

TOWARDS A EUROPEAN MARKET FOR THE UNDERTAKINGS FOR COLLECTIVE INVESTMENT IN TRANSFERABLE SECURITIES

Commentary on the provisions
of Council Directive 85/611/EEC
of 20 December 1985



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Since its creation in 1973, Mr. Vandamme was Head of the "Stock Exchanges and Securities Markets" division in the Directorate General for Financial Institutions and Company Law in the Commission of the European Communities. He occupied that post until his retirement in July, 1986.

From the very outset, Mr. Vandamme tackled the problem of undertakings for collective investment in transferable securities (UCITS) and after long and difficult negotiations the Directive was adopted by the Council of Ministers on 31 December 1985, a few months prior to his retirement. Having followed discussions on the Directive from start to finish, Mr. Vandamme is uniquely qualified to give an interpretation of the finished text and an account of the preparations that led up to it. I am grateful to Mr Vandamme for having drawn up a commentary on the Directive's text, which was a major landmark in his years in the stock exchange and securities field.

The ideas expressed in the present study are the author's own and do not necessarily represent the Commission's view. They are, however, considerably clear and well thought out and bear witness to Mr. Vandamme's long professional experience and his love of work well done.

I am convinced that this work will be a rich source of interest not only to professionals but also to all those who follow the Community's progress towards the realisation of the Internal Market in 1992.

G.E. FITCHEW
Director-General



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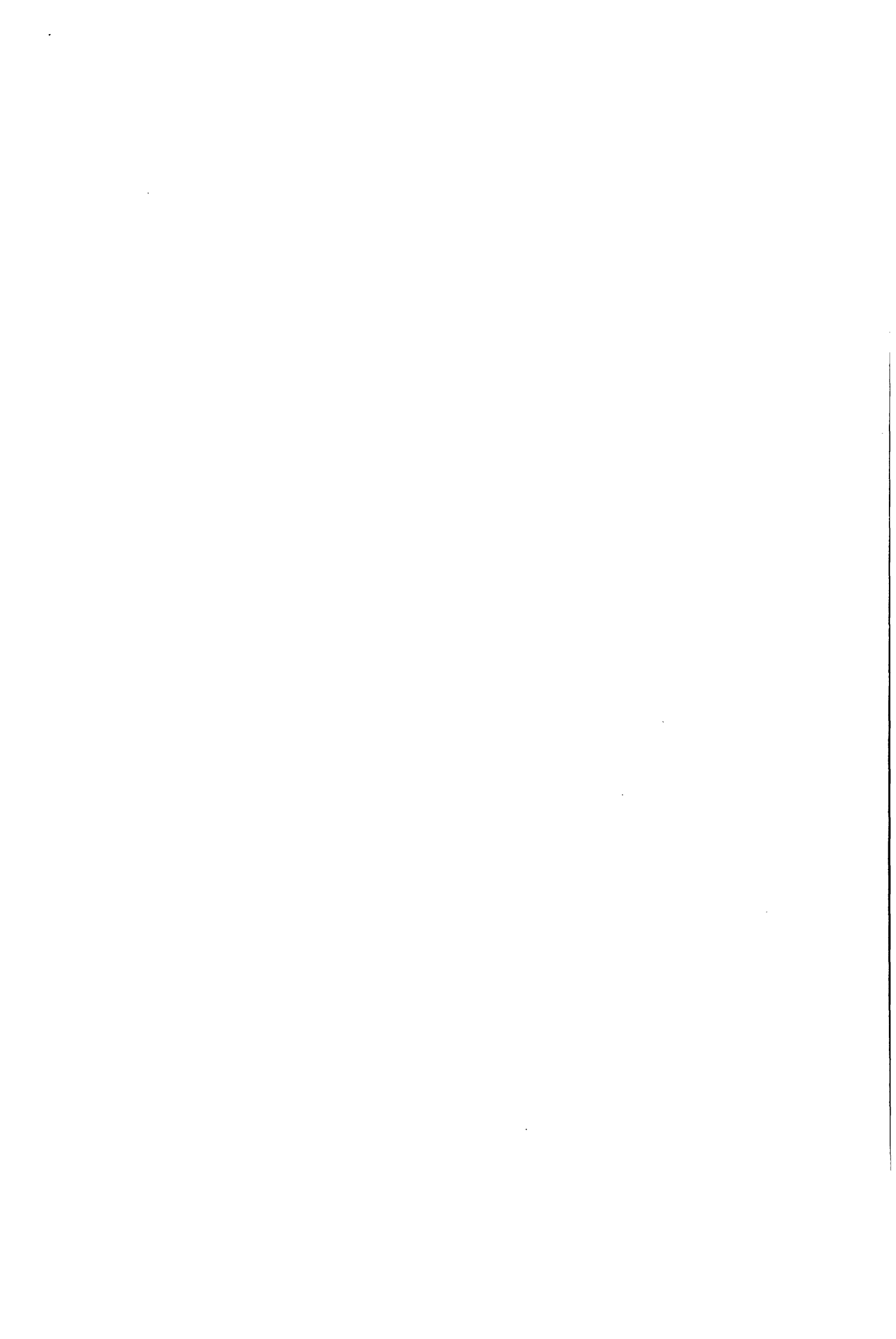
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INTRODUCTION

On 20 December 1985 the Council of Ministers of the European Communities adopted the Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (Official Journal No. L 375 of 31.12.1985) and the Directive amending the Directive of 11 May 1960 on the implementation of Article 67 of the Treaty establishing the European Economic Community (OJ No. L 372 of 31.12.1985); Article 67 is aimed at progressively abolishing restrictions on the movement of capital between Member States.

The thinking behind the adoption of these Directives is outlined below.

A. The "coordination" Directive

Aims

There are appreciable differences between the various Member States' laws relating to collective investment undertakings, particularly as regards the obligations and controls imposed on them. On a Community-wide view, these differences are liable to distort the conditions of competition between such undertakings and to make for unequal protection of people investing with them.

Coordination of national laws governing collective investment undertakings was therefore considered desirable with a view to approximating the conditions of competition between such undertakings at Community level and affording unit-holders more effective and more uniform protection.

Moreover, the need for such coordination was accentuated by the fact that it was the essential precondition for free marketing of these undertakings' units in the Community, which would mean that undertakings situated in a given Member State would be able to market their units in other Member States without the latter being able to subject the undertakings or their units to any provision whatsoever. Indeed, the majority of Member States maintained that such opening-up of frontiers in this sector was not possible until there had been substantial approximation of the essential provisions governing these undertakings.

These, then, are the three essential objectives of the "coordination" Directive of 20 December 1985. The first two are in fact subsumed in the third, since achievement of them is implicit in the establishment of freedom to market units in collective investment undertakings throughout the Community.

Scope

The Directive applies to all UCITS (other than those of the closed-ended type), viz. those

- which invest the capital they raise in transferable securities quoted on the stock exchange or traded on similarly regulated markets.
- which raise capital by means of offers open to the public, i.e. which sell their units by promoting them to the public;
- which operate on the principle of risk-spreading;
- whose units are, at the request of holders, repurchased or redeemed, out of the undertakings' assets;
- whose registered offices are situated in a Member State.

However, the Directive allows Member States to exclude from its scope certain categories of UCITS whose investment or borrowing policy differs from that specified in the Directive (for instance, UCITS which invest primarily in transferable securities not traded on regulated markets). Pending coordination in this area, each Member State remains free to lay down specific rules with which UCITS in these categories must comply when carrying on their activities on its territory.

Methodology

The approach that the Directive adopts to establishing free marketing of UCITS units is consistent with the principles upheld by the Commission, in that it is based on the need for mutual

recognition of Member States' laws made possible by a minimum degree of coordination of their laws and application of the rule that supervisory powers lie exclusively with the country of origin. In practice, application of these principles in the present case means that from 1 October 1989, the date by which Member States must have brought into force the measures necessary for them to comply with the Directive (1 April 1992 in the case of Greece and Portugal),

- any UCITS willing to carry on activities as such, irrespective of where it wishes to do so, will have to be authorized by the Member State in which it is situated (the Member State of origin); this authorization will be valid for all the other Member States;

- an authorized UCITS, in whichever Member State it markets its units, will be subject to the laws and supervision of its Member State of origin only; if it markets its units in a Member State other than that in which it is situated, the other Member State will only be able to require it to comply with the rules governing the marketing of such units on its territory and to exercise supervision over it for the exclusive purpose of ensuring that it does comply with those rules.

Range of coordination

The coordinated rules relate to:

- The conditions for authorization of UCITS:

Authorization requires approval of the management company in the case of a UCITS constituted under the law of contract or the investment company in that of a UCITS constituted under statute, its fund rules or instruments of incorporation, and the choice of depository.

- The structure of UCITS and in particular the obligations of the depository, whose main task is the safe-keeping of the assets of the UCITS.

- The investment policies of UCITS

The Directive specifies the transferable securities in which assets of a UCITS may be invested (transferable securities admitted to official listing on a stock exchange or dealt in on any other regulated market which operates regularly and is recognized and open to the public) and the other assets, including liquid assets, that a UCITS may hold on a subsidiary basis. In order to ensure a good spread of risks, a number of limits are set on the amount a UCITS can invest in such securities. In addition, rules are laid down to prevent a UCITS from exerting significant influence over the management of an issuing body.

- Information to be supplied to unit-holders

A UCITS is required to publish a prospectus, an annual report and a half-yearly report. The minimum information to be included in these publications is set out in two schedules annexed to the Directive.

- General obligations of UCITS

A number of obligations are laid on UCITS. For instance, they are not allowed to borrow (except within clearly defined limits) and they must repurchase their units at the request of unit-holders.

- Rules applicable to a UCITS when marketing units in a Member State other than that in which it is situated

The UCITS must comply with the other State's rules on marketing. In addition, it must take all appropriate steps to ensure that unit-holders in that State are readily able to exercise their financial rights and receive the information to which they are entitled. The authorities in the other State must be supplied with detailed information before the UCITS starts marketing its units there.

- Rights and obligations of the authorities responsible for authorization and supervision of UCITS

These are the authorities in the Member State where the UCITS is situated and, on the subsidiary plane of supervision of marketing rules, in any Member State where it markets its units. Close cooperation between these authorities is stipulated.

- The setting-up of a Contact Committee made up of representatives of the Member States and the Commission to examine all problems arising from application of the Directive.

B. The "liberalization" Directive

The first Council Directive of 11 May 1960 on the implementation of Article 67 of the Treaty (progressive abolition of restrictions on the movement of capital) excluded transactions in the units of unit trusts from the liberalization of capital movements, even where such units were dealt in on stock exchanges. On the other hand, securities issued by investment companies were included among the securities dealt in on stock exchanges covered by the liberalization provisions, no exception being specified in the Directive.

The main reason why it has not hitherto been possible to remove the restrictions on the free movement of unit trust units is that the Member States' laws governing unit trusts are so different that they are incapable of serving as a basis on which to ensure

equivalent protection of savers and conditions of healthy competition between unit trusts. This reason, given by several Member States as their grounds for not accepting freedom of movement, is therefore the same as that given by the Member States, as seen above, for not allowing the free marketing on their territory of units issued by UCITS from other Member States.

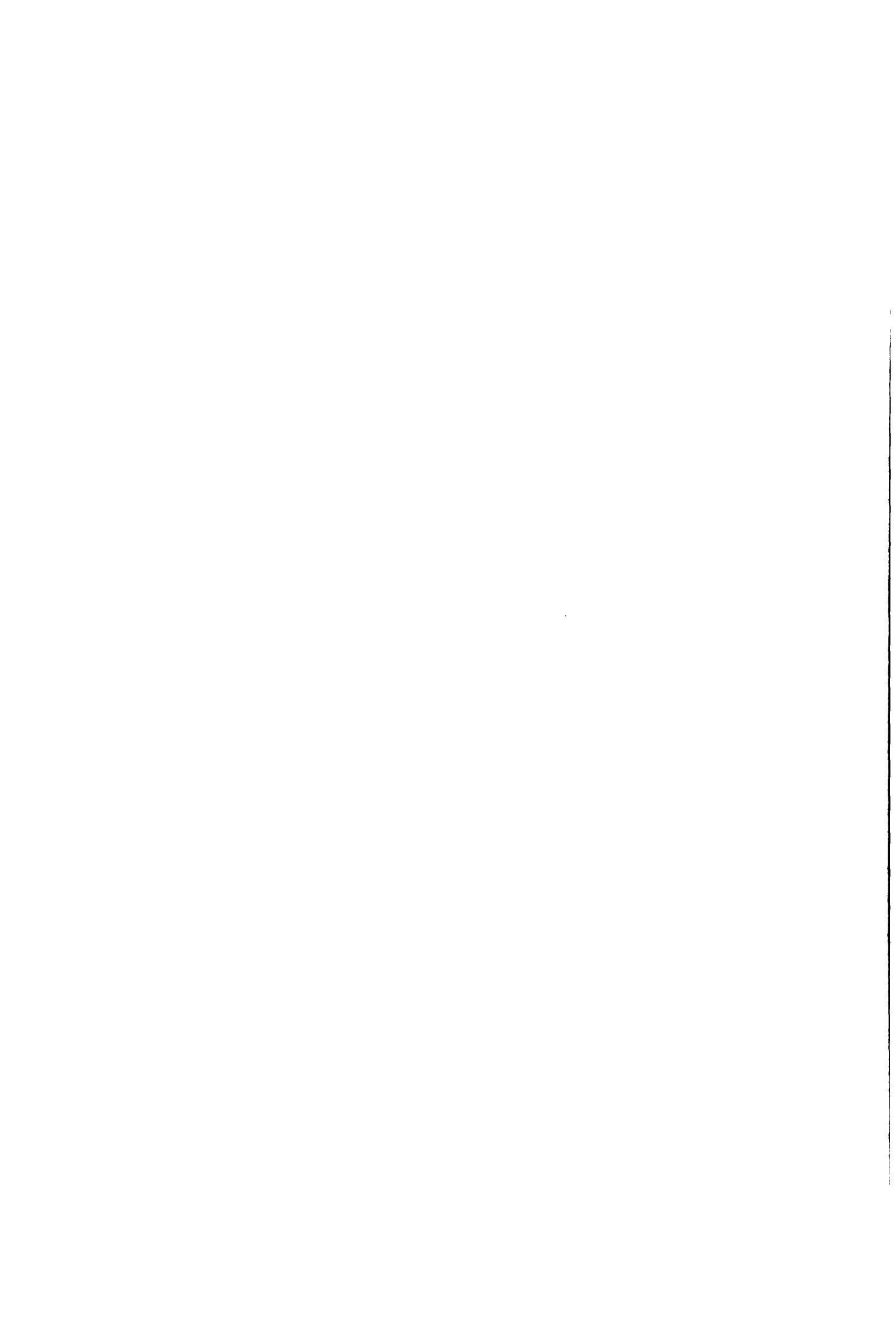
As also seen above, the "coordination" Directive of 20 December 1985 disposes of these problems, thus clearing the way for the free marketing of UCITS units from 1 October 1989 at the latest. For its part, adoption of the "liberalization" Directive clears the way, for the same reason and from the same date, for the abolition of the remaining exchange restrictions on free movement of UCITS units, which apply to unit trust units, whether or not traded on stock exchanges, and investment company units not traded on stock exchanges. Moreover, the retention of these restrictions would have deprived the "coordination" Directive of much of its effectiveness, since without the "liberalization" Directive Member States, although bound as from 1 October 1989 to allow the free marketing on their territory of units offered by UCITS from other Member States, would have been able in practice, if they chose, to prevent such free marketing by relying on the remaining exchange restrictions applied to the units of certain UCITS.

Apart from the shares of investment companies, which were already liberalized, the scope of the "liberalization" Directive is identical with that of the "coordination" Directive; it covers the units of UCITS to which the latter Directive applies. The date of entry into force is also the same: 1 October 1989 at the latest (1.1.1991 in the case of Portugal). In short, as from that date, it will be compulsory for all Member States to accept not only the free marketing on their territory of units offered by UCITS falling within the scope of the "coordination" Directive (however, see paragraph 20a) but also the removal of all restrictions on the free movement of such units (1).

Note

The following pages contain an article-by-article commentary on the provisions of the "coordination" Directive. This commentary is based primarily on the preparatory work that went into drafting these provisions; it therefore reflects the spirit presiding over the drafting process rather than the legal content of the text.

1 It should be noted that the "liberalization" Directive has been overtaken by the adoption, on 17 November 1986, of a further Directive (OJ No. L 332 of 26.11.1986) based on Article 67 of the EEC Treaty which to some extent encompasses UCITS not falling within the scope of the "coordination" Directive.



SECTION I: GENERAL PROVISIONS AND SCOPE OF THE DIRECTIVE

1. As stipulated in Article 1 (1) the Directive applies, subject to a number of exceptions that will be discussed in due course, to

- all undertakings for collective investment in transferable securities (UCITS)
- if they are situated on the territory of a Member State of the European Community.

2. It should be noted that, even if the primary aim of the harmonization called for in the Directive is to allow the units of a UCITS to be marketed freely in Member States other than that in which it is situated, and this is a prerequisite for liberalization of capital movements (see Introduction), the Directive applies to all UCITS, whether or not they market their units in Member States other than the one in which they are situated.

1. What is an undertaking for collective investment in transferable securities (UCITS)? - Article 1 (2) and (3)

3. In order to be a UCITS within the meaning of the Directive, an undertaking must meet two criteria, which are laid down in Article 1 (2) and (3).

1st criterion

4. A UCITS is an undertaking the sole object of which is the collective investment in transferable securities of capital raised from the public and which operates on the principle of risk-spreading. It matters little whether it is constituted under the law of contract (in which case it will generally be known as a "mutual fund", although having no legal personality, and will be managed by a management company), or under trust as in the United Kingdom (in which case it will be called a "unit trust") or under statute (as an "investment company"). With a mutual fund under the law of contract, the fund assets are generally the property of the unit-holders collectively, who are thus joint owners of the assets; with a trust, the assets are simultaneously owned by the trustee (legal ownership) and the unit-holders (equity ownership); with an investment company constituted under statute, the assets are the property of the company, and instead of unit-holders there are shareholders, who are the joint owners of the company.

5. This criterion is not met, therefore, by undertakings whose sole object is not the collective investment of capital raised from the public or which do not operate on the principle of risk-spreading. Examples of undertakings which do not operate on the principle of risk-spreading include holding companies whose object is to provide funding for businesses having no access to the financial market or to exercise control over businesses in

which they are shareholders. Again, the phrase "raised from the public" excludes investment clubs, since they are not open to the public but restrict their membership to a limited number of investors; nor do they issue units representative of their assets in the way that UCITS do. By the same token, the Directive does not cover collective investment undertakings which do not raise their capital from the public at large but make limited offers to certain categories of investors (such as insurance companies or pension funds); this exclusion applies to "fonds d'intéressement" in France, "exempted unit trusts" in the United Kingdom and "Spezialfonds" in the Federal Republic of Germany.

6. Also excluded from the scope of the Directive are collective investment undertakings which do not invest the capital they raise exclusively in transferable securities but also, for instance, partly in gold, immovable property, goods or mixed assets.

7. The restriction of the Directive's scope to undertakings whose sole object is collective investment in transferable securities does not mean that the operation or formation of undertakings engaging wholly or partly in other forms of investment is prohibited. Nor does the Directive prohibit such undertakings from marketing their units in other Member States, but it does allow another Member State - as long as it does not infringe other provisions of the Treaty (the non-discrimination

rule in particular) - to refuse to let such marketing be carried on freely in the sense of the word used in the Directive, or at the very least allows it to specify certain conditions with which such marketing must comply.

8. We shall see in due course (Section V, paragraphs 80 et seq.) what is to be understood by investment in "transferable securities" and the minimum rules that the Directive imposes to ensure that the principle of risk-spreading is complied with.

