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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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## I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

## REGULATIONS

**REGULATION (EC) No 1060/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL****of 16 September 2009****on credit rating agencies****(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 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the European Central Bank <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

(1) Credit rating agencies play an important role in global securities and banking markets, as their credit ratings are used by investors, borrowers, issuers and governments as part of making informed investment and financing decisions. Credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investment in transferable securities (UCITS) and institutions for occupational retirement provision may use those credit ratings as the reference for the calculation of their capital requirements for solvency purposes or for calculating risks in their investment activity. Consequently, credit ratings have a significant impact on the operation of the markets and on the

trust and confidence of investors and consumers. It is essential, therefore, that credit rating activities are conducted in accordance with the principles of integrity, transparency, responsibility and good governance in order to ensure that resulting credit ratings used in the Community are independent, objective and of adequate quality.

(2) Currently, most credit rating agencies have their headquarters outside the Community. Most Member States do not regulate the activities of credit rating agencies or the conditions for the issuing of credit ratings. Despite their significant importance for the functioning of the financial markets, credit rating agencies are subject to Community law only in limited areas, notably under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation <sup>(4)</sup>. Moreover, 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 <sup>(5)</sup> 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 <sup>(6)</sup> refer to credit rating agencies. It is therefore important to lay down rules ensuring that all credit ratings issued by the credit rating agencies registered in the Community are of adequate quality and issued by credit rating agencies subject to stringent requirements. The Commission will continue to work with its international partners to ensure convergence of the rules applying to credit rating agencies. It should be possible to exempt certain central banks issuing credit ratings from this Regulation provided that they fulfil the relevant applicable conditions which ensure the independence and integrity of their credit rating activities and which are as stringent as the requirements provided for in this Regulation.

<sup>(1)</sup> Opinion of 13 May 2009 (not yet published in the Official Journal).

<sup>(2)</sup> OJ C 115, 20.5.2009, p. 1.

<sup>(3)</sup> Opinion of the European Parliament of 23 April 2009 (not yet published in the Official Journal) and Council Decision of 27 July 2009.

<sup>(4)</sup> OJ L 96, 12.4.2003, p. 16.

<sup>(5)</sup> OJ L 177, 30.6.2006, p. 1.

<sup>(6)</sup> OJ L 177, 30.6.2006, p. 201.

- (3) This Regulation should not create a general obligation for financial instruments or financial obligations to be rated under this Regulation. In particular, it should not require undertakings for collective investment in transferable securities (UCITS) as defined in 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) <sup>(1)</sup> or institutions for occupational retirement provision as defined in Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision <sup>(2)</sup> to invest only in financial instruments which are rated under this Regulation.
- (4) This Regulation should not create a general obligation for financial institutions or investors to invest only in securities for which a prospectus has been published in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading <sup>(3)</sup> and Commission Regulation (EC) No 809/2004/EC of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements <sup>(4)</sup> and which are rated under this Regulation. In addition, this Regulation should not require the issuers or offerors or persons asking for admission to trading on a regulated market to obtain credit ratings for securities which are subject to the requirement to publish a prospectus under Directive 2003/71/EC and Regulation (EC) No 809/2004.
- (5) A prospectus published under Directive 2003/71/EC and Regulation (EC) No 809/2004 should contain clear and prominent information on whether or not the credit rating of the respective securities is issued by a credit rating agency established in the Community and registered under this Regulation. However, nothing in this Regulation should prevent persons responsible for publishing a prospectus under Directive 2003/71/EC and Regulation (EC) No 809/2004 from including any material information in the prospectus, including credit ratings issued in third countries and related information.
- (6) In addition to issuing credit ratings and performing credit rating activities, credit rating agencies should also be able to perform ancillary activities on a professional basis. The performance of ancillary activities should not compromise the independence or integrity of credit rating agencies' credit rating activities.
- (7) This Regulation should apply to credit ratings issued by credit rating agencies registered in the Community. The principal aim of this Regulation is to protect the stability of financial markets and investors. Credit scores, credit scoring systems and similar assessments related to obligations arising from consumer, commercial or industrial relationships should not fall within the scope of this Regulation.
- (8) Credit rating agencies should, on a voluntary basis, apply the Code of Conduct Fundamentals for credit rating agencies issued by the International Organisation of Securities Commissions (IOSCO Code). In 2006, a Communication from the Commission on credit rating agencies <sup>(5)</sup> invited the Committee of European Securities Regulators (CESR), re-established by Commission Decision 2009/77/EC <sup>(6)</sup>, to monitor compliance with the IOSCO Code and report back to the Commission on an annual basis.
- (9) The European Council of 13 and 14 March 2008 agreed to a set of conclusions to respond to the main weaknesses identified in the financial system. One of the objectives was to improve market functioning and incentive structures, including the role of credit rating agencies.
- (10) Credit rating agencies are considered to have failed, first, to reflect early enough in their credit ratings the worsening market conditions, and second, to adjust their credit ratings in time following the deepening market crisis. The most appropriate manner in which to correct those failures is by measures relating to conflicts of interest, the quality of the credit ratings, the transparency and internal governance of the credit rating agencies, and the surveillance of the activities of the credit rating agencies. The users of credit ratings should not rely blindly on credit ratings but should take utmost care to perform own analysis and conduct appropriate due diligence at all times regarding their reliance on such credit ratings.
- (11) It is necessary to lay down a common framework of rules regarding the enhancement of the quality of credit ratings, in particular the quality of credit ratings to be used by financial institutions and persons regulated by harmonised rules in the Community. In the absence of such a common framework, there is a risk that Member States take diverging measures at national level having a direct negative impact on, and creating obstacles to, the good functioning of the internal market, since the credit rating agencies issuing credit ratings for the use of financial institutions in the Community would be subject to different rules in different Member States. Moreover, diverging quality requirements as regards credit ratings could lead to different levels of investor and consumer protection. Users should, furthermore, be able to compare credit ratings issued in the Community with credit ratings issued internationally.

