

Collective Investment Schemes

Chapter 3

Constitution

3.1 Introduction

Application

3.1.1

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This chapter applies to:

- (1) an *authorised fund manager* of an *AUT*, *ACS* or an *ICVC*;
- (2) any other *director* of an *ICVC*;
- (3) a *depository* of an *AUT*, *ACS* or an *ICVC*; and
- (4) an *ICVC*,

where the *AUT*, *ACS* or *ICVC* is a *UCITS scheme* or a *non-UCITS retail scheme*.

Purpose

3.1.2

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This chapter assists in achieving the *statutory objective* of protecting *consumers*. In particular:

- (1) ■ **COLL 3.2** (The instrument constituting the fund) contains requirements about provisions which must be included in the *instrument constituting the fund* to give a similar degree of protection for investors in an *ICVC*, *AUT* or *ACS*; and
- (2) ■ **COLL 3.3** (Units) provides *rules* and *guidance* which deal with the *classes* of *units* to ensure that investors in each *class* are treated equally.

3.2 The instrument constituting the fund

Application

3.2.1

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This section applies to:

- (1) an *authorised fund manager* of an *AUT*, *ACS* or *ICVC*;
- (2) any other *director* of an *ICVC*;
- (3) a *depository* of an *AUT*, *ACS* or an *ICVC*;
- (4) an *ICVC*; and
- (5) a *nominated partner*;

except ■ COLL 3.2.8 R(UCITS obligations), which applies only to an *ICVC* or to the *authorised fund manager* of an *AUT* or *ACS* where the *ICVC*, *AUT* or *ACS* is a *UCITS scheme*.

Relationship between the instrument constituting the fund and the rules

3.2.2

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- (1) The *instrument constituting the fund* must not contain any provision that:
 - (a) conflicts with any applicable *rule*;
 - (b) prevents *units* in the *scheme* being marketed in the *United Kingdom*; or
 - (c) is unfairly prejudicial to the interests of *unitholders* generally or to the *unitholders* of any *class of units*.
- (2) Any power conferred by the *rules* on the *ICVC*, the *authorised fund manager*, any other *director* of the *ICVC*, or the *depository*, whether in a sole or joint capacity, is subject to any restriction in the *instrument constituting the fund*.

The trust deed for AUTs

3.2.3

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An *AUT* must be constituted by a *trust deed* made between the *manager* and the *trustee*.

The contractual scheme deed for ACSs

3.2.3A **R** An ACS must be constituted by a *contractual scheme deed* made between the *authorised contractual scheme manager* and:

- (1) the *depository*, in the case of a *co-ownership scheme*; or
- (2) the *nominated partner*, in the case of a *limited partnership scheme*.

Matters which must be included in the instrument constituting the fund

3.2.4 **R** The statements and provisions required by **COLL 3.2.6 R** (Table: contents of the instrument constituting the fund) must be included in the *instrument constituting the fund*, where appropriate.

The instrument constituting the fund: OEIC Regulations, Contractual Scheme Regulations and trust law requirements

3.2.5 **G**

- (1) Several of the matters set out in **COLL 3.2.6 R** are required to be included in the *instrument constituting the fund* under the *OEIC Regulations, Contractual Scheme Regulations* or as a consequence of relevant trust law. In addition, further statements are required if the *scheme* or the *authorised fund manager* are to take advantage of the powers under the *rules* in this sourcebook.
- (2) Additional matters which are not contained in **COLL 3.2.6 R** may be required to be included in the *instrument constituting the fund* in order to comply with the *OEIC Regulations*, (particularly Schedule 2 - Instrument of Incorporation), *Contractual Scheme Regulations* and for the purposes of making the *scheme* eligible under relevant tax, pensions, or charities legislation.

