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)

DIRECTIVE 2009/65/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(1)],

Whereas:

(1) Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[(2)] has been substantially amended several times[(3)]. Since further amendments are to be made, it should be recast in the interests of clarity.

(2) Directive 85/611/EEC has largely contributed to the development and success of the European investment funds industry. However, despite the improvements introduced since its adoption, in particular in 2001, it has steadily become clear that changes need to be introduced into the UCITS legal framework in order to adapt it to the financial markets of the twenty-first century. The Commission Green Paper of 12 July 2005 on the enhancement of the EU framework for investment funds launched a public debate on the way in which Directive 85/611/EEC should be amended in order to meet those new challenges. That intense consultation process led to the largely shared conclusion that substantial amendments to that Directive are needed.

(3) National laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection for unit-holders. Such coordination facilitates the removal of the restrictions on the free movement of units of UCITS in the Community.

(4) Having regard to those objectives, it is desirable to provide for common basic rules for the authorisation, supervision, structure and activities of UCITS established in the Member States and the information that they are required to publish.

(5) The coordination of the laws of the Member States should be confined to UCITS other than of the closed-ended type that promote the sale of their units to the public in the Community. It is desirable that UCITS be permitted, as part of their investment objective, to invest in financial instruments, other than transferable securities, which are sufficiently liquid. The financial instruments which are eligible to be investment assets of the portfolio of the UCITS should be listed in this Directive. The selection of investments for a portfolio by means of an index is a management technique.

(6) Where a provision of this Directive requires that UCITS take action, that provision should be understood to refer to the management company in cases where the UCITS is constituted as a common fund managed by a management company and where a common fund is not in a position to act by itself because it has no legal personality of its own.

(7) Units of UCITS are considered to be financial instruments for the purposes of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[(4)].

(8) An authorisation granted to the management company in its home Member State should ensure investor protection and the solvency of management companies, with a view to contributing to the stability of the financial system. The approach adopted in this Directive is to ensure the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the grant of a single authorisation valid throughout the Community and the application of the principle of home Member State supervision.

(9) In order to ensure that the management company will be able to fulfil the obligations arising from its activities and thus to ensure its stability, initial capital and an additional amount of own funds are required. To take account of developments, particularly those pertaining to capital charges on operational risk, within the Community and other international forums, those requirements, including the use of guarantees, should be reviewed.

(10) It is necessary, for the protection of investors, to guarantee the internal overview of every management company in particular by means of a two-person management system and by adequate internal control mechanisms.

(11) By virtue of the principle of home Member State supervision, management companies authorised in their home Member States should be permitted to provide the services for which they have received authorisation throughout the Community by establishing branches or under the freedom to provide services.

(12) With regard to collective portfolio management (management of unit trusts/common funds or investment companies), the authorisation granted to a management company in its home Member State should permit the company to pursue in host Member

States the following activities, without prejudice to Chapter XI: to distribute, through the establishment of a branch, the units of the harmonised unit trusts/common funds managed by that company in its home Member State; to distribute, through the establishment of a branch, the shares of the harmonised investment companies, managed by that company; to distribute the units of the harmonised unit trusts/ common funds or shares of the harmonised investment companies managed by other management companies; to perform all the other functions and tasks included in the activity of collective portfolio management; to manage the assets of investment companies incorporated in Member States other than its home Member State; to perform, on the basis of mandates, on behalf of management companies incorporated in Member States other than its home Member State, the functions included in the activity of collective portfolio management. Where a management company distributes the units of its own harmonised unit trusts/common funds or shares of its own harmonised investment companies in host Member States, without the establishment of a branch, it should be subject only to rules regarding cross-border marketing.

(13) With regard to the scope of activity of management companies and in order to take into account national law and permit such companies to achieve significant economies of scale, it is desirable to permit them also to pursue the activity of management of portfolios of investments on a client-by-client basis (individual portfolio management), including the management of pension funds as well as some specific non-core activities linked to the main business without prejudicing the stability of such companies. However, specific rules should be laid down in order to prevent conflicts of interest when management companies are authorised to pursue the business of both collective and individual portfolio management.

