Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (Text with EEA relevance)

COMMISSION DIRECTIVE 2010/43/EU

of 1 July 2010

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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)[(1)], and in particular Article 12(3), Article 14(2), Article 23(6), Article 33(6) and Article 51(4) thereof,

Whereas:

(1) The rules and terminology on the organisational requirements, conflicts of interest and conduct of business should be aligned to the greatest possible extent with the standards introduced in the financial services area by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC[(2)] and Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive[(3)]. Such alignment, while taking due account of the specificities of the collective portfolio management business, would allow the achievement of equal standards not only between different financial services sectors but also within asset management business more widely, where certain requirements of Directive 2006/73/EC have already been extended by some Member States to UCITS management companies.

(2) It is appropriate to adopt these rules in the form of a Directive in order to enable the implementing provisions to be adjusted to the specificities of the particular market and legal system in each Member State. A directive will also enable a maximum level of consistency with the regime created by Directive 2006/73/EC.

(3) Even though the principles laid down in this Directive have general relevance for all management companies, they are flexible enough to ensure that their application and the supervision of such application by competent authorities is proportionate and takes into account the nature, scale and complexity of a management company's business and the diversity of the companies falling within the scope of application of Directive 2009/65/EC, and the varied nature of the different UCITS that may be managed by a management company.

(4) As far as allowed by national law, management companies should be able to make arrangements for third parties to carry out some of their activities. The implementing rules should be read accordingly. The management company should in particular perform due diligence in order to determine whether, having regard to the nature of the functions to be carried out by third parties, the undertaking performing those activities can be considered as qualified and capable of undertaking the functions in question. The third party should therefore fulfil all the organisational and conflicts of interest requirements in relation to the activity to be carried out. It also follows that the management company should verify that the third party has taken the appropriate measures in order to comply with the said requirements and should monitor effectively the compliance by the third party with these requirements. Where the delegatee is responsible for applying the rules governing the delegated activities, equivalent organisational and conflict of interests requirements should apply to the activity of monitoring the delegated activities. The management company should be able to take into account in the due diligence process the fact that the third party to whom activities are delegated will often be subject to Directive 2004/39/EC.

(5) To avoid the application of different standards to management companies and investment companies which have not designated a management company, the latter should be subject to the same rules of conduct and provisions regarding conflicts of interest and risk management as management companies. Therefore, the rules of this Directive on administrative procedures and internal control mechanism should, as a matter of good practice, apply both to management companies and investment companies that have not designated a management company, taking into account the principle of proportionality.

(6) Directive 2009/65/EC requires management companies to have sound administrative procedures. In order to comply with this requirement management companies should establish a well-documented organisational structure that clearly assigns responsibilities and ensures good flows of information between all parties involved. Management companies should also establish systems to safeguard information and ensure business continuity and which are sufficient to allow them to discharge their obligations in cases where their activities are performed by third parties.

(7) Management companies should also maintain the necessary resources, in particular, to employ personnel with the right skills, knowledge and experience in order to be able to fulfil their duties.

(8) With respect to safe data processing procedures and the obligation to reconstruct all transactions involving the UCITS the management company should have arrangements

in place which permit a timely and proper recording of each transaction carried out on behalf of the UCITS.

(9) Accounting is one of the key areas of UCITS administration. It is therefore of paramount importance that the accounting procedures are further specified in the implementing legislation. This Directive should therefore uphold the principles that all assets and liabilities of a UCITS or of its investment compartments can be directly identified, and that accounts should be separate. In addition, where different share classes exist depending on, for example, the level of management fees, it should be possible to extract directly from the accounting the net asset value of those different classes.

(10) The clear allocation of the responsibilities of senior management and the supervisory function are central for the implementation of appropriate internal control mechanisms as required by Directive 2009/65/EC. This entails that the senior management should be responsible for the implementation of the general investment policy as referred to in the Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website[(4)]. Senior management should also maintain the responsibility for the investment strategies which are the general indications concerning the strategic asset allocation of the UCITS and the investment techniques which are needed to adequately and effectively implement the investment policy. The clear division of responsibilities should also ensure that adequate control exists so as to ensure the assets of the UCITS are invested according to the fund rules or the instruments of incorporation and the applicable legal provisions and that risk limits of each UCITS are complied with. The allocation of responsibilities should be consistent with the role and responsibilities of the senior management and the supervisory function under applicable national law and corporate governance codes. It is possible that senior management includes several or all members of the board of directors.