2nd criterion

9. Units issued by collective investment undertakings (the term "units" is taken to include shares in the case of investment companies) must be directly or indirectly repurchasable or redeemable out of the undertakings' assets, on request by unit-holders. This criterion provides the basis for distinguishing between collective investment undertakings of the open-ended and the closed-ended types. Only those in the former category are required to repurchase or redeem their units; thus, the Directive applies to them alone.

10. It should be noted that the expressions "units repurchased or redeemed" and "directly or indirectly" were used to take account of the variety of situations found in the Community. In some cases, for instance, units are redeemed and cancelled, while in others they may be repurchased, perhaps by a repurchasing

company, and subsequently put back into circulation. Again, the repurchase or redemption might be made directly by the UCITS or indirectly by an intermediary or affiliated company (a repurchasing company for example).

11. The Directive specifies that action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value is regarded as equivalent to such repurchase or redemption.

In the Netherlands, for instance, investment companies of the Robeco type which are quoted on the stock exchange do not directly repurchase their units; this is done on Robeco's behalf by a stock exchange intermediary. However, for this repurchase to be regarded as such for the purposes of the Directive, Robeco must take action to ensure that the stock exchange value of its units does not vary significantly from their asset value. Companies of the Robeco type which operate on the principle of risk-spreading are therefore UCITS within the meaning of the Directive if they invest the capital that they raise exclusively in transferable securities and as long as they take action on the stock exchange as indicated.

12. It is to be noted that although, in principle, UCITS of the open-ended type issue their units without restriction - according to demand, therefore - and unit-holders can withdraw at any time by requesting the repurchase or redemption of their units, there

are nevertheless cases in which the issue of units might be subject to a time-limit or restricted to certain periods or perhaps a maximum amount; similarly, although there must be provision for repurchase or redemption, it might be restricted to certain periods. Undertakings applying such restrictions fall within the scope of the Directive.

II. When is a UCITS to be deemed to be situated in a Member State? - Article 3

13. Under the Directive, a UCITS is deemed to be situated in a Member State if the management company in the case of a mutual fund (this term also includes unit trusts) or the investment company has its registered office there.

14. The Directive adds that Member States must require that the head office be situated in the same Member State as the registered office. This stipulation was added for two reasons:

(a) to prevent the creation of "letter-box UCITS", in other words UCITS considered to be situated in a Member State solely because they have their registered offices there although all their administration and management is carried on outside the Community;

(b) to facilitate the competent authorities' task of supervising UCITS, by requiring them to have their head offices, where all

the documents needed for the practical purposes of supervision have to be kept, in the same place as their registered offices.

This additional stipulation definitely does not mean that all fund management activities or decisions have to be concentrated in the one place, particularly when it is evident that these activities could be carried out more effectively elsewhere (such as in the United States when investments are being made there).

15. UCITS situated in non-member countries therefore do not fall within the scope of the Directive. The marketing of their units in a Member State is still governed by that State's laws, possibly in conjunction with bilateral agreements.

III. Derogations - Articles 2 and 1(4)

16. In its original form, the Directive laid down that it was applicable to all UCITS as defined under heading I. above situated in the Community, allowing no exceptions, so that all such undertakings had to comply with all the Directive's provisions, especially those on investment and borrowing policy. This meant that there could be only one type of UCITS in the Community.

17. The developments seen over recent years on the financial market - the emergence of new financial products in particular - have shown that applying the Directive's scope so rigidly would

be likely to prevent or hamper such developments, so that some leeway to allow them had to be introduced into the Directive. For instance, in the past few years it has become increasingly possible in various Member States for certain categories of UCITS to depart from the principle of having to invest all their assets in transferable securities quoted on a stock exchange or traded on other regulated markets and to invest in transferable securities not traded on regulated markets. The main such category comprises UCITS known as venture capital common funds, which invest a large proportion of their assets in newly formed businesses operating in innovative fields. The Directive's provisions on the borrowing policy of UCITS may also be found too restrictive in certain cases.

18. The Directive therefore provides that if certain categories of UCITS defined in the rules of the Member State where a UCITS is situated are authorized or required to operate an investment or borrowing policy which does not comply with the Directive's requirements (see paras. 80 et seq. and 139), such categories of UCITS, although conforming with the definition given above under heading I. are not to be deemed to be UCITS for the purposes of application of the Directive and are not governed by it. In the case of such UCITS, therefore, the Member State is free to derogate from any of the Directive's provisions - not just those laying down rules on investment and borrowing. Consequently, the

term "UCITS" used in the remainder of the Directive does not apply to these UCITS, only to those actually covered by its provisions.

19. Such derogation, it should be noted, cannot be applied on a case-by-case basis or be decided upon by a UCITS of its own volition, since its application is restricted to categories of UCITS defined in the rules of a Member State for which the Directive's requirements on investment or borrowing policy are inappropriate in the light of their own investment or borrowing policy. Member States must therefore specify such categories if they wish to exercise the right of derogation, which they may do only if the categories of UCITS in question operate an investment or borrowing policy genuinely different from that required in the Directive. Thus, the right of derogation cannot be used by Member States for the sole purpose of releasing certain categories of UCITS from the constraints of the Directive rather than allowing them to continue operating their investment or borrowing policy (for instance by simply allowing UCITS to invest a slightly higher percentage of their assets in a given type of security than is allowed under the Directive).

Clearly, the fairly loose wording of this particular derogation and the fact that application of it is left in the hands of Member States could lead to unlooked-for deviations. This is why the Commission is required, five years after the implementation of the Directive, to submit a report on application of this

derogation - and of those discussed in paragraph 20a), b) and c) - and, if necessary, to propose suitable measures to extend the Directive's scope.

20. The Directive also excludes the following from its scope.

(a) UCITS of the closed-ended type, whose units are neither repurchased nor redeemed, so that they are not UCITS for the purposes of the Directive, as is made clear by the definition given in Article 1. The purpose of this express exclusion is therefore to avoid all possible ambiguity;

(b) UCITS which raise capital without promoting the sale of their units to the public within the Community or any part of it. This derogation is already implicit in the definition in Article 1, in that it specifies that only those UCITS which raise their capital from the public fall within the scope of the Directive. In establishing whether or not an undertaking raises its capital from the public and is therefore a UCITS for the purposes of the Directive, what has to be considered is not the results achieved by its efforts to raise capital but whether or not it engages in promoting the sale of its units to the public within the Community or any part of it; if not, it will not be considered to be a UCITS, even if some of its units have been acquired by the public. On what is to be understood by promotion, it is made clear in a statement in the Council minutes that the scope of

this term is not confined to advertising but includes all types of promotional activity aimed at raising capital (such as direct selling).

As already seen (in paragraph 5), the term "the public" implies a public wider than that made up by a specific group of investors, such as insurance companies, pension funds or the employees of a company. On the other hand, though, it is not to be interpreted as meaning "all the public"; as we see it, a large section of the public (comprising all the professions, for instance) is enough to qualify as satisfying the definition. But should a UCITS which confines its promotional activities to, say, the medical profession be regarded as promoting its units to the public and therefore brought within the scope of the Directive? Here it can be argued that, with such a very specific target group of investors, the requirements are not fulfilled, especially since the intention has always been to confine the Directive's provisions essentially to conventional UCITS dealing with the public at large. This intention, along with the factual evidence, should be the key to interpretation of what is meant by "the public".

(c) UCITS whose units, under the fund rules or the investment company's instruments of incorporation, may be sold only to the public in non-member countries (this derogation is in fact implicit in the one discussed immediately above). There are a number of UCITS situated in the Grand Duchy of Luxembourg and

quoted on the stock exchange there which market their units exclusively in non-member countries, although not ruling out the purchase of units by members of the public in the Community. In future, if they wish to take advantage of this derogation, UCITS will have to stipulate in their fund rules or instruments of incorporation that their units are exclusively reserved for sale to the public in non-member countries.

(d) Investment companies whose assets are invested through the intermediary of subsidiary companies mainly otherwise than in transferable securities (see Article (4)). Such companies are UCITS in appearance only, since their assets are invested, through subsidiaries, in assets other than transferable securities. Thus, they do not really meet the definition of UCITS.

Note

As for the scope that UCITS covered by these derogations are allowed for marketing their units, it is the same as for collective investment undertakings which do not invest their assets exclusively in transferable securities (see paragraph 7).

IV. Legislation applicable to UCITS situated in a
Member State - Article 1(6) and (7)

21. Member States must apply to UCITS situated on their territory all the Directive's mandatory provisions, which they are obliged to incorporate into their national laws; they are of course at liberty to choose whether or not to incorporate the optional provisions. However, UCITS are governed solely by the laws of the Member State where they are situated, even if they market their units in another Member State.

22. The Directive's provisions are only minimum requirements, though, and Member States can therefore take a stricter line in applying them - exclusively to UCITS situated on their territory. For instance, they can enforce stricter requirements than those in the Directive on authorization of UCITS or on their investment policy (such as by setting a limit of 3% rather than 5% on a given type of investment by UCITS or by prohibiting them from investing in the units of other UCITS) or yet on the information that they must publish (for example by requiring quarterly rather than half-yearly reports to be published in addition to annual reports). But they cannot take a less strict line.

23. Again, a Member State is at liberty to submit UCITS situated on their territory - but only them - to additional requirements, provided that they are of general application and do not conflict with the provisions of the Directive.

24. It follows from the above that if a UCITS situated in Member State A wishes to market its units in Member State B, the latter will not be able to apply any provisions of its own to the UCITS (or to its units) in the area covered by the Directive, even if the UCITS does not have to comply in Member State A with stricter or additional requirements imposed by Member State B on UCITS situated on its own territory. In principle, this should not have any adverse effects on UCITS in Member State B, since the Directive is supposed to contain a comprehensive list of the important obligations with which UCITS must comply. If they do not wish to discriminate against their own UCITS, Member States will have to ensure that they do not impose stricter or additional obligations on them which would place them at a competitive disadvantage vis-à-vis UCITS from other Member States. However, as will be seen in due course (paragraphs 163 et seq.), a derogation from the principles set out above has been allowed in relation to marketing rules.

25. It should be noted that the option made available to Member States to impose additional or stricter requirements on UCITS does not apply to the scope of the Directive itself, as defined in Articles 1 to 4.

V. Prohibition on a UCITS from converting itself into
an undertaking not covered by the directive -
Article 1(5)

26. Consideration was given to the problem of what should be done about UCITS covered by the Directive which converted themselves into collective investment undertakings not covered by the Directive, for instance, if during the course of their existence they decided that they were no longer going to invest all their assets in transferable securities but to put a given percentage into gold or immovable property. This was an important matter, for it should not be forgotten that various Member States were unwilling to agree to the Directive, and therefore to the free marketing on their territory of units offered by UCITS from other Member States, except on the express condition that such UCITS complied with all the Directive's provisions, and in particular with the obligation to invest their assets exclusively in transferable securities. If a UCITS were authorized to convert itself into an undertaking not covered by the Directive, it would obviously forego its freedom to market its units in other Member States from that moment, but the other Member States would still be obliged to allow units no longer representing capital invested exclusively in transferable securities to remain in circulation on their territory. This was found unacceptable by a number of Member States.

27. Some experts made the suggestion that a UCITS planning such a conversion could be obliged to inform the public explicitly of its intention and to offer to repurchase its units at no cost to unit-holders, or at least to unit-holders in Member States where the units of UCITS which invested part of their assets otherwise than in transferable securities were not allowed to be marketed.

28. This suggestion was found to fall short of what was required, since it contained nothing to prevent a UCITS from taking advantage of the Directive to become established in a Member State and, having done so, changing its investment policy, speculating that unit-holders in that Member State would not take up the repurchase offer because they would be attracted by the new investment policy, particularly by investment in gold or other alternatives to transferable securities that it was planning to make in future.

29. For this reason, the solution adopted strictly prohibits a UCITS from converting itself into an undertaking not covered by the Directive. This is doubtless an extremely radical provision, but it can be regarded as the price to be paid by UCITS for the opportunity to market their units throughout the Community. If a UCITS wishes to convert itself into an undertaking not covered by the Directive, the only course available to it will therefore be to wind itself up and reconstitute itself in a different form.

30. It should be noted that this prohibition applies regardless of whether UCITS market their units exclusively in the Member State where they are situated or in other Member States as well.

SECTION II: AUTHORIZATION OF UCITS BY THE COMPETENT
AUTHORITIES (ARTICLE 4)

31. The authorities competent to authorize a UCITS are exclusively those of the Member State in which it is situated, i.e. where the management company, in the case of a unit trust or the investment company has its registered office.

32. Authorization given by the competent authorities is valid throughout the Community: if the UCITS markets its units in another Member State, it will therefore be out of the question for the latter to require fresh authorization.

33. Authorization of a unit trust by the competent authorities is subject to approval by them of the management company, the fund rules and the choice of depositary. It should be noted that the Directive does not require approval of the depositary itself, but only of the choice, since it will generally be a bank and will normally have been approved already by the banking authorities. In the case of an investment company, the instruments of incorporation and the choice of depositary have to be approved.

34. Fund rules contain all the contractual rules governing legal relations between the management company, the depositary and the unit-holders. Instruments of incorporation, which may differ from statutes, are a certified public document setting out, inter alia, the identity of the members of the board, the company name

or style, its registered office, its capital etc.

35. Since the competent authorities' approval is required for the management company, the choice of depositary and the fund rules or instruments of incorporation, it is again required if the company or depositary is replaced or changes are made in these documents. No approval or notification is required in the event of changes in the management company's or depositary's instruments of incorporation, but it is clear that if these changes were such as to jeopardize the unit-holders' interests, the competent authorities would have the right and duty to act and, if appropriate, withdraw the approval given to the management company or depositary and to require its replacement.

36. The authorization to be given by the competent authorities cannot be granted if the directors of the management company, investment company or depositary are not of sufficiently good repute or lack the experience required for the performance of their duties. To this end, the names of the directors and any persons succeeding them in office must be communicated forthwith to the competent authorities. It should be noted that the competent authorities are not required to ensure that the directors in question are of sufficiently good repute or have the necessary experience, but to withhold authorization from a UCITS when this is not the case, for instance if a director has a conviction for fraud. The term "directors" is understood as meaning those persons who, by law or under the instruments of

incorporation, represent the management company, investment company or depositary or effectively determine the business strategy of the management company, investment company or depositary.

**SECTION III: OBLIGATIONS REGARDING THE STRUCTURE OF
UNIT TRUSTS**

I. Capital of the management company

Article 5

37. Various Member States would have wished the Directive to specify a minimum figure for the capital of the management company. However, it became apparent that such a figure, which would necessarily have to be set at a level taking account of the different situations in the various Member States, would have little meaning in some Member States and would therefore offer only an illusory guarantee. The Directive therefore confines itself to setting forth the objective to be aimed at in this respect: that the management company must have sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities. It is left to each Member State to express this objective in terms of a minimum amount of capital, should it consider this necessary.

II. Activities of a management company

Articles 6 and 56

38. The Directive provides that a management company may not engage in any activity other than management of unit trusts and the assets of investment companies.

The purpose of this provision is to protect unit-holders by ensuring an optimum level of specialization by the management company and avoiding all risk of a conflict of interests between the specified activity and any others.

39. It will be noted that the Directive does not mention management UCITS, and this omission was deliberate since it was not intended to prohibit a management company from also managing funds or investment companies not covered by the Directive (for instance a real estate fund or close-ended investment company), which would not have been allowed if the term "UCITS", which refers exclusively to undertakings covered by the Directive, had been used. It should also be noted that this provision allows a management company to manage more than one fund or investment company, but there is nothing to prevent a Member State restricting its activity to the management of only one fund.

40. It is stated in the Council minutes that a management company is free to manage its own assets, which goes without saying, and in addition to engage in subsidiary operations directly connected with its main activity, such as managing savings plans based on UCITS units. In addition, a management company may, if authorized by the Member State concerned, issue bearer certificates representing the registered securities of other companies.

41. Finally, Member States may authorize management companies which, on the date of adoption of the Directive (20 December 1985), carried on activities other than the management of funds or investment companies (such as insurance business) to continue those other activities for five years after that date. In this connection, an examination was made in the course of the preparatory proceedings on whether insurance companies could be managers of investment funds, from the standpoint of Community legislation on insurance, particularly, Article 8 of the life assurance Directive, No. 79/267 EEC of 5 March 1979 (OJ No. L 63 of 13 March 1979 (1)). The prevailing opinion was that the role of the fund manager could be assumed by such companies only if they marketed policies whose yield, apart from the proportion providing minimum cover of the risk, was a function of the value of units of the fund that they managed (unit-linked insurance). At all events, this possibility should no longer be available after 20 December 1990.

III. Functions of a depositary - Articles 7 and 55

42. A unit trust's assets must be entrusted to a single depositary for safekeeping. Safekeeping naturally encompasses the everyday administration of these assets (collection of

(1) Article 8 §1b : "Each Member State shall require that any undertaking set up in its territory for which an authorization is sought shall ... limit its business activities to the business of insurance and operations directly arising therefrom, to the exclusion of all other commercial business".

dividends, interest payments, subscription charges etc.).

43. The fact that there is only one depositary does not mean that the depositary is obliged to attend itself to the safekeeping of all the fund's assets. It may entrust all or some of these assets to a third party; for instance, it may entrust to a bank situated in the United States the safekeeping of transferable securities originating from that country. If it does this, its liability is unaffected, but as we shall see (in paragraph 55) it can vary according to national laws. Depending on the relevant provisions, the depositary will either be fully liable for any improper performance of its obligations by the third party or only liable for its injudicious choice of the third party. The depositary will of course be held liable if, for instance, the fund rules did not allow it to entrust the safekeeping of assets to a third party.

44. Unless it is contrary to the law or fund rules, a management company may instruct a bank acting as depositary to entrust part of the assets, liquid assets in particular, to another bank offering better returns; in that case, the depositary's liability would be limited to proper execution of the instructions, the management company being liable for the transaction as such, i.e. the investment made, just as it would be for any other investment of transferable securities. On the other hand, if the depositary, acting on its own authority, invests liquid assets that it is holding temporarily for account

of the fund on the money market, it is fully liable for the investment made.

45. In addition to being entrusted with the safekeeping of assets, a depositary must ensure that the following are carried out in accordance with the law and the fund rules:

- the sale, issue, repurchase, redemption and cancellation of units effected on behalf of a unit trust or by a management company;
- calculation of the value of units;
- application of a unit trust's income.

46. A depositary is also required to carry out the instructions of the management company, unless they conflict with the law or the fund rules, and to ensure that in transactions involving a unit trust's assets - whether delivery of transferable securities sold on behalf of the unit trust or payment for securities purchased - any consideration is remitted to it within the usual time-limits prevailing in the State where these transactions took place.

47. It should be made clear that the use of the word "ensure" does not imply that the depositary is under any obligation as to results. It is merely required to take the steps necessary to ensure that tasks entrusted to it are properly carried out.

48. Finally, in order to take account of the situation prevailing in some Member States, the Directive provides that the competent authorities may authorize those UCITS which, on the date of adoption of the Directive (20 December 1985), had two or more depositaries entrusted with the safekeeping of their assets in accordance with their national laws to maintain that number of depositaries if the authorities have guarantees that the functions to be performed, as detailed above, will be performed in practice.

IV. Eligibility to act as depositary - Article 8

49. Although the practice in the majority of Member States is for depositaries to be credit institutions and several of these States wanted this to be made a requirement in the Directive, it goes no further than stipulating that a depositary must be an institution subject to public control, which must furnish sufficient financial and professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function. Determining which of the categories of institutions meeting these conditions are eligible to the depositaries is a matter for each Member State.

