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*Committee on Legal Affairs*

**2008/0153(COD)**

19.11.2008

## **OPINION**

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (COM(2008)0458 – C6-0287/2008 – 2008/0153(COD))

Rapporteur: Jean-Paul Gauzès

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## SHORT JUSTIFICATION

Draft opinion on the proposal for a directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

### - Management company passport

The last UCITS revision ie Directive 2001/107/EC created the Management Company Passport in order to give management companies the right to passport their collective portfolio management services across the EU. Its aim was to contribute to the establishment of a true common market for the fund industry in the EU.

This decision was taken on the basis of Article 49 of the Treaty Establishing the European Community which establishes the freedom to provide cross-border services.

However, the passport never worked in practice.

In order to fulfill the management company passport while ensuring a proper investor protection, the Commission has given the Committee of European Securities Regulators (CESR) a mandate until 01 November 2008 to deliver advice on those issues, with the view to introduce relevant provisions in the UCITS directive by the end of the legislature.

Having in mind the economic potential benefits that the management company passport could bring to both the European industry and the investors, your rapporteur is in favour of a full Management Company Passport as long as the supervision is efficient and the investor is well protected. He is confident that these objectives can be reconciled.

To reach this aim, your rapporteur suggests the following modifications:

-in order to ensure clarity of the nationality of the UCITS and proper supervision, consistency is needed between: the domicile of the fund, the law applicable to the constitution and the functioning of the UCITS and the competent authorities responsible for authorizing the UCITS and enforcing the rules regarding constitution and functioning of the UCITS;

-the choice of the management company should be taken into account by the competent authorities responsible for authorizing the UCITS. However, in order to ensure the freedom established by the EC Treaty, the localisation of the management company's registered office or activities should not be a condition for granting this authorization;

-the competent authority of the management company should make sure that, given its organization – including its risk management procedures -, the management company is in a position to comply with the rules applicable to all UCITS it manages.

- the depositary shall always be located in the same Member State as the fund. According to your rapporteur and in order to protect the investor, it shall not be subject to "public control", which is too vague but rather by proper on-going supervision.

### - Cross border mergers

The new merger provisions introduced in the directive establish a European framework for both domestic and cross-border fund mergers.

Your rapporteur is of the opinion that, according to the principle of subsidiarity, the directive should be applicable to cross-border mergers and domestic mergers only for those which have a cross-border impact. However, the domestic mergers which are purely national should be excluded from the scope of the directive.

Besides, the role of the depositary and its subsequent liabilities should be clarified, also with regard to the role assumed by supervisors.

Finally, according to the principle of non discrimination, Member states shall not impose more stringent rules for cross border mergers than for domestic mergers, including e.g. quorum requirements.

### - Master-feeder structure

The Commission has introduced new provisions on the pooling of funds via so-called master/feeder structures.

According to your rapporteur, when approval of the feeder UCITS' investment into the master UCITS is refused, the competent authority shall explain the reasons (comply or explain).

As a rule, a maximal harmonisation should be sought, in order to ensure a level playing field throughout the EU. Thus maximum harmonization should be applied to any agreement between a master and a feeder fund.

### **The recasting technique**

Under the Inter-institutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, and in particular pursuant to point 9 thereof, the Consultative Working Party consisting of the respective legal services of the European Parliament, the Council and the Commission, met on 4 and 24 September and on 13 November 2008 for the purpose of examining the proposal submitted by the Commission.

The said examination resulted in the Consultative Working Party's establishing, without dissent, that the proposal does not comprise any substantive amendment other than those identified as such therein or in the Working Party's opinion. The Working Party also concluded, as regards the codification of the unchanged provision of the earlier act with those substantive amendments, that the proposal contains a straightforward codification of the existing text, without any change in its substance.

## **AMENDMENTS**

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

### Proposal for a directive

#### Recital 18

##### *Text proposed by the Commission*

(18) Despite the need for consolidation between UCITS, mergers of UCITS encounter many legislative and administrative difficulties in the Community. It is therefore necessary, in order to improve the functioning of the Internal Market, to lay down Community provisions facilitating mergers between UCITS (and investment compartments thereof). Although some Member States have authorised only contractual funds, mergers between all types of funds (contractual, corporate and unit trusts) should be allowed and recognised by the laws of each Member State. This Directive covers those merger techniques which are most commonly used in the Member States. It does not prevent UCITS from using other techniques on a domestic *or cross-border* basis. These will *however* remain subject to the relevant provisions of national law.

##### *Amendment*

(18) Despite the need for consolidation between UCITS, mergers of UCITS encounter many legislative and administrative difficulties in the Community. It is therefore necessary, in order to improve the functioning of the Internal Market, to lay down Community provisions facilitating mergers between UCITS (and investment compartments thereof). Although some Member States have authorised only contractual funds, ***cross-border*** mergers between all types of funds (contractual, corporate and unit trusts) should be allowed and recognised by the laws of each Member State. ***This does not require Member States to introduce new legal forms of UCITS into their national regulation.*** This Directive covers those merger techniques which are most commonly used in the Member States. ***Member States should not be obliged to introduce all techniques mentioned in this Directive into their national law, but they should recognise transfers of assets resulting from those techniques.*** It does not prevent UCITS from using other techniques on a domestic basis, ***in situations where none of the UCITS concerned by the merger has been notified for cross-border marketing of its units.*** These ***mergers*** will remain subject to the relevant provisions of national law.

