

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 XII

**PROVISIONS CONCERNING THE AUTHORITIES  
RESPONSIBLE FOR AUTHORISATION AND SUPERVISION**

*Article 97*

[<sup>F1</sup> Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform ESMA and the Commission thereof, indicating any division of duties.]

2 The competent authorities shall be public authorities or bodies appointed by public authorities.

3 The authorities of the UCITS home Member State shall be competent to supervise that UCITS including, where relevant, pursuant to Article 19. However, the authorities of the UCITS host Member State shall be competent to supervise compliance with the provisions falling outside the field governed by this Directive and requirements set out in Articles 92 and 94.

**Textual Amendments**

**F1** 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 \(European Securities and Markets Authority\) \(Text with EEA relevance\).](#)

*Article 98*

1 The competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Such powers shall be exercised:

- a directly;
- b in collaboration with other authorities;
- c under the responsibility of the competent authorities, by delegation to entities to which tasks have been delegated; or
- d by application to the competent judicial authorities.

2 Under paragraph 1, competent authorities shall have the power, at least, to:

- a access any document in any form and receive a copy thereof;
- b require any person to provide information and, if necessary, to summon and question a person with a view to obtaining information;
- c carry out on-site inspections;

[<sup>F2</sup>d require:

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- (i) in so far as permitted by national law, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to an investigation into infringements of this Directive;
  - (ii) existing recordings of telephone conversations or electronic communications or other data traffic records held by UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive;]
- e require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
  - f request the freezing or the sequestration of assets;
  - g request the temporary prohibition of professional activity;
  - h require authorised investment companies, management companies or depositaries to provide information;
  - i adopt any type of measure to ensure that investment companies, management companies or depositaries continue to comply with the requirements of this Directive;
  - j require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
  - k withdraw the authorisation granted to a UCITS, a management company or a depositary;
  - l refer matters for criminal prosecution; and
  - m allow auditors or experts to carry out verifications or investigations.

#### Textual Amendments

- 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 \(Text with EEA relevance\)](#).

#### *[<sup>F2</sup>Article 99*

1 Without prejudice to the supervisory powers of competent authorities referred to in Article 98 and the right of Member States to provide for and impose criminal sanctions, Member States shall lay down rules on administrative sanctions and other administrative measures to be imposed on companies and persons in respect of infringements of national provisions transposing this Directive and shall take all measures necessary to ensure that they are implemented.

Where Member States decide not to lay down rules for administrative sanctions for infringements which are subject to national criminal law, they shall communicate to the Commission the relevant criminal law provisions.

Administrative sanctions and other administrative measures shall be effective, proportionate and dissuasive.

By 18 March 2016, Member States shall notify the laws, regulations and administrative provisions transposing this Article, including any relevant criminal law provisions, to the Commission and ESMA. Member States shall notify the Commission and ESMA without undue delay of any subsequent amendments thereto.

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2 Where Member States have chosen, in accordance with paragraph 1, to lay down criminal sanctions for infringements of the provisions referred to in that paragraph, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information relating to criminal investigations or proceedings commenced for possible infringements of this Directive and provide the same to other competent authorities and ESMA in order to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Directive.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

3 As part of its overall review of the functioning of this Directive, the Commission shall review, not later than 18 September 2017, the application of the administrative and criminal sanctions, and in particular the need to further harmonise the administrative sanctions laid down for infringements of the requirements laid down in this Directive.

4 A competent authority may refuse to act on a request for information or a request to cooperate with an investigation only in the following exceptional circumstances, namely where:

- a communication of relevant information might adversely affect the security of the Member State addressed, in particular the fight against terrorism and other serious crimes;
- b compliance with the request is likely to affect adversely its own investigation, enforcement activities or, where applicable, a criminal investigation;
- c judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or
- d a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

5 Member States shall ensure that where obligations apply to UCITS, management companies, investment companies or depositaries, in the event of an infringement of national provisions transposing this Directive, administrative penalties or other administrative measures may be applied, in accordance with national law, to the members of the management body and to other natural persons who are responsible, under national law, for the infringement.

