



Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS

delivered on 31 March 2022¹

Case C-473/20

INVEST FUND MANAGEMENT

v

Komisija za finansov nadzor

(Request for a preliminary ruling from the Sofiyski rayonen sad (District Court of Sofia, Bulgaria))

(Reference for a preliminary ruling – Markets in financial instruments – Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) – Article 72 – Essential elements of a prospectus that must be kept up to date – Article 99a(r) – Financial penalties)

I. Introduction

1. This reference for a preliminary ruling asks the Court to consider one of the points at which Directive 2009/65/EC² strikes a balance between ensuring investor protection and facilitating the free movement of units of undertakings for collective investment in transferable securities (UCITS) within the European Union.³ In particular, it seeks advice as to whether the identity of members of the administrative, management and supervisory boards of investment companies and management companies is an essential element of the prospectus that must be kept up to date pursuant to Article 72 of Directive 2009/65.

2. The reference arises in the following circumstances. Invest Fund Management AD manages five investment funds. It is subject to regulation and supervision by the Komisija za finansov nadzor (Financial Supervision Commission, Bulgaria) (FSC). On 28 August 2019, the relevant national trade register recorded that two new non-executive members had joined the board of directors of Invest Fund Management. According to the FSC, Invest Fund Management was required to update the prospectuses of each of the five investment funds that it managed within 14 days. That period expired on 11 September 2019. Invest Fund Management updated the prospectuses on 17 October 2019.

¹ Original language: English.

² 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) (OJ 2009 L 302, p. 32), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (OJ 2014 L 257, p. 186).

³ Directive 2009/65, recital 3.

3. On 15 April 2020, the FSC adopted five decisions to the effect that an administrative offence had been committed and issued five penalty notices to Invest Fund Management. The latter challenged those decisions and penalties before the Sofiyski rayonen sad (District Court of Sofia, Bulgaria), which decided of its own motion to refer four questions to the Court of Justice for a preliminary ruling on the interpretation of the relevant provisions of EU law. The questions fall into two categories. The first three questions enquire into the meaning of the term ‘essential elements of the prospectus’ and, more particularly, whether the appointment of new non-executive directors to the board of directors of a management company is such an essential element, thereby imposing an obligation on that company pursuant to Article 72 of Directive 2009/65 to update the prospectuses of the funds it manages. The fourth question concerns the power of the FSC to impose penalties for non-compliance with that alleged obligation.

II. Legal context

A. *European Union law*

4. Recital 3 of Directive 2009/65 states that it coordinates national laws governing collective investment undertakings with a view to approximating the conditions of competition between those undertakings in the European Union, whilst simultaneously ensuring more effective and more uniform protection for unit holders. That coordination facilitates the removal of restrictions on the free movement of units of UCITS.

5. Chapter IX, entitled ‘Obligations concerning information to be provided to investors’, contains information requirements in the form of the mandatory disclosure of three categories of information, namely a prospectus and periodical reports (Articles 68 to 75), other information (Articles 76 and 77) and key investor information (Articles 78 to 82).

6. Article 68 provides:

‘1. An investment company and, for each of the common funds it manages, a management company, shall publish the following:

(a) a prospectus;

...’

7. According to Article 69:

‘1. The prospectus shall include the information necessary for investors to be able to make an informed judgement of the investment proposed to them, and, in particular, of the risks attached thereto.

The prospectus shall include, independent of the instruments invested in, a clear and easily understandable explanation of the fund’s risk profile.

The prospectus shall include either:

- (a) the details of the up-to-date remuneration policy, including, but not limited to, a description of how remuneration and benefits are calculated, the identities of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, where such a committee exists; or
 - (b) a summary of the remuneration policy and a statement to the effect that the details of the up-to-date remuneration policy, including, but not limited to, a description of how remuneration and benefits are calculated, the identity of persons responsible for awarding the remuneration and benefits, including the composition of the remuneration committee where such a committee exists, are available by means of a website – including a reference to that website – and that a paper copy will be made available free of charge upon request.
2. The prospectus shall contain at least the information provided for in Schedule A of Annex I, in so far as that information does not already appear in the fund rules or instruments of incorporation annexed to the prospectus in accordance with Article 71(1).

...'