50. A depositary does not necessarily have to be a legal person. A natural person meeting the conditions enumerated (such as a private banker or stockbroker) could be a depositary. However, Member States wishing to set stricter standards, are free to

stipulate that the depositaries of their own UCITS must be credit institutions with a minimum amount of capital.

51. As seen above (paragraph 41), according to the prevailing opinion on insurance, insurance companies will be able, until 20 December 1990 at the latest, to act as managers of investment funds if they market policies linked to other value of units in such funds. According to the same opinion, insurance companies cannot be eligible under any circumstances to act as the depositary of a unit trust.

52. A depositary must either have its registered office in the same Member State as that of the management company or be established in that Member State if its registered office is in another Member State. This provision thus requires that the depositary's registered office must always be in the Community, so that a branch of a credit institution whose registered office is in a non-member country cannot be a depositary, even if the branch is established in the Community within the meaning of the Treaty. However, the same is not true of a subsidiary of such an institution, since a subsidiary is a legally distinct entity, so that it could be a depositary as long as it either had its registered office in the same Member State as that of the management company or was established there if its registered office was in another Member State.

53. The stipulation that the depositary must have its registered office (or alternatively, must be established) in the same Member State as that of the management company is made in the light of two considerations: first, the same competent authorities (those of the Member State where the management company has its registered office) have to authorize the management company and the choice of depositary and supervise their activities; secondly, by reason of its responsibilities vis-à-vis the management company, the depositary needs to be in constant contact with it. In order to make these arrangements fully effective, it was considered necessary for the depositary to be located in the same Member State as the management company, the seat of the registered office being taken as the criterion for this purpose.

V. Liability of a depositary - Article 9

54. The scope of a depositary's liability in regard to the safekeeping of unit trust assets and various other tasks has been discussed in paragraphs 43 and 44.

55. The Directive specifies that a depositary is in all circumstances liable to the management company and unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them. Its liability is determined in accordance with the national laws of the Member State in which the unit trust is situated, i.e. where the management company has its registered

office; in other words, the extent of its liability is determined according to that State's national laws. This is of course a minimum rule, and Member States are free to take a stricter line on fixing the extent of liability.

56. A depositary's liability to unit-holders may be invoked directly where there is a direct legal relationship between the depositary and the unit-holders, or indirectly through the management company where there is no such relationship.

VI. Separation of the roles of manager and depositary -
Article 10

57. The roles of management company and depositary are different: a management company manages fund assets, while a depositary is responsible for their safekeeping and for ensuring that they are managed legally by the management company. This is why the Directive stipulates that no single company may act as both management company and depositary for the same UCITS.

58. During the preparatory deliberations the question arose whether it would not be necessary to make the additional stipulation that the management company and depositary must be independent not only legally but also economically or financially (for instance, that they should not be linked by a common administration or management, by a substantial direct or indirect shareholding, or by any other financial interest). They cannot

be said to be independent when the depositary is a bank and the management company a subsidiary of that bank, as occurs in various Member States. In view of this situation, only legal independence was stipulated in the Directive, but it was considered useful to add that the management company and depositary must, in performing their respective roles, act independently and solely in the interest of the unit-holders.

VII. Replacement of a management company or depositary

Article 11

59. The law or the fund rules must lay down the conditions for the replacement of the management company or the depositary and rules to ensure the protection of unit-holders in the event of such replacement.

This provision does not detract from the right that the competent authorities must have to demand such replacement whenever they consider this necessary in the interest of unit-holders. Indeed, Article 49 of the Directive lays down that Member States must vest their competent authorities with all the powers necessary to carry out their task.

**SECTION IV: OBLIGATIONS REGARDING THE STRUCTURE OF
INVESTMENT COMPANIES AND THEIR DEPOSITARIES**

I. Capital and legal form - Article 12

60. Determining the legal form to be taken by an investment company is a matter for the Member States.

The only stipulation that the Directive makes in this connection is that the company must have sufficient paid-up capital to enable it to conduct its business effectively and meet its liabilities. As with the capital of a management company (see paragraph 37), it was considered undesirable, in view of the different situations from one Member State to another, to set a minimum figure for an investment company's capital.

II. Activities of an investment company - Article 13

61. As with management companies, and for the same reasons (see paragraph 38), it was considered appropriate to limit investment companies' activities to those specified for UCITS, viz.: collective investment in transferable securities of capital raised from the public; operating on the principle of risk-spreading; and, at the request of unit-holders, repurchasing or redeeming units, directly or indirectly out of their assets.

III. Role of a depositary - Articles 14 and 55

62. The role of a depositary is the same as that of a unit trust's depositary, apart from two differences: it does not have to ensure that the value of units is calculated in accordance with the law or the investment company's instruments of incorporation, nor does it have to check that the instructions it receives from the investment company are in keeping with the law or the instruments of incorporation. Allowing for these differences, therefore, the comments in paragraphs 42 to 48 apply equally to the depositary of an investment company.

63. The reasons why it was found possible to make the role of an investment company's depositary more limited than that of a unit trust's depositary were that:

- an investment company is generally governed by company law, so that its unit-holders are able to avail themselves of the guarantees afforded by company law: in particular, they are able to exercise direct control over management of the company by taking part in its general meetings, whereas a unit trust's unit-holders usually have no control over its management, which is in the hands of a management company;

- in an investment company, since the unit-holders are actually the company's shareholders, there is no risk of conflicts of

interest of the kind that can arise between the management company and the unit-holders in the case of a unit trust.

64. For these reasons (especially the guarantees enjoyed by unit-holders under company law), some Member States would have liked to go a step further, restricting the role of the depositary to safeguarding the investment company's assets. This wish could not be accommodated, however, since it was found that supervision of the investment company's management by the depositary would validly complement the control exercised by unit-holders, since the former could be brought into play whenever necessary whereas the latter was restricted to general meetings.

65. The provision allowing unit trusts to have two or more depositaries in certain circumstances (see paragraph 48) also applies to investment companies. It was included in the Directive to take account of the situation in Denmark, where in exceptional cases the responsibilities of an investment company's depositary may be shared, under close supervision by the competent authorities, between two or more depositaries, this arrangement being the subject of an agreement between the depositaries.

IV. Eligibility to act as depositary - Article 15

66. The comments made on this subject in connection with unit trusts (see paragraphs 49 to 53) apply in all particulars to investment companies as well, except that here of course it is the investment company's registered office that has to be taken into consideration when determining the Member State in which the depositary must be situated.

V. Liability of the depositary - Article 16

67. A depositary is liable, in accordance with the national law of the Member State in which the investment company's registered office is situated, to the investment company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them (see comments on this subject in paragraphs 54 and 55).

VI. Separation of the functions of investment company and depositary - Article 17

68. No single company may act as both investment company and depositary (see comments on this subject in paragraphs 57 and 58, which are applicable mutatis mutandis).

69. It is noteworthy that the Directive does not make the same stipulation as for unit trusts to the effect that in performing

their respective roles, the investment company and the depositary must act independently, although similar grounds could have been argued for including such a provision; this omission appears to be an oversight. However, the Directive does provide, as in the case of unit trusts, that a depositary must act solely in the interests of the unit-holders.

VII. Replacement of a depositary - Article 18

70. A provision similar to that for unit trusts is made on the conditions for replacing an investment company's depositary (see paragraph 59).

VIII. The specific case of investment companies which market their units through stock exchanges - Article 14(4), (5) and (6)

71. The original text of the Directive contained a section setting out provisions applicable specifically to investment companies situated on the territory of a Member State which market their units exclusively through one or more stock exchanges on which their units are admitted to official listing. It laid down that such companies were not required to have depositaries within the meaning of the Directives and exempted them from various rules in the Directive which were not applicable to them since their units were marketed through stock

exchanges (e.g. the obligation to repurchase their units).

72. These derogations were justified on the grounds that such investment companies, like all quoted companies, were bound by special obligations by reason of their listing and were subject to supervision by the stock-exchange authorities responsible not only for the proper operation of the stock market but also for ensuring that investors' interests were protected. They also took account of the fact that such companies, since their units were marketed exclusively through stock exchanges, were generally dealing with potential investors who were well versed in the ways of the market, whereas unlisted UCITS were more aggressive in their marketing policy, having the right to advertise, and were therefore able to reach a less sophisticated market. In short, these derogations were justified on the grounds of the special guarantees offered by listed companies and their marketing methods, which were similar to those used for all listed shares.

73. These derogations have been retained and even extended. They are optional, in that it is left to Member States to decide whether they wish to apply them to investment companies situated on their territory.

- Companies situated in a Member State which market their units through stock exchanges

74. These companies are not required to have a depository within

the meaning of the Directive, i.e. a single depositary responsible for safeguarding their assets and carrying out supervision over them. Nor are they required to repurchase or redeem their units, since they market them through stock exchanges, but they must intervene on the market (by either buying or selling) to prevent the stock-exchange value of their units deviating by more than 5% from their net asset value. As seen earlier (in paragraph II), such intervention by a UCITS is regarded as equivalent to repurchase or redemption. Finally, since their units are marketed through stock exchanges, they are not required to make public the issue, sale, repurchase or redemption prices of their units or to publish the rules according to which these prices are calculated.

75. On the other hand, these companies must:

- in the absence of provision in law, state in their instruments of incorporation the methods of calculation of the net asset value of their units;
- establish the net asset value of their units, communicate them to the competent authorities at least twice a week and publish them twice a month. At least twice a month, an independent auditor must ensure that the calculation of the net asset values of units is effected in accordance with the law and the company's instruments of incorporation. On such occasions, the auditor must make sure that the company's assets are invested in

accordance with the rules laid down by law and the company's instruments of incorporation.

- Companies situated in a Member State which market a proportion of their units through stock exchanges

76. The derogations described above for companies which market their units exclusively through stock exchanges are also applicable, subject to the conditions specified, to companies which market at least 80% of their shares through one or more stock exchanges named in their instruments of incorporation, as long as:

- their units are submitted to official listing on the stock exchanges of those Member States on whose territory the units are marketed.
- any transactions by the company in its units outside stock exchanges are effected at stock-exchange prices only, its instruments of incorporation being required to specify the stock exchange in the country of marketing the prices of which shall determine the prices at which the company will effect any transactions outside stock exchanges in that country.

77. It should be stressed that a Member State may avail itself of the derogations described in paragraph 76 only if it considers that unit-holders have protection equivalent to that of unit-holders in UCITS which have depositaries within the meaning of the Directive.

78. Again, Member States availing themselves of either of the sets of derogations described above must inform the Commission of the identities of companies benefiting from them. Given the strict conditions governing these derogations, the numbers are likely to be small.

79. The Commission will report to the Contact Committee on application of these derogations within five years of the implementation of the Directive. After obtaining the Contact Committee's opinion, the Commission will, if need be, propose appropriate measures.

**SECTION V: OBLIGATIONS CONCERNING THE INVESTMENT
POLICIES OF UCITS**

**I. Composition of the assets of UCITS - Articles
19, 20, 21 and 54**

(1) Transferable securities listed on the stock exchange or traded on another regulated market

80. Subject to the provisions discussed under headings (2) and (3) below, the investments of a UCITS must consist solely of:

- (a) transferable securities admitted to official listing on a stock exchange in a Member State;**
- (b) transferable securities dealt in on another regulated market in a Member State which operates regularly and is recognized and open to the public (no exact definition of such other markets is given, but it is clear that this refers primarily to the second tier stock markets that have been created in several Member States in recent years and to the various unofficial markets);**
- (c) transferable securities admitted to official listing on a stock exchange in a non-member State or dealt in on another regulated market in a non-member State which operates regularly and is recognized and open to the public, provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in**

law or the fund rules or the investment company's instruments of incorporation;

- (d) recently issued transferable securities, provided that
- the terms of issue include an undertaking that application will be made for admission to official listing on a stock exchange in a Member State or non-member State or to another regulated market in a Member State or a non-member State which operates regularly and is recognized and open to the public, provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the investment company's instruments of incorporation (although it is not stated explicitly, the content of subparagraphs (a), (b), and (c) makes it clear that such approval or indication of a choice of stock exchange or market can only apply to transferable securities recently issued in non-member States);

 - such admission is secured within a year of issue.

If admission has not been secured by the end of a year, such recently issued transferable securities will be regarded as not being admitted to official listing on a stock exchange or to another regulated market; nevertheless, they may be kept among the assets of the UCITS if their value combined with the value of other unlisted transferable securities or of debt instruments which can be treated as equivalent to transferable securities

held by the UCITS does not exceed 10% of its assets; see (2) below. If the limit is exceeded, the UCITS will have to remedy the situation without delay (on this subject, see paragraphs 112 and 113).

(2) Other securities

81. Investments as described under heading (1) above are not subject to any quantitative limitation. As long as it complies with the investment rules commented upon below, a UCITS can therefore invest 100% of its assets in listed transferable securities or transferable securities dealt in on another regulated market, whether they be securities issued in a Member State or a non-member country, or yet, although this is difficult to imagine, in transferable securities recently issued, whether in a Member State or a non-member country.

82. A UCITS may however invest in other securities, but only up to specified percentages of its assets:

- (a) A UCITS may invest no more than 10% of its assets (however, see paragraph 92) in transferable securities other than those referred to under heading (1) above, i.e. transferable securities that are neither admitted to official listing nor dealt in on any other regulated market.
- (b) A UCITS may, if so authorised by the Member State on whose territory it is situated, invest no more than 10% of its

assets (however, see paragraph 92) in debt instruments which, for the purposes of the Directive, can be treated, because of their characteristics, as equivalent to transferable securities and which are, inter alia, transferable, liquid and have a value which can be accurately determined at any time or at least with the frequency specified for publishing unit prices (see paragraph 136).

83. It should be pointed out that the Directive leaves Member States to decide, at their discretion, whether or not to allow investment in debt instruments treated as equivalent to transferable securities, whereas in the case of the investments referred to in paragraph 82 (a) (unlisted transferable securities), the wording of the Directive indicates that UCITS have the option to invest as of right. In practice, despite the differences between them, these two formulations could lead to the same result since, under the rule giving Member States the right to apply stricter provisions than those for investments as referred to in paragraph 82 (a), which would have the effect of closing down this investment option to UCITS situated on its territory. Moreover, this applies to most of the investment rules discussed below.

84. The option for UCITS to invest some of their assets in instruments treated as equivalent to transferable securities was introduced into the Directive in order to take account of the

situation prevailing in various Member States, where UCITS are authorised to invest part of their assets in debt instruments, which they regard or treat as transferable securities, whereas other Member States do not. The types of debt instrument quoted as examples include options, real property certificates, cash orders, treasury bonds, certificates or deposit, debt certificates and promissory notes.

85. The Member States, each for its own part, have to determine whether the instruments listed above or other debt instruments can be treated as equivalent to transferable securities on the basis of the criteria laid down in the Directive. There is an obvious danger that the imprecise wording and the fact that, in the absence of Community case law, interpretation of it is left to the individual Member State will result in divergent applications. It is for this reason that the Directive lays down a procedure for mutual information with a view to achieving more uniform application of this provision.

86. To this end, the Directive stipulates that the Member States must send to the Commission:

- no later than the date of implementation of the Directive, lists of the debt instruments which they plan to treat as equivalent to transferable securities, stating the characteristics of those instruments and the reasons for so doing:

- details of any amendments which they contemplate making to these lists or of any further instruments which they contemplate treating as equivalent to transferable securities, together with their reasons for so doing.

87. The Commission must immediately forward this information to the other Member States together with any comments it considers appropriate. Such communications may be the subject of exchanges of views within the Contact Committee (see paragraph 210).

(3) Liquid assets

88. Finally, a UCITS may hold ancillary assets.

89. During the course of the preparatory deliberations it transpired that this term was open to different interpretations from one Member State to another. While it clearly covered cash in hand and short-term bank assets, there were those who took the view that it ought to include debt instruments which had such short maturity and were so securely encashable that they could be treated as equivalent to liquid assets.

90. Despite the vagueness of this term, it was considered wiser not to define it but to leave Member States to qualify it if necessary. It would have been impossible to formulate a definition capable of taking account of special circumstances. Moreover, it was found that such divergences between Member

States as might arise in the absence of a definition of this term were unlikely to cause disruption.

91. Another matter considered during the preparatory deliberations was the maximum allowable percentage for liquid assets held by a UCITS. In recent years, UCITS in many Member States had been known to have had large holdings in liquid assets (sometimes 20% and more of their total assets); pending the appropriate moment for investing them in transferable securities, these liquid assets could be placed on the money market at highly remunerative rates. These Member States wanted to know whether the Directive's use of the expression "ancillary liquid assets" meant that holding such levels of liquid assets would be contrary to the Directive. It emerged from the discussions that this was not what was meant by this expression, which was to be understood as meaning that holding liquid assets could not in itself be an object of UCITS, whose sole object was investment of their assets in transferable securities. It is therefore not prohibited under the Directive for a UCITS, in certain circumstances and for a certain period, to hold a substantial amount of liquid assets, even in excess of 25% of its total assets, as long as it does not make the holding of liquid assets an investment objective in itself.

(4) Comments on the composition of assets

92. Investments in transferable securities not officially listed on a stock exchange or traded on some other regulated market are limited to 10% of assets. The same limit applies to investments in debt instruments treated as equivalent to transferable securities. However, the combined total of investments in these two categories (see paragraph 82) held by a UCITS is not allowed under any circumstances to exceed 10% of its assets.

93. During the preparatory deliberations, it was learnt that the assets other than transferable securities held by some UCITS exceptionally included gold or certificates representing gold. Since this is incompatible with the definition of a UCITS, the Directive includes a provision, superfluous though it may appear, to the effect that a UCITS may not acquire either precious metals or certificates representing them.

94. On immovable property, the Directive provides that investment companies only may include immovable property among their assets in so far as it is essential for the direct pursuit of their business. The same applies to movable property.

95. The term "transferable securities" is not defined in the Directive. Nor is it defined in the various other European Directives in which it is used. There is unlikely to be any problem over transferable securities listed on stock exchanges or

traded on other regulated markets: all securities found on these markets - shares, bonds, etc - are included. But difficulties over interpreting the term "transferable securities" could arise in the case of transferable securities not listed on a stock exchange or traded on another regulated market. Here, each Member State will if necessary have to indicate what is meant by this term, which is generally not defined in national laws.

96. In this context, the question arose during the preparatory deliberations whether option rights that can be traded on option markets, of which those in London and the Netherlands are leading examples, could be regarded as transferable securities. This was a controversial point and, with new financial products coming onto the market (notably those providing cover against currency risks) over which the same question could arise, it was decided to include the following provisions on investments by UCITS in the Directive:

- subject to authorization by the Member State in which it is situated and under the conditions and within the limits that it lays down, a UCITS may employ techniques and instruments relating to transferable securities, provided that such techniques and instruments are used for the purpose of efficient portfolio management;
- subject to authorization by the Member State in which it is situated, a UCITS may employ techniques and

instruments intended to provide protection against exchange risks in the context of management of its assets and liabilities.

97. For similar reasons, the Danish delegation, during the preparatory deliberations, raised the question whether Danish mortgage instruments of a very specific type (pantebreve) could be regarded as transferable securities traded on a regulated market. The delegation was inclined to give an affirmative answer to this question, to which it attached importance, since many Danish investment companies invested their assets exclusively or mainly in these instruments, which occupy a very prominent position on the financial market in Denmark. These instruments are not traded in on the stock exchange but they are negotiable on a market organized mainly by the credit institutions. So that the Danish delegation would be left in no doubt as to how to answer this question, it was decided to include a provision in the Directive to the effect that solely for the purpose of Danish UCITS, pantebreve issued in Denmark were to be treated as equivalent to transferable securities dealt in on a regulated market which operates regularly and is recognized and open to the public.

