of services and free movement of capital. However discussion of them has highlighted a number of practical problems, particularly in the application of the third objective above which however can in no way restrict the underlying Treaty given freedoms.

Systems of retirement provision have developed over many years and in very different ways in the different Member States of the Community.

This is seen most clearly in the different proportions of retirement income that come through state, occupational or individual provision, through funded or pay-as-you-go provision, through publicly or privately

administered provision, and through compulsory or voluntary provision. Occupational provision may be organised by individual employers or on a sectoral basis. A similar variety exists as regards the ways of establishing occupational retirement schemes. They may be set up by collective agreements, by single employers, groups or others. These differences are deeply rooted in national cultures and economic systems and no harmonisation at Community level is either necessary or desirable.

In particular it is not necessary to harmonise the levels of benefit that are provided either by individual components of retirement income or by the system as a whole. Community action must be carefully judged so as not to upset or distort the equilibrium which has been established at national level. Indeed the Commission in its document SEC(91)500 'Initial Contributions by the Commission to the Inter-Governmental Conference on Political Union' draws attention to the fact that there is no question of a general harmonisation of the existing systems. It may also be noted that the Inter-Governmental Conference is considering the decision-making process for Article 51 of the treaty.

There are however a number of cross-border aspects of retirement provision which can significantly impede the realisation of the fundamental freedoms of the Community treaties.

As the single market develops, companies increasingly organise their business operations on a trans-national basis, employing staff resident in more than one Member State, and this can only be expected to increase with closer economic integration. This inevitably focuses attention on the many difficulties in organising occupational retirement provision on a consistent basis both from the point of view of workers and companies, including many small companies, for instance operating in border areas.

These difficulties are most immediately apparent in the case of migrant workers who have worked in more than one Member State and particularly if they have done so whilst remaining with the same employer, or more

generally within the same group. In such cases it is often impossible to organise their retirement provision in a consistent and tax-efficient manner, and this can constitute a significant barrier to the free movement of workers. Such problems in the area of institutions for retirement provision have also been highlighted by progress towards the single market in the area of life assurance and particularly by the adoption of the 2nd Life Assurance Directive (90/619/EEC) which included group life assurance contracts within its scope. Such contracts are often used for the provision of pension benefits and it will thus become possible for occupational pension benefits to be provided across national borders by means of life assurance contracts. The Commission has also taken action under article 169 of the treaty to remove fiscal barriers to such provision. The alternative, often more direct, provision through an institution for retirement provision however remains extremely difficult and there should be equal opportunities for these alternative methods of financing. The diversity of national systems for financing retirement provision poses many practical problems in this respect.

Despite these various problems, it should be emphasised that institutions for retirement provision and their members are not without rights, which in many cases can be derived directly from the treaty or from existing legislation. Measures to remove the remaining barriers are not included within this proposal for a directive, but the Commission is currently reviewing these problems with the intention of bringing forward further proposals or taking further action in due course, in order to facilitate the free movement of persons and services. In this respect the Commission has already adopted on the 17th July 1991 a Communication to the Council on the rôle of occupational pension schemes in the social protection of workers and their implications for freedom of movement. This proposal is consistent with that communication and any further proposals would of course also be so.

There is strong pressure from consumer organisations for further proposals which would give greater freedom for consumers. From their point of view the current proposal may be considered unbalanced in facilitating the exercise of certain freedoms for institutions, without providing any freedoms for consumers (in the sense of members or beneficiaries of these institutions) to remain within a single scheme while exercising their freedom to work in different Member States. This needs to be balanced, however, against the need to ensure that any future proposals do not call into question compulsory supplementary pension schemes operating on a pay-as-you-go basis fulfilling a 'social solidarity' function.

At this stage the practical problems related to the objective of cross-border membership require further study before any additional legislation could be proposed. This proposal for a directive therefore deals essentially with the aspect of institutions for retirement provision as financial institutions, in other words with the first two of the three objectives outlined above, and not with the third objective. Indeed such institutions represent some of the largest financial institutions within the Community in terms of the size of assets under their control.

However the importance of such assets varies a great deal between the Member States, and between the different systems of pension provision. Where pension liabilities are covered by book reserves in the balance sheet of an employer, there is no financial institution in the above sense, and such systems do not therefore come within the scope of this proposal. Indeed the requirements of this proposal would have little meaning in such a case. Much the same is true of pay-as-you-go systems where pensions are paid directly from contribution income. However to the extent that reserves are built up in such systems and are invested in financial assets, they clearly can be considered as financial institutions for whom the requirements of this proposal would have a meaning and indeed they would fall within the scope of this proposal for a directive.