8. Point 1.8 of Schedule A of Annex I of Directive 2009/65 refers to the 'names and positions in the company of the members of the administrative, management and supervisory bodies [of the management company and the investment company]. Details of their main activities outside the company where these are of significance with respect to that company.'

9. Article 70 of Directive 2009/65 provides:

'1. The prospectus shall indicate in which categories of assets a UCITS is authorised to invest. It shall mention if transactions in financial derivative instruments are authorised, in which case it shall include a prominent statement indicating whether those operations may be carried out for the purpose of hedging or with the aim of meeting investment goals, and the possible outcome of the use of financial derivative instruments on the risk profile.

2. Where a UCITS invests principally in any category of assets defined in Article 50 other than transferable securities or money market instruments, or where a UCITS replicates a stock or debt securities index in accordance with Article 53, its prospectus and, where necessary, marketing communications shall include a prominent statement drawing attention to the investment policy.

3. Where the net asset value of a UCITS is likely to have a high volatility due to its portfolio composition or the portfolio management techniques that may be used, its prospectus and, where necessary, marketing communications shall include a prominent statement drawing attention to that characteristic.

...'

10. Article 71 provides:

'1. The fund rules or instruments of incorporation of an investment company shall form an integral part of the prospectus and shall be annexed thereto.

...'

11. According to Article 72:

‘The essential elements of the prospectus shall be kept up to date.’

12. Article 99(1) of Directive 2009/65 provides:

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

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

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

...’

13. By its Article 99a, Directive 2009/65 provides:

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

...

(r) an investment company or, for each of the common funds that it manages, a management company, repeatedly fails to comply with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82;

...’

B. Bulgarian law

14. Article 1 of the Zakon za deynostta na kolektivnite investitsionni shemi i na drugi predpriyatiya za kolektivno investirane (Law on collective investment schemes and other collective investment undertakings, State Gazette No 77 of 4 October 2011, ‘the ZDKISDPKI’) states that that law regulates, inter alia, the activity of collective investment schemes and management companies and the State’s supervision of compliance therewith.

15. By Article 3 thereof:

‘The persons ... covered by Article 1 herein shall be regulated and supervised by the Financial Supervision Commission, hereinafter referred to as “the Commission”, as well as by the Deputy Chair of the said Commission in charge of the “Nadzor na investitsionnata deynost” division (Supervision of the Investment Activities Division), hereinafter referred to as “the Deputy Chair”.’

16. Article 56(1) of the ZDKISDPKI (amended, State Gazette No 15/2018, effective as of 16 February 2018) provides:

‘In the event of any change to the essential elements included in the prospectus of the collective investment scheme, the prospectus shall be updated and submitted to the Commission within 14 days of the change.’

17. Article 273(1) of the ZDKISDPKI (renumbered from Article 204, State Gazette No 109/2013, effective as of 20 December 2013) provides:

‘(1) Whoever commits or permits an infringement of:

10. [new, State Gazette No 76/2016, effective as of 30 September 2016, renumbered from point 9, amended and supplemented, State Gazette No 102/2019] ... Article 56(1), ... shall be liable for a fine of [...]4 000 [leva (BGN)] to BGN 5 000 000;

...

(5) For infringements under Paragraph 1 committed by legal persons or sole traders a financial penalty shall be imposed as follows:

...

10. [new, State Gazette No 76/2016, effective as of 30 September 2016, renumbered from point 9, amended, State Gazette No 102/2019] For infringements referred to in point 10 of Paragraph 1 – of BGN 10 000 to BGN 5 000 000, and in the event of repeated infringement – of BGN 20 000 to BGN 10 000 000.’

18. The Supplementary Provisions to the ZDKISDPKI provide, at paragraph 1, that, for the purposes thereof:

‘...

21. “Repeated infringement” occurs where three or more administrative infringements of this Law or of the instruments for its application are committed within one year.’

19. Paragraph 2 of the Supplementary Provisions states that the ZDKISDPKI transposes the requirements of Directive 2009/65.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

20. Invest Fund Management is a company registered in the Trade Register and Register of Non-Profit Legal Entities of Bulgaria. It manages five investment funds, namely ‘Invest Aktiv’, ‘Invest Klassik’, ‘Global Opportunities’, ‘Invest Konservativen Fond’ and ‘Invest Obligatsii’. It is subject to regulation and supervision by the FSC.

