

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (Text with EEA relevance)

CHAPTER III

**OBLIGATIONS REGARDING MANAGEMENT COMPANIES**

SECTION 4

**Freedom of establishment and freedom to provide services**

*Article 16*

1 Member States shall ensure that a management company, authorised by its home Member State, may pursue within their territories the activity for which it has been authorised, either by the establishment of a branch or under the freedom to provide services.

Where a management company so authorised proposes, without establishing a branch, only to market the units of the UCITS it manages as provided for in Annex II in a Member State other than the UCITS home Member State, without proposing to pursue any other activities or services, such marketing shall be subject only to the requirements of Chapter XI.

2 Member States shall not make the establishment of a branch or the provision of the services subject to any authorisation requirement, to any requirement to provide endowment capital or to any other measure having equivalent effect.

3 Subject to the conditions set out in this Article, a UCITS shall be free to designate, or to be managed by a management company authorised in a Member State other than the UCITS home Member State in accordance with the relevant provisions of this Directive, provided that such a management company complies with the provisions of:

- a Article 17 or Article 18; and
- b Articles 19 and 20.

*Article 17*

1 In addition to meeting the conditions imposed in Articles 6 and 7, a management company wishing to establish a branch within the territory of another Member State to pursue the activities for which it has been authorised shall notify the competent authorities of its home Member State accordingly.

2 Member States shall require every management company wishing to establish a branch within the territory of another Member State to provide the following information and documents, when effecting the notification provided for in paragraph 1:

- a the Member State within the territory of which the management company plans to establish a branch;
- b a programme of operations setting out the activities and services according to Article 6(2) and (3) envisaged and the organisational structure of the branch, which shall include a description of the risk management process put in place by the management

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company. It shall also include a description of the procedures and arrangements taken in accordance with Article 15;

- c the address in the management company's host Member State from which documents may be obtained; and
- d the names of those responsible for the management of the branch.

3 Unless the competent authorities of the management company's home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of a management company, taking into account the activities envisaged, they shall, within two months of receiving all the information referred to in paragraph 2, communicate that information to the competent authorities of the management company's host Member State and shall inform the management company accordingly. They shall also communicate details of any compensation scheme intended to protect investors.

Where the competent authorities of the management company's home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the management company's host Member State, they shall give reasons for such refusal to the management company concerned within two months of receiving all the information. The refusal or any failure to reply shall be subject to the right to apply to the courts in the management company's home Member State.

Where a management company wishes to pursue the activity of collective portfolio management referred to in Annex II, the competent authorities of the management company's home Member State shall enclose with the documentation sent to the competent authorities of the management company's host Member State an attestation that the management company has been authorised pursuant to the provisions of this Directive, a description of the scope of the management company's authorisation and details of any restriction on the types of UCITS that the management company is authorised to manage.

4 A management company which pursues activities by a branch within the territory of the host Member State shall comply with the rules drawn up by the management company's host Member State pursuant to Article 14.

5 The competent authorities of the management company's host Member State shall be responsible for supervising compliance with paragraph 4.

6 Before the branch of a management company starts business, the competent authorities of the management company's host Member State shall, within two months of receiving the information referred to in paragraph 2, prepare for supervising the compliance of the management company with the rules under their responsibility.

7 On receipt of a communication from the competent authorities of the management company's host Member State or on the expiry of the period provided for in paragraph 6 without receipt of any communication from those authorities, the branch may be established and start business.

8 In the event of change of any particulars communicated in accordance with paragraph 2(b), (c) or (d), a management company shall give written notice of that change to the competent authorities of the management company's home Member State and of the management company's host Member State at least one month before implementing the change so that the competent authorities of the management company's home Member State may take a decision on the change under paragraph 3 and the competent authorities of the management company's host Member State may do so under paragraph 6.

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9 In the event of a change in the particulars communicated in accordance with the first subparagraph of paragraph 3, the competent authorities of the management company's home Member State shall inform the competent authorities of the management company's host Member State accordingly.

The competent authorities of the management company's home Member State shall update the information contained in the attestation referred to in the third subparagraph of paragraph 3 and inform the competent authorities of the management company's host Member State whenever there is a change in the scope of the management company's authorisation or in the details of any restriction on the types of UCITS that the management company is authorised to manage.

[<sup>F1</sup>10 In order to ensure consistent harmonisation of this Article ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 1, 2, 3, 8 and 9.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 3 and 9.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the third subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.]

#### **Textual Amendments**

- F1** Inserted by [Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority \(European Banking Authority\), the European Supervisory Authority \(European Insurance and Occupational Pensions Authority\) and the European Supervisory Authority \(European Securities and Markets Authority\) \(Text with EEA relevance\).](#)

#### *Article 18*

1 Any management company wishing to pursue the activities for which it has been authorised within the territory of another Member State for the first time under the freedom to provide services shall communicate the following information to the competent authorities of the management company's home Member State:

- a the Member State within the territory of which the management company intends to operate; and
- b a programme of operations stating the activities and services referred to in Article 6(2) and (3) envisaged which shall include a description of the risk management process put in place by the management company. It shall also include a description of the procedures and arrangements taken in accordance with Article 15.