6 In accordance with national law, Member States shall ensure that, in all cases referred to in paragraph 1, the administrative penalties and other administrative measures that may be applied include at least the following:

- a a public statement which identifies the person responsible and the nature of the infringement;
- b an order requiring the person responsible to cease the conduct and to desist from a repetition of that conduct;
- c in the case of a UCITS or a management company, suspension or withdrawal of the authorisation of the UCITS or the management company;
- d a temporary or, for repeated serious infringements, a permanent ban against a member of the management body of the management company or investment company or against any other natural person who is held responsible, from exercising management functions in those or in other such companies;
- e in the case of a legal person, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 17 September 2014, or 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial

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accounts in accordance with Directive 2013/34/EU of the European Parliament and of the Council<sup>(1)</sup>, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant Union law in the area of accounting according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

- f in the case of a natural person, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 17 September 2014;
- g as an alternative to points (e) and (f), maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts in points (e) and (f).

7 Member States may empower competent authorities, under national law, to impose types of penalty in addition to those referred to in paragraph 6 or to impose pecuniary penalties exceeding the amounts referred to in points (e), (f) and (g) of paragraph 6.]

#### Textual Amendments

- 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 \(Text with EEA relevance\)](#).

#### *F<sup>3</sup> Article 99a*

Member States shall ensure that their laws, regulations or administrative provisions transposing this Directive provide for penalties, in particular when:

- (a) the activities of UCITS are pursued without obtaining authorisation, thus infringing Article 5;
- (b) the business of a management company is carried out without obtaining prior authorisation, thus infringing Article 6;
- (c) the business of an investment company is carried out without obtaining prior authorisation, thus infringing Article 27;
- (d) a qualifying holding in a management company is acquired, directly or indirectly, or such a qualifying holding in a management company is further increased so that the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the management company would become its subsidiary ('the proposed acquisition'), without notifying in writing the competent authorities of the management company in which the acquirer is seeking to acquire or increase a qualifying holding, thus infringing Article 11(1);
- (e) a qualifying holding in a management company is disposed of, directly or indirectly, or reduced so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the management company would cease to be a subsidiary, without notifying in writing the competent authorities, thus infringing Article 11(1);
- (f) a management company has obtained an authorisation through false statements or any other irregular means, thus infringing point (b) of Article 7(5);

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- (g) an investment company has obtained an authorisation through false statements or any other irregular means, thus infringing point (b) of Article 29(4);
- (h) a management company, on becoming aware of any acquisition or disposal of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 11(1) of Directive 2014/65/EU fails to inform the competent authorities of those acquisitions or disposals, thus infringing Article 11(1) of this Directive;
- (i) a management company fails to inform the competent authority, at least once a year, of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings, thus infringing Article 11(1);
- (j) a management company fails to comply with procedures and arrangements imposed in accordance with the national provisions transposing point (a) of Article 12(1);
- (k) a management company fails to comply with structural and organisational requirements imposed in accordance with the national provisions transposing point (b) of Article 12(1);
- (l) an investment company fails to comply with procedures and arrangements imposed in accordance with the national provisions transposing Article 31;
- (m) a management company or an investment company fails to comply with requirements related to delegation of its functions to third parties imposed in accordance with the national provisions transposing Articles 13 and 30;
- (n) a management company or an investment company fails to comply with rules of conduct imposed in accordance with the national provisions transposing Articles 14 and 30;
- (o) a depositary fails to perform its tasks in accordance with national provisions transposing Article 22(3) to (7);
- (p) an investment company or, for each of the common funds that it manages, a management company, repeatedly fails to comply with obligations concerning the investment policies of UCITS laid down in national provisions transposing Chapter VII;
- (q) a management company or an investment company fails to employ a risk-management process or a process for accurate and independent assessment of the value of OTC derivatives as laid down in national provisions transposing Article 51(1);
- (r) an investment company or, for each of the common funds that it manages, a management company, repeatedly fails to comply with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82;
- (s) a management company or an investment company marketing units of UCITS that it manages in a Member State other than the UCITS home Member State fails to comply with the notification requirement laid down in Article 93(1).

#### Textual Amendments

- F3** Inserted 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](#)

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relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (Text with EEA relevance).

#### *Article 99b*

1 Member States shall ensure that competent authorities publish any decision against which there is no appeal imposing an administrative sanction or measure for infringements of the national provisions transposing this Directive on their official websites without undue delay after the person on whom the sanction or measure was imposed has been informed of that decision. The publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible. That obligation does not apply to decisions imposing measures that are of an investigatory nature.