21. During a remote review of the activities of Invest Fund Management, the FSC established that, on 28 August 2019, the relevant trade register recorded that two new non-executive members, to whom no management functions were delegated, had joined Invest Fund Management’s board of

directors. The FSC took the view that Invest Fund Management ought to have updated the prospectuses for each of the five investment funds that it managed within a statutory 14-day period that had expired on 11 September 2019. However, Invest Fund Management had not done so until 17 October 2019.

22. As a consequence of that failure to act within the prescribed time limit, the FSC adopted five separate decisions, each of which found that an administrative offence had been committed in respect of each one of the investment funds. The Deputy Chair of the FSC then issued five separate penalty notices, each of which imposed a financial penalty of BGN 10 000 on Invest Fund Management in accordance with Article 273(5), point 10, read in conjunction with Article 273(1), point 10, of the ZDKISDPKI, by reason of Invest Fund Management's failure to comply with a legal obligation pursuant to Article 56(1) of the ZDKISDPKI.

23. Invest Fund Management challenged those decisions and the penalties imposed thereunder before the Sofiyski rayonen sad (District Court of Sofia). The penalty notice dated 15 April 2020 contested in the main proceedings was issued in respect of Invest Fund Management's failure to update the prospectus of the 'Invest Obligatsii' investment fund in time.

24. In the course of those proceedings, the referring court established of its own motion that, in order to determine the dispute before it, it would refer the following questions to the Court of Justice for a preliminary ruling pursuant to the second paragraph of Article 267 TFEU:

- '(1) What meaning did the EU legislature intend to give to the term "essential elements" of the prospectus within the meaning of Article 72 of [Directive 2009/65]?
- (2) Is Article 69(2) of [Directive 2009/65] to be interpreted as meaning that any change to the minimum information in prospectuses provided for in Schedule A of Annex I is always covered by the term "essential elements" within the meaning of Article 72 of the Directive, so that these must be updated in due time?
- (3) If Question 2 is answered in the negative, is it to be assumed that information about a change in the composition of the board of directors of a particular management company that concerns non-executive members who are not assigned any management functions is included in the term "essential elements" within the meaning of Article 72 of [Directive 2009/65]?
- (4) Is Article 99a(r) of [Directive 2009/65] to be interpreted as meaning that it is only permissible to impose a penalty on a management company (for each of the investment funds managed by it) in the event of repeated non-compliance with obligations concerning information to be provided to investors imposed in accordance with the national provisions transposing Articles 68 to 82 of [Directive 2009/65]?'

IV. Procedure before the Court

25. Invest Fund Management, the FSC, the German, Italian, Luxembourg and Polish Governments and the European Commission filed written observations.

26. Pursuant to Article 24, paragraph 2, of the Statute of the Court of Justice of the European Union, the Court invited the European Securities and Markets Authority (ESMA) to reply in writing to certain questions and to participate at the hearing.

27. Invest Fund Management, the FSC, the Luxembourg Government, the Commission and ESMA submitted observations at that hearing, held on 26 January 2022.

V. Legal assessment

A. Questions relating to the interpretation of the term ‘essential elements’

28. By its first two questions, the referring court essentially wishes to know whether the information specified in Schedule A of Annex I to Directive 2009/65 that must be included in the prospectus is part of ‘the essential elements of the prospectus’ for the purposes of Article 72 of that directive, such that it must be kept up to date.

29. It is common ground that the term ‘essential elements of the prospectus’ is not defined in the applicable EU or national legislation. It is also of interest to note that, in its response to the questions put by the Court, ESMA indicated that guidance in relation to the application or implementation of that term has neither been sought from it nor issued by it.