(14) The activity of management of individual portfolios of investments is an investment service covered by Directive 2004/39/EC. In order to ensure a homogeneous regulatory framework in this area, it is desirable to subject management companies, the authorisation of which also covers that service, to the operating conditions laid down in that Directive.

(15) A home Member State should be able, as a general rule, to establish rules stricter than those laid down in this Directive, in particular as regards authorisation conditions, prudential requirements and the rules on reporting and the prospectus.

(16) It is desirable to lay down rules defining the preconditions under which a management company may delegate, on the basis of mandates, specific tasks and functions to third parties so as to increase the efficiency of the conduct of its business. In order to ensure the correct functioning of the principle of the home Member State supervision, Member States permitting such delegations should ensure that the management company to which they granted authorisation does not delegate the totality of its functions to one or more third parties, so as to become a letter-box entity, and that the existence of mandates does not hinder an effective supervision over the management company. However, the fact that the management company has delegated its functions should not affect the liabilities of that company or of the depositary vis-à-vis the unit-holders and the competent authorities.

(17) In order to ensure a level playing field and appropriate supervision in the long term, it should be possible for the Commission to examine the possibilities for harmonising delegation arrangements at Community level.

(18) The principle of home Member State supervision requires that the competent authorities withdraw or refuse to grant authorisation where factors, such as the content of programmes of operations, the geographical distribution or the activities in fact pursued indicate clearly that a management company has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to pursue or does pursue the greater part of its activities. For the purposes of this Directive, a management company should be authorised in the Member State in which it has its registered office. In accordance with the principle of home Member State supervision, only the competent authorities of the management company's home Member State should be considered competent to supervise the organisation of the management company, including all procedures and resources to perform the function of administration referred to in Annex II, which should be subject to the law of the management company's home Member State.

(19) Where the UCITS is managed by a management company authorised in a Member State other than the UCITS home Member State, that management company should adopt and establish appropriate procedures and arrangements to deal with investor complaints, such as through appropriate provisions in distribution arrangements or through an address in the UCITS home Member State, which should not need to be an address of the management company itself. Such a management company should also establish appropriate procedures and arrangements to make information available at the request of the public or the competent authorities of the UCITS home Member State, such as through the designation of a contact person, from among the employees of the management company, to deal with requests for information. However, such a management company should not be required by the law of the UCITS home Member State to have a local representative in that Member State in order to fulfil those duties.

(20) The competent authorities that authorise the UCITS should take into account the rules of the common fund or the instruments of incorporation of the investment company, the choice of the depositary and the ability of the management company to manage the UCITS. Where the management company is established in another Member State, the competent authorities should be able to rely on an attestation, issued by the competent authorities of the management company's home Member State, regarding the type of UCITS that the management company is authorised to manage. Authorisation of a UCITS should not be subject to an additional capital requirement at the level of the management company, the location of the management company's registered office in the UCITS home Member State, or the location of any activity of the management company in the UCITS home Member State.

(21) The competent authorities of the UCITS home Member State should be competent to supervise compliance with the rules regarding the constitution and functioning of the UCITS, which should be subject to the law of the UCITS home Member State. To this end, the competent authorities of the UCITS home Member State should be able to

obtain information directly from the management company. In particular, the competent authorities of the management company's host Member State may require management companies to provide information on transactions concerning the investments of the UCITS authorised in that Member State, including information contained in books and records of those transactions and fund accounts. To remedy any breach of the rules under their responsibility, the competent authorities of the management company's host Member States should be able to rely on the cooperation of the competent authorities of the management company's home Member State and, if necessary, should be able to take action directly against the management company.

(22) It should be possible for the UCITS home Member State to provide for rules regarding the content of the unit-holder register of the UCITS. The organisation of the maintenance and the location of that register should, however, remain part of the organisational arrangements of the management company.