(1) OJ L 375, 31.12.1985, p. 3. Directive replaced, with effect from 1 July 2011, by Directive 2009/65/EC of the European Parliament and of the Council (See page 32 of this Official Journal).

(2) OJ L 235, 23.9.2003, p. 10.

(3) OJ L 345, 31.12.2003, p. 64.

(4) OJ L 149, 30.4.2004, p. 1.

(5) OJ C 59, 11.3.2006, p. 2.

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

- (12) This Regulation should not affect the use made of credit ratings by persons other than those referred to in this Regulation.
- (13) It is desirable to provide for the use of credit ratings issued in third countries for regulatory purposes in the Community provided that they comply with requirements which are as stringent as the requirements provided for in this Regulation. This Regulation introduces an endorsement regime allowing credit rating agencies established in the Community and registered in accordance with its provisions to endorse credit ratings issued in third countries. When endorsing a credit rating issued in a third country, credit rating agencies should determine and monitor, on an ongoing basis, whether credit rating activities resulting in the issuing of such a credit rating comply with requirements for the issuing of credit ratings which are as stringent as those provided for in this Regulation, achieving the same objective and effects in practice.
- (14) In order to respond to concerns that lack of establishment in the Community may be a serious impediment to effective supervision in the best interests of the financial markets in the Community, such an endorsement regime should be introduced for credit rating agencies that are affiliated or work closely with credit rating agencies established in the Community. Nevertheless, it may be necessary to adjust the requirement of physical presence in the Community in certain cases, notably as regards smaller credit rating agencies from third countries with no presence or affiliation in the Community. A specific regime of certification for such credit rating agencies should therefore be established, in so far as they are not systemically important for the financial stability or integrity of the financial markets of one or more Member States.
- (15) Certification should be possible after determination by the Commission of the equivalence of the legal and supervisory framework of a third country to the requirements of this Regulation. The equivalence mechanism envisaged should not grant automatic access to the Community but should offer the possibility for qualifying credit rating agencies from a third country to be assessed on a case-by-case basis and be granted an exemption from some of the organisational requirements for credit rating agencies active in the Community, including the requirement of physical presence in the Community.
- (16) This Regulation should also require a third-country credit rating agency to meet criteria which are general prerequisites for the integrity of its credit rating activities in order to prevent interference with the content of credit ratings by the competent authorities and other public authorities of that third country, and to provide for an adequate conflict of interests policy, rotation of rating analysts and periodic and ongoing disclosure.
- (17) Another important prerequisite for a sound endorsement regime and an equivalence system is the existence of sound cooperation arrangements between competent authorities of home Member States and the relevant competent authorities of third-country credit rating agencies.
- (18) A credit rating agency that has endorsed credit ratings issued in a third country should be fully and unconditionally responsible for such endorsed credit ratings and for the fulfilment of the relevant conditions referred to in this Regulation.
- (19) This Regulation should not apply to credit ratings that a credit rating agency produces pursuant to an individual order and provides exclusively to the person who ordered it and which are not intended for public disclosure or distribution by subscription.
- (20) Investment research, investment recommendations and other opinions about a value or a price for a financial instrument or a financial obligation should not be considered to be credit ratings.
- (21) An unsolicited credit rating, namely a credit rating not initiated at the request of the issuer or rated entity, should be clearly identified as such and should be distinguished from solicited credit ratings by appropriate means.
- (22) In order to avoid potential conflicts of interest, credit rating agencies focus in their professional activity on the issuing of credit ratings. A credit rating agency should not be allowed to carry out consultancy or advisory services. In particular, a credit rating agency should not make proposals or recommendations regarding the design of a structured finance instrument. However, credit rating agencies should be able to provide ancillary services where this does not create potential conflicts of interest with the issuing of credit ratings.
- (23) Credit rating agencies should use rating methodologies that are rigorous, systematic, continuous and subject to validation including by appropriate historical experience and back-testing. Such a requirement should not, however, provide grounds for interference with the content of credit ratings and methodologies by the competent authorities and the Member States. Similarly, the requirement that credit rating agencies review credit ratings at least annually should not compromise the obligation on credit rating agencies to monitor credit ratings on a continuous basis and review credit ratings as necessary. Those requirements should not be applied in such a way as to prevent new credit rating agencies from entering the market.
- (24) Credit ratings should be well-founded and solidly substantiated, in order to avoid rating compromises.
- (25) Credit rating agencies should disclose information to the public on the methodologies, models and key rating assumptions which they use in their credit rating activities. The level of detail concerning the disclosure of information concerning models should be such as to give adequate information to the users of credit ratings in order to perform their own due diligence when assessing whether to rely or not on those credit ratings. Disclosure of information concerning models should not, however, reveal sensitive business information or seriously impede innovation.