However, where the publication of the identity of the legal persons or of the personal data of the natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an ongoing investigation, Member States shall ensure that competent authorities do one of the following:

- a defer the publication of the decision to impose the sanction or measure until the reasons for non-publication cease to exist;
- b publish the decision to impose the sanction or measure on an anonymous basis in a manner which complies with national law, if such anonymous publication ensures effective protection of the personal data concerned; or
- c not publish the decision to impose a sanction or measure in the event that the options laid down in points (a) and (b) are considered to be insufficient to ensure:
  - (i) that the stability of the financial markets would not be put in jeopardy;
  - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.

2 Competent authorities shall inform ESMA of all administrative sanctions imposed but not published in accordance with point (c) of the second subparagraph of paragraph 1 including any appeal in relation thereto and the outcome of such an appeal. Member States shall ensure that competent authorities receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of sanctions communicated to it solely for the purpose of exchanging information between competent authorities. That database shall be accessible only to competent authorities and it shall be updated on the basis of the information provided by the competent authorities.

3 Where the decision to impose a sanction or measure is subject to appeal before the relevant judicial or other authorities, competent authorities shall also publish immediately on their official website such information and any subsequent information on the outcome of such an appeal. Any decision annulling a previous decision to impose a sanction or a measure shall also be published.

4 Competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of at least five years from its publication. Personal data contained in the publication shall be kept on the official website of the competent

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authority only for the period which is necessary in accordance with the applicable data protection rules.

#### Textual Amendments

- F3** Inserted 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 99c*

1 Member States shall ensure that when determining the type of administrative penalties or measures and the level of administrative pecuniary penalties, the competent authorities ensure that they are effective, proportionate and dissuasive and take into account all relevant circumstances, including, where appropriate:

- a the gravity and the duration of the infringement;
- b the degree of responsibility of the person responsible for the infringement;
- c the financial strength of the person responsible for the infringement, as indicated, for example, by its total turnover in the case of a legal person or the annual income in the case of a natural person;
- d the importance of the profits gained or losses avoided by the person responsible for the infringement, the damage to other persons and, where applicable, the damage to the functioning of markets or the wider economy, in so far as they can be determined;
- e the level of cooperation with the competent authority of the person responsible for the infringement;
- f previous infringements by the person responsible for the infringement;
- g measures taken after the infringement by the person responsible for the infringement to prevent its repetition.

2 In the exercise of their powers to impose penalties under Article 99, competent authorities shall cooperate closely to ensure that the supervisory and investigative powers and administrative penalties produce the results pursued by this Directive. They shall also coordinate their actions in order to avoid possible duplication and overlap when applying supervisory and investigative powers and administrative penalties and measures to cross-border cases in accordance with Article 101.

#### Textual Amendments

- F3** Inserted 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 99d*

1 Member States shall establish effective and reliable mechanisms to encourage the reporting of potential or actual infringements of national provisions transposing this Directive to competent authorities, including secure communication channels for reporting such infringements.

2 The mechanisms referred to in paragraph 1 shall include at least:

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- a specific procedures for the receipt of reports on infringements and their follow-up;
- b appropriate protection for employees of investment companies, management companies and depositaries, who report infringements committed within those entities, at least against retaliation, discrimination and other types of unfair treatment;
- c protection of personal data concerning both the person who reports the infringements and the natural person who is allegedly responsible for an infringement, in accordance with Directive 95/46/EC of the European Parliament and of the Council<sup>(2)</sup>;
- d clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports an infringement, unless disclosure is required by national law in the context of further investigations or subsequent judicial proceedings.

3 ESMA shall provide one or more secure communication channels for reporting infringements of the national provisions transposing this Directive. ESMA shall ensure that those communication channels comply with points (a) to (d) of paragraph 2.

4 Member States shall ensure that the reporting by employees of investment companies, management companies and depositaries referred to in paragraphs 1 and 3 shall not be considered to be an infringement of any restriction on disclosure of information imposed by contract or by any law, regulation or administrative provision, and shall not subject the person reporting to liability of any kind relating to such reporting.

5 Member States shall require management companies, investment companies and depositaries to have in place appropriate procedures for their employees to report infringements internally through a specific, independent and autonomous channel.