Table: contents of the instrument constituting the fund

3.2.6 **R** This table belongs to **COLL 3.2.4 R** (Matters which must be included in the instrument constituting the fund)

Name of scheme	
1	A statement of: <ul style="list-style-type: none"> (1) the name of the <i>authorised fund</i>; and (2) whether the <i>authorised fund</i> is a <i>UCITS scheme</i> or a <i>non-UCITS retail scheme</i>.
Investment powers in eligible markets	
2	A statement that, subject to any restriction in the <i>rules</i> in this sourcebook or the <i>instrument constituting the fund</i> , the <i>scheme</i> has the power to invest in any eligible securities market or <i>deal</i> on any <i>eligible derivatives</i> market to the extent that power to do so is conferred by COLL 5 (Investment and borrowing powers).
Unitholder's liability to pay	
3	A provision that a <i>unitholder</i> in an <i>AUT, ICVC</i> or <i>co-ownership scheme</i> is not liable to make any further payment after he has paid the <i>price</i> of his <i>units</i> and that no further liability can be imposed on him in respect of the <i>units</i> which he holds.

- 3A A provision that a *unitholder* in a *limited partnership scheme* is not liable for the debts or obligations of the *limited partnership scheme* beyond the amount of the *scheme property* which is available to the *authorised contractual scheme manager* to meet such debts or obligations, provided that the *unitholder* does not take part in the management of the partnership business.
- 3B A provision that the exercise of rights conferred on *limited partners* by *FCA rules* does not constitute taking part in the management of the partnership business.
- Base currency**
- 4 A statement of the *base currency* of the *scheme*.
- Valuation and pricing**
- 5 A statement setting out the basis for the valuation and pricing of the *scheme*.
- Duration of the scheme**
- 6 If the *scheme* is to be wound up after a particular period expires, a statement to that effect.
- Object of the scheme**
- 7 A statement:
- (1) as to the object of the *scheme*, in particular the types of *investments* and assets in which it and each *sub-fund* (where applicable) may invest; and
 - (2) that the object of the *scheme* is to invest in property of that kind with the aim of spreading investment risk and giving *unitholders* the benefits of the results of the management of that property.
- 7A Where the *authorised fund* is a *qualifying money market fund*, a statement to that effect and a statement that the *authorised fund's* investment objectives and policies will meet the conditions specified in the definition of *qualifying money market fund*.
[deleted]
- Government and public securities: investment in one issuer**
- 8 Where relevant, for a *UCITS scheme*, a statement in accordance with COLL 5.2.12 R (Spread: government and public securities) with the names of the individual states, local authorities or public international bodies issuing or guaranteeing the *transferable securities* or *approved money-market instruments* in which more than 35% in value of the *scheme property* may be invested.
- Classes of unit**
- 9 A statement:
- (1) specifying the *classes of unit* that may be issued, and for a *scheme* which is an *umbrella*, the *classes* that may be issued in respect of each *sub-fund*; and
 - (2) if the rights of any *class of unit* differ, a statement describing those differences in relation to the differing *classes*.
- Authorised fund manager's charges and expenses**
- 10 A statement setting out the basis on which the *authorised fund manager* may make a charge and recover expenses out of the *scheme property*.
- Issue or cancellation directly through the ICVC or depositary of an AUT or ACS**

- 11 Where relevant, a statement authorising the *issue* or *cancellation* of *units* to take place through the *ICVC* or *depository* of an *AUT* or *ACS* directly.
- In specie issue and cancellation**
- 12 Where relevant, a statement authorising payment for the *issue* or *cancellation* of *units* to be made by the transfer of assets other than cash.
- Restrictions on sale and redemption**
- 13 Where relevant, the restrictions which will apply in relation to the *sale* and *redemption* of *units* under COLL 6.2.16 R (Sale and redemption).
- Voting at meetings**
- 14 The manner in which votes may be given at a meeting of *unitholders* under COLL 4.4.8 R (Voting rights).
- Certificates**
- 15 A statement:
- (1) for *ICVCs*, authorising the issue of *bearer certificates* if any, and how such *holders* are to identify themselves; and
 - (2) authorising the *person* responsible for the *register* to charge for issuing any document recording, or for amending, an entry on the *register*, other than on the *issue* or *sale* of *units*.
- Income**
- 16 A statement setting out the basis for the distribution or re-investment of income.
- Income equalisation**
- 17 Where relevant, a provision for *income equalisation*.
- Redemption or cancellation of units on breach of law or rules**
- 18 A statement that where any holding of *units* by a *unitholder* is (or is reasonably considered by the *authorised fund manager* to be) an infringement of any law, governmental regulation or rule, those *units* must be redeemed or cancelled.
- ICVCs: larger and smaller denomination shares**
- 19 A statement of the proportion of a *larger denomination share* represented by a *smaller denomination share* for any relevant *unit class*.
- ICVCs: resolution to remove a director**
- 20 A statement that the *ICVC* may (without prejudice to the requirements of regulation 21 of the *OEIC Regulations* (The Authority's approval for certain changes in respect of a company), by a resolution passed by a simple majority of the votes validly cast for and against the resolution at a general meeting of *unitholders*, remove a *director* before his period of office expires, despite anything else in the *ICVC's instrument of incorporation* or in any agreement between the *ICVC* and that *director*.
- ICVCs: unit transfers**
- 21 A statement that the *person* designated for the purposes of paragraph 4 of Schedule 4 to the *OEIC Regulations* (Share transfers) is the *person* who, for the time being, is the *ACD* of the *ICVC*.
- ICVCs and ACSs: Charges and expenses**
- 22 A statement that charges or expenses of the *ICVCor ACS* may be taken out of the *scheme property*.