- (26) Credit rating agencies should establish appropriate internal policies and procedures in relation to employees and other persons involved in the credit rating process in order to prevent, identify, eliminate or manage and disclose any conflicts of interest and ensure at all times the quality, integrity and thoroughness of the credit rating and review process. Such policies and procedures should, in particular, include the internal control mechanisms and compliance function.
- (27) Credit rating agencies should avoid situations of conflict of interest and manage those conflicts adequately when they are unavoidable in order to ensure their independence. Credit rating agencies should disclose conflicts of interest in a timely manner. They should also keep records of all significant threats to the independence of the credit rating agency and that of its employees and other persons involved in the credit rating process, as well as the safeguards applied to mitigate those threats.
- (28) A credit rating agency or group of credit rating agencies should maintain arrangements for sound corporate governance. In determining its corporate governance arrangements, the credit rating agency or group of credit rating agencies should have regard to the need to ensure that it issues credit ratings that are independent, objective and of adequate quality.
- (29) In order to ensure the independence of the credit rating process from the business interest of the credit rating agency as a company, credit rating agencies should ensure that at least one third, but no less than two, of the members of the administrative or supervisory board are independent in a manner consistent with point 13 in Section III of Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board <sup>(1)</sup>. Moreover, it is necessary that the majority of the senior management, including all independent members of the administrative or supervisory board, have sufficient expertise in appropriate areas of financial services. The compliance officer should report regularly on the carrying out of his or her duties to the senior management and the independent members of the administrative or supervisory board.
- (30) In order to avoid conflicts of interest, the compensation of independent members of the administrative or supervisory board should not depend on the business performance of the credit rating agency.
- (31) A credit rating agency should allocate a sufficient number of employees with appropriate knowledge and experience to its credit rating activities. In particular, the credit rating agency should ensure that adequate human and financial resources are allocated to the issuing, monitoring and updating of credit ratings.
- (32) In order to take account of the specific condition of credit rating agencies that have fewer than 50 employees, the competent authorities should be able to exempt such credit rating agencies from some of the obligations laid down by this Regulation as regards the role of the independent members of the board, the compliance function and the rotation mechanism, and provided that those credit rating agencies are able to demonstrate that they comply with specific conditions. The competent authorities should examine, in particular, whether the size of a credit rating agency has been determined in such a way as to avoid compliance with the requirements of this Regulation by the credit rating agency or by a group of credit rating agencies. The application of the exemption by competent authorities of Member States should be made in such a way as to avoid the risks of fragmenting the internal market and to guarantee the uniform application of Community law.
- (33) Long-lasting relationships with the same rated entities or their related third parties could compromise the independence of rating analysts and persons approving credit ratings. Those analysts and persons should therefore be subject to an appropriate rotation mechanism which should provide for a gradual change in analytical teams and credit rating committees.
- (34) Credit rating agencies should ensure that methodologies, models and key rating assumptions such as mathematical or correlation assumptions used for determining credit ratings are properly maintained, up-to-date and subject to a comprehensive review on a periodic basis and that their descriptions are published in a manner permitting comprehensive review. In cases where the lack of reliable data or the complexity of the structure of a new type of financial instrument, in particular structured finance instruments, raises serious questions as to whether the credit rating agency can produce a credible credit rating, the credit rating agency should not issue a credit rating or should withdraw an existing credit rating. Changes in the quality of information available for monitoring an existing credit rating should be disclosed with that review and, if appropriate, a revision of the credit rating should be made.
- (35) In order to ensure the quality of credit ratings, a credit rating agency should take measures to ensure that the information it uses in assigning a credit rating is reliable. For that purpose, a credit rating agency should be able to envisage, inter alia, reliance on independently audited financial statements and public disclosures; verification by reputable third-party services; random sampling examination of the information received; or contractual provisions clearly stipulating liability for the rated entity or its related third parties, if the information provided under the contract is knowingly materially false or misleading or if the rated entity or its related third parties fail to conduct reasonable due diligence regarding the accuracy of the information as specified under the terms of the contract.