However the vast bulk of the assets covered by this proposal are held by those institutions for retirement provision established under funded systems, where assets are accumulated to cover not only current pensions but also liabilities for future pension payments. For such institutions it is clear that the protection of the pension rights of members requires that the assets should be invested prudently.

The provisions of the Capital Movements Directive (88/361/EEC) have a clear impact on institutions for retirement provision but are without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of prudential supervision (Article 4).

In order that institutions for retirement provision may benefit fully from the free movement of services and capital, it is therefore necessary to define carefully the level and the type of prudential investment rules, which may not pursue any other purpose. Such rules must be justified by the general good and thus enable the competent authorities of the Member States to exercise a control on institutions for retirement provision which is proportional to the prudential objectives they may legitimately pursue.

Consequently, on the one hand this proposal for a directive lays down limits on the type of restrictions that may be imposed by Member States on prudential grounds, where such restrictions would be inconsistent with treaty principles. On the other hand it proposes a number of prudential investment principles which should be followed by all institutions for retirement provision. Although this does not prevent Member States from applying other, possibly more detailed, investment rules consistent with these principles, it provides a standard against which any such rules may be assessed.

In determining its proposals concerning the prudential investment of assets, the Commission has taken account of the proposals already made for insurance companies, particularly in the area of life assurance, and

and in certain cases an identical text is proposed. This is particularly the case for the limits on the type of restrictions that may be imposed, such as those concerning localisation or investment in particular categories of asset. However the proposal also allows for differences between institutions for retirement provision and insurance companies both in the nature of their liabilities and in the extent of harmonisation that is required. In particular, as the current proposal does not cover the objective of cross-border membership, it does not require mutual recognition of the supervisory systems in different Member States. It is therefore appropriate that the harmonisation proposed for prudential investment rules is not as extensive as is the case in life assurance.

The proposal aims to facilitate the exercise of freedoms for institutions for retirement provision in respect of the investment of their assets and their choice of investment manager. There will of course be no obligation to use these greater freedoms. The proposal in no way changes the procedures for taking decisions on investments or investment management within institutions for retirement provision. In particular it does not in any way alter the extent or the nature of any arrangements for participation in decision-making by representatives of the members.

In summary, the essential value of the proposal lies in providing greater precision as to the application of fundamental treaty principles to institutions for retirement provision. By providing a framework for the application of prudential investment rules the proposal will make it significantly easier to assess whether individual rules in Member States are consistent with the treaty freedoms. Similarly for the application of freedom of services provided to institutions for retirement provision, the proposal provides greater legal precision but does not introduce any fundamentally new principles.

II. COMMENTARY ON THE ARTICLES

Article 1 - Definitions

This Article contains definitions of certain terms used in the proposal for a directive, the aim being to clarify their meaning and hence contribute to a better understanding of the Directive.

The definitions of 'Institution for retirement provision' and 'Retirement Benefits' are drawn widely, the intention being to bring within the scope of the directive a wide variety of different types of institution, which however have in common that they hold assets for the purpose of providing retirement or other social benefits in the context of an occupational or employment link. Statutory social security funds as defined in regulation 1408/71 are specifically excluded from the scope.

Article 2 - Scope

This article builds on the definitions in Article 1 to define the scope of the proposal for a directive. This scope is wider than would be appropriate for a directive covering the objective of cross-border membership and in particular includes institutions which operate essentially on a pay-as-you-go basis with compulsory membership and limited reserves. The proposal does not in any way call into question the compulsory membership of these institutions, nor is there any intention to do so in any future proposals.

Paragraph 2 makes clear that the proposal is not intended to apply to financial institutions which are already covered by other directives in related areas. This is necessary in view of the close relationships and the overlaps in type of activity between different types of financial institutions.

Article 3 - Investment management and Custody services

The effective exercise of the right of free provision of services, in this case the service of investment management, requires not only that the providers of a service are free to offer their services throughout the Community, but also that the demanders of a service are free to select a provider who is not established in their own Member State.

Whilst other Community legislation, or proposed legislation, deals with the authorisation and the activity of the providers of the service of investment management, paragraph 1 of this article aims to ensure the freedom of institutions for retirement provision as demanders of this service to choose freely from amongst those authorised to provide it. Paragraph 3 does the same for the service of acting as a custodian or depositary for the assets of such institutions. Whilst the provisions of these paragraphs should help to clarify the position in these respects, such freedoms are in principle already available by direct application of the Treaty.