(11) To ensure that a management company has an adequate control mechanism, a permanent compliance function and an internal audit function are necessary. The compliance function should be designed in such a way as to ensure that it may detect any risk of failure by the management company to comply with its obligations under Directive 2009/65/EC. The audit function should aim at verifying and evaluating the different control procedures and administrative arrangements the management company has put in place.

(12) It is necessary to allow management companies some flexibility in structuring the organisation of their risk management. Where it is not appropriate or proportionate to have a separate risk management function, the management company should nevertheless be able to demonstrate that specific safeguards against conflicts of interest allow for an independent performance of risk management activities.

(13) Directive 2009/65/EC obliges management companies to put rules in place on personal transactions. In accordance with Directive 2006/73/EC, management companies should prevent their employees who are subject to conflicts of interest or in possession

of insider information, within the meaning of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)[(5)], from entering into personal transactions that are the consequence of a misuse of information they have acquired through their professional activity.

(14) Directive 2009/65/EC requires that management companies ensure that each portfolio transaction involving the UCITS can be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was executed. Therefore, it is necessary to lay down requirements for recording of portfolio transactions and of subscription and redemption orders.

(15) Directive 2009/65/EC requires UCITS management companies to have appropriate mechanisms in place to ensure fair treatment of UCITS in cases of unavoidable conflicts of interest. Therefore, management companies should make sure that in these cases senior management or other competent internal body of the management company are promptly informed, in order to for them to take any necessary decision to ensure the fair treatment of the UCITS and of its unit-holders.

(16) Management companies should be requested to adopt, apply and maintain an effective and adequate strategy for the exercise of voting rights attached to the financial instruments held by the UCITS they manage, with a view to ensuring that such rights are exercised to the exclusive benefit of UCITS. Information related to the strategy and its application should be freely available to investors, including via a website. As the case may be, the decision not to exercise voting rights could be considered in certain circumstances as being to the exclusive benefit of the UCITS depending upon its investment strategy. However the possibility for an investment company to vote itself or to give specific voting instructions to its management company should not be excluded.

(17) The obligation to inform senior management or other competent internal body of the management company in order for them to take necessary decisions should not limit the duty of the management companies and the UCITS to report on situations where the organisational or administrative arrangements for conflicts of interest were not sufficient to ensure, with reasonable confidence, the prevention of the risk of damage, for instance in their periodic reports. Such reporting should explain and give reasons for the decision taken by the management company, even where a decision is taken not to act, taking into account the internal policies and procedures adopted to identify, prevent and manage conflicts of interest.

(18) Directive 2009/65/EC obliges management companies to act in the best interest of the UCITS they manage and the integrity of the market. Certain behaviour, such as market timing and late trading, may have detrimental effects on unit-holders and may undermine the functioning of the market. Therefore, management companies should have appropriate procedures in place to prevent malpractices. Furthermore, management companies should put in place appropriate procedures to guard against unreasonable charges and activities such as excessive trading, taking into account the UCITS investment objectives and policy.

(19) Management companies should also act in the best interest of the UCITS when directly executing orders to deal on behalf of the UCITS they manage or by transmitting them to third parties. When executing orders on behalf of the UCITS, management companies should take all reasonable steps to obtain the best possible result for the UCITS on a consistent basis, taking into account price, costs, speed, likelihood of execution and settlement, size and nature of the order or any other consideration relevant to the execution of the order.

(20) In order to ensure that management companies act with due skill, care and diligence in the best interests of the UCITS they manage as required by 2009/65/EC Directive, it is necessary to lay down rules on order handling.

(21) Certain fees, commissions or non-monetary benefits which may be paid to or by a management company should not be permitted as they could have an impact on the observance of the requirements laid down in 2009/65/EC Directive that the management company should act honestly, fairly and professionally in accordance with the best interests of the UCITS. Therefore, it is necessary to set out clear rules specifying where the payments of fees, commissions and non-monetary benefits are not considered a violation of those principles.