##### *Justification*

*En application du principe de subsidiarité, la directive ne devrait pas imposer aux Etats*

membres l'introduction de nouvelles formes de société, d'autant que cela n'est pas nécessaire à l'efficacité de la directive.

*En application du principe de subsidiarité, la directive devrait s'appliquer 1/ aux fusions transfrontalières mais aussi 2/ aux fusions nationales dont l'impact est transfrontalier. Pour ces fusions, l'efficacité de la directive suppose une reconnaissance par les Etats membres des techniques énoncées dans la directive. En revanche les fusions purement nationales ne devraient pas être incluses dans le champ d'application de la directive.*

## **Amendment 2**

### **Proposal for a directive**

#### **Recital 40**

*Text proposed by the Commission*

(40) In order to protect the feeder UCITS' investors, the feeder UCITS' investment into the master UCITS should be subject to prior approval of the competent authorities of the feeder UCITS' home Member State.

*Amendment*

(40) In order to protect the feeder UCITS' investors, the feeder UCITS' investment into the master UCITS should be subject to prior approval of the competent authorities of the feeder UCITS' home Member State.  
***In order to ensure a level playing field throughout the Community, the information which has to be provided for approving the feeder UCITS' investment into the master UCITS should be exhaustive.***

*Justification*

*Une harmonisation maximale est nécessaire pour assurer l'égalité de concurrence.*

## **Amendment 3**

### **Proposal for a directive**

#### **Recital 41**

*Text proposed by the Commission*

(41) In order to allow the feeder UCITS to act in the best interests of its unit-holders and notably place it in a position to obtain from the master UCITS all information and documents necessary to perform its obligations, the feeder UCITS and the master UCITS should enter into a binding

*Amendment*

(41) In order to allow the feeder UCITS to act in the best interests of its unit-holders and notably place it in a position to obtain from the master UCITS all information and documents necessary to perform its obligations, the feeder UCITS and the master UCITS should enter into a binding

and enforceable agreement. ***In a similar way the*** information-sharing agreement between the depositaries or, respectively, the auditors of the feeder UCITS and the master UCITS should ensure the flow of information and documents that is needed for the feeder UCITS' depositary or auditor to fulfil its duties.

and enforceable agreement. ***However, if both are managed by the same management company, it should be sufficient that the latter set up internal conduct-of-business rules.*** An information-sharing agreement between the depositaries or, respectively, the auditors of the feeder UCITS and the master UCITS should ensure the flow of information and documents that is needed for the feeder UCITS' depositary or auditor to fulfil its duties. ***Compliance with these requirements should not result in a breach of any restriction on disclosure of information or of data protection rules.***

#### *Justification*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

*Il convient par ailleurs de clarifier l'articulation de ces dispositions avec les règles relatives au secret professionnel et à la protection des données.*

#### **Amendment 4**

##### **Proposal for a directive**

##### **Article 2 – paragraph 1 – point a**

###### *Text proposed by the Commission*

(a) "depository" means any institution ***entrusted with the duties mentioned in Articles 19 and 29 and subject to the other provisions laid down in Chapter IV and Section 3 of Chapter V;***

###### *Amendment*

(a) "depository" means any ***credit institution or investment firm or insurance company as defined in Directives 2006/48/EC, 2004/34/EC and 2002/12/EC;***

#### *Justification*

*Cette modification entraînerait de fait la caducité des articles 20-2 et 20-3 ainsi que des articles 30-2 et 30-3.*

## Amendment 5

### Proposal for a directive

#### Article 2 – paragraph 1 – point e

*Text proposed by the Commission*

(e) **a** "UCITS home Member State" means: the Member State in which the **UCITS is authorised pursuant to Article 5;**

*Amendment*

(e) "UCITS home Member State" means the Member State in which the **management company or, where applicable, an investment company has applied for authorisation of the UCITS;**

*Justification*

*In order to ensure clarity of the nationality of the UCITS and proper supervision, consistency is needed between: 1/ the domicile of the fund; 2/ the law applicable to the constitution and the functioning of the UCITS and 3/ the competent authorities responsible for authorizing the UCITS and enforcing the rules regarding constitution and functioning of the UCITS.*

## Amendment 6

### Proposal for a directive

#### Article 4

*Text proposed by the Commission*

For the purposes of this Directive, a UCITS shall be deemed to be established in **the** Member State **in which the investment company or the management company of the common fund has its registered office. The Member States shall require that the head office be established in the same Member State as the registered office.**

*Amendment*

For the purposes of this Directive, a UCITS shall be deemed to be established in **its home** Member State.

