

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

1 Member States shall designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.

2 The 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.

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;
- d require existing telephone and existing data traffic records;
- 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.

Article 99

1 Member States shall lay down the rules on measures and penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that those rules are enforced. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal penalties, Member States shall, in particular, ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative penalties be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with.

The measures and penalties provided for shall be effective, proportionate and dissuasive.

2 Without precluding rules on measures and penalties applicable to infringements of the other national provisions adopted pursuant to this Directive, Member States shall, in particular, lay down effective, proportionate and dissuasive measures and penalties concerning the duty to present key investor information in a way that is likely to be understood by retail investors according to Article 78(5).

3 Member States shall allow competent authorities to disclose to the public any measure or penalty that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets, be detrimental to the interests of investors or cause disproportionate damage to the parties involved.

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.

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;
- 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.

8 Competent authorities may bring to the attention of the Committee of European Securities Regulators, established by Commission Decision 2009/77/EC⁽¹⁾, 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.

9 The Commission may adopt implementing measures concerning procedures for on-the-spot verifications and investigations.

Those measures shall be adopted in accordance with the regulatory procedure referred to in Article 112(3).

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.

2 Paragraph 1 shall not prevent the competent authorities of the Member States from exchanging information in accordance with this Directive or other Community law applicable to UCITS or to undertakings contributing towards their business activity. 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:

- 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.

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.

Article 103

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

- 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.

3 Member States shall communicate 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.

7 Member States shall communicate to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to paragraph 4.

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.

Article 105

The Commission may adopt implementing measures relating to the procedures for exchange of information between competent authorities.

Those measures shall be adopted in accordance with the regulatory procedure referred to in Article 112(3).

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.

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
- b if necessary, bring the matter to the attention of the Committee of European Securities Regulators.

The Commission 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.

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 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.

Status: This is the original version (as it was originally adopted).

(1) OJ L 25, 29.1.2009, p. 18.