(23) It is necessary to provide the UCITS home Member State with all means to remedy any breach in the rules of the UCITS. To that end, the competent authorities of the UCITS home Member State should be able to take preventive measures and adopt penalties as regards the management company. As a last resort, the competent authorities of the UCITS home Member State should have the possibility to require the management company to cease managing the UCITS. Member States should provide for the necessary provisions in order to arrange for an orderly management or liquidation of the UCITS in such a case.

(24) In order to prevent supervisory arbitrage and promote confidence in the effectiveness of supervision by the home Member State's competent authorities, authorisation should be refused where a UCITS is prevented from marketing its units in its home Member State. Once authorised, UCITS should be free to choose the Member State(s) where its units are to be marketed, in accordance with this Directive.

(25) To safeguard shareholders' interests and secure a level playing field in the market for harmonised collective investment undertakings, initial capital is required for investment companies. Investment companies which have designated a management company will, however, be covered through the management company's additional amount of own funds.

(26) Where there are applicable rules on the conduct of business and the delegation of functions and where such delegation by a management company is allowed under the law of its home Member State, authorised investment companies should comply with such rules, *mutatis mutandis*, either directly, where they have not designated a management company authorised in accordance with this Directive, or indirectly, where they have designated such a management company.

(27) Despite the need for consolidation between UCITS, mergers of UCITS encounter many legal and administrative difficulties in the Community. It is therefore necessary, in order to improve the functioning of the internal market, to lay down Community provisions facilitating mergers between UCITS (and investment compartments thereof). Although some Member States are likely to authorise only contractual funds, cross-border mergers between all types of UCITS (contractual, corporate and unit trusts)

should be permitted and recognised by each Member State without the need for Member States to provide for new legal forms of UCITS in their national law.

(28) This Directive concerns those merger techniques which are most commonly used in Member States. It does not require all Member States to introduce all three techniques into their national law, but each Member State should recognise a transfer of assets resulting from those merger techniques. This Directive does not prevent UCITS from using other techniques on a purely national basis, in situations where none of the UCITS concerned by the merger has been notified for cross-border marketing of its units. Those mergers will remain subject to the relevant provisions of national law. National rules on quorum should neither discriminate between national and cross-border mergers, nor be more stringent than those laid down for mergers of corporate entities.

(29) In order to safeguard investors' interests, Member States should require proposed domestic or cross-border mergers between UCITS to be subject to authorisation by their competent authorities. For cross-border mergers, the competent authorities of the merging UCITS should authorise the merger so as to ensure that the interests of the unit-holders who effectively change UCITS are duly protected. If the merger involves more than one merging UCITS and such UCITS are domiciled in different Member States, the competent authorities of each merging UCITS will need to authorise the merger, in close cooperation with each other, including through appropriate information-sharing. Since the interests of the unit-holders of the receiving UCITS also need to be adequately safeguarded, they should be taken into account by the competent authorities of the receiving UCITS home Member State.

(30) Unit-holders of both the merging and the receiving UCITS should also be able to request the repurchase or redemption of their units or, where possible, to convert them into units in another UCITS with similar investment policies and managed by the same management company or by a linked company. That right should not be subject to any additional charge, save for fees, to be retained exclusively by the respective UCITS, to cover disinvestment costs in all situations, as set out in the prospectuses of the merging and the receiving UCITS.

(31) Third-party control of mergers should also be ensured. The depositaries of each of the UCITS involved in the merger should verify the conformity of the common draft terms of the merger with the relevant provisions of this Directive and of the UCITS fund rules. Either a depositary or an independent auditor should draw-up a report on behalf of all the UCITS involved in the merger validating the valuation methods of the assets and liabilities of such UCITS and the calculation method of the exchange ratio as set out in the common draft terms of merger as well as the actual exchange ratio and, where applicable, the cash payment per unit. In order to limit costs connected with cross-border mergers, it should be possible to draw up a single report for all UCITS involved and the statutory auditor of the merging or the receiving UCITS should be enabled to do so. For investor protection reasons, unit-holders should be able to obtain a copy of such report on request and free of charge.