Paragraph 2 deals with the situation where an institution for retirement provision manages its own investments, or those of an associated institution within a group of undertakings.

Although not all Member States allow this possibility, it is necessary that where it is allowed, such freedom should not discriminate, particularly in cases where it has been necessary for an undertaking, or a group of undertakings to set up separate institutions to cover employees in different Member States. It should be possible for such institutions to operate for the purposes of the choice of investment manager in the same way as they would have been able to, if there had been a single institution, and in particular to manage their own investments.

The use of one institution for retirement provision as investment manager for a separate institution associated with the same group of undertakings does not however imply any pooling of the assets of such institutions, nor any difference in the treatment of such institutions for taxation purposes. Separate identification of the assets of each institution is in practice

likely to be necessary for several purposes, including for instance the need to respect the rights of members to participate in the management of the institutions.

Article 4 - Investment of assets

This article lays down a number of principles for the prudent investment of assets of institutions for retirement provision. It also restricts the possibilities for Member States to apply rules which would limit this freedom. This applies in particular to minimum investment requirements in certain asset categories, to rules on localisation of assets and on currency matching, which could otherwise have the effect of limiting the possibilities for cross-border investment. In this respect the proposed rules are consistent with those that have been proposed for insurance companies.

However this proposal draws a distinction between those institutions whose liabilities are fixed in monetary terms and those whose liabilities are instead determined by some other factor such as future salary levels. In the latter case the principles of currency matching do not apply in the same way and currency diversification may be a more important element of prudent investment management. It is therefore appropriate for matching requirements to be less restrictive.

Paragraph 5 of this article makes clear that Member States are free to lay down more detailed rules for the investment of the assets of institutions established within their territory. These more detailed rules must however not contravene the principles laid down in this article.

There is at this stage no need for more detailed rules to be harmonised at Community level as, in the absence of any proposals for cross-border

membership, this proposal does not require mutual recognition of the supervisory systems in different Member States.

Articles 5-7 - Implementation of the Directive

These articles contain the final provisions.

Proposal for a
COUNCIL DIRECTIVE
relating to the freedom of management and investment of funds
held by institutions for retirement provision

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission,

In cooperation with the European Parliament,

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

Whereas institutions for retirement provision are institutions sui generis which are amongst the largest and most important financial institutions within the Community and often represent an alternative means of providing the same benefits as are provided by other competing financial institutions;

Whereas the provision of supplementary retirement benefits through institutions for retirement provision is a matter of considerable importance for social policy within the Community and forms one part of the overall structure of retirement provision, the components of which vary considerably between Member States, particularly as regards the level and the form of statutory social security retirement benefits; whereas there is no intention to alter at Community level the balance which has been

arrived at in individual Member States in this respect; whereas the provision of supplementary retirement benefits can facilitate the effective provision of a satisfactory level of overall retirement income; whereas the protection of rights to retirement benefits is therefore a matter of proper concern and great importance for the Member States;

Whereas the provisions of this Directive apply equally to many different types of institution for retirement provision including institutions which operate on a fully funded basis, but also some institutions operating essentially on a pay-as-you-go basis with compulsory membership and limited reserves on the basis of generational transfers; whereas such institutions are different in many other respects; whereas the characteristics which are necessary for their stability must be taken into account;

Whereas freedom of services extends to the provision of investment management services and custody services to institutions for retirement provision; whereas a situation where such institutions are restricted to the use of investment managers or custodians established in a particular Member State is incompatible with the principle of freedom of services; whereas the requirements for authorisation and mutual recognition of the providers of such services are set out under the legislation applicable to these providers;

Whereas institutions for retirement provision represent major accumulations of capital within the Community; whereas the provisions of Council Directive 88/361/EEC¹ (capital movements) have a clear impact on such institutions but are without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia, in the field of prudential supervision of financial institutions; whereas it is therefore necessary to define in

1 OJ No L 178, 8.7.1988, p. 5.

more detail the prudential investment rules which are consistent with the free movement of capital and the freedom of services; whereas the adoption of common prudential investment principles will facilitate the exercise of the freedom of establishment for institutions for retirement provision;