*Justification*

*In order to fulfil the freedoms established by the EC Treaty, a UCITS established in one Member state should be allowed to be managed by a management company situated in another MemberState.*



## Amendment 7

### Proposal for a directive Article 5 – paragraph 1 – subparagraph 1

*Text proposed by the Commission*

1. No UCITS shall carry on activities as such unless it has been authorised by the competent authorities of *the* Member State *in which it is established*.

*Amendment*

1. No UCITS shall carry on activities as such unless it has been authorised by the competent authorities of *its home* Member State.

## Amendment 8

### Proposal for a directive Article 5 – paragraph 2

*Text proposed by the Commission*

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

*Amendment*

2. A common fund shall be authorised only if the competent authorities *of its home Member State* have approved the *application of the* management company, the fund rules and the choice of depositary. An investment company shall be authorised only if the competent authorities *of its home Member State* have approved both its instruments of incorporation and the choice of depositary, *and, where relevant, the choice of the designated management company*.

## Amendment 9

### Proposal for a directive Article 5 – paragraph 3

*Text proposed by the Commission*

3. *The competent authorities may not authorise a UCITS if the management company or the investment company does not comply with the preconditions laid*

*Amendment*

3. *If the UCITS is not established in the management company's home Member State, the competent authorities of the UCITS' home Member State shall*

*down in Chapters III and V respectively.*

*approve the application of the management company pursuant to Article 17c. It must not be made a condition of authorisation that the UCITS be managed by a management company having its registered office in that Member State or that the management company perform or delegate any activities in the UCITS' home Member State.*

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

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

## **Amendment 10**

### **Proposal for a directive Article 5 – paragraph 5**

#### *Text proposed by the Commission*

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

#### *Amendment*

5. Neither the management company nor the depositary may be replaced, nor may the fund rules or the instruments of incorporation of the investment company be amended, without the approval of the competent authorities *of the UCITS' home Member State.*

## Amendment 11

### Proposal for a directive Article 5 – paragraph 5 a (new)

*Text proposed by the Commission*

*Amendment*

***5a. Whenever the competent authorities of the UCITS' home Member State do not approve the replacement of a management company, they shall set out, in writing, the reasons for that decision.***

#### *Justification*

*In order to ensure clarity of the nationality of the UCITS and proper supervision, consistency is needed between: 1/ the domicile of the fund; 2/ the law applicable to the constitution and the functioning of the UCITS and 3/ the competent authorities responsible for authorizing the UCITS and enforcing the rules regarding constitution and functioning of the UCITS.*

*The choice of the management company should be taken into account by the competent authorities responsible for authorizing the UCITS. However, in order to ensure the freedom established by the EC Treaty, the localisation of the management company's registered office or activities should not be a condition for granting this authorization.*

## Amendment 12

### Proposal for a directive Article 6 – paragraph 1

*Text proposed by the Commission*

*Amendment*

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

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

#### *Justification*

*A management company should be authorized and supervised by the competent authorities of the Member state where it has its registered office, which should be defined as the management company's home Member State.*

## Amendment 13

### Proposal for a directive Article 17 a (new)

*Text proposed by the Commission*

*Amendment*

#### *Article 17a*

***1. A management company providing cross-border management services for the UCITS under the free provision of services or by the establishment of a branch shall comply with the rules of the management company's home Member State which relate to the organisation of the management company, including delegation arrangements, risk management procedures, prudential rules and supervision, rules of conduct and the management company's reporting requirements.***

***Those rules may not be stricter than rules applicable to management companies conducting their activities only in their home Member State.***

***2. The competent authorities of the management company's home Member State shall be responsible for supervising compliance with paragraph 1, inter alia with a view to ensuring that the management company complies with the rules regarding the constitution and the functioning of all the UCITS it manages.***

#### *Justification*

*Consistency is needed between: 1/ the definition of the management company's home Member state; 2/ the law applicable to the organization of the management company and 3/ the competent authorities responsible for authorizing the management company and enforcing the rules regarding its organization.*

*If a problem occurs at the level of the management company, it is likely that all UCITS managed by this management company in the EU will be affected. Only the competent authority of the management company is able to intervene quickly at the level of the management company to solve such a problem and avoid endangering all the concerned UCITS. Therefore, the competent authority of the management company should make sure*

*that, given its organization – including its risk management procedures -, the management company is in a position to comply the rules applicable to all UCITS it manages.*

## **Amendment 14**

### **Proposal for a directive Article 17 b (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 17b**

- 1. A management company authorised in a Member State other than the UCITS' home Member State which provides cross-border management services for the UCITS through the free provision of services or by the establishment of a branch shall comply with the rules of the UCITS' home Member State which relate to the constitution and functioning of the UCITS.***
- 2. The management company shall comply with the obligations set out in the fund rules and in the prospectus.***
- 3. The competent authorities of the UCITS' home Member State shall be responsible for supervising compliance with paragraphs 1 and 2.***