(32) It is particularly important that the unit-holders are adequately informed about the proposed merger and that their rights are sufficiently protected. Although the interests

of the unit-holders of the merging UCITS are most concerned by the merger, those of the unit-holders of the receiving UCITS should also be safeguarded.

(33) The provisions on mergers laid down in this Directive are without prejudice to the application of the legislation on control of concentrations between undertakings, in particular Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[(5)].

(34) The free marketing of the units issued by UCITS authorised to invest up to 100 % of their assets in transferable securities issued by the same body (State, local authority, etc.) should not have the direct or indirect effect of disturbing the functioning of the capital market or the financing of the Member States.

(35) The definition of transferable securities included in this Directive applies only for the purposes of this Directive and does not affect the various definitions used in national legislation for other purposes such as taxation. Consequently, shares and other securities equivalent to shares issued by bodies such as building societies and industrial and provident societies, the ownership of which cannot, in practice, be transferred except by the issuing body buying them back, are not covered by this definition.

(36) Money market instruments comprise transferable instruments which are normally dealt in on the money market rather than on the regulated markets, for example treasury and local authority bills, certificates of deposit, commercial papers, medium-term notes and bankers' acceptances.

(37) The concept of regulated market in this Directive corresponds to that in Directive 2004/39/EC.

(38) It is desirable to permit a UCITS to invest its assets in units of UCITS and other collective investment undertakings of the open-ended type which also invest in liquid financial assets referred to in this Directive and which operate on the principle of risk spreading. It is necessary that UCITS or other collective investment undertakings in which a UCITS invests be subject to effective supervision.

(39) The development of opportunities for a UCITS to invest in UCITS and in other collective investments undertakings should be facilitated. It is therefore essential to ensure that such investment activity does not diminish investor protection. Because of the enhanced possibilities for UCITS to invest in the units of other UCITS and collective investment undertakings, it is necessary to lay down certain rules on quantitative limits, the disclosure of information and prevention of the cascade phenomenon.

(40) In order to take into account market developments and in consideration of the completion of economic and monetary union it is desirable to permit UCITS to invest in bank deposits. To ensure adequate liquidity of investments in deposits, those deposits should be repayable on demand or have the right to be withdrawn. If the deposits are made with a credit institution the registered office of which is located in a third country, the credit institution should be subject to prudential rules equivalent to those laid down in Community law.

(41) In addition to the case in which a UCITS invests in bank deposits in accordance with its fund rules or instruments of incorporation, it should be possible to allow all UCITS to hold ancillary liquid assets, such as bank deposits at sight. The holding of such ancillary liquid assets may be justified, inter alia, in order to cover current or exceptional payments; in the case of sales, for the time necessary to reinvest in transferable securities, money market instruments or in other financial assets provided for in this Directive; or for a period of time strictly necessary when, because of unfavourable market conditions, the investment in transferable securities, money market instruments and in other financial assets is suspended.

(42) For prudential reasons it is necessary to avoid excessive concentration by a UCITS in investments which expose it to counterparty risk to the same entity or to entities belonging to the same group.

(43) UCITS should be expressly permitted, as part of their general investment policy or for hedging purposes in order to reach a set financial target or the risk profile indicated in the prospectus, to invest in financial derivative instruments. In order to ensure investor protection, it is necessary to limit the maximum potential exposure relating to derivative instruments so that it does not exceed the total net value of the UCITS' portfolio. In order to ensure constant awareness of the risks and commitments arising from derivative transactions and to check compliance with investment limits, those risks and commitments should be measured and monitored on an ongoing basis. Finally, in order to ensure investor protection through disclosure, UCITS should describe their strategies, techniques and investment limits governing their derivative operations.

(44) It is necessary for measures to address the potential misalignment of interests in products where credit risk is transferred by securitisation, as envisaged with regard to Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[(6)] and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions[(7)], to be consistent and coherent in all relevant financial sector regulation. The Commission will put forward the appropriate legislative proposals, including as regards this Directive, to ensure such consistency and coherence, after duly considering the impact of such proposals.