2 The competent authorities of the management company's home Member State shall, within one month of receiving the information referred to in paragraph 1, forward it to the competent authorities of the management company's host Member State.

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The competent authorities of the management company's home Member State shall also communicate details of any applicable compensation scheme intended to protect investors.

Where a management company wishes to pursue the activity of collective portfolio management as referred to in Annex II, the competent authorities of the management company's home Member State shall enclose with the documentation sent to the competent authorities of the management company's host Member State an attestation that the management company has been authorised pursuant to the provisions of this Directive, a description of the scope of the management company's authorisation and details of any restriction on the types of UCITS that the management company is authorised to manage.

Notwithstanding Articles 20 and 93, the management company may then start business in the management company's host Member State.

3 A management company which pursues activities under the freedom to provide services shall comply with the rules drawn up by the management company's home Member State pursuant to Article 14.

4 Where the content of the information communicated in accordance with paragraph 1(b) is amended, the management company shall give notice of the amendment in writing to the competent authorities of the management company's home Member State and of the management company's host Member State before implementing the change. The competent authorities of the management company's home Member State shall update the information contained in the attestation referred to in paragraph 2 and inform the competent authorities of the management company's host Member State whenever there is a change in the scope of the management company's authorisation or in the details of any restriction on the types of UCITS that the management company is authorised to manage.

[<sup>F15</sup> In order to ensure consistent harmonisation of this Article ESMA may develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 1, 2 and 4.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 2 and 4.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the third subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.]

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#### **Textual Amendments**

**F1** Inserted by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (Text with EEA relevance).

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### Article 19

1 A management company which pursues the activity of collective portfolio management on a cross-border basis by establishing a branch or under the freedom to provide services 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, procedures referred to in Article 12 and the management company's reporting requirements. Those rules shall be no stricter than those 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.

3 A management company which pursues the activity of collective portfolio management on a cross-border basis by establishing a branch or in accordance with the freedom to provide services shall comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS, namely the rules applicable to:

- a the setting up and authorisation of the UCITS;
- b the issuance and redemption of units and shares;
- c investment policies and limits, including the calculation of total exposure and leverage;
- d restrictions on borrowing, lending and uncovered sales;
- e the valuation of assets and the accounting of the UCITS;
- f the calculation of the issue or redemption price, and errors in the calculation of the net asset value and related investor compensation;
- g the distribution or reinvestment of the income;
- h the disclosure and reporting requirements of the UCITS, including the prospectus, key investor information and periodic reports;
- i the arrangements made for marketing;
- j the relationship with unit-holders;
- k the merging and restructuring of the UCITS;
- l the winding-up and liquidation of the UCITS;
- m where applicable, the content of the unit-holder register;
- n the licensing and supervision fees regarding the UCITS; and
- o the exercise of unit-holders' voting rights and other unit-holders' rights in relation to points (a) to (m).

4 The management company shall comply with the obligations set out in the fund rules or in the instruments of incorporation, and the obligations set out in the prospectus, which shall be consistent with the applicable law as referred to in paragraphs 1 and 3.

5 The competent authorities of the UCITS home Member State shall be responsible for supervising compliance with paragraphs 3 and 4.

6 The management company shall decide and be responsible for adopting and implementing all the arrangements and organisational decisions which are necessary to ensure compliance with the rules which relate to the constitution and functioning of the UCITS and with the obligations set out in the fund rules or in the instruments of incorporation, and with the obligations set out in the prospectus.

7 The competent authorities of the management company's home Member State shall be responsible for supervising the adequacy of the arrangements and organisation of the management company so that the management company is in a position to comply with the

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obligations and rules which relate to the constitution and functioning of all the UCITS it manages.

8 Member States shall ensure that any management company authorised in a Member State is not subject to any additional requirement established in the UCITS home Member State in respect of the subject matter of this Directive, except in the cases expressly referred to in this Directive.

#### *Article 20*

1 Without prejudice to Article 5, a management company which applies to manage a UCITS established in another Member State shall provide the competent authorities of the UCITS home Member State with the following documentation:

- [<sup>F2</sup>a the written contract with the depositary referred to in Article 22(2);]
- b information on delegation arrangements regarding functions of investment management and administration referred to in Annex II.

If a management company already manages other UCITS of the same type in the UCITS home Member State, reference to the documentation already provided shall be sufficient.

2 In so far as it is necessary to ensure compliance with the rules for which they are responsible, the competent authorities of the UCITS home Member State may ask the competent authorities of the management company's home Member State for clarification and information regarding the documentation referred to in paragraph 1 and, based on the attestation referred to in Articles 17 and 18, as to whether the type of UCITS for which authorisation is requested falls within the scope of the management company's authorisation. Where applicable, the competent authorities of the management company's home Member State shall provide their opinion within 10 working days of the initial request.