#### *Justification*

*In order to ensure clarity of the nationality of the UCITS and proper supervision, consistency is needed between: 1/ the domicile of the fund; 2/ the law applicable to the constitution and the functioning of the UCITS and 3/ the competent authorities responsible for authorizing the UCITS and enforcing the rules regarding constitution and functioning of the UCITS.*

## **Amendment 15**

### **Proposal for a directive Article 17 c (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 17c**

**1. A management company which applies for approval to manage a UCITS established in another Member State shall provide the competent authorities of the UCITS' home Member State with the following documentation:**

**(a) a report on the risk management process adopted with respect to the specific type of UCITS for which the approval is requested;**

**(b) a written agreement with the depositary which shall ensure the proper flow of information between the management company and the depositary and, hence, allow the depositary to perform the duties assigned to it by this Directive;**

**(c) information on delegation arrangements for operational functions.**

**2. The competent authorities of the UCITS' home Member State shall inform both the management company and the competent authorities of the management company's home Member State, within one month of the submission of a complete application, whether or not the management company has been approved. Reasons shall be given whenever approval is not granted.**

#### *Justification*

*In order to authorize the UCITS, some information on the management company is needed. It is especially important to confirm that the depositary is in a position to perform its oversight duties.*

*In order to fulfil the freedom established by the EC Treaty, the assessment of the choice of the management company should be made in a clear timeframe.*

## Amendment 16

### Proposal for a directive Article 20 – paragraph 2

*Text proposed by the Commission*

2. A depositary shall be an institution which is subject to **public control**. It shall 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.

*Amendment*

2. A depositary shall be an institution which is subject to **ongoing supervision**. It shall 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.

*Justification*

*Proper supervision of the depositary should be ensured.*

## Amendment 17

### Proposal for a directive Article 30 – paragraph 2

*Text proposed by the Commission*

2. A depositary shall be an institution which is subject to **public control**. It shall 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.

*Amendment*

2. A depositary shall be an institution which is subject to **ongoing supervision**. It shall 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.

*Justification*

*Proper supervision of the depositary should be ensured.*

## Amendment 18

### Proposal for a directive Article 34 – introductory wording

*Text proposed by the Commission*

This Chapter shall apply *in relation to any of the following operations, hereinafter "mergers"*:

*Amendment*

This Chapter shall apply to *cross-border mergers as well as domestic mergers when either the merging UCITS or the receiving UCITS has been notified pursuant to Article 88.*

*For the purposes of this Chapter, "mergers" shall mean:*

*Justification*

*En application du principe de subsidiarité, la directive devrait s'appliquer 1/ aux fusions transfrontalières mais aussi 2/ aux fusions nationales dont l'impact est transfrontalier. En revanche les fusions purement nationales ne devraient pas être incluses dans le champ d'application de la directive.*

## Amendment 19

### Proposal for a directive Article 36 – paragraph 2 – point c

*Text proposed by the Commission*

(c) a *certificate issued* by the depositaries of the merging and the receiving UCITS confirming that they have verified compliance of the common draft terms of merger with this Directive and the fund rules or instruments of incorporation of their respective UCITS *and indicating their conclusions in this respect*;

*Amendment*

(c) a *statement* by *each of* the depositaries of the merging and the receiving UCITS confirming that, *in accordance with Article 38*, they have verified compliance of the common draft terms of merger with *the particulars listed in Article 37(1), points (c), (f) and (g) of* this Directive and the fund rules or instruments of incorporation of their respective UCITS;

*Justification*

*The scope of the statement delivered by each of the depositary should be precise as certain elements cited in Article 37 paragraph 1 come under the roles and duties of the auditors, and ultimately the management company. Moreover, the roles, duties and responsibilities of auditors are harmonised at a European level through the Directive 2006/43/CE, unlike depositaries. This amendment proposal aims at avoiding different levels of validation and*



verification from one Member State to another.

## Amendment 20

### Proposal for a directive

#### Article 37 – paragraph 1

##### *Text proposed by the Commission*

1. Member States shall require that the management or administrative body of the merging UCITS and of the receiving UCITS draw up common draft terms of merger.

The common draft terms of merger shall include the following particulars:

- (a) identification of the type of merger and of the UCITS involved;
- (b) the background to and the rationale for the proposed merger;
- (c) the expected impact of the proposed merger on the unit-holders of both the merging UCITS and the receiving UCITS;
- (d) the criteria adopted for valuation of the assets and, where applicable, the liabilities on the planned effective date of the merger;
- (e) the calculation method of the exchange ratio;
- (f) the planned effective date of the merger;
- (g) the fund rules or instruments of incorporation of the receiving UCITS.

##### *Amendment*

1. Member States shall require that the management or administrative body of the merging UCITS and of the receiving UCITS draw up common draft terms of merger.