If UCITS from other Member States wanted to invest in pantebreve, they could not do so under this provision in the Directive, which is specifically reserved for Danish UCITS. However, they could invest up to 10% of their assets in these instruments, either as

unlisted transferable securities if they are recognized as such by the Member State concerned or as debt instruments treated as equivalent to transferable securities if this is permitted by the Member States concerned.

II. Rules imposing percentage limits

(1) Application of the principle of risk-spreading

Article 22 and 23

98. A UCITS may invest no more than 5% of its assets in transferable securities issued by the same body. In order to ensure a spread of risks, it is necessary to prevent excessive concentration of investments.

99. However, it is open to a Member State to raise this limit from 5% to 10%, but if it does so the total value of the transferable securities held by a UCITS in the issuing bodies in each of which it invests more than 5% of its assets must not exceed 40% of the value of its assets. In other words, a UCITS would be able to invest 10% of its assets in each of four different issuing bodies (i.e. 4 x 10%); other combinations would be possible up to the limits indicated. (1)

100. It is also open to a Member State to raise the 5% limit to a maximum of 35% if the transferable securities are issued or guaranteed by a Member State and/or its local authorities and/or

(1) See also directive 88/220/EEC of 22 March 1988 (O.J. 100 of 19.4.88), copy attached

a non-member State and/or public international bodies of which one or more Member States are members.

101. It is even open to a Member State to authorise UCITS to invest up to 100% of their assets in such securities. However, the competent authorities will grant such a derogation only if they consider that unit-holders in the UCITS have protection equivalent to that of unit-holders in UCITS complying with the limits quoted in paragraphs 98 and 99. In order to take advantage of this derogation, UCITS must comply with various conditions:

- (a) In keeping with the basic principles defining UCITS (see paragraph 4), their investments in public issues must observe the principle of risk-spreading. In other words, UCITS must invest their assets in different issues of transferable securities issued or guaranteed by the public authorities concerned. The Directive even specifies in this connection that a UCITS must hold securities from at least six different issues from one or more Member States, local authorities, non-member States or public international bodies, and that securities from any one issue may not account for more than 30% of its total assets.
- (b) UCITS must make express mention in the fund rules or in the investment company's instruments of incorporation of the States, local authorities or public international bodies

issuing or guaranteeing securities in which they intend to invest more than 35% of their assets; such fund rules or instruments of incorporation must be approved by the competent authorities.

- (c) UCITS must include a prominent statement in their prospectuses and any promotional literature drawing attention to such authorization and indicating the States, local authorities and/or public international bodies in the securities of which they intend to invest or have invested more than 35% of their assets.

Comments

102. The reasons why it was considered possible, in the case of public issues, to derogate from the 5% and 10% limits were twofold: first, because it was felt that such issues did not entail the risks that might arise with other investments; secondly, in order to take account of the fact that many UCITS had specialized in investing all or part of their assets in such issues, which in recent years had accounted for an increasing percentage of transactions on financial markets.

103. It should not be forgotten that the basic rule under which the transferable securities in which UCITS are allowed to invest their assets must, subject to the derogations allowed under specified circumstances, be officially listed on a stock exchange

or traded on another regulated market (see paragraphs 80 to 87) still applies to transferable securities issued or guaranteed by public authorities as referred to in paragraphs 100 and 101 (however, see paragraph 92).

104. During the deliberations, various Member States maintained that the option available to a UCITS to invest up to 100% of its assets, subject to the conditions described, in transferable securities issued or guaranteed by public authorities could not be used by Member State B without the latter's consent, i.e. using a UCITS situated on the latter's territory as an intermediary placing all its assets in a loan issued by Member State A. It is for this reason that the Directive specifies that any such investment of up to 100% of assets must be without prejudice to Article 68(3) of the Treaty, which stipulates that a Member State's loans may not be placed in other Member States unless the States concerned have reached agreement thereon. However, there was no need to spell this out, since under the terms of the Directive such an investment cannot be made in Member State B without the latter's authorization.

(2) Investment in units of other collective investment undertakings - Article 24

105. According to one school of thought, it is undesirable to allow a UCITS to invest in the units of other UCITS, since in such circumstances:

- (1) unit-holders would probably not be in a position to tell which transferable securities their capital had actually been invested in;
- (2) the UCITS would be given an indirect opportunity to circumvent the provisions of the Directive prohibiting it from investing more than 5% of its assets in transferable securities issued by the same body or from exercising significant influence over issuing bodies in which it invested its assets;
- (3) there would be duplication of costs.

106. According to a second view, it would be regrettable if such investments were not allowed, since if a UCITS wishes to invest part of its assets in a given geographical region or in a particular sector of activity, it should be allowed to do so through another UCITS specializing in such investments so that it can avoid incurring extra expenditure on analysis and research.

107. The latter view was the one adopted in the Directive, which allows a UCITS to invest part of its assets in units of other collective investment undertakings subject to the following conditions:

- (a) A UCITS may not acquire the units of other collective investment undertakings of the open-ended type unless

they are collective investment undertakings within the meaning of the first and second indents of Article 1(2), i.e. unless they meet the two criteria laid down in the definition given (see paragraphs 3 to 12). Thus, it could not acquire units in collective investment undertakings which invest even part of their assets in immovable property or gold. However, it is of little consequence whether the undertakings in which it invests are situated in a Member State; this is the reason why the Directive refers to acquiring the units of other collective investment undertakings within the meaning of the first and second indents of Article 1(2) rather than of acquiring the units of other UCITS, the latter expression being used in the Directive for undertakings falling within its scope, i.e. those situated on the territory of a Member State.

- (b) Investment by a UCITS in the units of such collective investment undertakings is limited to 5% of its assets. However, any such investment, if the units of the collective investment undertakings are not listed on a stock exchange or traded on another regulated market, would be taken into account as part of the 10% that a UCITS is allowed to invest in other transferable securities or debt instruments treated as equivalent to transferable securities (see paragraph 92).

- (c) The restrictions described in (a) and (b) above do not apply to investment in the units of collective investment undertakings of the closed-ended type. This is why the Directive's provisions on these restrictions refer to acquisition of the units of collective investment undertakings of the closed-ended type only. This is entirely justified since the units of undertakings of the closed-ended type (which normally have a stock exchange listing) are similar to any other transferable security, and from the standpoint of the Directive's rules on investment, they have to follow the general rules applicable to transferable securities.
- (d) It should be noted that undertakings which, although UCITS within the meaning of the first and second indents of Article 1(2) can be excluded from the scope of the Directive on the ground that they have inappropriate investment or borrowing policies (see paragraphs 16 to 19), are to be deemed to be collective investment undertakings according to the definition given. However, this is not true of UCITS which are excluded from the Directive because they raise their capital without promoting sales of their units to the public, since they do not meet the criterion of "capital raised from the public" specified in Article 1 as a condition for being deemed to be a

UCITS (see paragraph 20 (b)). Nor, it goes without saying, can it be true of UCITS excluded from the Directive because sales of their units are reserved exclusively for the public in non-member countries (see paragraph 20 (c)).

- (e) Several Member States were concerned to avoid the forms of abuse that might arise with cross-holdings where a UCITS invests in the units of a unit trust managed by the same management company or by any other company with which the management company is linked. At the same time, it was necessary to avoid duplication of charges or costs by the management company in such cases. Hence the incorporation into the Directive of the following provisions:

"Article 24

.....

3. Investment in the units of a unit trust managed 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, shall be permitted only in the case of a trust which, in accordance with its rules has specialized in investment in a specific geographical area or economic sector, and provided that such

investment is authorised by the competent authorities. Authorization shall be granted only if the trust has announced its intention of making use of that option and that option has been expressly stated in its rules. A management company may not charge any fees or costs on account of transactions relating to a unit trust's units where some of a unit trust's assets are invested in the units of another unit trust managed 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.

4. Paragraph 3 shall also apply where an investment company acquires units in another investment company to which it is linked within the meaning of paragraph 3.

Paragraph 3 shall also apply where an investment company acquires units of a unit trust to which it is linked, or where a unit trust acquires units of an investment company to which it is linked."

In a statement in the Council minutes, the Council and Commission specify that the fees or costs referred to in the second paragraph of Article 24(3) include not only commissions on purchase or repurchase but also management or consultancy commissions.

(3) Application of the principle prohibiting UCITS from pursuing a takeover policy - Article 25

108. The object of a UCITS is to invest capital raised according to the principle of risk-spreading. Hence the rule that a UCITS may invest no more than 5% of its assets in transferable securities issued by the same body (see paragraph 98). However, this limit is not enough in itself to protect unit-holders' interests since, even if it complied with the limit, a UCITS could purchase up to 100% of such a body's shares so as to exercise control over it. UCITS therefore have to be prevented from exercising such control against the unit-holders' will, which would moreover be contrary to the Directive's provisions requiring management companies and investment companies to act solely in the unit-holders' interests.

109. In order to prevent all possibility of such irregularities, the Directive lays down that an investment company or a management company acting in connection with all of the unit trusts which it manages and which fall within the scope of the Directive may not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body.

110. In the case of transferable securities carrying no voting rights, the Directive stipulates that an investment company or a unit trust (not, in this instance, a management company acting in

connection with all of the unit trusts which it manages) may acquire no more than:

- 10% of the non-voting shares of any single issuing body;
- 10% of the debt securities of any single issuing body;
- 10% of the units of any single collective investment undertaking fulfilling the definition of a UCITS as given in the first and second indents of Article 1(2) of the Directive (see paragraphs 3 to 12).

However, the limit on the acquisition of debt securities or units may be disregarded at the time of acquisition if at that time the gross amount of the debt securities or the net amount of the securities in issue cannot be calculated.

111. These provisions call for several comments.

(a) The limit on the acquisition of transferable securities carrying no voting rights is to be seen as a reinforcement of the rule requiring risks to be spread.

(b) Rather than rely on the criterion - which is open to discussion - of "significant influence that can be exercised over the management of an issuing body", a number of Member States had found it preferable in their legislation to express this concept of significant influence in quantitative terms, to which end they had set a percentage limit (generally 5%) on the amount of a

single issuing body's voting shares that a UCITS was allowed to acquire. During the preparatory deliberations, these Member States, which wanted to carry on applying this rule in their own countries, were worried about the distortion of competition that their own UCITS might suffer if UCITS from other Member States were not governed by a similar rule. They took the view that if they continued to apply such limits to their own UCITS it would be appropriate for UCITS from other Member States to have to comply with the same limits, at least in the case of acquisition of voting shares of issuing bodies established on their territory.

This view was accommodated in the Directive, which lays down that pending further coordination, the Member States must take account of existing rules defining the principle of "significant influence" under other Member States' legislation.

What was meant by this was spelt out by the Council of Ministers in a Recommendation worded as follows:

"The Council of the European Communities,

(1) Hereby recommends

that each time the concept of "significant influence" for the purposes of Article 25(1) of Directive 85/611/EEC is represented in another

Member State's legislation by a numerical limit, the Member State's competent authorities should ensure, if so requested by that other Member State, that such limits are observed by investment and management companies situated within its territory when they acquire shares carrying voting rights issued by a company established within the territory of a Member State where such limits apply.

With a view to implementing this recommendation, the Member States in which such limits apply when that Directive is published should communicate them to the Commission, which in turn will inform the other Member States; the same applies to any subsequent relaxation of those limits.

(2) Hereby invites

the competent authorities to collaborate closely with each other, in accordance with Article 50 of that Directive, to implement this recommendation."

(c) As seen earlier, a UCITS may not invest more than 5% (10% in certain circumstances) of its assets in transferable securities issued by the same body, although a Member State may raise this limit to 35% or even 100% in the case of transferable securities

issued or guaranteed by a Member State, its local authorities, a non-member State or public international bodies of which one or more Member States are members (see paragraphs 100 and 101). Consequently, the Directive provides that when a Member State does this, the limit laid down on the acquisition of debt securities issued by any single body does not apply.

(d) It may be that a non-member country prohibits non-residents from acquiring transferable securities issued by industrial or commercial companies in that country. The only way to invest in such a country is sometimes for a Community UCITS to set up an investment company there, in which it holds all or a substantial proportion of the shares, and for that company to invest in the securities of issuing bodies of the State concerned. In order to take account of such circumstances, the Directive allows Member States to waive application of the limits quoted in paragraphs 109 and 110 in the case of shares held by UCITS in the capital of a company incorporated in a non-member State investing its assets mainly in the securities of issuing bodies having their registered offices in that State, where under the legislation of that State such a holding represents the only way in which the UCITS can invest in the securities of issuing bodies of that State. However, such waiver is applicable only if in its investment policy the company from the non-member State complies with the limits quoted in paragraphs 98 to 100 and 105 to 110, and provided that where these limits are exceeded, the

rules in the Directive to cover such an eventuality (see paragraphs 112 and 113) are observed.

(e) Finally, the Directive provides that a Member State may waive application of the limits quoted in paragraphs 109 and 110 in the case of shares held by an investment company in the capital of subsidiary companies carrying on the business of management, advice or marketing exclusively on its behalf. This is primarily to take care of the case of an investment company that has set up a subsidiary whose capital it owns and whose object is to repurchase units at unit-holders' request.

III. Remediating the situation if the limits laid down in the Directive are exceeded - Article 26

112. The Directive lays down a number of limits on investments that UCITS are allowed to make. There might be occasions when these limits are temporarily exceeded, not because the UCITS has deliberately flouted the rules but, for instance, because the value of its assets has varied or as a result of the exercise of subscription rights. Thus, if a UCITS has invested 5% of its assets in the shares of a given company, the 5% limit might be exceeded if the value of these shares increases or if the overall value of the assets of the UCITS falls, for instance if its other investments lose value. The limits could also be exceeded in the event of mergers or takeovers between investment companies.

113. The Directive lays down the following rules to cover such cases:

(a) UCITS need not comply with the limits laid down in Articles 19 to 25 when exercising subscription rights attaching to transferable securities which form part of their assets. Thus, if a UCITS has invested 5% of its assets in the shares of a given company, it will be allowed to exercise the subscription rights attaching to those shares, even though this operation will cause it to exceed the 5% limit laid down in Article 19. However, as will be seen in (b) below, it will have to remedy the situation subsequently.

(b) If the limits are exceeded for reasons beyond the control of a UCITS (as a result, for example, of a fluctuation in stock-market prices), it must adopt as a priority objective for its sales transactions the remedying of that situation, taking due account of the interests of its unit-holders. The same applies if the limits are exceeded as a result of the exercise of subscription rights. The obligation to rectify the situation is a priority objective for the UCITS, but it must at the same time take account of its unit-holders' interests, and this might lead it to delay rectifying the situation if it hopes that it will be able to do so on better terms at a later stage and to sell other transferable securities instead.

(c) Member States may allow recently authorised UCITS to derogate from the limits laid down in the interests of risk-spreading (see paragraphs 98 to 104) for a period of six months from the date of their authorisation. However, they are still required to do all they can to ensure observance of the principle of risk-spreading.

(d) It should be noted that Articles 19 to 24 place limits on the investments that a UCITS may make and that these limits have to be complied with not only at the time of purchase of transferable securities but at all times, subject to the provisions discussed above. Article 25 on the other hand states that the limits apply to acquisitions of securities, and this, on a literal interpretation, could be taken as meaning that they have to be taken into account at the time of acquisition only and the situation would not have to be rectified if the limits were exceeded at a later stage. However, this interpretation is contradicted by Article 26, which lays down how the situation must be remedied in the event of any exceeding of the limits, including those laid down in Article 25. No particular importance should therefore be attached, in our view, to the fact that Article 25 uses the term "acquire" instead of "invest".

SECTION VI: OBLIGATIONS CONCERNING INFORMATION TO BE
SUPPLIED TO UNIT-HOLDERS

I. Publication of a prospectus and periodical reports -
Article 27

114. An investment company and, for each of the trusts it manages, a management company must publish:

- a prospectus
- an annual report for each financial year, and
- a half-yearly report covering the first six months of the financial year.

Since this, in common with the Directive's other provision, is a minimum requirement, a Member State would be free to take a stricter line, requiring UCITS to publish quarterly reports in addition to those called for in the Directive, but were it to do so, only UCITS situated on its territory would be obliged to comply.

115. Publication of a second half-yearly report was not made compulsory, since the information to be published in half-yearly reports is generally included in annual reports. The same line was taken on periodical reports to be published by companies

admitted to official listing on a stock exchange (Council

Directive of 15 February 1982, OJ No. L 48/26 of 20 February 1982).

116. The annual report must be published within four months of the end of the financial year, and the half-yearly report within two months of the end of the first half of the financial year.

II. Contents of the prospectus and periodical reports -
Article 28

117. A prospectus must include the information necessary for investors to be able to make an informed judgment of the investment proposed to them. For this purpose, it must contain at least the information provided for in Schedule A annexed to the Directive, reproduced at the end of this commentary, unless that information already appears in the investment company's instruments of incorporation annexed to the prospectus (see paragraph 122).

Publishing all the information provided for in Schedule A therefore does not exempt a UCITS from having to publish additional information if this is necessary to enable an investor to form a judgment on the investment proposed. The Schedule A information is thus a minimum to which Member States may add additional requirements in their respective countries, although these will apply exclusively to UCITS situated on their territory. The Council Directive of 17 March 1980 (OJ No. L 100

of 17 April 1980) took a similar line on the prospectus to be published for admission to official listing on a stock exchange; it sets out in detail the information to be incorporated into the prospectus, while at the same time stressing that the prospectus must still contain any other information of significance to investors.

118. The annual report must include a balance-sheet or a statement of assets and liabilities, a detailed income and expenditure account for the financial year, a report on the activities of the financial year and the other information provided for in Schedule B annexed to the Directive (reproduced at the end of this commentary).

As with the prospectus, the obligation to publish this information is reinforced by the general rule that the UCITS is still obliged to include any significant information which will enable investors to make an informed judgment on the development of its activities and its results.

119. In a statement recorded in the Council minutes, the Commission stressed that investment companies falling within the scope of Directive 78/660/EEC of 25 July 1978 (OJ No. L 222 of 14 August 1978) on companies' annual accounts still have to comply with all that Directive's provisions, in addition to those contained in the Directive on UCITS. Directive 78/660/EEC provides, in Article 5(1) that Member States may lay down special

rules on the presentation of investment companies' annual accounts as long as they faithfully reflect their assets and liabilities, financial position and results, on the understanding that Member States may, under Article 6, provide that valuation of the securities in which investment companies have invested their assets is based on market value.

120. On the half-yearly report, the Directive merely specifies that it must include at least the information provided for in Chapters I to IV of Schedule B.

121. By analogy with the requirements on half-yearly reports to be published by companies admitted to official listing on stock exchanges, the Directive provides, in connection with the half-yearly report to be published by a UCITS, that where a UCITS has paid or proposes to pay an interim dividend, the figures must indicate the results after tax for the half-year concerned and the interim dividend paid or proposed.

III. Documents to be annexed to the prospectus -

Article 29

122. The fund rules or an investment company's instruments of incorporation must form an integral part of the prospectus and must therefore be annexed to it.

123. However, the fund rules or an investment company's

instruments of incorporation need not be annexed to the prospectus provided that the unit-holder is informed that on request he or she will be sent those documents or be apprised of the place where, in each Member State in which the units are placed on the market, he or she may consult them.

124. The Directive does not expressly state whether the prospectus and its annexes have to be sent free of charge to the unit-holder on request, but it is reasonable to suppose that this ought to be so. The Directive stipulates that the prospectus must be offered free of charge to a subscriber (see paragraph 133), and this must also apply to the fund rules or instruments of incorporation since they normally form an integral part of the prospectus and have to be annexed to it. It is only logical that when these documents do not have to be annexed to the prospectus, they should be sent free of charge to a subscriber. There seems no reason why this should not be the case when such documents are sent not to a subscriber but to a unit-holder on request, since the Directive stipulates that they must be offered free of charge to a subscriber (see paragraph 133).