(45) With regard to over-the-counter (OTC) derivatives, requirements should be set in terms of the eligibility of counterparties and instruments, liquidity and ongoing assessment of the position. The purpose of such requirements is to ensure an adequate level of investor protection, close to that which they obtain when they acquire derivatives dealt in on regulated markets.

(46) Operations in derivatives should never be used to circumvent the principles or rules set out in this Directive. With regard to OTC derivatives, additional risk-spreading rules should apply to exposures to a single counterparty or group of counterparties.

(47) Some portfolio management techniques for collective investment undertakings investing primarily in shares or debt securities are based on the replication of stock indices or debt-security indices. It is desirable to permit UCITS to replicate well-known

and recognised stock indices or debt-security indices. It may therefore be necessary to introduce more flexible risk-spreading rules for UCITS investing in shares or debt securities to this end.

(48) Collective investment undertakings falling within the scope of this Directive should not be used for purposes other than the collective investment of the capital raised from the public according to the rules laid down in this Directive. In the cases identified by this Directive, it should be possible for a UCITS to have subsidiaries only when necessary to pursue effectively, on its own behalf, certain activities, also defined in this Directive. It is necessary to ensure effective supervision of UCITS. The establishment of a subsidiary of a UCITS in a third country should therefore be permitted only in the cases identified and in accordance with the conditions laid down in this Directive. The general obligation to act solely in the interests of unit-holders and, in particular, the objective of increasing cost efficiencies, never justify a UCITS undertaking measures that could hinder the competent authorities from effectively exercising their supervisory functions.

(49) The original version of Directive 85/611/EEC contained a derogation from the restriction on the percentage of its assets that a UCITS can invest in transferable securities issued by the same body, which applied in the case of bonds issued or guaranteed by a Member State. That derogation allowed UCITS to invest, in particular, up to 35 % of their assets in such bonds. A similar but more limited derogation is justified with regard to private sector bonds which, even in the absence of a State guarantee, offer special guarantees to the investor under the specific rules applicable thereto. It is necessary, therefore, to extend the derogation to the totality of private sector bonds which fulfil jointly fixed criteria, while leaving it to the Member States to draw up the list of bonds to which they intend, where appropriate, to grant a derogation.

(50) Several Member States have enacted provisions that enable non-coordinated collective investment undertakings to pool their assets in one so-called master fund. In order to allow UCITS to make use of those structures, it is necessary to exempt feeder UCITS wishing to pool their assets in a master UCITS from the prohibition to invest more than 10 % of their assets or, as the case may be, 20 % of their assets in a single collective investment undertaking. Such an exemption is justified as the feeder UCITS invests all or almost all of its assets into the diversified portfolio of the master UCITS, which itself is subject to UCITS diversification rules.

(51) In order to facilitate the effective operation of the internal market and to ensure the same level of investor protection throughout the Community, master-feeder structures should be allowed both where the master and the feeder are established in the same Member State and where they are established in different Member States. In order to allow investors better to understand master-feeder-structures and regulators to supervise them more easily, notably in a cross-border situation, no feeder UCITS should be able to invest into more than one master. In order to ensure the same level of investor protection throughout the Community the master should itself be an authorised UCITS. In order to avoid an undue administrative burden, provisions on notification of cross-border marketing should not apply if a master UCITS does not raise capital from the public

in a Member State other than that in which it is established, but has only one or more feeder UCITS in that other Member State.

(52) In order to protect the feeder UCITS' investors, the feeder UCITS' investment into the master UCITS should be subject to prior approval by the competent authorities of the feeder UCITS home Member State. Only the initial investment into the master UCITS, by which the feeder UCITS exceeds the limit applicable for investing into another UCITS, requires approval. In order to facilitate the effective operation of the internal market and to ensure the same level of investor protection throughout the Community, the conditions which must be met and the documents and information which are to be provided for approving the feeder UCITS' investment into the master UCITS should be exhaustive.