The common draft terms of merger shall include the following particulars:

- (a) identification of the type of merger and of the UCITS involved;
- (b) the background to and the rationale for the proposed merger;
- (c) the expected impact, ***including the tax treatment***, of the proposed merger on the unit-holders of both the merging UCITS and the receiving UCITS;
- (d) the criteria adopted for valuation of the assets and, where applicable, the liabilities on the planned effective date of the merger;
- (e) the calculation method of the exchange ratio;
- (f) the planned effective date of the merger;
- (fa) the rules applicable for the transfer of units;***
- (g) the fund rules or instruments of incorporation of the receiving UCITS.

***The particulars listed in points (c), (f) and (g) shall be provided by the depositary, taking into account the provisions of Article 36(2), point (c).***

***The particulars listed in points (d) and (e) shall be provided by the independent auditor, taking into account the***

*provisions of Article 39(1).*

*The particulars listed in points (a), (b) and (g) shall be provided under the responsibility of the management company.*

*Justification*

*To guarantee that the development of cross-border mergers is not realised to the detriment of the protection of the investor, the common draft terms must identify all the impacts on the merger for the unit-holders, from a point of view of the conditions of transfer of the units and of the tax impacts to realise the merger under optimal conditions. The role of the actors of the merger should be also precise to ensure the legal certainty of the operation.*

**Amendment 21**

**Proposal for a directive**

**Article 39 – paragraph 1 – point b**

*Text proposed by the Commission*

*Amendment*

(b) the calculation method of the exchange ratio.

(b) the calculation method of the exchange ratio **and the outcome of that calculation.**

*Justification*

*The independent auditor, in addition to the method, must verify the outcome of the exchange ratio calculation in order to avoid the situation of the unit-holders being determined on an erroneous basis.*

**Amendment 22**

**Proposal for a directive**

**Article 40 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

4. The information to be provided to unit-holders of the merging UCITS and, where applicable, the receiving UCITS, shall include appropriate and accurate information on the proposed merger such as to enable them to take an informed decision on the possible impact thereof on their investment and to exercise their rights

4. The information to be provided to unit-holders of the merging UCITS and, where applicable, the receiving UCITS, shall include appropriate and accurate information on the proposed merger such as to enable them to take an informed decision on the possible impact thereof on their investment and to exercise their rights

under Articles 41 and 42.

It shall include *at least* the following:

- (a) the background to and the rationale *of* the proposed merger;
- (b) the possible impact of the proposed merger on unit-holders, including but not limited to any material differences in respect of investment policy and strategy, costs, expected outcome, periodic reporting and possible dilution in performance;
- (c) any specific rights unit-holders have in relation to the proposed merger, including but not limited to the right to obtain additional information ; the right to obtain a copy of the report of the independent auditor on request, *and* the right to request the repurchase or redemption of their units without charge as specified in Article 42;
- (d) the relevant procedural aspects and the planned effective date of the merger;
- (e) a copy of the key investor information referred to in Article 73 of the receiving UCITS.

under Articles 41 and 42.

It shall include the following:

- (a) the background to and the rationale *for* the proposed merger;
- (b) the possible impact of the proposed merger on unit-holders, including but not limited to any material differences in respect of investment policy and strategy, costs, expected outcome, periodic reporting and possible dilution in performance, *and tax treatment*;
- (c) any specific rights unit-holders have in relation to the proposed merger, including but not limited to the right to obtain additional information, the right to obtain a copy of the report of the independent auditor on request, the right to request the re-purchase or redemption of their units without charge as specified in Article 42 *and the deadline for exercising that right*;
- (d) the relevant procedural aspects, *including the procedure for the transfer of units*, and the planned effective date of the merger;
- (e) a copy of the key investor information referred to in Article 73 of the receiving UCITS.

#### *Justification*

*The information transmitted to the unit-holders must also concern the procedure for the transfer of units and the tax impacts (this mainly relates to informing the unit-holder of the change to the tax regime). For example, in France, the unit-holder is taxed on the difference between the purchase price in the merging fund and the selling price in the receiving fund. In Germany the unit-holder is taxed on the capital gain for each security.*

### **Amendment 23**

#### **Proposal for a directive Article 41 – subparagraph 2**

*Text proposed by the Commission*

The first paragraph shall be without

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*Amendment*

The first paragraph shall be without

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prejudice to any presence quorum provided for under national *laws*.

prejudice to any presence quorum provided for under national *law*. ***Member States shall not impose more stringent rules in respect of presence quora for cross-border mergers than for domestic mergers.***

*Justification*

*Les Etats membres sont libres d'imposer, ou non, des règles de présence. Toutefois, conformément au principe de non-discrimination, les règles établies pour les fusions transfrontalières ne devraient pas être plus exigeantes que les règles établies pour les fusions nationales.*

**Amendment 24**

**Proposal for a directive  
Article 53 – paragraph 1**

*Text proposed by the Commission*

1. A feeder UCITS is a UCITS which invests, by way of derogation from Article 1(2)(a), Article 45, Article 47, Article 50 and Article 51(2)(c), at least 85 % of its assets in units of another UCITS ("the master UCITS") ***or an investment compartment thereof.***

*Amendment*

1. A feeder UCITS is a UCITS ***or an investment compartment thereof*** which invests, by way of derogation from Article 1(2)(a), Article 45, Article 47, Article 50 and Article 51(2)(c), at least 85 % of its assets in units of another UCITS ***or an investment compartment thereof*** ("the master UCITS").