30. The Court has consistently held that it follows both from the need for uniform application of EU law and from the principle of equality that a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the objective pursued by the legislation in question.⁴

31. In those circumstances the term ‘essential elements of the prospectus’ in Article 72 of Directive 2009/65 should have an autonomous and uniform interpretation throughout the European Union. That approach is, moreover, consistent with the aim of the directive, which is to coordinate national laws governing collective investment undertakings with a view to approximating the conditions of competition – in other words, creating a level playing field – while achieving effective and more uniform protection for investors.⁵

32. It is settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only the wording of the provision under consideration, here ‘the essential elements of the prospectus’ in Article 72 of Directive 2009/65, but also the context in which it occurs and the objectives of the rules of which it forms part.⁶

33. The word ‘essential’ may be variously described as meaning ‘crucial’, ‘vital’ or ‘necessary’. An ‘element’ is a ‘component’ or a ‘part’. The expression ‘essential elements’ appears in the section of Chapter IX of Directive 2009/65 entitled ‘Publication of a prospectus and periodical reports’. It directly follows provisions that specify the information that must be included in a prospectus.⁷ It

⁴ Judgment of 11 September 2014, *Gruslin* (C-88/13, EU:C:2014:2205, paragraph 32 and the case-law cited).

⁵ Directive 2009/65, recital 3.

⁶ Judgment of 28 February 2019, *Meyn* (C-9/18, EU:C:2019:148, paragraph 26 and the case-law cited).

⁷ Article 69(1) and (2), Article 70(1) to (3) and Article 71 of Directive 2009/65.

appears to me that, if the legislature requires that certain information be included in a prospectus, that information is by definition a vital or necessary component of that document. It is therefore consistent with the literal meaning of the term that such information constitutes an ‘essential element’ of the prospectus that, in accordance with Article 72 of Directive 2009/65, must be kept up to date.

34. Article 69(2) of Directive 2009/65, which specifies that ‘the prospectus shall contain at least the information provided for in Schedule A of Annex I’, makes that point particularly clearly. The inclusion of the words ‘shall contain at least’ indicates that the information to which that schedule refers is a necessary and important part of the prospectus, with the consequence that the legislature considered it to be an essential element thereof that must be updated when it is changed.

35. As ESMA explains, it follows from the text of Article 69(1) of Directive 2009/65 that the prospectus includes information ‘necessary’ to enable investors to make informed judgements. Since the information provided for in Schedule A of Annex I to that directive, referred to in Article 69(2) thereof, is the minimum mandatory content of the prospectus, that information must, logically, be considered ‘necessary’ for the purposes of Article 69(1) of Directive 2009/65. Since UCITS prospectuses do not comply with Directive 2009/65 unless they contain at least all of the information provided for in Schedule A of Annex I thereto, the term ‘essential elements of the prospectus’ within the meaning of Article 72 of that directive is understood to include at least all of that information.

36. That literal and contextual interpretation of Article 72 of Directive 2009/65 is also supported by adopting a purposive approach to its interpretation. According to the first paragraph of Article 69(1), the purpose of the prospectus is to enable investors to make an informed judgement of the investment proposed to them and the risks attached thereto. Article 69(2) of Directive 2009/65, read in conjunction with point 1.8 of Schedule A of Annex 1 thereto, provides that the prospectus must include the names and positions in the company of the members of the administrative, management and supervisory bodies, as well as details of their main activities outside the company where these are of significance with respect to that company.⁸ It is uncontested that non-executive directors are ‘members of the administrative, management and supervisory bodies’ of a company. At the hearing, the FSC, ESMA and the Commission observed that non-executive directors, while not responsible for day-to-day management decisions, are involved in board-level decisions relating to investments. Investing consists in making choices. The quality of those choices depends in large part upon the calibre and the probity of the individuals charged with that responsibility. It follows that the identity of decision-makers may be of importance to potential investors. Moreover, timely identification of the individuals who decide upon the investment of funds allows investors to verify, amongst other matters, potential conflicts of interest. If that information in the prospectus is not kept up to date, the ability of investors to make an informed judgement of investments proposed to them is impaired.

37. In its written observations, the German Government, whose position Invest Fund Management and the Luxembourg Government aligned themselves with at the hearing, submitted that the essential elements of a prospectus that must be kept up to date are limited to those elements that must be included in the key investor information document required by Chapter IX, Section 3, of Directive 2009/65.

⁸ It is noteworthy that point 1.8 of Schedule A of Annex 1 to Directive 2009/65 does not distinguish between executive and non-executive directors.