(53) In order to allow the feeder UCITS to act in the best interests of its unit-holders and notably place it in a position to obtain from the master UCITS all information and documents necessary to perform its obligations, the feeder and the master UCITS should enter into a binding and enforceable agreement. If both feeder and master UCITS are managed by the same management company, however, it should be sufficient that the latter establish internal conduct of business rules. Information-sharing agreements between the depositaries or the auditors respectively of the feeder UCITS and the master UCITS should ensure the flow of information and documents that is needed for the feeder UCITS' depositary or auditor to fulfil its duties. This Directive should ensure that, when complying with those requirements, the depositaries or the auditors are not to be found in breach of any restriction on disclosure of information or of data protection.

(54) In order to ensure a high level of protection of the interests of the feeder UCITS' investors, the prospectus, the key investor information, as well as all marketing communications should be adapted to the specificities of master-feeder structures. The investment of the feeder UCITS into the master UCITS should not affect the ability of the feeder UCITS itself either to repurchase or redeem units at the request of its unit-holders or to act in the best interests of its unit-holders.

(55) Under this Directive, unit-holders should be protected from being charged unjustified additional costs by a prohibition against master UCITS charging feeder UCITS subscription and redemption fees. The master UCITS should, however, be able to charge subscription or redemption fees to other investors in the master UCITS.

(56) The conversion rules should enable an existing UCITS to convert into a feeder UCITS. At the same time they should sufficiently protect unit-holders. As conversion is a fundamental change of the investment policy, the converting UCITS should be required to provide its unit-holders with sufficient information in order to enable them to decide whether to maintain their investment. The competent authorities should not require the feeder UCITS to provide more or information other than that specified in this Directive.

(57) Where the competent authorities of the master UCITS home Member State are informed of an irregularity with regard to the master UCITS or detect that the master UCITS does not comply with the provisions of this Directive, they may decide, where appropriate, to take relevant action to ensure that unit-holders of the master UCITS are informed accordingly.

(58) Member States should make a clear distinction between marketing communications and obligatory investor disclosures provided for under this Directive. Obligatory investor disclosure includes key investor information, the prospectus and annual and half-yearly reports.

(59) Key investor information should be provided as a specific document to investors, free of charge, in good time before the subscription of the UCITS, in order to help them to reach informed investment decisions. Such key investor information should contain only the essential elements for making such decisions. The nature of the information to be found in the key investor information should be fully harmonised so as to ensure adequate investor protection and comparability. Key investor information should be presented in a short format. A single document of limited length presenting the information in a specified sequence is the most appropriate manner in which to achieve the clarity and simplicity of presentation that is required by retail investors, and should allow for useful comparisons, notably of costs and risk profile, relevant to the investment decision.

(60) The competent authorities of each Member State may make available to the public, in a dedicated section of their website, key investor information concerning all UCITS authorised in that Member State.

(61) Key investor information should be produced for all UCITS. Management companies or, where applicable, investment companies should provide key investor information to the relevant entities, in accordance with the distribution method used (direct sales or intermediated sales). Intermediaries should provide key investor information to clients and potential clients.

(62) UCITS should be able to market their units in other Member States subject to a notification procedure based on improved communication between the competent authorities of the Member States. Following transmission of a complete notification file by the competent authorities of the UCITS home Member State, it should not be possible for the UCITS host Member State to oppose access to its market by a UCITS established in another Member State or challenge the authorisation given by that other Member State.

(63) UCITS should be able to market their units subject to their taking the necessary measures to ensure that facilities are available for making payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are required to provide.

(64) In order to facilitate cross-border marketing of units of UCITS, control of compliance of arrangements made for marketing of units of UCITS with laws, regulations and administrative procedures applicable in the UCITS host Member State, should be performed after the UCITS has accessed the market of that Member State. That control could cover the adequacy of arrangements made for marketing, in particular the adequacy of distribution arrangements and the obligation for marketing communications to be presented in a manner that is fair, clear and not misleading. This Directive should not prevent the competent authorities of the host Member State from verifying that marketing communications, not including key investor information,

the prospectus and annual and half-yearly reports, comply with national law before the UCITS can use them, subject to such control being non-discriminatory and not preventing that UCITS from accessing the market.