- ICVCs: Umbrella schemes - principle of limited recourse**
- 22A For an *ICVC* which is an *umbrella*, a statement that the assets of a *sub-fund* belong exclusively to that *sub-fund* and shall not be used to discharge directly or indirectly the liabilities of, or claims against, any other *person* or body, including the *umbrella*, or any other *sub-fund*, and shall not be available for any such purpose.
- Co-ownership schemes: umbrella schemes - principle of limited recourse**
- 22B For a *co-ownership scheme* which is an *umbrella*, a statement that the property subject to a *sub-fund* is beneficially owned by the *participants* in that *sub-fund* as tenants in common (or, in Scotland, is the common property of the *participants* in that *sub-fund*) and must not be used to discharge any liabilities of, or meet any claims against, any *person* other than the *participants* in that *sub-fund*.
- AUTs: governing law for a trust deed**
- 23 A statement that the *trust deed* is made under and governed by the law of England and Wales, Wales or Scotland or Northern Ireland.
- AUTs: trust deed to be binding and authoritative**
- 24 A statement that the *trust deed*:
- (1) is binding on each *unitholder* as if it had been a party to it and that it is bound by its provisions; and
 - (2) authorises and requires the *trustee* and the *manager* to do the things required or permitted of them by its terms.
- AUTs: declaration of trust**
- 25 A declaration that, subject to the provisions of the *trust deed* and all *rules* made under section 247 of the *Act* (Trust scheme rules) and for the time being in force:
- (1) the *scheme property* (other than sums standing to the credit of the *distribution account*) is held by the *trustee* on trust for the *unitholders* according to the number of *units* held by each *unitholder* or, where relevant, according to the number of undivided shares in the *scheme property* represented by the *units* held by each *unitholder*; and
 - (2) the sums standing to the credit of the *distribution account* are held by the *trustee* on trust to distribute or apply them in accordance with COLL 6.8 (Income: accounting, allocation and distribution).
- AUTs: trustee's remuneration**
- 26 Where relevant, a statement authorising payments to the *trustee* by way of *remuneration* for its services to be paid (in whole or in part) out of the *scheme property*.
- AUTs: responsibility for the register**
- 27 A statement identifying the *person* responsible under the *rules* for the maintenance of the *register*.
- ACs: governing law for a contractual scheme deed**
- 27A A statement that the *contractual scheme deed* is made under and governed by the law of England and Wales, or Scotland or Northern Ireland.
- ACs: contractual scheme deed to be binding and authoritative**
- 27B A statement that the *contractual scheme deed*:
- (1) is binding on each *unitholder* as if it had been a party to it and that it is bound by its provisions; and

- (2) authorises and requires the *depository* and the *authorised contractual manager* to do the things required or permitted of them by its terms.

ACs: ownership of scheme property

27C A statement that, subject to the provisions of the *contractual scheme deed* and all *rules* made under section 261I of the *Act* (Contractual scheme rules) and for the time being in force:

- (1) the *scheme property* (other than sums standing to the credit of the *distribution account*) is held by, or to the order of, the *depository* for and on behalf of the *unitholders* according to the number of *units* held by each *unitholder* or, where relevant, according to the number of undivided shares in the *scheme property* represented by the *units* held by each *unitholder*;
- (2) the sums standing to the credit of the *distribution account* are held by the *depository* to distribute or apply them in accordance with COLL 6.8 (Income: accounting, allocation and distribution); and
- (3) the *scheme property* of a *co-ownership scheme* is beneficially owned by the *participants* as tenants in common (or, in Scotland, is the common property of the *participants*).