38. Article 78(1) of Directive 2009/65 provides that Member States must require that an investment company and, for each of the common funds it manages, a management company, draw up a short document containing key information for investors, described as ‘key investor information’. Article 78(2) thereof provides that ‘key investor information’ must include appropriate information about the essential characteristics of the UCITS concerned, to be provided to investors so that they are reasonably able to understand the nature and the risks of the investment product that is being offered to them and, consequently, can take investment decisions on an informed basis. Pursuant to Article 78(3) of that directive, ‘key investor information’ must identify the UCITS and provide a short description of its investment objectives and investment policy; a past-performance presentation or, where relevant, performance scenarios; costs and associated charges; and the risk/reward profile of the investment, including appropriate guidance and warnings in relation to the risks associated with investments in the UCITS.

39. The German Government points out that the English and French language versions of Article 78(3) of Directive 2009/65 respectively refer to ‘the essential elements’ and ‘les éléments essentiels’ in relation to which information must be provided. It considers that the ‘essential elements of the prospectus’ that must be kept up to date pursuant to Article 72 thereof are the ‘essential elements in respect of the UCITS’ that must be provided by way of key investor information pursuant to Article 78(3)(a) to (e). Article 69(1) of Directive 2009/65 provides that the prospectus must include the information necessary for investors to be able to make an informed judgement of the investment proposed to them, and, in particular, of the risks attached thereto. A prospectus that includes such up-to-date key investor information allows investors to make such an informed judgement.

40. According to the German Government, that interpretation furthers the aims and objectives pursued by Directive 2009/65 in that the aim of both the key investor information document, which must be consistent with the relevant parts of the prospectus, and the prospectus itself is to enable investors to understand the risks of the investment and to make an informed judgement thereon.

41. By way of response, I would first observe that Article 78 of Directive 2009/65 appears in Section 3 of Chapter IX thereof, entitled ‘Key investor information’, whereas Article 72 is located in Section 1 of Chapter IX, entitled ‘Publication of a prospectus and periodical reports’. The absence of a cross-reference between those provisions, or recourse to the same, expressly defined term in both of them, tends to undermine the textual interpretation for which the German Government contends. Moreover, other language versions of Directive 2009/65 do not seem to support such an interpretation of the provisions under examination.⁹

42. Second, and perhaps of greater importance, is the fact that the prospectus is designed to provide far more detail than the key investor information document. Whilst their objectives may coincide as regards enabling investors to understand the risks of investment and to make an informed judgement thereon, the scope of the information imparted by those two documents is different. As the FSC, the Commission and ESMA explained at the hearing, the key investor information document is envisaged as a very short document containing standardised content, with a view to facilitating the comparison of different investment proposals, notably by retail

⁹ See, for example, the Dutch and German language versions of Directive 2009/65. Article 72 of the Dutch language version refers to ‘de essentiële informatie in het prospectus’, whereas Article 78(3) refers to ‘de volgende essentiële elementen van de icbe’ (emphasis added). Article 72 of the German language version refers to ‘die Angaben von wesentlicher Bedeutung im Prospekt’, whereas Article 78(3) refers to ‘Angaben zu folgenden wesentlichen Elementen des betreffenden OGAW’ (emphasis added).

investors. The prospectus is significantly longer and provides more detail, by reason of which it may be of greater assistance to institutional investors in particular. Viewed from that perspective there is no reason why the obligation to update information in the prospectus should not be wider than that applicable to the key investor information document. Nor is the imposition of two distinct regimes for the provision of information to potential investors by Directive 2009/65 inconsistent with the aims it pursues.

43. For those reasons, I am therefore unpersuaded that the German Government's suggested approach towards the interpretation of the provisions of Directive 2009/65 under examination is correct.

44. Invest Fund Management contends that, since the appointment of new non-executive directors to the board must be approved by the FSC and recorded in the relevant national trade register, that information is in the public domain from the date upon which it is so recorded. Since investors and potential investors have access to the national trade register, it is reasonable to interpret that Article 72 of Directive 2009/65 does not impose a requirement to update that information in a prospectus.

45. If it was the legislature's intention that investors rely on publicly available information in a national trade register in order to identify members of the relevant administrative, management and supervisory bodies, it is difficult to understand why Schedule A of Annex I to Directive 2009/65 includes that information as a mandatory, minimum requirement of a prospectus. The corollary of that observation is that, in the legislature's view, it is insufficient that national trade registers provide such up-to-date information. It may also be asked why investors ought to check national trade registers in order to verify whether the information contained in a prospectus is up to date.