#### **Textual Amendments**

- F3** Inserted 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 99e*

1 Competent authorities shall provide ESMA annually with aggregated information regarding all penalties and measures imposed in accordance with Article 99. ESMA shall publish that information in an annual report.

2 Where the competent authority has disclosed administrative penalties or measures to the public, it shall simultaneously report those administrative penalties or measures to ESMA. Where a published penalty or measure relates to a management company or investment company, ESMA shall add a reference to the published penalty or measure in the list of management companies published under Article 6(1).

3 ESMA shall develop draft implementing technical standards to determine the procedures and forms for submitting information as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 18 September 2015.

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



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### Textual Amendments

- F3** Inserted 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 100

1 Member States shall ensure that efficient and effective complaints and redress procedures are in place for the out-of-court settlement of consumer disputes concerning the activity of UCITS using existing bodies where appropriate.

2 Member States shall ensure that the bodies referred to in paragraph 1 are not prevented by legal or regulatory provisions from cooperating effectively in the resolution of cross-border disputes.

### Article 101

1 The competent authorities of the Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive or of exercising their powers under this Directive or under national law.

Member States shall take the necessary administrative and organisational measures to facilitate the cooperation provided for in this paragraph.

Competent authorities shall use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in their Member State.

2 The competent authorities of the Member States shall immediately provide each other with the information required for the purposes of carrying out their duties under this Directive.

[<sup>F42a</sup> The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.

The competent authorities shall without delay provide ESMA with all information necessary to carry out its duties, in accordance with Article 35 of Regulation (EU) No 1095/2010.]

3 Where a competent authority of one Member State has good reason to suspect that acts contrary to the provisions of this Directive, are being or have been carried out by entities not subject to that competent authority's supervision on the territory of another Member State, it shall notify the competent authorities of the other Member State thereof in as specific a manner as possible. The recipient authorities shall take appropriate action, shall inform the notifying competent authority of the outcome of that action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.

4 The competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter within the framework of their powers pursuant to this Directive. Where a competent authority receives a request with respect to an on-the-spot verification or investigation, it shall:

- a carry out the verification or investigation itself;

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- b allow the requesting authority to carry out the verification or investigation; or
- c allow auditors or experts to carry out the verification or investigation.

5 If the verification or investigation is carried out on the territory of one Member State by a competent authority of the same Member State, the competent authority of the Member State which has requested cooperation may request that its own officials accompany the officials carrying out the verification or investigation. The verification or investigation shall, however, be subject to the overall control of the Member State on whose territory it is conducted.

If the verification or investigation is carried out on the territory of one Member State by a competent authority of another Member State, the competent authority of the Member State on whose territory the verification or investigation is carried out may request that its own officials accompany the officials carrying out the verification or investigation.

6 The competent authorities of the Member State where the verification or investigation is carried out may refuse to exchange information as provided for in paragraph 2 or to act on a request for cooperation in carrying out an investigation or on-the-spot verification as provided for in paragraph 4, only where:

- a such an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public policy of that Member State;
- b judicial proceedings have already been initiated in respect of the same persons and the same actions before the authorities of that Member State;
- c final judgment in respect of the same persons and the same actions has already been delivered in that Member State.

7 The competent authorities shall notify the requesting competent authorities of any decision taken under paragraph 6. That notification shall contain information about the motives of their decision.

[<sup>F18</sup> The competent authorities may refer to ESMA situations where a request:

- a to exchange information as provided for in Article 109 has been rejected or has not been acted upon within a reasonable time;
- b to carry out an investigation or on-the-spot verification as provided for in Article 110 has been rejected or has not been acted upon within a reasonable time; or
- c for authorisation for its officials to accompany those of the competent authority of the other Member State has been rejected or has not been acted upon within a reasonable time.

Without prejudice to Article 258 of the Treaty of on the Functioning of the European Union (TFEU), ESMA may, in situations referred to in the first subparagraph, act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010, without prejudice to the possibilities for refusing to act on a request for information or for an investigation provided for in paragraph 6 of this Article and to the ability of ESMA to act in accordance with Article 17 of that Regulation in those cases.

9 In order to ensure uniform conditions of application of this Article, ESMA may develop draft implementing technical standards to establish common procedures for competent authorities to cooperate in on-the-spot verifications and investigations as referred to in paragraphs 4 and 5.