Whereas the protection of members' rights requires that the assets of institutions for retirement provision be invested in a prudent manner; whereas capital movements within the Community must not lead to a situation where an increased level of risk could endanger those rights; whereas the assets of institutions for retirement provision must therefore be invested with the care, skill, prudence and diligence, under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; whereas those responsible for the investment of the assets of an institution for retirement provision, such as the directors or trustees of such an institution, and their delegates, such as external or internal managers and advisers, must act together in the sole interest of plan participants and beneficiaries; whereas no investment should be made for the particular interest of any such directors or trustees or of their delegates, nor should any investment be made to pursue solely the interests of the undertaking or undertakings which sponsor the institution; whereas the investment of the assets of an institution for retirement provision should follow the principles of sufficient diversification, quality, liquidity and restraint on investment in the sponsoring undertaking or undertakings; whereas the investment of such assets must be considered and judged within the context of the overall portfolio and the performance objectives and risk tolerance of the institution and not within the context of each investment taken in isolation;

Whereas supplementary retirement provision is often organised on an occupational basis either for a particular sector or associated with particular undertakings; whereas as a result of progress towards the single market such undertakings are often organised on a basis which

crosses national borders and wish to organise retirement provision on a consistent basis; whereas direct and indirect barriers still exist to the free provision of cross-border services by institutions for retirement provision; whereas in this respect there are also requests from consumer representatives to take the Community dimension into account in the development of supplementary retirement benefits; whereas this dimension could, subject to certain conditions, contribute to the transnational mobility of workers; whereas further work needs to be done on this subject, taking into account the differences between the types of institution for retirement provision and not calling into question the functioning of institutions with compulsory membership,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive shall apply to institutions for retirement provision in order to ensure certain freedoms concerning the management and investment of their assets.
2. This Directive shall not apply to financial institutions which are covered by

Council Directive	89/646/EEC ¹	
Directive		(3rd Life Assurance Directive)
Directive		(3rd Non-Life Insurance Directive)
Council Directive	85/611/EEC ²	
Directive		(Investment Services Directive)

1 OJ No L 386, 30.12.1989, p. 1.

2 OJ No L 375, 31.12.1985, p. 3.

Article 2

For the purpose of this Directive

- (a) "institution for retirement provision" means an institution which is established separately from any sponsoring undertaking for the purpose of financing retirement benefits to a group of persons defined by an occupational or professional or similar relationship. Institutions, other than competent institutions within the meaning of Council Regulation No 1408/71¹, which provide retirement benefits prescribed by or provided for in social security legislation are regarded as institutions for retirement provision within this definition.
- (b) "retirement benefits" means benefits in the form of pensions, whether for life-time or a temporary period, or in the form of lump sums paid on death, disability, cessation of employment or when a defined retirement age is reached, or support payments in case of sickness or indigence when they are supplementary to the abovementioned benefits. Benefits which replace social security benefits as defined above are regarded as retirement benefits within this definition.
- (c) "sponsoring undertaking" means any undertaking or other body which pays contributions into an institution for retirement provision.

Article 3

1. Member States which permit the external management of the investments of certain forms of institution for retirement provision, shall not restrict the freedom of such institutions to choose an investment manager, for parts or the whole of their assets, who is established in another Member State and duly authorised for this activity, according to Directive (3rd Life Assurance Directive), Directive (Investments Services Directive) or Directive 89/646/EEC.

1 OJ No L 149, 5.7.1971, p. 2.

2. Member States shall allow institutions for retirement provision of which the sponsoring undertakings belong to a group of undertakings to organise the management of their investments on a group basis, through one of these institutions. This shall not affect the right of Member States to provide that institutions for retirement provision shall be managed by a separate legal entity.

3. Member States which permit or require that the assets of an institution for retirement provision are held by a custodian shall not restrict the freedom of such institutions to choose a custodian to hold parts or the whole of their assets, who is established in another Member State and duly authorised according to Directive 89/646/EEC or Directive (Investment Services Directive), or is accepted as a depositary for the purposes of Directive 85/611/EEC.

Article 4

1. Member States shall require institutions for retirement provision established within their territory to invest all assets held to cover expected future retirement benefit payments in accordance with the following principles:
 - (a) the assets shall be invested in a manner appropriate to the nature and the duration of the corresponding liabilities and the level of their funding, taking account of the requirements of security, quality, liquidity and profitability of the institution's portfolio as a whole;

 - (b) the assets shall be sufficiently diversified in such a way as to avoid major accumulations of risk in the portfolio as a whole;

 - (c) investment in the sponsoring undertaking or undertakings shall be restricted to a prudent level.