(22) The cross-border activities of the management company create new challenges for the relationship between the management company and the UCITS' depositary. To ensure the necessary legal certainty, the main elements of the agreement between the UCITS' depositary and the management company, where that management company is established in a Member State other than the UCITS' home Member State, should be specified in this Directive. Given the need to ensure that this agreement properly serves its purpose it is necessary to provide for conflict of law rules which derogate from Articles 3 and 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[(6)] in such a way that the applicable law to this agreement should be the law of the UCITS' home Member State.

(23) Directive 2009/65/EC contains an obligation to specify the criteria for assessing the adequacy of a management company's risk management process. Such criteria focus on the establishment of an adequate and documented risk management policy to be employed by management companies. This policy should enable the management companies to assess the risks of the positions taken within the portfolios they manage and the contributions of these individual risks to the overall risk profile of the portfolio. The organisation of the risk management policy should be adequate and proportionate to the nature, scale and complexity of the management company's activities and of the UCITS it manages.

(24) The periodical assessment, monitoring and review of the risk management policy by management companies are also a criterion to assess the adequacy of the risk management process. This criterion also includes the review of the effectiveness of measures taken to address any deficiencies in the performance of the risk management process.

(25) As an essential element in the criteria for assessing the adequacy of risk management processes, proportionate and effective risk measurement techniques should be adopted by management companies in order to measure at any time the risks which the UCITS they manage are or might be exposed to. These requirements are based on common practices agreed by competent authorities of Member States. They include both quantitative measures, as regards quantifiable risks, and qualitative methods. Electronic data processing systems and tools used for the computation of quantitative measures should be integrated with one another or with the front-office and accounting applications. Risk measurement techniques should allow for an adequate measurement of risks in periods of increased market turbulence and be reviewed whenever necessary in the interest of unit-holders. They should also allow adequate assessment of the concentration and interaction of relevant risks at the portfolio level.

(26) It is the objective of a functioning risk management system that the investment limits set by Directive 2009/65/EC such as limits on global exposure and exposure to counterparty risk are respected by the management companies. Therefore criteria should be laid down as to how the global exposure should be calculated and how counterparty risk should be calculated.

(27) It is necessary in laying down such criteria that this Directive clarifies how the global exposure can be calculated, including by using the commitment approach, the value at risk approach or advanced risk measurement methodologies. It should also lay down the main elements of the methodology according to which the management company should calculate the counterparty risk. In applying those rules, account should be taken of the conditions under which those methodologies are used, including the principles to be applied to such collateral arrangements to reduce the UCITS' exposure to counterparty risk as well as the use of the hedging and netting arrangements, as developed by competent authorities working within the Committee of European Securities Regulators.

(28) According to Directive 2009/65/EC, management companies are obliged to employ a process for the accurate and independent assessment of the value of over-the-counter (OTC) derivatives. This Directive therefore lays down detailed rules for that process in accordance with Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions[7]. As a matter of good practice, management companies should apply those requirements to instruments which expose UCITS to valuation risks equivalent to those raised by OTC derivatives, such as those relating to product illiquidity and/or the complexity of the pay-off structure. Accordingly, management companies should adopt arrangements and procedures consistent with the requirements set out in Article 44 for the valuation of less liquid or complex transferable securities and money market instruments which require the use of model-based valuation methods.

(29) Directive 2009/65/EC obliges a management company to provide the relevant competent authorities with information with regard to the types of derivative

instruments in which a UCITS has been invested, the underlying risks posed, applicable quantitative limits and methods chosen for estimating the risks associated with such transactions. The content and the procedure to be followed by a management company when discharging this obligation should be specified.

(30) The Committee of European Securities Regulators, established by Commission Decision 2009/77/EC[(8)] has been consulted for technical advice.

(31) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DIRECTIVE:

(**1**) OJ L 302, 17.11.2009, p. 32.

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

(**3**) OJ L 241, 2.9.2006, p. 26.

(**4**) See page 1 of this Official Journal.

(**5**) OJ L 96, 12.4.2003, p. 16.

(**6**) OJ L 177, 4.7.2008, p. 6.

(**7**) OJ L 79, 20.3.2007, p. 11.

(**8**) OJ L 25, 29.1.2009, p. 18.