*Justification*

*Par souci de cohérence avec les autres dispositions de la directive, un fonds nourricier ou un fonds maître devrait pouvoir être, soit un OPCVM, soit un compartiment d'OPCVM.*

**Amendment 25**

**Proposal for a directive  
Article 53 – paragraph 3 – introductory wording**

*Text proposed by the Commission*

3. A master UCITS is a UCITS which:

*Amendment*

3. A master UCITS is a UCITS ***or an investment compartment thereof*** which:

### *Justification*

*Par souci de cohérence avec les autres dispositions de la directive, un fonds nourricier ou un fonds maître devrait pouvoir être, soit un OPCVM, soit un compartiment d'OPCVM.*

#### **Amendment 26**

##### **Proposal for a directive Article 54 – paragraph 2**

###### *Text proposed by the Commission*

2. If the feeder UCITS already carried on activities as a UCITS, including as a feeder UCITS of a different master UCITS, the feeder UCITS shall be informed within at the latest 15 **working** days following the submission of a complete file, whether or not the competent authorities approved the feeder UCITS' investment into the master UCITS.

###### *Amendment*

2. If the feeder UCITS already carried on activities as a UCITS, including as a feeder UCITS of a different master UCITS, the feeder UCITS shall be informed within at the latest 15 days following the submission of a complete file, whether or not the competent authorities approved the feeder UCITS' investment into the master UCITS. ***The competent authorities shall give reasons whenever approval is not granted.***

### *Justification*

*Comme toute décision administrative de refus, la décision de refuser un investissement dans un fonds maître doit être motivée.*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

#### **Amendment 27**

##### **Proposal for a directive Article 54 – paragraph 3**

###### *Text proposed by the Commission*

3. ***In the event that the feeder UCITS and the master UCITS are established in the same Member State, the*** competent authorities of ***that*** Member State shall grant approval if the feeder UCITS, its depositary and its auditor, as well as the master UCITS, comply with all the

###### *Amendment*

3. ***The*** competent authorities of ***the feeder UCITS' home*** Member State shall grant approval if the feeder UCITS, its depositary and its auditor, as well as the master UCITS, comply with all the requirements set out in this Chapter. For such purpose, the feeder UCITS shall

requirements set out in this Chapter. For such purpose, the feeder UCITS shall provide to the competent authorities of its home Member State the following documents:

(a) the fund rules or instruments of incorporation of the feeder UCITS and the master UCITS;

(b) the prospectus and the key investor information referred to in Article 73 of the feeder UCITS and the master UCITS;

(c) the agreement between the feeder UCITS and the master UCITS referred to in Article 55(1);

(d) where applicable, the information to be provided to unit-holders referred to in Article 59(1);

(e) a declaration of the master UCITS to the effect that it does not hold any units of **a** feeder UCITS;

(f) in the event that the master UCITS and the feeder UCITS have different depositaries, the information-sharing agreement referred to in Article 56(1) between their respective depositaries;

(g) in the event that the master UCITS and the feeder UCITS have different auditors, the information-sharing agreement referred to in Article 57(1) between their respective auditors.

provide to the competent authorities of its home Member State the following documents:

(a) the fund rules or instruments of incorporation of the feeder UCITS and the master UCITS;

(b) the prospectus and the key investor information referred to in Article 73 of the feeder UCITS and the master UCITS;

(c) the agreement between the feeder UCITS and the master UCITS **or the internal conduct-of-business rules** referred to in Article 55(1);

(d) where applicable, the information to be provided to unit-holders referred to in Article 59(1);

(e) a declaration of the master UCITS to the effect that it does not hold any units of **one of its own** feeder UCITS;

(f) in the event that the master UCITS and the feeder UCITS have different depositaries, the information-sharing agreement referred to in Article 56(1) between their respective depositaries;

(g) in the event that the master UCITS and the feeder UCITS have different auditors, the information-sharing agreement referred to in Article 57(1) between their respective auditors.

#### *Justification*

*Comme toute décision administrative de refus, la décision de refuser un investissement dans un fonds maître doit être motivée.*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

## Amendment 28

### Proposal for a directive Article 54 – paragraph 4

*Text proposed by the Commission*

4. When the feeder UCITS is established in another Member State than the master UCITS, the competent authorities of the feeder UCITS' home Member State shall **grant approval provided the following conditions are met:**

***(a) the feeder UCITS, its depositary and its auditor comply with all the requirements set out in this Chapter and the feeder UCITS for such purpose submits the documents referred to in paragraph 3 of this Article;***

***(b) the feeder UCITS demonstrates that the master UCITS is duly authorised as a UCITS, that it is not itself a feeder UCITS and does not hold any units of a feeder UCITS.***

***The competent authorities of the feeder UCITS' home Member State shall immediately inform those of the master UCITS, if the approval is granted or withdrawn.***

*Amendment*

4. When the feeder UCITS is established in another Member State than the master UCITS, the competent authorities of the feeder UCITS' home Member State shall immediately inform those of the master UCITS, if the approval is granted or withdrawn.