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

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### Textual Amendments

- F1** 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).
- F4** 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 102

1 Member States shall provide that all persons who work or who have worked for the competent authorities, as well as auditors and experts instructed by the competent authorities, be bound by the obligation of professional secrecy. Such obligation implies that no confidential information which those persons receive in the course of their duties shall be divulged to any person or authority whatsoever, save in summary or aggregate form such that UCITS, management companies and depositaries (undertakings contributing towards UCITS' business activity) cannot be individually identified, without prejudice to cases covered by criminal law.

However, when a UCITS or an undertaking contributing towards its business activity has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in rescue attempts may be divulged in the course of civil or commercial proceedings.

[<sup>F12</sup> Paragraph 1 shall not prevent the competent authorities of the Member States from exchanging information in accordance with this Directive or other Union legislation applicable to UCITS or to undertakings contributing towards their business activity or from transmitting it to ESMA in accordance with Regulation (EU) No 1095/2010 or the ESRB. That information shall be subject to the conditions of professional secrecy laid down in paragraph 1.]

The competent authorities exchanging information with other competent authorities under this Directive may indicate at the time of communication that such information must not be disclosed without their express consent, in which case such information may be exchanged solely for the purposes for which those authorities gave their consent.

3 Member States may conclude cooperation agreements providing for exchange of information with the competent authorities of third countries, or with authorities or bodies of third countries, as determined in paragraph 5 of this Article and Article 103(1) only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Article. Such exchange of information shall be intended for the performance of the supervisory task of those authorities or bodies.

Where the information originates in another Member State, it shall not be disclosed without the express consent of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their consent.

4 The competent authorities receiving confidential information under paragraphs 1 or 2 may use the information only in the course of their duties for the purposes of:

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- a checking that the conditions governing the taking-up of business of UCITS or of undertakings contributing towards their business activity are met and facilitating the monitoring of the conduct of that business, administrative and accounting procedures and internal-control mechanisms;
- b imposing penalties;
- c conducting administrative appeals against decisions by the competent authorities; and
- d pursuing court proceedings initiated under Article 107(2).

5 Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State or between Member States, where that exchange is to take place between a competent authority and:

- a authorities with public responsibility for the supervision of credit institutions, investment undertakings, insurance undertakings or other financial organisations, or authorities responsible for the supervision of financial markets;
- b bodies involved in the liquidation or bankruptcy of UCITS or undertakings contributing towards their business activity, or bodies involved in similar procedures; or
- c persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment undertakings or other financial institutions<sup>[F1];</sup>
- <sup>[F4]</sup>d ESMA, the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>(3)</sup>, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council<sup>(4)</sup> and the ESRB.]

In particular, paragraphs 1 and 4 shall not preclude the performance by the competent authorities listed above 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.

#### Textual Amendments

- F1** 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).
- F4** 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 103

1 Notwithstanding Article 102(1) to (4), Member States may authorise exchanges of information between a competent authority and:

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- a authorities responsible for overseeing bodies involved in the liquidation and bankruptcy of UCITS or undertakings contributing towards their business activity, or bodies involved in similar procedures;
- b authorities responsible for overseeing persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms or other financial institutions.

2 Member States which have recourse to the derogation provided for in paragraph 1 shall require that at least the following conditions are met:

- a the information is used for the purpose of performing the task of overseeing referred to in paragraph 1;
- b the information received is subject to the conditions of professional secrecy imposed in Article 102(1); and
- c where the information originates in another Member State, it is not disclosed without the express consent of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their consent.

[<sup>F13</sup> Member States shall communicate to ESMA, to the Commission and to the other Member States the names of the authorities which may receive information pursuant to paragraph 1.]

4 Notwithstanding Article 102(1) to (4), Member States may, with the aim of strengthening the stability, including the integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

5 Member States which have recourse to the derogation provided for in paragraph 4 shall require that at least the following conditions are met:

- a the information is used for the purpose of performing the task referred to in paragraph 4;
- b the information received is subject to the conditions of professional secrecy provided for in Article 102(1); and
- c where the information originates in another Member State, it is not disclosed without the express consent of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their consent.