(65) For the purpose of enhancing legal certainty there is a need to ensure that a UCITS which markets its units on a cross-border basis has easy access, in the form of an electronic publication and in a language customary in the sphere of international finance, to complete information on the laws, regulations and administrative provisions applicable in the UCITS host Member State, which specifically relate to the arrangements made for marketing of units of UCITS. Liabilities relating to such publications should be subject to national law.

(66) To facilitate access of UCITS to the markets of other Member States, the UCITS should be required to translate only the key investor information into the official language or one of the official languages of a UCITS host Member State or a language approved by its competent authorities. Key investor information should specify the language(s) in which other obligatory disclosure documents and additional information are available. Translations should be produced under the responsibility of the UCITS, which should decide whether a simple or a sworn translation is necessary.

(67) To facilitate the access to the markets of other Member States, it is important that notification fees are disclosed.

(68) Member States should take the necessary administrative and organisational measures to enable cooperation between national authorities and competent authorities of other Member States, including through bilateral or multilateral agreements between those authorities, which could provide for the voluntary delegation of tasks.

(69) It is necessary to enhance convergence of powers at the disposal of competent authorities so as to bring about the equal enforcement of this Directive throughout the Member States. A common minimum set of powers, consistent with those conferred upon competent authorities by other Community financial services legislation should guarantee supervisory effectiveness. In addition, Member States should lay down rules on penalties, which may include criminal or administrative penalties, and administrative measures, applicable to infringements of this Directive. Member States should also take the measures necessary to ensure that those penalties are enforced.

(70) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation between them.

(71) For the purpose of cross-border provision of services, clear competences should be assigned to the respective competent authorities so as to eliminate any gaps or overlaps, in accordance with the applicable law.

(72) The provisions in this Directive relating to the competent authorities' effective exercise of their supervisory functions covers supervision on a consolidated basis which must be exercised over a UCITS or an undertaking contributing towards its business activity where the provisions of Community law so provide. In such cases, the authorities applied to for authorisation must be able to identify the authorities competent to exercise

supervision on a consolidated basis over that UCITS or an undertaking contributing towards its business activity.

(73) The principle of home Member State supervision requires that the competent authorities withdraw or refuse to grant authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually pursued indicate clearly that a UCITS or an undertaking contributing towards its business activity has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it pursues or intends to pursue the greater part of its activities.

(74) Certain behaviour, such as fraud or insider offences, is liable to affect the stability, including integrity, of the financial system, even when involving undertakings other than UCITS or undertakings contributing towards their business activity.

(75) It is appropriate to provide for the possibility of exchanges of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, however, the addressees of such exchanges should remain within strict limits.

(76) It is necessary to specify the conditions under which such exchanges of information are authorised.

(77) Where it is stipulated that information may be disclosed only with the express agreement of the competent authorities, these may, where appropriate, make their agreement subject to compliance with strict conditions.

(78) Exchanges of information between the competent authorities on the one hand and central banks, bodies with a function similar to central banks, in their capacity as monetary authorities, or, where appropriate, other public authorities responsible for supervising payment systems on the other, should also be authorised.

(79) The same obligation of professional secrecy on the authorities responsible for authorising and supervising UCITS and the undertakings contributing towards such authorising and supervising and the same possibilities for exchanging information as those granted to the authorities responsible for authorising and supervising credit institutions, investment firms and insurance undertakings, should be included in this Directive.

(80) For the purpose of strengthening the prudential supervision of UCITS or of undertakings contributing towards their business activity and protection of clients of UCITS or of undertakings contributing towards their business activity, auditors should have a duty to report promptly to the competent authorities, wherever, as provided for by this Directive, they become aware, while carrying out their tasks, of facts which are likely to have a serious effect on the financial situation or the administrative and accounting organisation of a UCITS, or an undertaking contributing towards its business activity.

(81) Having regard to the aim in this Directive, it is desirable for Member States to provide that such a duty should apply in all circumstances where such facts are discovered by

an auditor during the performance of his tasks in an undertaking which has close links with a UCITS or an undertaking which contributes towards its business activity.