ACs: responsibility for the register

27D A statement identifying the *person* responsible under the *rules* for the maintenance of the *register*.

ACs: UCITS and NURS eligible investors

27E For an *ACS* which is a *UCITS scheme* or a *non-UCITS retail scheme*, a statement that *units* may not be *issued* to a *person* other than a:

- (1) *professional ACS investor*;
- (2) *large ACS investor*; or
- (3) *person* who already holds *units* in the *scheme*.

27F A statement that the *authorised contractual scheme manager* must *redeem units* as soon as practicable after becoming aware that those *units* are vested in anyone (whether as a result of subscription or transfer of *units*) other than a *person* meeting the criteria in paragraph 27E.

ACs: UCITS and NURS transfer of units

- 27G (1) A statement whether the transfer of *units* in the *ACS scheme* is either:
- (a) prohibited; or
- (b) allowed
- (2) Where transfer of *units* is allowed in accordance with (1)(b), a statement that *units* may only be transferred in accordance with the conditions specified by *FCA rules*, including that *units* may not be transferred to a *person* other than a:
- (a) *professional ACS investor*;
- (b) *large ACS investor*; or
- (c) *person* who already holds *units* in the *scheme*.
- (3) For a *co-ownership scheme* which is an *umbrella*, a statement in accordance with (1)(a) or (1)(b) and, where appropriate, a statement in accordance with (2), must also be made for the *sub-funds*. Where individual *sub-funds* have differing policies in relation to transfer of *units*, separate statements are required.

Co-ownership schemes: constitution

27H For a *co-ownership scheme*, a statement that the arrangements constituting the *scheme* are intended to constitute a *co-ownership scheme* as defined in section 235A(2) of the *Act*.

Co-ownership schemes: operator's powers

27I A statement that the *operator* of a *co-ownership scheme* is authorised to:

- (1) acquire, manage and dispose of the *scheme property*; and
- (2) enter into contracts which are binding on *unitholders* for the purposes of, or in connection with, the acquisition, management or disposal of *scheme property*.

Co-ownership schemes: winding-up

27J A statement that the *operator* and *depository* of a *co-ownership scheme* are required to wind up the *scheme* if directed to do so by the *FCA* in exercise of its power under section 261X (Directions) or section 261Z (Winding up or merger of master UCITS) of the *Act*.

Limited partnership schemes: participants

27K A statement that the *limited partners*, other than the *nominated partner*, are to be the *participants* in the *scheme*.

Limited partnership schemes: resignation of limited partners

27L A statement that the *scheme* is not dissolved on any *person* ceasing to be a *limited partner* or *nominated partner* provided that there remains at least one *limited partner*.

Limited partnership schemes: inability to operate as an umbrella

27M A statement that the *limited partnership scheme* prohibits pooling as is mentioned in section 235(3)(a) of the *Act* in relation to separate parts of the *scheme property*, with the effect that the *scheme* cannot be an *umbrella*.

Investment in overseas property through an intermediate holding vehicle

28 If investment in an overseas immovable is to be made through an *intermediate holding vehicle* or a series of *intermediate holding vehicles*, a statement that the purpose of that *intermediate holding vehicle* or series of *intermediate holding vehicles* will be to enable the holding of overseas immovables by the *scheme*.

3.2.7 **R** [deleted]

UCITS obligations

- 3.2.8 **R**
- (1) The instrument constituting a *UCITS scheme* may not be amended in such a way that it ceases to be a *UCITS scheme*.
 - (2) [deleted]
 - (3) [deleted]

3.3 Units

Application

- 3.3.1 **R** This section applies to an *authorised fund manager*, an *ICVC* and the *depository* of an *AUT* or *ACS*.