#### *Justification*

*Comme toute décision administrative de refus, la décision de refuser un investissement dans un fonds maître doit être motivée.*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

## Amendment 29

### Proposal for a directive

#### Article 55 – paragraph 1 - subparagraphs 1 and 2

*Text proposed by the Commission*

1. Member States shall require the feeder UCITS to enter into an agreement with the master UCITS ***concerned in order to enable the feeder UCITS to meet the requirements laid down in this Directive.***

***Such agreement*** shall include the following ***particulars***:

***(a) the main characteristics of the investment objective and policy of the master UCITS;***

***(b) the rules which govern a possible modification of the investment objective and policy of the master UCITS;***

***(c) the rights and duties of the feeder UCITS and of the master UCITS and of their respective management companies.***

*Amendment*

1. Member States shall require the feeder UCITS to enter into an agreement with the master UCITS ***which*** shall include the following ***information***:

***(a) the rules which govern a possible modification of the investment objective and policy of the master UCITS;***

***(b) the rights and duties of the feeder UCITS and of the master UCITS and of their respective management companies.***

#### *Justification*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

*Une harmonisation maximale du contenu de l'accord passé entre le maître et le nourricier est nécessaire pour assurer l'égalité de concurrence.*

## Amendment 30

### Proposal for a directive

#### Article 55 – paragraph 1 – subparagraph 3 a (new)

*Text proposed by the Commission*

*Amendment*

***3a. In the event that the master and feeder UCITS are managed by the same management or administrative body, the agreement may be replaced by internal conduct-of-business rules ensuring***



***compliance with the requirements set out in this paragraph.***

*Justification*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

*Une harmonisation maximale du contenu de l'accord passé entre le maître et le nourricier est nécessaire pour assurer l'égalité de concurrence.*

**Amendment 31**

**Proposal for a directive**

**Article 55 – paragraph 6 – point a**

*Text proposed by the Commission*

*Amendment*

(a) the ***particulars that need to be included in the agreement referred to in the first subparagraph of*** paragraph 1;

(a) the ***content of the agreement or the internal conduct-of-business rules*** referred to in paragraph 1;

*Justification*

*Si le maître et le nourricier sont gérés par la même société de gestion, un accord entre le maître et le nourricier est une condition impossible à réaliser. En revanche, des règles de conduite interne appropriées devraient être mises en place par la société de gestion.*

*Une harmonisation maximale du contenu de l'accord passé entre le maître et le nourricier est nécessaire pour assurer l'égalité de concurrence.*

**Amendment 32**

**Proposal for a directive**

**Article 56**

*Text proposed by the Commission*

*Amendment*

1. Member States shall require that, if the master UCITS and the feeder UCITS have different depositaries, ***these depositaries enter into an information-sharing agreement in order to ensure the fulfilment of the duties of both***

1. Member States shall require that, if the master UCITS and the feeder UCITS have different depositaries, ***the management company of the master UCITS is to be responsible for informing the feeder UCITS or, where applicable, the management company of the feeder***

*depositories.*

*The feeder UCITS shall not invest in units of the master UCITS until such agreement has become effective.*

2. The *depository of the master UCITS shall immediately inform the* feeder UCITS or, where applicable, the management company *and* the depository of the feeder UCITS *about any irregularities it detects with regard to the master UCITS.*

3. The Commission may adopt implementing measures further specifying the following:

(a) the particulars that need to be included in the *agreement* referred to in *paragraph 1 subparagraph 1*;

(b) the types of irregularities referred to in paragraph 2 *which are deemed to have a negative impact on the feeder UCITS.*

Those measures, designed to amend this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 107(2).

*UCITS about any irregularities it detects with regard to the master UCITS.*

2. The feeder UCITS or, where applicable, the management company *of the feeder UCITS, shall be responsible for communicating to* the depository of the feeder UCITS *any information about the master UCITS which is required for complete performance of the duties of the depository of the feeder UCITS.*

3. The Commission may adopt implementing measures further specifying the following:

(a) the particulars that need to be included in the *information* referred to in *paragraphs 1 and 2*;

(b) the types of irregularities referred to in paragraph 1.

Those measures, designed to amend this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 107(2).