In the application of these principles, the extent of any insolvency insurance or State guarantees must be taken into account.

2. Member States shall not require institutions for retirement provision to invest in particular categories of assets or to localise their assets in a particular Member State.
3. Member States shall in no case require institutions for retirement provision to hold more than 80% of their assets in matching currencies, after taking account of the effect of any currency hedging instruments held by the institution. In the case of those institutions for retirement provision whose liabilities are not fixed in monetary terms, but are for instance linked to future salary levels, this percentage shall be reduced to 60%.

Assets denominated in ECU shall be regarded as matching any particular currency in the Community.

4. Member States shall not subject the investment decisions of an institution for retirement provision or its investment manager to any kind of prior approval or systematic notification requirements.
5. Member States may lay down more detailed rules consistent with paragraphs 1 to 4.

Article 5

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1992. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the texts of the main laws, regulations or administrative provisions which they adopt in the field covered by this Directive.

Article 6

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS

with special reference to small and medium-sized enterprises (SMEs)

Title of proposal: Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the freedom of management and investment of funds held by institutions for retirement provision.

Reference Number (Répertoire): COM(91)

The proposal

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The main aims of the directive are as follows:

1. To define the level and the type of prudential investment rules which are consistent with the freedom of services and the free movement of capital as applied to institutions for retirement provision.
2. To remove obstacles to the free provision of services by investment managers and asset custodians by removing restrictions on institutions for retirement provision freely choosing from amongst the providers of such services.

Since the main aims of the directive involve the removal of barriers to cross-border provision of services and investment of assets, legislation is necessary at Community level. It is recognised

however that the principle of subsidiarity applied to the area of retirement provision requires that Member States should retain a large measure of freedom in their choice of systems for the financing of retirement benefits and indeed the level of such benefits. This freedom is entirely respected in this proposal for a directive.

The impact on business

2. Who will be affected by the proposal?

- which sectors of business

There will be an indirect effect on businesses in all sectors in as far as businesses contribute to institutions for retirement provision set up for the benefit of their employees. The institutions themselves are not businesses, in the normal sense of the word, although they may in some aspects of their activity, act in a similar manner.

- which sizes of business (what is the concentration of small and medium-sized firms)

All sizes of businesses are potentially affected in the indirect manner described above. However there is probably a proportionately greater number of large firms affected, as where businesses have a choice as to the level of retirement benefits provided and the method of their financing, larger firms are more likely to choose the option of establishing a an institution for retirement provision. Smaller firms on the other hand are more likely to choose provision through life assurance contracts.

- are there particular geographical areas of the Community where these businesses are found

Institutions for retirement provision as defined in the proposal for a directive are particularly concentrated in the United Kingdom

and the Netherlands and to a lesser extent in Ireland, at least in as far as the level of assets is concerned. The level of assets covered in other Member States is much lower, although the absolute amounts can still be quite significant.

3. What will businesses have to do to comply with the proposal?

Businesses will not need to take any direct action to comply with the proposal. Action will be necessary only by national legislators and supervisory authorities. However this will increase the freedom available to institutions for retirement provision and they may then wish to take advantage of this increased freedom. In as far as the institutions themselves can be considered as businesses, or in as far as businesses are involved in the administration of such institutions, they may therefore be indirectly affected.

4. What economic effects is the proposal likely to have?

- on investment and the creation of new businesses

By removing restrictions on the investment of the assets of institutions for retirement provision, the proposal should improve the economic efficiency of investment and channel resources towards more productive investment, which could include the creation of new businesses.

- on the competitive position of businesses

In many cases retirement plans provide defined benefits, with businesses accepting the commitment to finance the balance of the cost after allowing for fixed contributions by members. Any improvement in the economic efficiency of the investment of the related assets could therefore directly reduce the cost to businesses of financing this commitment and thus improve their competitive position.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc.)?

No such measures are considered necessary in view of the nature of the proposal, which is such as to reduce restrictions on institutions for retirement provision, and hence indirectly on businesses, of all sizes.

Consultation

6. List the organizations which have been consulted about the proposal and outline their main views.

European Federation for Retirement Provision (EFRP)

The EFRP supports the proposal, particularly as concerns the proposals for freedom of cross-border investment. They have also indicated their support for common prudential principles for the investment of assets.

ISSN 0254-1475

COM(91) 301 final

DOCUMENTS

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Catalogue number : CB-CO-91-491-EN-C

ISBN 92-77-77256-5

Office for Official Publications of the European Communities
L-2985 Luxembourg