Classes of units

- 3.3.2 **G**
- (1) The *instrument constituting the fund* may provide for different *classes of unit* to be issued in an *authorised fund* and, for a *scheme* which is an *umbrella*, provide that *classes of units* may be issued for each *sub-fund*.
 - (2) In order to be satisfied that **COLL 3.2.2 R** (Relationship between the Instrument constituting the fund and the rules) is complied with, the *FCA* will take into account the principles in (a) to (c) when considering proposals for *unit classes*:
 - (a) a *unit class* should not provide any advantage for that *class* if that would result in prejudice to *unitholders* of any other *class*;
 - (b) the nature, operation and effect of the new *unit class* should be capable of being explained clearly to prospective investors in the *prospectus*; and
 - (c) the effect of the new *unit class* should not appear to be contrary to the purpose of any part of this sourcebook.

Currency class units

- 3.3.3 **G** A *currency class unit* differs from other *units* mainly in that its *price*, having been calculated initially in the *base currency*, will be quoted, and normally paid for, in the currency of the designation of the *class*. Income distributions will also be paid in the currency of designation of the *class*.

Currency class units: requirements

- 3.3.4 **R** For a *currency class unit*:
- (1) the currency of the *class* concerned must not be the *base currency* (or, in the case of a *sub-fund* which, in accordance with a statement in the *prospectus*, is to be valued in some other currency, the currency of the *class* may be in the *base currency*, but must not be in that other currency);

- (2) the *price* must be expressed in the currency of the *class* concerned;
- (3) any distribution must be paid in the currency of the *class* concerned; and
- (4) statements of amounts of *money* or values included in statements and in tax certificates must be given in the currency of the *class* concerned (whether or not also given in the *base currency*).

Rights of unit classes

3.3.5

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- (1) If any *class* of *units* in an *authorised fund* has different rights from another *class* of *units* in that fund, the *instrument constituting the fund* must provide how the proportion of the value of the *scheme property* and the proportion of income available for allocation attributable to each such *class* must be calculated.
- (2) For an *authorised fund* which is not an *umbrella*, the *instrument constituting the fund* must not provide for any *class* of *units* in respect of which:
 - (a) the extent of the rights to participate in the *capital property*, *income property* or *distribution account* would be determined differently from the extent of the corresponding rights for any other *class* of *units*; or
 - (b) payments or accumulation of income or capital would differ in source or form from those of any other *class* of *units*.
- (3) For a *scheme* which is an *umbrella*, the provisions in (2)(a) apply to *classes* of *units* in respect of each *sub-fund* as if each *sub-fund* were a separate *scheme*.
- (4) Paragraphs (2) and (3) do not prohibit a difference between the rights attached to one *class* of *units* and to another *class* of *units* that relates solely to:
 - (a) the accumulation of income by way of periodical credit to capital rather than distribution; or
 - (b) charges and expenses that may be taken out of the *scheme property* or payable by the *unitholders*; or
 - (c) the currency in which *prices* or values are expressed or payments made; or
 - (d) the use of *derivatives* and forward transactions entered into for the purpose of reducing the effect of fluctuations in the rate of exchange between the currency of a *class* of *units* and either the *base currency* of the *scheme* or any currency in which all or part of the *scheme property* is denominated or valued (in this section referred to as a "class hedging transaction").

Hedging of unit classes

3.3.5A

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A class hedging transaction must:

- (1) be undertaken in accordance with the requirements of ■ COLL 5 (Investment and borrowing powers); and

3.3.5B

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- (2) (for the purposes of valuing *scheme property* and calculating the *price of units* in accordance with ■ COLL 6.3 (Valuation and pricing)) be attributed only to the *class of units* for which it is undertaken.