For the purposes of point (c), the authorities or bodies referred to in paragraph 4 shall communicate to the competent authorities which have disclosed the information the names and precise responsibilities of the persons to whom it is to be sent.

6 Where, in a Member State, the authorities or bodies referred to in paragraph 4 perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector the possibility of exchanging information provided for in that paragraph may be extended to such persons under the conditions stipulated in paragraph 5.

[<sup>F17</sup> Member States shall communicate to ESMA, to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to paragraph 4.]

#### Textual Amendments

- F1** 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](#)

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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 104*

1 Articles 102 and 103 shall not prevent a competent authority from transmitting to central banks and other bodies with a similar function in their capacity as monetary authorities information intended for the performance of their tasks, nor shall those articles prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of Article 102(4). Information received in this context shall be subject to the conditions of professional secrecy imposed in Article 102(1).

2 Articles 102 and 103 shall not prevent the competent authorities from communicating the information referred to in Article 102(1) to (4) to a clearing house or other similar body recognised under national law for the provision of clearing or settlement services for one of their Member State's markets if they consider that it is necessary to communicate the information in order to ensure the proper functioning of those bodies in relation to defaults or potential defaults by market participants.

The information received in this context shall be subject to the conditions of professional secrecy imposed in Article 102(1).

Member States shall, however, ensure that information received under Article 102(2) is not disclosed in the circumstances referred to in the first subparagraph of this paragraph without the express consent of the competent authorities which disclosed it.

3 Notwithstanding Article 102(1) and (4), Member States may, by virtue of provisions laid down by law, authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of UCITS and of undertakings contributing towards their business activity, credit institutions, financial institutions, investment undertakings and insurance undertakings and to inspectors instructed by those departments.

Such disclosures may, however, be made only where necessary for reasons of prudential control.

Member States shall, however, provide that information received under Article 102(2) and (5) is never disclosed in the circumstances referred to in this paragraph except with the express consent of the competent authorities which disclosed the information.

#### *[<sup>F3</sup>Article 104a*

1 Member States shall apply Directive 95/46/EC to the processing of personal data carried out in the Member States pursuant to this Directive.

2 Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>(5)</sup> shall apply to the processing of personal data carried out by ESMA pursuant to this Directive.]

#### **Textual Amendments**

**F3** Inserted 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 \(Text with EEA relevance\).](#)

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### *F1 Article 105*

In order to ensure uniform conditions of application of the provisions in this Directive concerning the exchange of information, ESMA may develop draft implementing technical standards to determine the conditions of application with regard to the procedures for exchange of information between competent authorities and between the competent authorities and ESMA.

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

#### **Textual Amendments**

- F1** 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 \(European Securities and Markets Authority\) \(Text with EEA relevance\).](#)

### *Article 106*

1 Member States shall provide at least that any person approved in accordance with Directive 2006/43/EC, performing in a UCITS, or in an undertaking contributing towards its business activity, the statutory audit referred to in Article 51 of Directive 78/660/EEC, Article 37 of Directive 83/349/EEC or Article 73 of this Directive or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which he has become aware while carrying out that task and which is liable to bring about any of the following:

- a a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of UCITS or undertakings contributing towards their business activity;
- b the impairment of the continuous functioning of the UCITS or an undertaking contributing towards its business activity; or
- c a refusal to certify the accounts or the expression of reservations.

That person shall have a duty to report any facts and decisions of which he becomes aware in the course of carrying out a task as described in point (a) in an undertaking having close links resulting from a control relationship with the UCITS or an undertaking contributing towards its business activity, within which he is carrying out that task.

2 The disclosure in good faith to the competent authorities, by persons approved in accordance with Directive 2006/43/EC of any fact or decision referred to in paragraph 1 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision and shall not subject such persons to liability of any kind.

### *Article 107*

1 The competent authorities shall give written reasons for any decision to refuse authorisation, or any negative decision taken in the implementation of the general measures adopted in application of this Directive, and communicate them to applicants.

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2 Member States shall provide that any decision taken under the laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and subject to a right of appeal in the courts, including where no decision is taken within six months of submission of an application for authorisation which provides all the information required.

3 Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

- a public bodies or their representatives;
- b consumer organisations having a legitimate interest in protecting consumers; or
- c professional organisations having a legitimate interest in protecting their members.