46. I also consider it pertinent that Invest Fund Management itself appears to have been of the view that the information in the prospectuses needed to be updated following the appointment of the new non-executive directors. The penalty at issue in the proceedings before the referring court was incurred because Invest Fund Management updated the prospectuses after the change had been registered in the relevant trade register but beyond the time limit applicable, not that it failed to update them at all.

47. The Luxembourg Government is of the view that, in the absence of a precise definition of the term 'essential elements of the prospectus' in Article 72 of Directive 2009/65, it falls to the competent authorities of the Member States to define its content. In so doing, those authorities should consider whether updating the prospectus is required in order to reflect significant changes that could potentially affect investors' interests. That assessment must be conducted on a case-by-case basis and be subject to the principle of proportionality, with a view to reconciling the interests of investors with those of management companies in the light of the Directive's objectives.

48. Directive 2009/65 contains no indication that the legislature intended to leave the definition of the term 'essential elements of the prospectus' in its Article 72 to the Member States or to the discretion of their competent authorities. As explained in point 30 of this Opinion, in those circumstances those words are to be given an autonomous and uniform interpretation as a matter of EU law.

49. Invest Fund Management and the Luxembourg Government both submit that certain changes to the information included in the prospectus may be so minor or immaterial as to be of no interest to investors, in which case Article 72 of Directive 2009/65 does not require that the prospectus be kept up to date. In that context, Article 56(1) of the ZDKISDPKI provides that, in the event of ‘any change’ to the essential elements included in the prospectus of the collective investment scheme, the prospectus must be updated. That may reflect an intention on the part of the Bulgarian legislature to establish stricter rules than those laid down in Directive 2009/65 with respect to updating the contents of a prospectus, which that legislation permits.¹⁰ In any event, in the light of my observations in point 36 of this Opinion, I am of the view that the change at issue in the present case cannot be characterised as immaterial or *de minimis*.

50. The Polish Government observes that both the ordinary meaning of the word ‘essential’ and a teleological reading of Article 72 of Directive 2009/65 support the conclusion that the essential elements of a prospectus are described in Article 69(1), second paragraph, thereof, namely ‘a clear and easily understandable explanation of the fund’s risk profile’. The alternative interpretation, that the essential elements of a prospectus are those referred to in Article 69(2) thereof, is to be excluded since it would impose excessively onerous obligations on management and investment companies that do not materially improve the protection of investors. The Polish Government refers to the facts of the main proceedings for an example of information that must be contained in a prospectus but does not amount to an ‘essential element’ that must be kept up to date pursuant to Article 72 of Directive 2009/65. It nevertheless accepts that Member States may impose stricter requirements in that regard.

51. I am unconvinced by the approach that the Polish Government contends for two reasons. First, as explained in points 33 to 35 of this Opinion, it is consistent with the ordinary meaning of the term ‘essential’ that it includes ‘at least the information provided for in Schedule A of Annex I’, since Article 69(2) of Directive 2009/65 makes that a minimum information requirement. It is thus reasonable to conclude – in the absence of indications to the contrary – that that information is ‘essential’ in the context of a prospectus, which must be updated when it is changed. Secondly, neither the Polish Government nor indeed any of the parties that have made observations to the Court to the effect that such an interpretation would be excessively onerous have substantiated those claims, notably by reference to the estimated cost of updating a prospectus. In the absence of such evidence it is difficult to understand why the undoubted interest of investors to have access to correct, up-to-date information ought not to prevail in the circumstances under consideration here.

52. It follows, in my opinion, that the information specified in Schedule A of Annex I to Directive 2009/65 included in the prospectus is part of ‘the essential elements of the prospectus’ for the purposes of Article 72 of that directive and therefore must be kept up to date. In the light of that suggested response, it appears the Court need not reply to the third question. I therefore do not propose to address it.

¹⁰ Recital 15 of Directive 2009/65 provides: ‘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.’