Guidance on hedging of unit classes

- (1) Before undertaking a class hedging transaction for a *class of units*, the *authorised fund manager* should:
- (a) ensure that the relevant *prospectus* clearly:
 - (i) states that such a transaction may be undertaken for the relevant *class of units*; and
 - (ii) explains the nature of the risks that such a transaction may pose to investors in all *classes*;
 - (b) consult the *depository* about the adequacy of the systems and controls it uses to ensure compliance with ■ COLL 3.3.5A R (Hedging of unit classes); and
 - (c) consult the *scheme auditor* and, where appropriate, *depository* to determine how:
 - (i) the transaction will be treated in the *scheme's* accounts; and
 - (ii) any consequential tax liability will be met;
 (in each case) without prejudice to *unitholders of classes* other than the relevant hedged *class*.
- (2) Class hedging transactions should be entered into for the purpose of reducing risk by limiting the effect of movements in exchange rates on the value of a *unit*. Such transactions are not limited to *currency class units*. The *authorised fund manager* should ensure that the total value of the hedged position does not exceed the value of the relevant *class of units* unless there is adequate cover and it is reasonable for it to do so on a temporary basis for reasons of efficiency (for example, to avoid the need to make small and frequent adjusting transactions). In such cases, the difference between the value of the hedged position and the value of the *class of units* should not be so large as to be speculative or to constitute an investment strategy.

Requirement: larger and smaller denomination shares in an ICVC

3.3.6

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- (1) This *rule* applies whenever the *instrument of incorporation* of an ICVC provides, in relation to any *class*, for *smaller denomination shares* and *larger denomination shares*.
- (2) Whenever a registered holding includes a number of *smaller denomination shares* that can be consolidated into a *larger denomination share* of the same *class*, the *ACD* must consolidate the relevant number of those *smaller denomination shares* into a *larger denomination share*.
- (3) The *ACD* may, to effect a transaction in *shares*, substitute for a *larger denomination share* the relevant number of *smaller denomination shares*, in which case (2) does not apply to the resulting smaller

denomination shareholding or holdings until immediately after the completion of the transaction.

Characteristics of larger and smaller denomination shares in an ICVC

3.3.7

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Regulation 45 of the *OEIC Regulations (Shares)* allows the rights attached to a *share* in an *ICVC* of any *class* to be expressed in two denominations, in which case the 'smaller' denomination must be such proportion of the 'larger' denomination (a standard *share*) as is fixed by the *ICVC's instrument of incorporation* as described in ■ COLL 3.2.6R (19). This will enable holdings to consist of more or less than a complete number of *larger denomination shares*.

Sub-division and consolidation of units

3.3.8

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- (1) The *directors* of an *ICVC* or the *authorised fund manager* of an *AUT* or *ACS* may, unless expressly forbidden to do so by the *instrument constituting the fund*, determine that:
 - (a) each *unit* of any *class* is to be subdivided into two or more *units*; or
 - (b) *units* of any *class* are to be consolidated.
- (2) The *ICVC* or the *authorised fund manager* of an *AUT* or *ACS* must (unless it has done so before the sub-division or consolidation became effective) immediately give notice to each *unitholder* (or the first named of joint *unitholders*) of any sub-division or consolidation under (1).

Guarantees and capital protection

3.3.9

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If there is any arrangement intended to result in a particular capital or income return from a holding of *units* in an *authorised fund*, or any investment objective of giving protection to the capital value of, or income return from, such a holding:

- (1) that arrangement or protection must not be such as to cause the possibility of a conflict of interest as between:
 - (a) *unitholders* and the *authorised fund manager* or *depository*; or
 - (b) *unitholders* intended and not intended to benefit from the arrangement; and
- (2) where, in accordance with any statement required by ■ COLL 4.2.5R (27)(c)(iv) (Table: contents of the prospectus), action is required by the *unitholders* to obtain the benefit of any guarantee, the *authorised fund manager* must provide reasonable notice in writing to *unitholders* before such action is required.

Switching rights: umbrella schemes

3.3.10

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- (1) In accordance with section 235(4) of the *Act* (Collective investment schemes), the *participants* in a *scheme* which is an *umbrella* are entitled to exchange rights in one *sub-fund* for rights in another *sub-fund* of the *umbrella*.

- (2) To satisfy (1), where any *sub-fund* in a *scheme* which is an *umbrella* has provisions in its *prospectus* limiting the *issue* of *units* in that *sub-fund*, the *authorised fund manager* should ensure that at least two *sub-funds* are able to issue *units* at any time. In the case of an *umbrella* consisting of a single *sub-fund* that limits the issue of *units*, where the *ICVC* or the *authorised fund manager* of an *AUT* or *co-ownership scheme* of such an *umbrella* intends to offer additional *sub-funds*, it should ensure that *unitholders* will have the right to switch at all times between two or more *sub-funds* in that *umbrella*.