125. As seen above (paragraph 117), when the fund rules or the investment company's instruments of incorporation are annexed to the prospectus, the prospectus itself does not have to reproduce the information already contained in them. This does not apply therefore when, in the circumstances described in paragraph 123, these documents are not annexed to the prospectus.

IV. Updating of the prospectus - Article 30

126. The essential elements of the prospectus must be kept up to date. This can be done by publishing either a new prospectus or addenda. Since fund rules or an investment company's instruments of incorporation form an integral part of the prospectus, this requirement applies to them as well.

V. Auditing of accounting information in the annual report - Article 31

127. The accounting information given in the annual report must be audited by one or more persons empowered under national law to audit accounts in accordance with Council Directive 84/253/EEC (OJ No. L 126 of 12 May 1984), which determines the persons whom Member States' authorities may authorise to carry out the statutory audit of accounting documents and the minimum conditions that such persons must meet. The names of the auditors must be given in the prospectus (see Schedule A, 1.7).

128. The auditor's report, including any qualifications, must be reproduced in full in the annual report.

VI. Communications of the prospectus and periodical
reports to the competent authorities -
Article 32

129. A UCITS must send its prospectus and any amendments thereto, as well as its annual and half-yearly reports, to the competent authorities.

130. The Commission's initial proposal called for these documents to be submitted prior to publication for inspection by the competent authorities, which would ensure, inter alia, that the prospectus and reports contained no information or omissions capable of misleading the public. This proposal was made by analogy with the provisions adopted by the Council on prospectuses for admission to official listing on a stock exchange, which have to be submitted in advance for inspection by the competent authorities (Council Directive 80/390/EEC - OJ No. L 100 of 17 April 1980).

131. A number of Member States felt they were unable to go along with this proposal, since the competent authorities in this instance were, in principle, public authorities, whereas those responsible for inspecting a prospectus seeking admission to official listing on a stock exchange were stock exchange authorities. Such inspection by public authorities might place them under a liability, which they were neither able nor willing to accept. These Member States took the view that the competent

authorities' role was to check that the prospectus contained the required items of information, but not to give an opinion on whether this information was truthful, thereby giving a kind of endorsement to the document published, which could have been the impression given if the Directive stipulated that the prospectus and periodical reports had to be submitted for inspection, prior or otherwise, by the competent authorities.

132. It is for this reason that the Directive confines itself to obliging a UCITS to send its documents to the competent authorities. It will be a matter for these authorities to decide how they are going to exercise their general duty of supervision in relation to these documents; it is always open to Member States to incorporate or retain the principle of pre-publication inspection in their legislation.

VII. Provision of the prospectus and periodical reports-
Article 33

133. The prospectus, the latest annual report and the next half-yearly report, if published, must be offered to a subscriber free of charge before the conclusion of a contract. It is therefore not only on request that these documents must be supplied to a subscriber; this must be done in any event, even if there is no request and before the conclusion of a contract.

134. The term "subscriber" is used here to mean a potential purchaser to whom a proposal is made, whether face to face by a representative, or at a bank counter, or personally by letter. This requirement would therefore not apply to advertising aimed at the public generally; here, it is a matter for the national lawgiver to specify the conditions applicable to such advertising from the viewpoint of information to be supplied to the public, bearing in mind that the Directive makes it compulsory for all publicity to indicate the places where the prospectus may be obtained (see paragraph 138).

135. The annual and half-yearly reports must be supplied to unit-holders free of charge on request. In addition, the Directive requires these reports to be available to the public at the places specified in the prospectus.

VIII. Publication of the issue and repurchase prices -
Article 34

136. A UCITS must make public in an appropriate manner the issue, sale, repurchase or redemption price of its units each time that it issues, sells, repurchases or redeems them, and at least twice a month. The competent authorities may, however, permit a UCITS to reduce the frequency to once a month on condition that such a derogation does not prejudice the interests of the unit-holders.

137. The Directive does not specify how these prices are to be made public; this could be done by national lawgivers. Possible methods would be the display of posters at bank counters or communication to unit-holders on request. At all events, the Directive does not require publication of prices in a periodical.

IX. Information to be provided in publicity material -
Article 35

138. All publicity comprising an invitation to purchase the units of a UCITS must indicate that a prospectus exists and the places where it may be obtained by the public.

SECTION VII: GENERAL OBLIGATIONS OF UCITS**I. Ban on borrowing - Article 36**

139. In the interests of unit-holders, UCITS are not allowed to borrow. This ban is fully justified in the case of borrowings by a UCITS for investment purposes, but less so in that of borrowings to be used, for lack of sufficient liquid assets, to repurchase or redeem units. It may be preferable for a UCITS to borrow the amounts needed for repurchasing units rather than have to sell transferable securities for this purpose at what might be a particularly unfavourable moment or to maintain substantial liquid assets. Recourse to borrowing can also be particularly useful when a UCITS is in the position of having to exercise subscription rights when it lacks the necessary liquid assets. This point of view was adopted in the Directive.

140. The Directive lays down that a UCITS may not borrow, although it allows exceptions which are discussed in paragraph 142. This provision applies to investment companies, management companies and depositaries acting on behalf of unit trusts.

141. The acquisition by a UCITS of foreign currency by means of a "back-to-back" loan is not regarded as borrowing for the purposes of the Directive. According to a statement in the Council minutes, a back-to-back loan is a loan in foreign currency that a UCITS obtains in the course of its purchasing and

holding of foreign transferable securities while at the same time depositing an amount in its own currency equal to or more than the amount borrowed with the lender, the lender's agent or any other person nominated by the lender. Loans to protect against currency risks, which are similar to back-to-back loans, are covered by the provision in the Directive commented on in paragraph 96.

142. There are no exceptions to the ban on borrowing.

Under the first, a Member State may authorise a UCITS to borrow up to 10% of its assets in the case of an investment company or up to 10% of the value of the fund in the case of a unit trust, provided that the borrowing is on a temporary basis. Unlike the Commission's initial text, the Directive does not stipulate that amounts borrowed may only be used for specified purposes (such as repurchasing units). This is because the conclusion was reached that it would be difficult to keep a check on the purposes for which loans were used, since the sums concerned would be indistinguishable from others held by funds as part of their liquid assets. On the other hand, the requirement that borrowing must be temporary was introduced into the Directive; no period is specified, although a maximum of three months was mentioned on numerous occasions during the preparatory deliberations.

Under the second exception, a Member State may authorise an investment company to borrow up to 10% of its assets provided that the borrowing is to make possible the acquisition of immovable property essential for the direct pursuit of its business (see paragraph 94). The combined amount of borrowings for this purpose and those contracted under the first exception may not exceed 15% of the investment company's assets.

II. Obligation to repurchase units - Article 37

143. A UCITS must repurchase or redeem its units at the request of any unit-holder. This obligation is in fact one of the elements entering into the definition of a UCITS (see paragraph 9).

144. However, there may be exceptional circumstances in which a UCITS is temporarily unable to comply with this obligation. It might be that the units' surrender value cannot be established because one or more stock exchanges, on which a substantial proportion of the transferable assets of the UCITS are quoted, are closed, or that foreign-exchange markets are closed while major monetary fluctuations are in progress, or that the UCITS is faced with requests to repurchase units which it cannot meet until it has realized assets.

145. It is for this reason that the Directive provides that a UCITS may, in the cases and according to the procedures provided

for by law, the fund rules or the investment company's investments of incorporation, temporarily suspend the repurchase or redemption of its units. Suspension may be provided for only in exceptional cases where circumstances so require and where suspension is justified having regard to the interests of the unit-holders.

If it decides to suspend repurchase or redemption of its units, a UCITS must without delay communicate its decision to the competent authorities, i.e. the authorities in the Member States where it is situated, and to the authorities of any other Member States in which it markets its units.

146. In addition, the Directive provides that a Member State may allow the competent authorities to require the suspension of repurchase or redemption of units if this is necessary in the interests of unit-holders or the public, even if the UCITS has not itself contemplated any suspension. For instance, the competent authorities could require a suspension in the event of severe political, economic or social disruption likely to have a distorting effect on the transferable securities market.

147. The procedures and conditions for repurchase or redemption of units must be stated in the prospectus, unless they are set out in the fund rules or the investment company's instruments of incorporation annexed to the prospectus (see paragraph 125). The prospectus or the documents annexed to it must also specify the

circumstances in which repurchase or redemption may be suspended (see Schedule A, 1.13).

III. Rules for valuation of assets and calculating issue and repurchase prices - Article 38

148. The rules for the valuation of assets and the rules for calculating the sale or issue price and the repurchase or redemption price of the units of a UCITS must be laid down in the law, in the fund rules or in the investment company's instruments of incorporation.

149. In addition, the Directive stipulates that the prospectus must indicate how the sale or issue price and the repurchase or redemption price of units are determined (see Schedule A, 1.17), supplying the following information in particular:

- the method and frequency of the calculation of these prices,
- information concerning the charges relating to the sale or issue and repurchase or redemption of units,
- the means, places and frequency of the publication of these prices.

However, it is not compulsory for this information to be provided in the prospectus if it is already given in the fund rules or the

investment company's instruments of incorporation annexed to the prospectus (see paragraph 125).

The rules for the valuation of assets must also be stated in the prospectus (see Schedule A, 1.16) or in the documents annexed to it.

IV. Rules for applying income - Article 39

150. The Directive provides that the distribution or reinvestment of the income of a unit trust or of an investment company must be effected in accordance with the law and/or with the fund rules or the investment company's instruments of incorporation.

151. The Commission's original proposal contained a number of rules concerning the frequency of distributions, information to be provided to unit-holders if income was reinvested, and the distribution of any capital gains. The conclusion was reached during the preparatory deliberations that it was not essential for harmonization to extend to such rules, which could if necessary be defined in greater detail at national level. However, the Directive does require the prospectus to contain a description of the rules for determining and applying income (see Schedule A, 1.14), unless they are given in the fund rules or the investment company's instruments of incorporation annexed to the prospectus (see paragraph 125).

V. Issue of units - Article 40

152. A UCITS unit may not be issued unless the equivalent of the net issue price is paid into the assets of the UCITS within the usual time-limits.

153. The equivalent of the net issue price may of course be cash, but it may also be transferable securities as long as these are transferable securities in which the UCITS is authorised to invest its assets, which must be valued according to the same rules as those laid down for the valuation of the assets of the UCITS.

154. The Directive adds that the provision quoted in paragraph 152 does not preclude the distribution of bonus units, as when units are distributed instead of dividends.

155. The procedures and conditions of issue and sale of units must be stated in the prospectus (see Schedule A, 1.12), unless they are quoted in the fund rules or the investment company's instruments of incorporation annexed to the prospectus (see paragraph 125).

VI. Ban on granting loans - Article 41

156. Neither an investment company nor a management company or depositary acting on behalf of a unit trust may grant loans or

act as guarantor on behalf of third parties.

157. As is made clear in the Directive, this provision does not prevent a UCITS from acquiring loan stock or debt instruments treated as equivalent to transferable securities within the limits specified by the Directive (see paragraph 82). Nor does it prevent a UCITS from employing techniques and instruments relating to transferable securities to provide protection against exchange risks (see paragraph 96).

158. The Directive adds that the provision quoted in paragraph 156 does not prevent an investment company or a management company or depositary acting on behalf of a unit trust from acquiring transferable securities which are not fully paid up. This addition was made to avoid all ambiguity, since such acquisitions entail a commitment to pay the balance of the price when it is called up by the company issuing such securities, and this commitment could have been taken as contrary to the ban on acting as guarantor.

VII. Ban on selling short - Article 42

159. Neither an investment company nor a management company or depositary acting on behalf of a unit trust may engage in selling transferable securities short. Such transactions are particularly speculative and can lead to heavy losses.

160. It will of course be a matter for Member States to determine what other operations may not be engaged in by UCITS because they involve unit-holders in major risks. The Directive confines itself in this area to prohibiting selling short, an operation universally acknowledged to be particularly hazardous (also see paragraph 96).

VIII. Costs to be borne by a UCITS - Article 43

161. The law or the fund rules must prescribe the remuneration and the expenditure which a management company is empowered to charge to a unit trust and the method of calculation of such remuneration. Similarly, the law or an investment company's instruments of incorporation must prescribe the nature of the costs to be borne by the company.

162. In addition, the Directive requires a unit trust prospectus to give information concerning the manner, amount and calculation of remuneration payable by the unit trust to the management company, the depositary or third parties, and the manner, amount and calculation of reimbursement of costs by the unit trust to the management company, the depositary or third parties (Schedule A, 1.18). Similarly, an investment company's prospectus must give information concerning the manner, amount and calculation of remuneration paid by the company to its directors and to members of the administrative, management and supervisory bodies, to the depositary or to third parties, and the manner, amount and

calculation of reimbursement of costs by the company to its directors, the depositary or third parties.

This information does not of course have to be given in the prospectus if it is already provided in the fund rules or the investment company's instruments of incorporation annexed to the prospectus (see paragraph 125).

**SECTION VIII: PROVISIONS APPLICABLE TO UCITS WHICH MARKET
THEIR UNITS IN MEMBER STATES OTHER THAN
THOSE IN WHICH THEY ARE SITUATED**

**I. Compliance with rules on marketing in the Member States
where units are marketed - Article 44**

163. Within the field governed by the Directive, as seen earlier, a UCITS is subject only to the laws of the Member State where it is situated. When it markets its units in another Member State, that State therefore cannot subject the UCITS to any provision whatsoever in the field governed by the Directive, including any additional provisions that it may apply to UCITS situated on its territory (see paragraphs 21 et seq.).

164. Conversely, the Directive stipulates that if a UCITS markets its units in another Member State (known as the Member State of marketing), it must comply with the laws, regulations and administrative provisions in force in that State which do not fall within the field governed by the Directive.

165. The question that comes to mind immediately is: what are these laws etc. that do not fall within the field governed by the Directive?

It should be noted in this connection that the original version of the Commission's proposal sought to achieve exactly the same

aim; it required a UCITS to comply with the rules in force in the Member State of marketing, in so far as they were concerned with the marketing of units. In seeking to achieve this end, the proposal required a UCITS to "comply with the marketing rules" of a Member State where it marketed its units rather to "comply with the laws ... which do not fall within the field governed by this Directive". The original text of the Directive spelt out that the term "marketing rules" was basically to be understood as comprising:

- the rules on registration with the trade register,
- the rules on promotion,
- the rules on unfair competition,
- the rules on direct selling or other methods of marketing.

The expression "marketing rules" was dropped because it was a potential source of confusion, since although it clearly covered marketing rules as such, it was also intended to cover rules that might be thought not to be marketing rules in the strict sense.

166. It was therefore preferred to use "laws ... which do not fall within the field governed by this Directive", although this expression again is not entirely clear. (For the sake of convenience in this commentary, we shall continue referring to these rules as "marketing arrangements").

In order to define the scope of the "laws... which do not fall within the field governed by this Directive" that a Member State may apply to all UCITS marketing their shares on its territory, it seems easier to start by adopting the opposite approach and establishing those which do fall within the field governed by the Directive. These are:

- the rules on authorization of UCITS,
- the rules on the structure of UCITS,
- the rules on the management of UCITS, and in particular on their investment and borrowing policies,
- the rules on information to be made public by UCITS,
- the rules on supervision of UCITS and the competent authorities,
- and more generally, as we see it, all rules in force in a Member State which are intended specifically for UCITS situated on its territory and impose positive obligations or prohibitions on them, except of course those relating to the marketing arrangements they use in promoting their units.

167. In all the areas listed above, therefore, a Member State may not impose any provisions whatsoever of its own on UCITS from other Member States, even though the Directive's provisions in these areas might contain no more than a few essential rules, making no attempt to be exhaustive. For instance, in the area of authorization of a management company, the Directive does not

specify the legal form to be taken by the company; in that of management, it contains no provisions on avoidance of conflicts of interest, nor does it specify the liquidity ratios allowed in the case of a UCITS; in its provisions on information to be supplied, it does not establish whether or not a prospectus must be inspected in advance. In short, even where the Directive contains no specific rules in these areas, a Member State may not impose on UCITS from other Member States rules that it has itself established in these areas for UCITS situated on its territory.

168. On the other hand, a Member State may impose on other Member States' UCITS its own rules on all aspects of the marketing of UCITS units in force on its territory. For instance, it may refuse to allow them to market their units by means of direct selling if this is prohibited under its laws applied to its own UCITS, even though direct selling might be allowed under the laws of the Member States where such UCITS are situated. It may stipulate that units must be sold under the conditions with which its own UCITS have to comply; it may require that any sales department that a UCITS situated in another Member State wishes to set up on its territory must comply with its national rules; it may require a UCITS to comply with its laws on trade names.

169. In a statement contained in the Council minutes, the Council and the Commission place on record that the Directive's provisions have no effect on Member States' jurisdiction in

regard to admission of UCITS units to official listing on a stock exchange. Although this is an area not governed by the Directive, it was thought useful, in view of the doubts expressed in certain quarters as to the rules applicable to the stock-exchange listing units, to make clear that each Member State retains its jurisdiction in this matter.

170. The Directive adds that a UCITS may advertise its units in the Member State in which they are marketed, but must comply with the provisions governing advertising in that State.

The final part of this provision merely underlines a principle already embodied in the provision quoted in paragraph 164, so that its real significance lies in the first part, which gives a UCITS which markets its units in a Member State other than the one in which it is situated the right to advertise there. It was necessary to state this right unequivocally, since it will often be absolutely necessary for a UCITS to advertise its units in such other Member State if it is to market them successfully.

171. Finally, the Directive stipulates that provisions applied by a Member State to other Member States' UCITS marketing their units on its territory must be applied without discrimination. This is another provision that it was doubtless not essential to incorporate into the Directive, since the principle of non-discrimination is already enshrined in the Treaty. The purpose of including it was to emphasize that a Member State may not

apply such provisions to other Member States UCITS in such a way that it makes it impracticable or difficult for them to market their units on its territory whereas this would not be the case when it applied them to its own UCITS.

II. Obligations of a UCITS to provide a "financial service" and information to unit-holders in a Member State where it markets its units -
Article 45

172. When a UCITS markets its units in a Member State other than the one in which it is situated it must, inter alia, take measures necessary to ensure that facilities are available in that State for making payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are obliged to provide to unit-holders or subscribers. The Directive adds that these measures must be taken in accordance with the laws, regulations and administrative provisions in force in the Member State of marketing, which is consistent with the principle set forth in the provision quoted in paragraph 164.

The Directive leaves UCITS to make their own arrangements regarding these measures, as long as they are compatible with the rules in the country of marketing. Thus, a UCITS may rely on an existing financial network, such as a credit institution already established in the country of marketing. Alternatively, it may set up its own financial service in that country to carry out the

tasks enumerated in the previous paragraph and possibly the sale of its units in addition, on the understanding that any such service would be bound by the rules in force in the country of marketing.

173. At all events, a Member State where a UCITS markets its units would not be able, any under circumstances, to use the rule quoted in paragraph 172 as a basis for obliging it to have a legal representative on its territory, since that would amount to making the right of a UCITS to market its units in a Member State other than the one in which it is situated conditional on its having an establishment there, which would be contrary to the concept of the provision of services as established in the Treaty. Consequently, to avoid all ambiguity, the requirement in the original version of the Commission's proposal that a UCITS must have a financial service in a Member State where it markets its units, even though it is generally accepted that a financial service is merely an administrative service and, unlike a legal representative, cannot be regarded as the equivalent of an establishment.