(82) The duty of auditors to communicate, where appropriate, to the competent authorities certain facts and decisions concerning a UCITS or an undertaking contributing towards its business activity which they discover during the performance of their tasks in an entity which is neither a UCITS nor an undertaking contributing towards the business activity of a UCITS does not, alone, change the nature of their tasks in that entity nor the manner in which they must perform those tasks in that entity.

(83) This Directive should not affect national rules on taxation, including arrangements that may be imposed by Member States to ensure compliance with those rules in their territory.

(84) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[(8)].

(85) In particular, the Commission should be empowered to adopt the following implementing measures. As regards management companies, the Commission should be empowered to adopt measures specifying the details of organisational requirements, risk management, conflicts of interest and rules of conduct. As regards depositaries, the Commission should be empowered to adopt measures specifying the measures to be taken by depositaries in order to fulfil their duties in regard to UCITS managed by a management company, established in a Member State other than the UCITS home Member State and the particulars of the agreement between the depositary and the management company. Those implementing measures should facilitate a uniform application of the obligations of management companies and depositaries but should not be a precondition for implementing the right of management companies to pursue the activities for which they have been authorised in their home Member State throughout the Community by establishing branches or under the freedom to provide services including the management of UCITS in another Member State.

(86) As regards mergers, the Commission should be empowered to adopt measures designed to specify detailed content, format and way to provide information to unit-holders.

(87) As regards master-feeder structures, the Commission should be empowered to adopt measures designed to specify the content of the agreement between master and feeder UCITS or of the internal conduct of business rules, the content of the information-sharing agreement between either their depositaries or their auditors, the definition of measures appropriate to coordinate the timing of their net asset value calculation and publication in order to avoid market timing, the impact of the merger of the master on the authorisation of the feeder, the type of irregularities originating from the master to be reported to the feeder, the format and the way to provide information to unit-holders in case of conversion from a UCITS to a feeder UCITS, the procedure for valuing and auditing the transfer of assets from a feeder to a master, and the role of the depositary of the feeder in this process.

(88) As regards the provisions on disclosure, the Commission should be empowered to adopt measures designed to specify the specific conditions to be met when the prospectus is provided in a durable medium other than paper or by means of a website which does not constitute a durable medium, the detailed and exhaustive content, form and presentation of the key investor information taking into account the different nature or components of the UCITS concerned, and the specific conditions for providing key investor information in a durable medium other than paper or by means of a website which does not constitute a durable medium.

(89) As regards notification, the Commission should be empowered to adopt measures designed to specify the scope of the information on the applicable local rules to be published by host Member State competent authorities and the technical details on access by host Member State competent authorities to stored and updated UCITS documents.

(90) The Commission should also be empowered, inter alia, to clarify definitions and align terminology and framing definitions in accordance with subsequent acts on UCITS and related matters.

(91) Since the measures referred to in Recitals 85 to 90 are of general scope and are designed to amend non-essential elements of this Directive, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(92) Since the objectives of this Directive cannot be sufficiently achieved by the Member States in so far as they involve the adoption of rules with common features applicable at Community level and can therefore, by reason of the scale and effects of those rules, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

(93) The obligation to transpose this Directive into national law should be confined to those provisions that represent a substantive change as compared with the directives that it recasts. The obligation to transpose the provisions which are unchanged arises under the earlier directives.

(94) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex III, Part B.

(95) In accordance with point 34 of the Interinstitutional Agreement on better law-making[9], Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

(**1**) Opinion of the European Parliament of 13 January 2009 (not yet published in the Official Journal) and Council Decision of 22 June 2009.

(**2**) OJ L 375, 31.12.1985, p. 3.

(**3**) See Annex III, Part A.

(**4**) OJ L 145, 30.4.2004, p. 1.

(**5**) OJ L 24, 29.1.2004, p. 1.

(**6**) OJ L 177, 30.6.2006, p. 1.

(**7**) OJ L 177, 30.6.2006, p. 201.

(**8**) OJ L 184, 17.7.1999, p. 23.

(**9**) OJ C 321, 31.12.2003, p. 1.