#### *Article 108*

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

However, the authorities of the UCITS host Member State may take action against that UCITS if it infringes the laws, regulations and administrative provisions in force in that Member State that fall outside the scope of this Directive or the requirements set out in Articles 92 and 94.

2 Any decision to withdraw authorisation, or any other serious measure taken against a UCITS, or any suspension of the issue, repurchase or redemption of its units imposed upon it, shall be communicated without delay by the authorities of the UCITS home Member State to the authorities of the UCITS host Member States and, if the management company of a UCITS is established in another Member State, to the competent authorities of the management company's home Member State.

3 The competent authorities of the management company's home Member State or those of the UCITS home Member State may take action against the management company if it infringes rules under their respective responsibility.

4 In the event that the competent authorities of the UCITS host Member State have clear and demonstrable grounds for believing that a UCITS, the units of which are marketed within the territory of that Member State is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authorities of the UCITS host Member State, they shall refer those findings to the competent authorities of the UCITS home Member State, which shall take the appropriate measures.

5 If, despite the measures taken by the competent authorities of the UCITS home Member State or because such measures prove to be inadequate, or because the UCITS home Member State fails to act within a reasonable timeframe, the UCITS persists in acting in a manner that is clearly prejudicial to the interests of the UCITS host Member State's investors, the competent authorities of the UCITS host Member State, may, as a consequence, take either of the following actions:

- a after informing the competent authorities of the UCITS home Member State, take all the appropriate measures needed in order to protect investors, including the possibility of preventing the UCITS concerned from carrying out any further marketing of its units within the territory of the UCITS host Member State; or
- [<sup>F1</sup>b if necessary, 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.]



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[<sup>F1</sup>The Commission and ESMA shall be informed without delay of any measure taken pursuant to point (a) of the first subparagraph.]

6 Member States shall ensure that within their territories it is legally possible to serve the legal documents necessary for the measures which may be taken by the UCITS host Member State in regard to UCITS pursuant to paragraphs 2 to 5.

#### **Textual Amendments**

**F1** 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).

#### *Article 109*

1 Where, through the provision of services or by the establishment of branches, a management company operates in one or more management company's host Member States, the competent authorities of all the Member States concerned shall collaborate closely.

They shall supply one another on request with all the information concerning the management and ownership of such management companies that is likely to facilitate their supervision and all information likely to facilitate the monitoring of such companies. In particular, the authorities of the management company's home Member State shall cooperate to ensure that the authorities of the management company's host Member State collect the particulars referred to in Article 21(2).

2 In so far as it is necessary for the purpose of exercising the powers of supervision of the home Member State, the competent authorities of the management company's host Member State shall inform the competent authorities of the management company's home Member State of any measures taken by the management company's host Member State pursuant to Article 21(5) which involve measures or penalties imposed on a management company or restrictions on a management company's activities.

3 The competent authorities of the management company's home Member State shall, without delay, notify the competent authorities of the UCITS home Member State of any problem identified at the level of the management company which may materially affect the ability of the management company to perform its duties properly with respect to the UCITS or of any breach of the requirements under Chapter III.

4 The competent authorities of the UCITS home Member State shall, without delay, notify the competent authorities of the management company's home Member State of any problem identified at the level of the UCITS which may materially affect the ability of the management company to perform its duties properly or to comply with the requirements of this Directive which fall under the responsibility of the UCITS home Member State.

#### *Article 110*

1 Each management company's host Member State shall ensure that where a management company authorised in another Member State pursues business within its territory through a branch the competent authorities of the management company's home Member State may, after informing the competent authorities of the management company's host Member

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State, themselves or through the intermediary they instruct for the purpose, carry out on-the-spot verification of the information referred to in Article 109.

2 Paragraph 1 shall not affect the right of the competent authorities of the management company's host Member State, in discharging their responsibilities under this Directive, to carry out on-the-spot verifications of branches established within the territory of that Member State.

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- (1) [<sup>F2</sup>Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).]
- (2) [<sup>F3</sup>Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).]
- (3) [<sup>F4</sup>OJ L 331, 15.12.2010, p. 12.]
- (4) [<sup>F4</sup>OJ L 331, 15.12.2010, p. 48.]
- (5) [<sup>F3</sup>Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).]

#### **Textual Amendments**

- 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).
- F3** Inserted 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).
- F4** 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).