III. Obligation to inform the authorities - Article 46

174. If a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first inform the competent authorities (those in the Member State where it is situated) and the authorities of that other Member State (those

of the Member State of marketing). It must simultaneously send the latter authorities:

- an attestation by the competent authorities to the effect that it fulfils the conditions imposed by the Directive, in other words that it is a UCITS falling within the scope of the Directive and complies with all its provisions,
- its fund rules or its instruments of incorporation
- its prospectus,
- where appropriate, its latest annual report and any subsequent half-yearly report, and
- details of the arrangements made for the marketing of its units in that other Member State.

175. A UCITS may begin to market its units in that other Member State two months after such communication unless the authorities of the Member State concerned establish, in a reasoned decision taken before the expiry of that period of two months, that the arrangements made for the marketing of units do not comply with the provisions quoted in paragraphs 164 and 172. In other words, if the authorities in the other Member State find that the UCITS does not comply with the rules in force in that State in areas not covered by the Directive, particularly in regard to marketing arrangements, they may issue a reasoned decision establishing this before the two months expire. The same applies if these authorities find that the UCITS has not taken the measures necessary to ensure that facilities are available for making

payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are obliged to provide to unit-holders, or if the authorities find that such measures as have been taken do not comply with its rules.

When such a reasoned decision has been taken within the time-limit by a Member State where it wishes to market its units, the UCITS concerned, which must be advised of this decision (see paragraph 201), may not begin to market its units in that State until such time as it has complied with its rules in the areas in question.

176. The Directive does not state whether, when the authorities of the Member State of marketing issue a reasoned decision establishing an infringement of their rules on marketing, the UCITS must send these authorities a second set of details of the arrangements made for marketing its units in the Member State concerned, adjusted to eliminate the infringement established. It is more than likely that the authorities in the Member State of marketing would require this to be done. Again, if these authorities were to find at a later stage that a UCITS which had started marketing its units in their country was not complying with its marketing rules, they could take appropriate steps against it, including obliging it to suspend marketing of its units (see paragraph 206).

Since the authorities in the various Member State are called upon to cooperate closely to ensure that the Directive is complied

with, it is reasonable to expect that their cooperation will be able to avoid any difficulty in such circumstances.

177. It should be noted that although the authorities in the Member State of marketing may issue a reasoned decision establishing that a UCITS does not comply with the marketing arrangements laid down in that State's rules, this decision cannot under any circumstances be upgraded so that it becomes a second authorization of the UCITS. These authorities' right is confined to establishing this point in a reasoned decision, the effect of which is that the UCITS may not begin marketing its units in the Member State concerned until it has complied with the marketing arrangements in force there.

IV. Distribution of information in the Member State of marketing - Article 47

178. When a UCITS markets its units in a Member State other than that in which it is situated, it must, under the terms of the Directive, take the measures necessary to ensure that the information it is required to publish is provided to unit-holders in that other Member State (see paragraph 172).

179. Is the information that the UCITS required under the laws of the Member State where it is situated or under those of the Member State where it is marketing its units?

The Directive answers this question by specifying that the documents and information to be distributed in the Member State of marketing are the same as those that the UCITS is required to publish in the Member State in which it is situated and that the procedures used must be the same in both cases. On this point, therefore, the Directive adheres to the principle whereby a UCITS is governed by the laws of the Member State where it is situated and does not take the view that the production and distribution of such documents and information constitute a marketing arrangement falling within the jurisdiction of the other Member State.

180. Under the terms of the Directive, to refresh the reader's memory, the documents and information that a UCITS must publish in the Member State where it is situated and the arrangements for publishing them are as follows:

- publication of the prospectus and annual and half-yearly reports, which must be offered free of charge to a subscriber before a contract is concluded (see paragraph 133);
- annual and half-yearly reports to be made available to the public; these documents (see paragraph 135) and where appropriate the prospectus (see paragraph 124) to be supplied free of charge to unit-holders;
- publication of the issue, sale, repurchase or redemption price of units (see paragraph 136).

181. It should not be forgotten, however, that the Directive's provisions are minimum requirements, so that a Member State may impose more stringent requirements concerning documents and information to be published by UCITS situated on its territory. It may require the prospectus and periodical reports to contain information additional to that stipulated in the Directive or it may require publication of information other than that stipulated in the Directive.

182. It follows from the combination of principles set out in paragraphs 179 and 181 that if a Member State takes a stricter line than the Directive regarding the scope of documents and information to be published by UCITS situated on its territory, it will be the documents and information specified in its stricter laws that have to be distributed in any other Member States where the units are marketed.

Thus if the former Member State requires quarterly reports to be published, a UCITS must distribute them in the latter, even if half-yearly reports only are required of UCITS situated in the latter. The converse also applies: if the State in which it is situated requires a half-yearly report only, that is all a UCITS will have to distribute in a Member State where it markets its units, even if UCITS situated there have to publish quarterly reports.

183. The Directive therefore establishes the principle of mutual recognition between Member States of documents and information produced by a UCITS according to the rules applicable in the Member State where it is situated.

The Directive nevertheless stipulates, most logically, that such documents and information must be distributed in the Member State of marketing in at least one of its official languages, so that there is an obligation on the UCITS to have them translated if necessary.

184. Would a Member State be entitled to ask a UCITS marketing its units on its territory to make adjustments to the documents and information that it had to distribute there in order to take account of special circumstances prevailing there? The answer to this question is that it would not, since the Directive makes no provision for the right to impose any such obligation but on the contrary provides that the documents and information to be distributed in the Member State of marketing are to be the same as those that a UCITS must publish in the Member State where it is situated.

In practice, however, a UCITS would clearly be inclined to make such adjustments on its own initiative or to attend to requests made by the Member State where it markets its units in so far as such adjustments are likely to make the information supplied to

subscribers and unit-holders in that State more appropriate to their needs.

In any event, with the arrangements made for cooperation between Member States' authorities (see paragraph 197), it should be possible to settle any difficulties that might arise over the distribution of information by a UCITS in a Member State where it markets its units.

Although the Directive makes no formal provision for an obligation to make such adjustments, the view may be taken that such an obligation is implicit in the aim of the Directive in the area concerned, which is to ensure that subscribers and unit-holders in a Member State where units are marketed receive information as complete and appropriate as the information a UCITS is obliged to supply in the Member State where it is situated.

185. As seen earlier, a UCITS must make the arrangements necessary for making payments to unit-holders, repurchasing or redeeming units and making available the information that UCITS are obliged to provide, for the benefit of unit-holders in the Member State of marketing as well as that where the UCITS is situated. In addition to this, however, unit-holders must be kept informed about measures taken for this purpose. To this end, the Directive prescribes that the prospectus must contain information on these measures and adds the stipulation that this

information must not only be given in the Member State where the UCITS is situated but, where units are marketed in another Member State, that it must be given in respect of that Member State in the prospectus there (see Schedule A,4). The measures taken for this purpose must therefore be suited to the circumstances prevailing in both Member States concerned and in particular to the circumstances in the Member State of marketing, especially in relation to the places where the UCITS provides its financial service and where documents and information to be published by it are made available to the public.

186. It might be that a Member State where a UCITS markets its units, but not the Member State in which it is situated, applies a rule under which some of the information that UCITS have to publish (e.g. their periodical reports) must be published in newspapers or other publications. Would the Member State of marketing be entitled to impose this mode of publication on UCITS from other Member States marketing their units on its territory, even though the obligations imposed on UCITS in this area fall within the scope of the Directive?

In our view, the answer must be in the affirmative, since the Directive specifies that the information which UCITS are obliged to provide must be made available to unit-holders in the Member State of marketing in accordance with the laws, regulations and administrative provisions of that State (see paragraph 172). Although Article 47 of the Directive stipulates that information

must be published in accordance with the procedures provided for in the Member State in which a UCITS is situated, this refers, in our view, to the content of the information rather than to the method of publication.

187. In connection with documents and information that have to be translated for distribution in a Member State of marketing, the Directive contains no ruling on which text, an original or a translation, would be binding in that State if there were any inconsistency between them. Should this arise, the problem would have to be resolved on the basis of the ordinary law of the State of marketing.

V. Use of generic names - Article 48

188. Under the Directive, a UCITS may, for the purposes of carrying on its activities, use the same generic term (such as investment company or unit trust) in the Community as it uses in the Member State in which it is situated. In the event of any danger of confusion, the host Member State may, for the purpose of clarification, require that the name be accompanied by certain explanatory particulars.

189. The Directive therefore confines itself to the problem of generic names. As for trade names, those used by UCITS in the Member States where they are situated may in principle be used in Member States where they market their units, unless such a name

fails to conform with a host Member State's relevant rules. Such rules are to be considered, in our view, as being in a field not governed by the Directive, so that the host Member State has jurisdiction in the matter.

SECTION IX: PROVISIONS CONCERNING THE AUTHORITIES RESPONSIBLE
FOR AUTHORIZATION AND SUPERVISION OF UCITS

1. Designation of authorities responsible for authorization
and supervision - Article 49(1), (2), and (4)

190. The authorities responsible for carrying out the duties provided for in the Directive are designated by the Member States. As seen earlier, these duties are extremely important, since the competent authorities are responsible not only for approving the management company, the choice of depositary and the fund rules or an investment company's instruments of incorporation but also for ensuring that the directors of these bodies are of sufficiently good repute and have the necessary experience (see paragraph 31 to 36). In addition, these authorities are required to supervise UCITS, to which end the Directive provides that each UCITS must send its prospectus and annual and half-yearly reports to them (see paragraph 129).

191. The authorities responsible for authorization and supervision of UCITS must be public authorities, as they are in most of the Member States, or alternatively bodies appointed by public authorities. This alternative was allowed to take account of the situation in a number of Member States where the competent authorities entrust one or other of their duties to the depositary (trustee).

192. The Directive specifies that Member States must advise the Commission which authorities they have appointed to carry out the duties provided for in the Directive, indicating any division of duties between authorities.

193. The Directive requires Member States to grant the authorities appointed all the powers necessary to carry out their task.

To this end, the authorities should in any event have the power to require a UCITS to communicate any information and produce any document that they need in order to carry out their duties. Any power to carry out investigations on the premises of a UCITS would of course not extend beyond national frontiers, unless there was an agreement between the authorities concerned.

II. Authorities competent to supervise UCITS - Article 49(3)

194. As stated earlier, UCITS are subject to the laws of the Member State in which they are situated, even if they market their units in another Member State, but as an exception to this general rule they have to comply with the arrangements for marketing UCITS units laid down in the other Member State (see paragraphs 163 and 164).

The same principle and the same exception apply in the case of supervision of UCITS.

The Directive accordingly provides that the authorities competent to exercise supervision over a UCITS are those in the Member State where it is situated; this is logical, since these same authorities are responsible for authorizing such a UCITS.

The competent authorities have to supervise the activities engaged in by the UCITS not only on their territory but throughout the Community. They will still exercise this supervisory role even if the UCITS has no activity on their territory.

196. The only exception to the overall supervisory role accorded to the competent authorities concerns the supervision of compliance by a UCITS with the marketing arrangements required in another Member State where it markets its units. Since a UCITS which markets its units in a Member State other than that in which it is situated must comply with the laws, regulations and administrative provisions in force in that State which fall outside the scope of the Directive (i.e. those in fact which bear on the marketing of units), it was logical to make the authorities in that other State responsible for supervising compliance with these provisions by any UCITS which, although situated in another Member State, markets its units on their territory; moreover, these authorities are in the best position to carry out this task.

III. Collaboration between Member States' authorities -
Article 50(1)

197. The various Member States' authorities responsible for authorization and supervision of UCITS must collaborate closely in order to carry out their task and must for that purpose communicate to one another all information required. This collaboration between authorities will be particularly useful where a UCITS situated in a Member State also markets its units in another Member State; since the authorities in these two States both have to supervise the UCITS, each within its own area of responsibility, exchanges of information between them are likely to be necessary.

IV. Professional secrecy - Article 50(2), (3) and (4)

198. The Member States are required to stipulate that all persons employed or formerly employed by the authorities responsible for supervising UCITS are bound by professional secrecy. This means that any confidential information received in the course of their duties may not be divulged to any person or authority except by virtue of provisions laid down by law.

199. The obligation not to divulge confidential information received in this manner does not, however, preclude communications between authorities responsible for monitoring UCITS as provided for in the Directive. But information

exchanged in the course of such communications is covered by the obligation of professional secrecy on persons employed or formerly employed by the authorities receiving the information.

200. Without prejudice to cases covered by criminal law, a supervisory authority receiving such information may use it only for the performance of its duties or in the context of administrative appeals or legal proceedings relating to such performance.

V. Statement of reasons for supervisory authorities' decisions; right to apply to the courts - Article 51

201. The authorities in the Member State where the UCITS is situated must give reasons for any decision to refuse authorization. In addition, these authorities and those in the Member State of marketing must give reasons for any decision against a UCITS taken in implementation of the general measures adopted in application of the Directive and communicated to the persons concerned.

202. The Member States must provide that decisions taken in respect of a UCITS pursuant to laws, regulations and administrative provisions adopted in accordance with the Directive are subject to the right to apply to the courts. There is nothing to stop a Member State making provision for an administrative appeal prior to an application to the courts. The

effect of the stipulation in the Directive is that a UCITS must in all circumstances have the opportunity to make an application before the courts against decisions affecting it.

203. The Directive does not state whether the court action is to be one in which the court can review the decision taken by the authorities or only give judgment on whether the decision taken was legal. It should be recalled in this connection that the Directive on the conditions for admission to official listing on a stock exchange (Directive of 5 March 1979, OJ No. L 66 of 16 March 1979) also made provision for the right to apply to the courts, against decisions refusing admission to official listing on a stock exchange; it was considered at the time that only the legality of such a decision could be challenged in such an action.

204. The Directive also provides that if no decision is taken within six months of its submission on an authorization application made by a UCITS which includes all the information required under the provisions in force, the applicant will have the right to apply to the courts.

VI. Sanctions against infringements of the Directive - Article 52

205. As has been explained above, the authorities in the Member State where a UCITS is situated have sole competence to authorize

the UCITS, no other authorization is required, and the UCITS is subject to the laws of that Member State alone in the field governed by the Directive, while in other fields, i.e. all aspects of marketing of its units, it is required to comply with the rules of the Member State where its units are marketed. As has also been explained, the authorities of the Member State where the UCITS is situated are responsible for supervising it, whether its units are marketed exclusively in that Member State or on the territory of other Member States as well, except for supervision of compliance with marketing arrangements, which is the responsibility of the authorities in the Member State where the units are marketed.

206. The same principles apply in the area of sanctions to be taken against UCITS which commit infringements. The Directive provides that only the authorities of the Member State in which a UCITS is situated have the power to take action against it if it infringes any law, regulation or administrative provision or any regulation laid down in the fund rules or in the investment company's instruments of incorporation. But it adds that the authorities of the Member State in which the units of a UCITS are marketed may themselves take action against it if it infringes the provisions that the Directive obliges it to comply with when marketing its units in a Member State other than the one in which it is situated (see Section VIII).

To refresh the reader's memory, a UCITS marketing its units in another Member State is required under the Directive to:

- send the authorities in the other Member States certain information before starting to market its units there;
- comply with the arrangements required by the other Member State for marketing UCITS units and with that State's provisions on publicity;
- provide a "financial service" in the other Member State and ensure that it is properly run;
- distribute to unit-holders in the other Member State the requisite documents and information, in at least one of that State's official languages;
- add explanatory particulars to the generic name that it uses, if required to do so by the other Member State.

207. It should be noted that any measures taken against a UCITS by the authorities in the Member State in which it is situated are likely to be of concern not only to its unit-holders in that State but also in any other Member State where it markets its units. This would obviously be the case if authorisation were withdrawn from a UCITS, but also if any other serious measure were taken against it. For this reason the Directive provides that any decision to withdraw authorization, or any other serious measure taken against a UCITS, or any suspension of repurchase or redemption imposed upon it, must be communicated without delay by the authorities of the Member State in which the UCITS in

question is situated to the authorities of the other Member States in which its units are marketed.

As mentioned earlier (in paragraph 145), if the repurchase or redemption of units is suspended in any of the cases provided for by law, the fund rules or the investment company's instruments of incorporation rather than by order of the competent authorities, the UCITS itself must inform the authorities, not only those in the Member State where it is situated but also those in all Member States in which it markets its units.

208. The Directive does not specify the types of measure that the authorities may take against a UCITS in the event of an infringement. It was considered right to leave the authorities wide powers of discretion in this area so that they could take the best possible account of unit-holders' interests. To withdraw authorization from a UCITS, thereby prohibiting it from carrying on its business, if this had been stipulated in the Directive, would not necessarily have been in the unit-holders' best interests, even where a serious infringement had been committed.

209. It should not be forgotten that the reasons must be given for a decision taken by supervisory authorities against a UCITS if it infringes any law, regulation or administrative provision; this decision must be notified to the UCITS and is subject to the right to apply to the courts (see paragraphs 201 and 202).

SECTION X: CONTACT COMMITTEE - ARTICLE 53

210. The Directive makes provision for a Contact Committee to be set up alongside the Commission. The functions of this Committee are:

- (a) to facilitate, without prejudice to the provisions in the Treaty on non-fulfilment of obligations by a Member State, the harmonized implementation of the Directive through regular consultations on any practical problems arising from its application on which exchanges of views are deemed useful;
- (b) to facilitate consultation between Member States either on requirement more rigorous than or additional to those of the Directive that they may adopt or on the provisions which they may adopt when a UCITS situated in another Member State markets its units on their territory;
- (c) to advise the Commission, if necessary, on additions or amendments to be made to the Directive.

211. It is not the function of the Committee to appraise the merits of decisions taken in individual cases by the authorities for authorization and supervision of UCITS.

212. The Committee is composed of persons appointed by the Member States and of representatives of the Commission. The Chairman is a representative of the Commission. Secretarial

services are provided by the Commission.

213. Meetings of the Committee are convened by its Chairman, either on his own initiative or at the request of a Member State delegation. The Committee draws up its own rules of procedure.

214. In a statement contained in the Council minutes, the Council and the Commission took the view that one of the Contact Committee's most important tasks was to achieve comparability of the accounting information to be given to the public. The Commission added that it intended to submit proposals to the Council in due course on harmonization of rules concerning the structure of funds' annual accounts and rules on valuation of assets.

SECTION XI: FINAL PROVISIONS**I. Date of entry into force - Article 57**

215. The Member States are required to bring into force no later than 1 October 1989 the measures necessary for them to comply with the Directive.

However, a Member State may grant UCITS existing on the date of implementation of the Directive a period of not more than twelve months from that date in order to comply with the new national legislation. Thus, if a Member State chooses to bring the necessary measures into force on the last possible date (1 October 1989), the maximum additional period for complying with the Directive granted to UCITS in that State on that date will expire on 30 September 1990.

216. A question arises as to the extent to which a UCITS which has been constituted in accordance with the Directive or has been adapted to comply with its provisions will be able to claim free circulation for its units in another Member State if the latter implements the Directive at a later stage than the Member State where the UCITS is situated. This question can be answered on the basis of the practical example set out below.

Let us suppose that State A implements the Directive on 1.1.1988 and State B on 1.7.1988 and that both States grant their UCITS the maximum period of twelve months in which to comply with the

Directive, i.e. by no later than 1.1.1989 in State A and 1.7.1989 in State B.

- UCITS from State A formed after 1.1.1988 and therefore necessarily governed by the Directive as from their formation will be able to market their units in State B as from 1.7.1988, the date on which the Directive comes into force in State B. Those formed before 1.1.1988 will enjoy freedom to market their units in State B as from the same date (1.7.1988) if by that date they have complied with the Directive, or otherwise from the date by which they have complied with the Directive, i.e. not later than 1.1.1989.