B. Question relating to the penalties for non-compliance

53. The fourth question enquires as to the extent of the FSC's power to impose penalties for non-compliance with the obligation to update a prospectus. As explained in point 22 of the present Opinion, the failure on the part of Invest Fund Management to update the prospectuses of each of the five funds it manages gave rise to five separate penalty notices. The referring court asks whether Article 99a(r) of Directive 2009/65 permitted the FSC to impose those penalties.¹¹

54. Invest Fund Management considers that the FSC's approach is incompatible with the provisions of Directive 2009/65. In its view, the failure to update the prospectuses of the five funds that it manages is a single act of non-compliance since it relates to the same set of circumstances, namely the appointment of new non-executive directors to its board of directors. The FSC's approach is contrary to Article 99a(r) of Directive 2009/65 pursuant to which – it is argued – penalties can be imposed only for repeated non-compliance with Articles 68 to 82 thereof. Moreover, the FSC's practice of imposing penalties for non-compliance in respect of each of the funds managed by Invest Fund Management is also disproportionate by reason of its incompatibility with Article 99a(r) of Directive 2009/65.

55. I am unpersuaded by Invest Fund Management's argument that the referring court is confronted by a single act of non-compliance. Article 68 of Directive 2009/65 imposes an obligation on management companies to publish a prospectus 'for each of the common funds it manages'. A failure to update the prospectuses for each of those funds means that the obligation in Article 72 of that directive to keep the prospectus up to date has not been met in respect of each of those funds, regardless of the explanations proffered therefor. Viewed in that light, there have been five instances of non-compliance, each of which relates to a different fund, constituting a single instance of non-compliance for each fund managed.

56. In their respective observations to the Court, the FSC, the Polish Government and the Commission addressed the fourth question. All of them, correctly in my view, point out that Directive 2009/65 does not aim at the complete harmonisation of the laws of the Member States. As stated in recital 15 of that directive, as a general rule Member States should be able to establish rules stricter than those laid down therein, with particular regard to authorisation conditions, prudential requirements, the rules on reporting and the contents of the prospectus. Article 99a of that directive makes an express reference to laws, regulations or administrative provisions of the Member States. The introductory sentence of that article also makes it clear that Directive 2009/65 does not exhaustively define the list of non-compliant behaviour that must be penalised; instead, it sets out non-compliant behaviour that must be penalised 'in particular'. According to the Court's settled case-law, in the absence of harmonisation of EU legislation regarding the penalties applicable in cases of non-compliance with conditions laid down thereunder, Member States may choose penalties that seem to them to be appropriate.¹²

57. It follows that Directive 2009/65 permits Member States to enact implementing legislation that provides for stricter penalties for non-compliance with Article 72 thereof than those specified in Article 99a(r) thereof, always provided that such penalties are not disproportionate.¹³ I am unpersuaded by Invest Fund Management's succinct statement that the approach taken by

¹¹ According to the order for reference, the legislation applicable in Bulgaria provides for the imposition of a separate penalty for every failure by a management company to comply with the obligation to update essential elements.

¹² See, for example, judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraphs 39 and 40 and the case-law cited).

¹³ Article 99c of Directive 2009/65, as well as the case-law referenced in point 56 of this Opinion.

the FSC in the case before the referring court will lead to disproportionately high penalties. To the contrary, Invest Fund Management has an obligation towards actual and potential investors of each of the funds that it manages to ensure that the essential elements of the relevant prospectus are kept up to date. The imposition of a penalty for failure to update each prospectus is therefore not disproportionate per se.

VI. Conclusion

58. I thus propose that the Court give the following answers to the questions for a preliminary ruling referred by the Sofijski rayonen sad (District Court of Sofia, Bulgaria):

- (1) The information specified in Schedule A of Annex I 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), as amended by Directive 2014/91/EU, that is included in the prospectus is part of ‘the essential elements of the prospectus’ for the purposes of Article 72 of that directive and must therefore be kept up to date.
- (2) Article 99a(r) of Directive 2009/65/EC is to be interpreted to mean that national implementing legislation may provide for the imposition of a penalty on a management company for each of the investment funds managed by it in the event of a single instance of non-compliance with obligations concerning information to be provided to investors imposed in accordance with national provisions transposing Articles 68 to 82 of Directive 2009/65/EC.