3 The competent authorities of the UCITS home Member State may refuse the application of the management company only if:

- a the management company does not comply with the rules falling under their responsibility pursuant to Article 19;
- b the management company is not authorised by the competent authorities of its home Member State to manage the type of UCITS for which authorisation is requested; or
- c the management company has not provided the documentation referred to in paragraph 1.

Before refusing an application, the competent authorities of the UCITS home Member State shall consult the competent authorities of the management company's home Member State.

4 Any subsequent material modifications of the documentation referred to in paragraph 1 shall be notified by the management company to the competent authorities of the UCITS home Member State.

[<sup>F15</sup> In order to ensure consistent harmonisation of this Article, ESMA may develop draft regulatory technical standards to determine the information to be provided to the competent authorities in the application for managing a UCITS established in another Member State.

The Commission may adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

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In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish standard forms, templates and procedures for such provision of information.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the third subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.]

#### **Textual Amendments**

- F1** Inserted by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (Text with EEA relevance).
- F2** Substituted by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).

#### *Article 21*

1 A management company's host Member State may, for statistical purposes, require all management companies with branches within its territory to report periodically on their activities pursued in that host Member State to the competent authorities of that host Member State.

2 A management company's host Member State may require management companies pursuing business within its territory through the establishment of a branch or under the freedom to provide services, to provide the information necessary for the monitoring of their compliance with the rules under the responsibility of the management company's host Member State that apply to them.

Those requirements shall not be more stringent than those which the same Member State imposes on management companies authorised in that Member State for the monitoring of their compliance with the same standards.

Management companies shall ensure that the procedures and arrangements referred to in Article 15 enable the competent authorities of the UCITS home Member State to obtain directly from the management company the information referred to in this paragraph.

3 Where the competent authorities of a management company's host Member State ascertain that a management company that has a branch or provides services within its territory is in breach of one of the rules under their responsibility, those authorities shall require the management company concerned to put an end to that breach and inform the competent authorities of the management company's home Member State thereof.

4 If the management company concerned refuses to provide the management company's host Member State with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 3, the competent authorities of the management company's host Member State shall inform the competent authorities of the management company's home Member State accordingly. The competent authorities of the management company's home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the management company concerned provides the

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information requested by the management company's host Member State pursuant to paragraph 2 or puts an end to the breach. The nature of those measures shall be communicated to the competent authorities of the management company's host Member State.

[<sup>F35</sup> If, despite the measures taken by the competent authorities of the management company's home Member State or because such measures prove to be inadequate or are not available in the Member State in question, the management company continues to refuse to provide the information requested by the management company's host Member State pursuant to paragraph 2, or persists in breaching the legal or regulatory provisions, referred to in the same paragraph, in force in the management company's host Member State, the competent authorities of the management company's host Member State may take either of the following actions:

- a after informing the competent authorities of the management company's home Member State, take appropriate measures, including under Articles 98 and 99, to prevent or penalise further irregularities and, in so far as necessary, to prevent that management company from initiating any further transaction within its territory. Member States shall ensure that within their territories it is possible to serve the legal documents necessary for those measures on management companies. Where the service provided within the management company's host Member State is the management of a UCITS, the management company's host Member State may require the management company to cease managing that UCITS; or
- b where they consider that the competent authority of the management company's home Member State has not acted adequately, refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.]

6 Any measure adopted pursuant to paragraphs 4 or 5 involving measures or penalties shall be properly justified and communicated to the management company concerned. Every such measure shall be subject to the right to apply to the courts in the Member State which adopted it.

[<sup>F37</sup> Before following the procedure laid down in paragraphs 3, 4 or 5, the competent authorities of the management company's host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided. The Commission, ESMA, and the competent authorities of the other Member States concerned shall be informed of such measures at the earliest opportunity.

After consulting the competent authorities of the Member States concerned, the Commission may decide that the Member State in question must amend or abolish those measures, without prejudice to power of ESMA under Article 17 of Regulation (EU) No 1095/2010.]

8 The competent authorities of the management company's home Member State shall consult the competent authorities of the UCITS home Member State before withdrawing the authorisation of the management company. In such cases, the competent authorities of the UCITS home Member State shall take appropriate measures to safeguard investors' interests. Those measures may include decisions preventing the management company concerned from initiating any further transactions within its territory.

Every two years the Commission shall issue a report on such cases.

[<sup>F39</sup> Member States shall inform ESMA and the Commission of the number and type of cases in which they refuse authorisation under Article 17 or an application under Article 20 and of any measures taken in accordance with paragraph 5 of this Article.]

Every two years the Commission shall issue a report on such cases.



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### **Textual Amendments**

- F3** Substituted by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (Text with EEA relevance).