- UCITS from State B formed after 1.7.1988 and therefore necessarily governed by the Directive as from their formation will enjoy freedom to market their units in State A from the date of their formation, since State A will already have implemented the Directive by that date. Those formed before 1.7.1988 will enjoy freedom to market their units in State A from the date on which they comply with the Directive, which will be not later than 1.7.1988, the date on which the Directive comes into force in State B. Although State A will have implemented the Directive on 1.1.1988, UCITS from State B will not be able to demand freedom to market units on

the territory of State A until State B has itself implemented the Directive.

217. The Hellenic Republic and the Portuguese Republic are authorised to postpone the implementation of this Directive until 1 April 1992 at the latest. These two States were allowed this extension to take account of the fact that their financial markets, notably in the UCITS sector, are less developed than those in the other Member States.

Until these States implement the Directive, their UCITS, even if they have complied voluntarily with the Directive, will not be able to market their units freely in the other Member States. Similarly, UCITS from the other States will not be able to market their units in Greece or Portugal until such time, within the period allowed, as these two States have implemented the Directive.

The Directive provides that, one year before 1 April 1992, the Commission shall report to the Council on progress in implementing the Directive and on any difficulties which the Hellenic Republic or the Portuguese Republic may encounter in implementing the Directive by 1 April 1992. If necessary, the Commission will propose that the Council extend the postponement by up to four years.

II. Information to be supplied to the Commission -
Articles 57(1) and 58

218. The Directive requires Member States to inform the Commission of:

- the date on which they bring into force the measures necessary for them to comply with the Directive, this without delay,
- the texts of the main laws, regulations and administrative provisions which they adopt in the field covered by the Directive.

Conclusion

The Directive of 20 December 1985, coordinating Member States' laws on UCITS and establishing freedom to market these undertakings' units throughout the Community, marks a very important step forward. It is an integral part of the process of completing the single market by 1992 at the latest, to which objective it seeks to contribute through a minimum level of coordination of Member States' laws and application by each Member State of the principle of mutual recognition of Member States' laws and the principle of exclusive supervision by the country of origin. With the enlargement of the Community to twelve Member States, it is increasingly out of the question for

the single market to be completed by 1992 by means of detailed coordination of national rules.

The Directive of 20 December 1985 therefore showed the course to be followed in order to complete the eagerly awaited single market in financial services. Indeed, this course has since been followed in the Directive of 22 June 1987 (OJ No. L 185 of 4 July 1987), establishing mutual recognition between Member States of prospectuses for admission to official listing on stock exchanges, and a similar line can be expected to be taken in other Directives on the provision of services to be adopted by the Council in the course of establishing the single market. From this point of view, therefore, the Directive of 20 December 1985 sets a very significant precedent.

It only remains to hope that this Directive will be applied by Member States in the liberal spirit in which it was formulated and adopted.

COUNCIL DIRECTIVE

of 20 December 1985

on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

(85/611/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas the laws of the Member States relating to collective investment undertakings differ appreciably from one state to another, particularly as regards the obligations and controls which are imposed on those undertakings; whereas those differences distort the conditions of competition between those undertakings and do not ensure equivalent protection for unit-holders;

Whereas national laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders; whereas such coordination will make it easier for a collective investment undertaking situated in one Member State to market its units in other Member States;

Whereas the attainment of these objectives will facilitate the removal of the restrictions on the free circulation of the units of collective investment undertakings in the Community, and such coordination will help to bring about a European capital market;

Whereas, having regard to these objectives, it is desirable that common basic rules be established for the authorization, supervision, structure and activities of collective investment undertakings situated in the Member States and the information they must publish;

Whereas the application of these common rules is a sufficient guarantee to permit collective investment undertakings situated in Member States, subject to the applicable provisions relating to capital movements, to market their units in other Member States without those Member States' being able to subject those undertakings or their units to any provision whatsoever other than provisions which, in those states, do not fall within the field covered by this Directive; whereas, nevertheless, if a collective investment undertaking situated in one Member State markets its units in a different Member State it must take all necessary steps to ensure that unit-holders in that other Member State can exercise their financial rights there with ease and are provided with the necessary information,

Whereas the coordination of the laws of the Member States should be confined initially to collective investment undertakings other than of the closed-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 (which are essentially transferable securities officially listed on stock exchanges or similar regulated markets); whereas regulation of the collective investment undertakings not covered by the Directive poses a variety of problems which must be dealt with by means of other provisions, and such undertakings will accordingly be the subject of coordination at a later stage; whereas pending such coordination any Member State may, *inter alia*, prescribe those categories of undertakings for collective investment in transferable securities (UCITS) excluded from this Directive's scope on account of their investment and borrowing policies and lay down those specific rules to which such UCITS are subject in carrying on their business within its territory;

Whereas the free marketing of the units issued by UCITS authorized to invest up to 100 % of their assets in transferable securities issued by the same body (State, local authority, etc.) may not have the direct or indirect effect of disturbing the functioning of the capital market or the financing of the Member States or of creating economic situations similar to those which Article 68 (3) of the Treaty seeks to prevent;

Whereas account should be taken of the special situations of the Hellenic Republic's and Portuguese Republic's

⁽¹⁾ OJ No C 171, 26. 7. 1976, p. 1.

⁽²⁾ OJ No C 57, 7. 3. 1977, p. 31.

⁽³⁾ OJ No C 75, 26. 3. 1977, p. 10.

financial markets by allowing those countries and additional period in which to implement this Directive,

that they are of general application and do not conflict with the provisions of this Directive.

HAS ADOPTED THIS DIRECTIVE:

Section I

General provisions and scope

Article 1

1. The Member States shall apply this Directive to undertakings for collective investment in transferable securities (hereinafter referred to as UCITS) situated within their territories.

2. For the purposes of this Directive, and subject to Article 2, UCITS shall be undertakings:

- the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and
- the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such re-purchase or redemption.

3. Such undertakings may be constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies).

For the purposes of this Directive 'common funds' shall also include unit trusts.

4. Investment companies the assets of which are invested through the intermediary of subsidiary companies mainly otherwise than in transferable securities shall not, however, be subject to this Directive.

5. The Member States shall prohibit UCITS which are subject to this Directive from transforming themselves into collective investment undertakings which are not covered by this Directive.

6. Subject to the provisions governing capital movements and to Articles 44, 45 and 52 (2) no Member State may apply any other provisions whatsoever in the field covered by this Directive to UCITS situated in another Member State or to the units issued by such UCITS, where they market their units within its territory.

7. Without prejudice to paragraph 6, a Member State may apply to UCITS situated within its territory requirements which are stricter than or additional to those laid down in Article 4 *et seq.* of this Directive, provided

Article 2

1. The following shall not be UCITS subject to this Directive:

- UCITS of the closed-ended type;
- UCITS which raise capital without promoting the sale of their units to the public within the Community or any part of it;
- UCITS the units of which, under the fund rules or the investment company's instruments of incorporation, may be sold only to the public in non-member countries;
- categories of UCITS prescribed by the regulations of the Member States in which such UCITS are situated, for which the rules laid down in Section V and Article 36 are inappropriate in view of their investment and borrowing policies.

2. Five years after the implementation of this Directive the Commission shall submit to the Council a report on the implementation of paragraph 1 and, in particular, of its fourth indent. If necessary, it shall propose suitable measures to extend the scope.

Article 3

For the purposes of this Directive, a UCITS shall be deemed to be situated in the Member State in which the investment company or the management company of the unit trust has its registered office; the Member States must require that the head office be situated in the same Member State as the registered office.

SECTION II

Authorization of UCITS

Article 4

1. No UCITS shall carry on activities as such unless it has been authorized by the competent authorities of the Member State in which it is situated, hereinafter referred to as 'the competent authorities'.

Such authorization shall be valid for all Member States.

2. A unit trust shall be authorized only if the competent authorities have approved the management company, the fund rules and the choice of depositary. An investment company shall be authorized only if the competent authorities have approved both its instruments of incorporation and the choice of depositary.

3. The competent authorities may not authorize a UCITS if the directors of the management company, of the

investment company or of the depositary are not of sufficiently good repute or lack the experience required for the performance of their duties. To that end, the names of the directors of the management company, of the investment company and of the depositary and of every person succeeding them in office must be communicated forthwith to the competent authorities.

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

4. Neither the management company nor the depositary may be replaced, nor may the fund rules or the investment company's instruments of incorporation be amended, without the approval of the competent authorities.

SECTION III

Obligations regarding the structure of unit trusts

Article 5

A management company must have sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities.

Article 6

No management company may engage in activities other than the management of unit trusts and of investment companies.

Article 7

1. A unit trust's assets must be entrusted to a depositary for safe-keeping.

2. A depositary's liability as referred to in Article 9 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.

3. A depositary must, moreover:

- (a) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected on behalf of a unit trust or by a management company are carried out in accordance with the law and the fund rules;
- (b) ensure that the value of units is calculated in accordance with the law and the fund rules;

(c) carry out the instructions of the management company, unless they conflict with the law or the fund rules;

(d) ensure that in transactions involving a unit trust's assets any consideration is remitted to it within the usual time limits;

(e) ensure that a unit trust's income is applied in accordance with the law and the fund rules.

Article 8

1. A depositary must either have its registered office in the same Member State as that of the management company or be established in that Member State if its registered office is in another Member State.

2. A depositary must be an institution which is subject to public control. It must also furnish sufficient financial and professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function.

3. The Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries.

Article 9

A depositary shall, in accordance with the national law of the State in which the management company's registered office is situated, be liable to the management company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them. Liability to unit-holders may be invoked either directly or indirectly through the management company, depending on the legal nature of the relationship between the depositary, the management company and the unit-holders.

Article 10

1. No single company shall act as both management company and depositary.

2. In the context of their respective roles the management company and the depositary must act independently and solely in the interest of the unit-holders.

Article 11

The law or the fund rules shall lay down the conditions for the replacement of the management company and the depositary and rules to ensure the protection of unit-holders in the event of such replacement.

SECTION IV

Obligations regarding the structure of investment companies and their depositaries

Article 12

The Member States shall determine the legal form which an investment company must take. It must have sufficient paid-up capital to enable it to conduct its business effectively and meet its liabilities.

Article 13

No investment company may engage in activities other than those referred to in Article 1 (2).

Article 14

1. An investment company's assets must be entrusted to a depositary for safe-keeping.
2. A depositary's liability as referred to in Article 16 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.
3. A depositary must, moreover:
 - (a) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected by or on behalf of a company are carried out in accordance with the law and with the company's instruments of incorporation;
 - (b) ensure that in transactions involving a company's assets any consideration is remitted to it within the usual time limits;
 - (c) ensure that a company's income is applied in accordance with the law and its instruments of incorporation.
4. A Member State may decide that investment companies situated within its territory which market their units exclusively through one or more stock exchanges on which their units are admitted to official listing shall not be required to have depositaries within the meaning of this Directive.

Articles 34, 37 and 38 shall not apply to such companies. However, the rules for the valuation of such companies' assets must be stated in law or in their instruments of incorporation.

5. A Member State may decide that investment companies situated within its territory which market at least 80% of their units through one or more stock exchanges designated in their instruments of incorporation shall not be required

to have depositaries within the meaning of this Directive provided that their units are admitted to official listing on the stock exchanges of those Member States within the territories of which the units are marketed, and that any transactions which such a company may effect outwith stock exchanges are effected at stock exchange prices only. A company's instruments of incorporation must specify the stock exchange in the country of marketing the prices on which shall determine the prices at which that company will effect any transactions outwith stock exchanges in that country.

A Member State shall avail itself of the option provided for in the preceding subparagraph only if it considers that unit-holders have protection equivalent to that of unit-holders in UCITS which have depositaries within the meaning of this Directive.

In particular, such companies and the companies referred to in paragraph 4, must:

- (a) in the absence of provision in law, state in their instruments of incorporation the methods of calculation of the net asset values of their units;
- (b) intervene on the market to prevent the stock exchange values of their units from deviating by more than 5% from their net asset values;
- (c) establish the net asset values of their units, communicate them to the competent authorities at least twice a week and publish them twice a month.

At least twice a month, an independent auditor must ensure that the calculation of the value of units is effected in accordance with the law and the company's instruments of incorporation. On such occasions, the auditor must make sure that the company's assets are invested in accordance with the rules laid down by law and the company's instruments of incorporation.

6. The Member States shall inform the Commission of the identities of the companies benefiting from the derogations provided for in paragraphs 4 and 5.

The Commission shall report to the Contact Committee on the application of paragraphs 4 and 5 within five years of the implementation of this Directive. After obtaining the Contact Committee's opinion, the Commission shall, if need be, propose appropriate measures.

Article 15

1. A depositary must either have its registered office in the same Member State as that of the investment company or be established in that Member State if its registered office is in another Member State.
2. A depositary must be an institution which is subject to public control. It must also furnish sufficient financial and

professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function.

3. The Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries.

Article 16

A depositary shall, in accordance with the national law of the State in which the investment company's registered office is situated, be liable to the investment company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations, or its improper performance of them.

Article 17

1. No single company shall act as both investment company and depositary.

2. In carrying out its role as depositary, the depositary must act solely in the interests of the unit-holders.

Article 18

The law or the investment company's instruments of incorporation shall lay down the conditions for the replacement of the depositary and rules to ensure the protection of unit-holders in the event of such replacement.

SECTION V

Obligations concerning the investment policies of UCITS

Article 19

1. The investments of a unit trust or of an investment company must consist solely of:

- (a) transferable securities admitted to official listing on a stock exchange in a Member State and/or;
- (b) transferable securities dealt in on another regulated market in a Member State which operates regularly and is recognized and open to the public and/or;
- (c) transferable securities admitted to official listing on a stock exchange in a non-member State or dealt in on another regulated market in a non-member State which operates regularly and is recognized and open to the public provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the investment company's instruments of incorporation and/or;

(d) recently issued transferable securities, provided that:

- the terms of issue include an undertaking that application will be made for admission to official listing on a stock exchange or to another regulated market which operates regularly and is recognized and open to the public, provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the investment company's instruments of incorporation;
- such admission is secured within a year of issue.

2. However:

- (a) a UCITS may invest no more than 10% of its assets in transferable securities other than those referred to in paragraph 1;
- (b) a Member State may provide that a UCITS may invest no more than 10% of its assets in debt instruments which, for purposes of this Directive, shall be treated, because of their characteristics, as equivalent to transferable securities and which are, *inter alia*, transferable, liquid and have a value which can be accurately determined at any time or at least with the frequency stipulated in Article 34;
- (c) an investment company may acquire movable and immovable property which is essential for the direct pursuit of its business;
- (d) a UCITS may not acquire either precious metals or certificates representing them.

3. The total of the investments referred to in paragraph 2 (a) and (b) may not under any circumstances amount to more than 10% of the assets of a UCITS.

4. Unit trusts and investment companies may hold ancillary liquid assets.

Article 20

1. The Member States shall send to the Commission:

- (a) no later than date of implementation of this Directive, lists of the debt instruments which, in accordance with Article 19 (2) (b), they plan to treat as equivalent to transferable securities, stating the characteristics of those instruments and the reasons for so doing;
- (b) details of any amendments which they contemplate making to the lists of instruments referred to in (a) or any further instruments which they contemplate treating as equivalent to transferable securities, together with their reasons for so doing.

2. The Commission shall immediately forward that information to the other Member States together with any comments which it considers appropriate. 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).

Article 21

1. The Member States may authorize UCITS to employ techniques and instruments relating to transferable securities 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.

2. The Member States may also authorize UCITS to employ techniques and instruments intended to provide protection against exchange risks in the context of the management of their assets and liabilities.

Article 22

1. A UCITS may invest no more than 5% of its assets in transferable securities issued by the same body.

2. The Member States may raise the limit laid down in paragraph 1 to a maximum of 10%. However, the total value of the transferable securities held by a 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.

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

Article 23

1. By way of derogation from Article 22 and without prejudice to Article 68 (3) of the Treaty, the Member States may authorize UCITS to invest in accordance with the principle of risk-spreading up to 100% of their assets in different transferable securities issued or guaranteed by any Member State, its local authorities, a non-member State or public international bodies of which one or more Member States are members.

The competent authorities shall grant such a derogation only if they consider that unit-holders in the UCITS have protection equivalent to that of unit-holders in UCITS complying with the limits laid down in Article 22.

Such a UCITS must hold securities from at least six different issues, but securities from any one issue may not account for more than 30% of its total assets.

2. The UCITS referred to in paragraph 1 must make express mention in the fund rules or in the investment company's instruments of incorporation of the States, local

authorities or public international bodies issuing or guaranteeing securities in which they intend to invest more than 35% of their assets; such fund rules or instruments of incorporation must be approved by the competent authorities.

3. In addition each such UCITS referred to in paragraph 1 must include a prominent statement in its prospectus and any promotional literature drawing attention to such authorization and indicating the States, local authorities and/or public international bodies in the securities of which it intends to invest or has invested more than 35% of its assets.

Article 24

1. A UCITS may not acquire the units of other collective investment undertakings of the open-ended type unless they are collective investment undertakings within the meaning of the first and second indents of Article 1 (2).

2. A UCITS may invest no more than 5% of its assets in the units of such collective investment undertakings.

3. Investment in the units of a unit trust managed 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, shall be permitted only in the case of a trust which, in accordance with its rules, has specialized in investment in a specific geographical area or economic sector, and provided that such investment is authorized by the competent authorities. Authorization shall be granted only if the trust has announced its intention of making use of that option and that option has been expressly stated in its rules.

A management company may not charge any fees or costs on account of transactions relating to a unit trust's units where some of a unit trust's assets are invested in the units of another unit trust managed 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.

4. Paragraph 3 shall also apply where an investment company acquires units in another investment company to which it is linked within the meaning of paragraph 3.

Paragraph 3 shall also apply where an investment company acquires units of a unit trust to which it is linked, or where a unit trust acquires units of an investment company to which it is linked.

Article 25

1. An investment company or a management company acting in connection with all of the unit trusts which it manages and which fall within the scope of this Directive may not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body.

Pending further coordination, the Member States shall take account of existing rules defining the principle stated in the first subparagraph under other Member States' legislation.

2. Moreover, an investment company or unit trust may acquire no more than:

- 10 % of the non-voting shares of any single issuing body;
- 10 % of the debt securities of any single issuing body;
- 10 % of the units of any single collective investment undertaking within the meaning of the first and second indents of Article 1 (2).

The limits laid down in the second and third indents may be disregarded at the time of acquisition if at that time the gross amount of the debt securities or the net amount of the securities in issue cannot be calculated.

3. A Member State may waive application of paragraphs 1 and 2 as regards:

- (a) transferable securities issued or guaranteed by a Member State or its local authorities;
- (b) transferable securities issued or guaranteed by a non-member State;
- (c) transferable securities issued by public international bodies of which one or more Member States are members;
- (d) shares held by a UCITS in the capital of a company incorporated in a non-member State investing its assets mainly in the securities of issuing bodies having their registered offices in that State, where under the legislation of that State such a holding represents the only way in which the UCITS can invest in the securities of issuing bodies of that State. This derogation, however, shall apply only if in its investment policy the company from the non-member State complies with the limits laid down in Articles 22, 24 and 25 (1) and (2). Where the limits set in Articles 22 and 24 are exceeded, Article 26 shall apply *mutatis mutandis*;
- (e) shares held by an investment company in the capital of subsidiary companies carrying on the business of management, advice or marketing exclusively on its behalf.

Article 26

1. UCITS need not comply with the limits laid down in this Section when exercising subscription rights attaching to transferable securities which form part of their assets.

While ensuring observance of the principle of risk-spreading, the Member States may allow recently authorized UCITS to derogate from Articles 22 and 23 for six months following the date of their authorization.

2. If the limits referred to in paragraph 1 are exceeded for reasons beyond the control of a UCITS or as a result of the exercise of subscription rights, that UCITS must adopt as a priority objective for its sales transactions the remedying of that situation, taking due account of the interests of its unit-holders.