#### *Justification*

*As there is no contractual relations between the depositories, the Directive should be based on the contractual relationship between the management company and the depository and should indicate that the management company remains responsible for transmission of information, whereas the depositories' responsibilities remain as defined nationally at the time being.*

**OPINION**

**FOR THE ATTENTION OF      THE EUROPEAN PARLIAMENT  
THE COUNCIL THE  
COMMISSION**

**Proposal for a directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) COM(2008) 458 final of 16.7.2008 - 2008/0153 (COD)**

Having regard to the Inter-institutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, and in particular to point 9 thereof, the Consultative Working Party consisting of the respective legal services of the European Parliament, the Council and the Commission met on 4 and 24 September and on 13 November 2008 for the purpose of examining the aforementioned proposal submitted by the Commission.

At those meetings<sup>1</sup>, an examination of the proposal for a directive of the European Parliament and of the Council recasting Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) resulted in the Consultative Working Party's establishing, by common accord, as follows.

1) The following parts of text of the recast proposal should have been identified by using the grey-shaded type generally used for marking substantive changes:

- the entire text of recital 5 of Directive 85/611/EEC, having been presented between the texts of recitals 4 and 5 in the recast proposal and having been already marked with double strikethrough;
- in recital 8, which corresponds to recital 5 of Directive 2001/1G7/EC, the final wording "*within three years*", which has already been marked with double strikethrough;
- in Article 2(5), the reference made to "*Article 92 of Directive 2001/34/EC of the European Parliament and of the Council*" (the wording of Article 1a(10), second subparagraph, of Directive

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<sup>1</sup> The Consultative Working Party had at its disposal the English, French and German language versions of the proposal and worked on the basis of the English version, being the master-copy language version of the text under discussion.

85/611/EEC currently reads *"For the purpose of this definition, the voting rights referred to in Article 7 of Directive 88/627/EEC(7) shall be taken into account"*; in the recast text that reference was adapted so as to read as a reference made to *"Article 92 of Directive 2001/34/EC of the European Parliament and the Council"*; Article 92 of Directive 2001/34/EC has been deleted by Article 32(5) of Directive 2004/109/EC of the European Parliament and of the Council. The Legal Service of the European Parliament is of the opinion that the text *"Article 92 of Directive 2001/34/EC of the European Parliament and the Council"* should have been presented with double strikethrough);

- in Article 21, first paragraph, the words *"UCITS home Member"* as well as the wording *"in which the management company's registered office is situated"* (which has already been marked with double strikethrough).

2) In Article 6(1), the expression *"UCITS"* presented between adaptation arrows before the wording *"home Member State"* should be removed.

3) In Article 12(1)(b), the expression *"UCITS"* presented between adaptation arrows before the wording *"host Member State"* should be removed.

4) In Article 97(5), the existing wording of Article 50(6) of Directive 85/611/EEC should be reintroduced, in slightly adapted form, in the place of the adapted text that appears in the recast proposal. The wording of Article 97(5) should read as follows: *"5. Paragraphs 1 and 4 shall not preclude the exchange of information:*

- (a) *within a Member State, where there are two or more competent authorities; or*
- (b) *within a Member State or between Member States, between competent authorities; and*

- (i) *authorities with public responsibility for the supervision of credit institutions, investment undertakings, insurance undertakings and other financial organisations and the authorities responsible for the supervision of financial markets;*

- (ii) *bodies involved in the liquidation or bankruptcy of UCITS and other similar procedures and of undertakings contributing towards their business activity;*

- (iii) *persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment undertakings and other financial institutions,*

*in the performance of their supervisory functions, or the disclosure to bodies which administer compensation schemes of information necessary for the performance of their functions,*

*Information exchanged pursuant to the first subparagraph shall be subject to the conditions of professional secrecy imposed in paragraph 1".*

5) In the correlation table contained in Annex IV, a correspondence should be indicated between Annex II of Directive 85/611 /EEC and Annex II of the recast text. In consequence, examination of the proposal has enabled the Consultative Working Party to conclude, without dissent, that the proposal does not comprise any substantive amendments other than those identified as such therein or in the present opinion. The Working Party also concluded, as regards the codification of the unchanged provisions of the earlier act with those substantive amendments, that the proposal contains a straightforward codification of the existing text, without any change in its substance.

C. PENNERA  
Jurisconsult

J.-C. PIRIS  
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C.-F.DURAND  
actg. Director General

## PROCEDURE

<b>Title</b>	Coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
<b>References</b>	COM(2008)0458 – C6-0287/2008 – 2008/0153(COD)
<b>Committee responsible</b>	ECON
<b>Opinion by</b> Date announced in plenary	JURI 2.9.2008
<b>Drafts(wo)man</b> Date appointed	Jean-Paul Gauzès 22.9.2008
<b>Discussed in committee</b>	7.10.2008
<b>Date adopted</b>	17.11.2008
<b>Result of final vote</b>	+: 19 -: 0 0: 0
<b>Members present for the final vote</b>	Carlo Casini, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Neena Gill, Othmar Karas, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Manuel Medina Ortega, Aloyzas Sakalas, Diana Wallis, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Jean-Paul Gauzès, József Szájer, Jacques Toubon, Ieke van den Burg