SECTION VI

Obligations concerning information to be supplied to unit-holders

A. Publication of a prospectus and periodical reports

Article 27

1. An investment company and, for each of the trusts it manages, a management company must publish:

- a prospectus,
- an annual report for each financial year, and
- a half-yearly report covering the first six months of the financial year.

2. The annual and half-yearly reports must be published within the following time limits, with effect from the ends of the periods to which they relate:

- four months in the case of the annual report,
- two months in the case of the half-yearly report.

Article 28

1. A prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them. It shall contain at least the information provided for in Schedule A annexed to this Directive, insofar as that information does not already appear in the documents annexed to the prospectus in accordance with Article 29 (1).

2. The annual report must include a balance-sheet or a statement of assets and liabilities, a detailed income and

expenditure account for the financial year, a report on the activities of the financial year and the other information provided for in Schedule B annexed to this Directive, as well as any significant information which will enable investors to make an informed judgement on the development of the activities of the UCITS and its results.

3. The half-yearly report must include at least the information provided for in Chapters I to IV of Schedule B annexed to this Directive; where a UCITS has paid or proposes to pay an interim dividend, the figures must indicate the results after tax for the half-year concerned and the interim dividend paid or proposed.

Article 29

1. The fund rules or an investment company's instruments of incorporation shall form an integral part of the prospectus and must be annexed thereto.

2. The documents referred to in paragraph 1 need not, however, be annexed to the prospectus provided that the unit-holder is informed that on request he or she will be sent those documents or be apprised of the place where, in each Member State in which the units are placed on the market, he or she may consult them.

Article 30

The essential elements of the prospectus must be kept up to date.

Article 31

The accounting information given in the annual report must be audited by one or more persons empowered by law to audit accounts in accordance with Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the EEC Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents⁽¹⁾. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

Article 32

A UCITS must send its prospectus and any amendments thereto, as well as its annual and half-yearly reports, to the competent authorities.

Article 33

1. The prospectus, the latest annual report and any subsequent half-yearly report published must be offered to subscribers free of charge before the conclusion of a contract.

2. In addition, the annual and half-yearly reports must be available to the public at the places specified in the prospectus.

3. The annual and half-yearly reports shall be supplied to unit-holders free of charge on request.

B. Publication of other information

Article 34

A UCITS must make public in an appropriate manner the issue, sale, re-purchase or redemption price of its units each time it issues, sells, re-purchases or redeems them, and at least twice a month. The competent authorities may, however, permit a UCITS to reduce the frequency to once a month on condition that such a derogation does not prejudice the interests of the unit-holders.

Article 35

All publicity comprising an invitation to purchase the units of a UCITS must indicate that a prospectus exists and the places where it may be obtained by the public.

SECTION VII

The general obligations of UCITS

Article 36

1. Neither:
- an investment company, nor
 - a management company or depositary acting on behalf of a unit trust,
- may borrow.

However, a UCITS may acquire foreign currency by means of a 'back-to-back' loan.

2. By way of derogation from paragraph 1, a Member State may authorize a UCITS to borrow:

- (a) up to 10 %
- of its assets, in the case of an investment company, or
 - of the value of the fund, in the case of a unit trust,
- provided that the borrowing is on a temporary basis;

⁽¹⁾ OJ No L 126, 12. 5. 1984, p. 20.

(h) up to 10 % of its assets, in the case of an investment company, provided that the borrowing is to make possible the acquisition of immovable property essential for the direct pursuit of its business; in this case the borrowing and that referred to in subparagraph (a) may not in any case in total exceed 15 % of the borrower's assets.

Article 37

1. A UCITS must re-purchase or redeem its units at the request of any unit-holder.

2. By way of derogation from paragraph 1:

(a) a UCITS may, in the cases and according to the procedures provided for by law, the fund rules or the investment company's instruments of incorporation, temporarily suspend the re-purchase or redemption of its units. Suspension may be provided for only in exceptional cases where circumstances so require, and suspension is justified having regard to the interests of the unit-holders;

(b) the Member States may allow the competent authorities to require the suspension of the re-purchase or redemption of units in the interest of the unit-holders or of the public.

3. In the cases mentioned in paragraph 2 (a), a UCITS must without delay communicate its decision to the competent authorities and to the authorities of all Member States in which it markets its units.

Article 38

The rules for the valuation of assets and the rules for calculating the sale or issue price and the re-purchase or redemption price of the units of a UCITS must be laid down in the law, in the fund rules or in the investment company's instruments of incorporation.

Article 39

The distribution or reinvestment of the income of a unit trust or of an investment company shall be effected in accordance with the law and with the fund rules or the investment company's instruments of incorporation.

Article 40

A UCITS unit may not be issued unless the equivalent of the net issue price is paid into the assets of the UCITS within the usual time limits. This provision shall not preclude the distribution of bonus units.

Article 41

1. Without prejudice to the application of Articles 19 and 21, neither:

- an investment company, nor
- a management company or depositary acting on behalf of a unit trust

may grant loans or act as a guarantor on behalf of third parties.

2. Paragraph 1 shall not prevent such undertakings from acquiring transferable securities which are not fully paid.

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.

Article 43

The law or the fund rules must prescribe the remuneration and the expenditure which a management company is empowered to charge to a unit trust and the method of calculation of such remuneration.

The law or an investment company's instruments of incorporation must prescribe the nature of the cost to be borne by the company.

SECTION VIII

Special provisions applicable to UCITS which market their units in Member States other than those in which they are situated

Article 44

1. 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.

2. Any UCITS may advertise its units in the Member State in which they are marketed. It must comply the provisions governing advertising in that State.

3. The provisions referred to in paragraphs 1 and 2 must be applied without discrimination.

Article 45

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, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide.

Article 46

If a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first inform the competent authorities and the authorities of that other Member State accordingly. It must simultaneously send the latter authorities:

- an attestation by the competent authorities to the effect that it fulfils the conditions imposed by this Directive,
- its fund rules or its instruments of incorporation,
- its prospectus,
- where appropriate, its latest annual report and any subsequent half-yearly report and
- details of the arrangements made for the marketing of its units in that other Member State.

A UCITS may begin to market its units in that other Member State two months after such communication unless the authorities of the Member State concerned establish, in a reasoned decision taken before the expiry of that period of two months, that the arrangements made for the marketing of units do not comply with the provisions referred to in Articles 44 (1) and 45.

Article 47

If a UCITS markets its units in a Member State other than that in which it is situated, it must distribute in that other Member State, in at least one of that other Member State's official languages, the documents and information which must be published in the Member State in which it is situated, in accordance with the same procedures as those provided for in the latter State.

Article 48

For the purpose of carrying on its activities, a UCITS may use the same generic name (such as investment company or unit trust) in the Community as it uses in the Member State in which it is situated. In the event of any danger of confusion, the host Member State may, for the purpose of clarification, require that the name be accompanied by certain explanatory particulars.

SECTION IX

Provisions concerning the authorities responsible for authorization and supervision

Article 49

1. The Member States shall designate the authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.
2. The authorities referred to in paragraph 1 must be public authorities or bodies appointed by public authorities.
3. The authorities of the State in which a UCITS is situated shall be competent to supervise that UCITS. However, the authorities of the State in which a UCITS markets its units in accordance with Article 44 shall be competent to supervise compliance with Section VIII.
4. The authorities concerned must be granted all the powers necessary to carry out their task.

Article 50

1. The authorities of the Member States referred to in Article 49 shall collaborate closely in order to carry out their task and must for that purpose alone communicate to each other all information required.
2. The Member States shall provide that all persons employed or formerly employed by the authorities referred to in Article 49 shall be bound by professional secrecy. This means that any confidential information received in the course of their duties may not be divulged to any person or authority except by virtue of provisions laid down by law.
3. Paragraph 2 shall not, however, preclude communications between the authorities of the various Member States referred to in Article 49, as provided for in this Directive. Information thus exchanged shall be covered by the obligation of professional secrecy on persons employed or formerly employed by the authorities receiving the information.
4. Without prejudice to cases covered by criminal law, an authority of the type referred to in Article 49 receiving such information may use it only for the performance of its duties or in the context of administrative appeals or legal proceedings relating to such performance.

Article 51

1. The authorities referred to in Article 49 must give reasons for any decision to refuse authorization, and any negative decision taken in implementation of the general

measures adopted in application of this Directive, and communicate them to applicants.

2. The Member States shall provide that decisions taken in respect of a UCITS pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts; the same shall apply if no decision is taken within six months of its submission on an authorization application made by a UCITS which includes all the information required under the provisions in force.

Article 52

1. Only the authorities of the Member State in which a UCITS is situated shall have the power to take action against it if it infringes any law, regulation or administrative provision or any regulation laid down in the fund rules or in the investment company's instruments of incorporation.

2. Nevertheless, the authorities of the Member State in which the units of a UCITS are marketed may take action against it if it infringes the provisions referred to in Section VIII.

3. Any decision to withdraw authorization, or any other serious measure taken against a UCITS, or any suspension of re-purchase or redemption imposed upon it, must be communicated without delay by the authorities of the Member State in which the UCITS in question is situated to the authorities of the other Member States in which its units are marketed.

SECTION X

Contact Committee

Article 53

1. A Contact Committee, hereinafter referred to as 'the Committee', shall be set up alongside the Commission. Its function shall be:

- (a) to facilitate, without prejudice to Articles 169 and 170 of the Treaty, the harmonized implementation of this Directive through regular consultations on any practical problems arising from its application and on which exchanges of views are deemed useful;
- (b) to facilitate consultation between Member States either on more rigorous or additional requirements which they may adopt in accordance with Article 1 (7), or on the provisions which they may adopt in accordance with Articles 44 and 45;
- (c) to advise the Commission, if necessary, on additions or amendments to be made to this Directive.

2. It shall not be the function of the Committee to appraise the merits of decisions taken in individual cases by the authorities referred to in Article 49.

3. The Committee shall be composed of persons appointed by the Member States and of representatives of the Commission. The Chairman shall be a representative of the Commission. Secretarial services shall be provided by the Commission.

4. Meetings of the Committee shall be convened by its chairman, either on his own initiative or at the request of a Member State delegation. The Committee shall draw up its rules of procedure.

SECTION XI

Transitional provisions, derogations and final provisions

Article 54

Solely for the purpose of Danish UCITS, *pantebreve* issued in Denmark shall be treated as equivalent to the transferable securities referred to in Article 19 (1) (b).

Article 55

By way of derogation from Articles 7 (1) and 14 (1), the competent authorities may authorize those UCITS which, on the date of adoption of this Directive, had two or more depositaries in accordance with their national law to maintain that number of depositaries if those authorities have guarantees that the functions to be performed under Articles 7 (3) and 14 (3) will be performed in practice.

Article 56

1. By way of derogation from Article 6, the Member States may authorize management companies to issue bearer certificates representing the registered securities of other companies.

2. The Member States may authorize those management companies which, on the date of adoption of this Directive, also carry on activities other than those provided for in Article 6 to continue those other activities for five years after that date.

Article 57

1. The Member States shall bring into force no later than 1 October 1989 the measures necessary for them to comply with this Directive. They shall forthwith inform the Commission thereof.

2. The Member States may grant UCITS existing on the date of implementation of this Directive a period of not

more than 12 months from that date in order to comply with the new national legislation.

3. The Hellenic Republic and the Portuguese Republic shall be authorized to postpone the implementation of this Directive until 1 April 1992 at the latest.

One year before that date the Commission shall report to the Council on progress in implementing the Directive and on any difficulties which the Hellenic Republic or the Portuguese Republic may encounter in implementing the Directive by the date referred to in the first subparagraph.

The Commission shall, if necessary, propose that the Council extend the postponement by up to four years.

Article 58

The Member States shall ensure that the Commission is informed of the texts of the main laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 59

This Directive is addressed to the Member States.

Done at Brussels, 20 December 1985.

For the Council

The President

R. KRIEPS

ANNEX

SCHEDULE A

1. Information concerning the unit trust	1. Information concerning the management company	1. Information concerning the investment company
1.1. Name	1.1. Name or style, form in law, registered office and head office if different from the registered office.	1.1. Name or style, form in law, registered office and head office if different from the registered office.
1.2. Date of establishment of the unit trust. Indication of duration, if limited.	1.2. Date of incorporation of the company. Indication of duration if limited.	1.2. Date of the incorporation of the company. Indication of duration, if limited.
	1.3. If the company manages other unit trusts, indication of those other trusts.	
1.4. Statement of the place where the fund rules, if they are not annexed, and periodic reports may be obtained.		1.4. Statement of the place where the instruments of incorporation, if they are not annexed, and periodical reports may be obtained.
1.5. Brief indications relevant to unit-holders of the tax system applicable to the unit trust. Details of whether deductions are made at source from the income and capital gains paid by the trust to unit-holders.		1.5. Brief indications relevant to unit-holders of the tax system applicable to the company. Details of whether deductions are made at source from the income and capital gains paid by the company to unit-holders.
1.6. Accounting and distribution dates		1.6. Accounting and distribution dates.
1.7. Names of the persons responsible for auditing the accounting information referred to in Article 31.		1.7. Names of the persons responsible for auditing the accounting information referred to in Article 31.
	1.8. Names and positions in the company of the members of the administrative, management and supervisory bodies. Details of their main activities outside the company where these are of significance with respect to that company.	1.8. Names and positions in the company of the members of the administrative, management and supervisory bodies. Details of their main activities outside the company where these are of significance with respect to that company.
	1.9. Amount of the subscribed capital with an indication of the capital paid-up	1.9. Capital

1. Information concerning the unit trust (continued)	1. Information concerning the management company (continued)	1. Information concerning the investment company (continued)
<p>1.10. Details of the types and main characteristics of the units and in particular:</p> <ul style="list-style-type: none"> — the nature of the right (real, personal or other) represented by the unit, — original securities or certificates providing evidence of title; entry in a register or in an account, — characteristics of the units: registered or bearer. Indication of any denominations which may be provided for, — indication of unit-holders' voting rights if these exist, — circumstances in which winding-up of the unit trust can be decided on and winding-up procedure, in particular as regards the rights of unit-holders. <p>1.11. Where applicable, indication of stock exchanges or markets where the units are listed or dealt in.</p>		<p>1.10. Details of the types and main characteristics of the units and in particular:</p> <ul style="list-style-type: none"> — original securities or certificates providing evidence of title; entry in a register or in an account, — characteristics of the units: registered or bearer. Indication of any denominations which may be provided for, — indication of unit-holders' voting rights, — circumstances in which winding-up of the investment company can be decided on and winding-up procedure, in particular as regards the rights of unit-holders. <p>1.11. Where applicable, indication of stock exchanges or markets where the units are listed or dealt in.</p>
<p>1.12. Procedures and conditions of issue and sale of units.</p>		<p>1.12. Procedures and conditions of issue and sale of units.</p>
<p>1.13. Procedures and conditions for re-purchase or redemption of units, and circumstances in which re-purchase or redemption may be suspended.</p>		<p>1.13. Procedures and conditions for re-purchase or redemption of units, and circumstances in which re-purchase or redemption may be suspended</p>
<p>1.14. Description of rules for determining and applying income.</p>		<p>1.14. Description of rules for determining and applying income.</p>
<p>1.15. Description of the unit trust's investment objectives, including its financial objectives (e.g. capital growth or income), investment policy (e.g. specialization in geographical or industrial sectors), any limitations on that investment policy and an indication of any techniques and instruments or borrowing powers which may be used in the management of the unit trust.</p>		<p>1.15. Description of the company's investment objectives, including its financial objectives (e.g. capital growth or income), investment policy (e.g. specialization in geographical or industrial sectors), any limitations on that investment policy and an indication of any techniques and instruments or borrowing powers which may be used in the management of the company.</p>
<p>1.16. Rules for the valuation of assets.</p>		<p>1.16. Rules for the valuation of assets.</p>

1. Information concerning the unit trust (continued)	1. Information concerning the management company (continued)	1. Information concerning the investment company (continued)
<p>1.17. Determination of the sale or issue price and the re-purchase or redemption price of units, in particular:</p> <ul style="list-style-type: none"> — the method and frequency of the calculation of those prices, — information concerning the charges relating to the sale or issue and the re-purchase or redemption of units, — the means, places and frequency of the publication of those prices. 		<p>1.17. Determination of the sale or issue price and the re-purchase or redemption price of units, in particular:</p> <ul style="list-style-type: none"> — the method and frequency of the calculation of those prices, — information concerning the charges relating to the sale or issue and the re-purchase or redemption of units, — the means, places and frequency of the publication of those prices⁽¹⁾.
<p>1.18. Information concerning the manner, amount and calculation of remuneration payable by the unit trust to the management company, the depositary or third parties, and reimbursement of costs by the unit trust to the management company, to the depositary or to third parties.</p>		<p>1.18. Information concerning the manner, amount and calculation of remuneration paid by the company to its directors, and members of the administrative, management and supervisory bodies, to the depositary, or to third parties, and reimbursement of costs by the company to its directors, to the depositary or to third parties.</p>

(¹) Investment companies within the meaning of Article 14 (5) of the Directive shall also indicate:

- the method and frequency of calculation of the net asset value of units,
- the means, place and frequency of the publication of that value,
- the stock exchange in the country of marketing the price on which determines the price of transactions effected outwith stock exchanges in that country.

2. Information concerning the depositary:

- 2.1. Name or style, form in law, registered office and head office if different from the registered office;
- 2.2. Main activity.

3. Information concerning the advisory firms or external investment advisers who give advice under contract which is paid for out of the assets of the UCITS:

- 3.1. Name or style of the firm or name of the adviser;
- 3.2. Material provisions of the contract with the management company or the investment company which may be relevant to the unit-holders, excluding those relating to remuneration;
- 3.3. Other significant activities.

4. Information concerning the arrangements for making payments to unit-holders, re-purchasing or redeeming units and making available information concerning the UCITS. Such information must in any case be given in the Member State in which the UCITS is situated. In addition, where units are marketed in another Member State, such information shall be given in respect of that Member State in the prospectus published there.

SCHEDULE B

Information to be included in the periodic reports

- I. *Statement of assets and liabilities*
 - transferable securities,
 - debt instruments of the type referred to in Article 19 (2) (b),
 - bank balances,
 - other assets,
 - total assets,
 - liabilities,
 - net asset value.
- II. *Number of units in circulation*
- III. *Net asset value per unit*
- IV. *Portfolio, distinguishing between:*
 - (a) transferable securities admitted to official stock exchange listing;
 - (b) transferable securities dealt in on another regulated market;
 - (c) recently issued transferable securities of the type referred to in Article 19 (1) (d);
 - (d) other transferable securities of the type referred to in Article 19 (2) (a);
 - (e) debt instruments treated as equivalent in accordance with Article 19 (2) (b);

and analyzed in accordance with the most appropriate criteria in the light of the investment policy of the UCITS (e. g. in accordance with economic, geographical or currency criteria) as a percentage of net assets; for each of the above investments the proportion it represents of the total assets of the UCITS should be stated.

Statement of changes in the composition of the portfolio during the reference period.
- V. *Statement of the developments concerning the assets of the UCITS during the reference period including the following:*
 - income from investments,
 - other income,
 - management charges,
 - depositary's charges,
 - other charges and taxes,
 - net income,
 - distributions and income reinvested,
 - changes in capital account,
 - appreciation or depreciation of investments,
 - any other changes affecting the assets and liabilities of the UCITS.
- VI. *A comparative table covering the last three financial years and including, for each financial year, at the end of the financial year:*
 - the total net asset value,
 - the net asset value per unit.
- VII. *Details, by category of transaction within the meaning of Article 21 carried out by the UCITS during the reference period, of the resulting amount of commitments.*

Towards a European market for the undertakings for collective investment in transferable securities

Commentary on the provisions of Council Directive 85/611/EEC of 20 December 1985

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