<sup>(1)</sup> OJ L 52, 25.2.2005, p. 51.



- (36) This Regulation is without prejudice to the duty of credit rating agencies to protect the right to privacy of natural persons with respect to the processing of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data <sup>(1)</sup>.
- (37) It is necessary for credit rating agencies to establish proper procedures for the regular review of methodologies, models and key rating assumptions used by the credit rating agency in order to be able to properly reflect the changing conditions in the underlying asset markets. With a view to ensuring transparency, disclosure of any material modification to the methodologies and practices, procedures and processes of credit rating agencies should be made prior to their coming into effect, unless extreme market conditions require an immediate change in the credit rating.
- (38) A credit rating agency should indicate any appropriate risk warning, including a sensitivity analysis of the relevant assumptions. That analysis should explain how various market developments that move the parameters built into the model may influence the credit rating changes (for example volatility). The credit rating agency should ensure that the information on historical default rates of its rating categories is verifiable and quantifiable and provides a sufficient basis for interested parties to understand the historical performance of each rating category and if and how rating categories have changed. If the nature of the credit rating or other circumstances makes a historical default rate inappropriate, statistically invalid, or otherwise likely to mislead the users of the credit rating, the credit rating agency should provide appropriate clarification. That information should, to the extent possible, be comparable with any existing industry patterns in order to assist investors in drawing performance comparisons between different credit rating agencies.
- (39) In order to reinforce transparency of credit ratings and contribute to the protection of investors, CESR should maintain a central repository where information on the past performances of credit rating agencies and information about credit ratings issued in the past should be kept. Credit rating agencies should provide information to that repository in standardised form. CESR should make that information available to the public and should, annually, publish summary information on the main developments observed.
- (40) Under certain circumstances structured finance instruments may have effects which are different from traditional corporate debt instruments. It could be misleading for investors to apply the same rating categories to both types of instruments without further explanation. Credit rating agencies should play an important role in raising awareness of the users of credit ratings about the specificities of the structured finance products in relation to traditional ones. Credit rating agencies should therefore clearly differentiate between rating categories used for rating structured finance instruments on the one hand, and rating categories used for other financial instruments or financial obligations on the other, by adding an appropriate symbol to the rating category.
- (41) Credit rating agencies should take measures to avoid situations where issuers request the preliminary rating assessment of the structured finance instrument concerned from a number of credit rating agencies in order to identify the one offering the best credit rating for the proposed structure. Issuers should also avoid applying such practices.
- (42) A credit rating agency should keep records of the methodology for credit ratings and regularly update changes thereto and also keep a record of the substantial elements of the dialogue between the rating analyst and the rated entity or its related third parties.
- (43) In order to ensure a high level of investor and consumer confidence in the internal market, credit rating agencies which issue credit ratings in the Community should be subject to registration. Such a registration is the principal prerequisite for credit rating agencies to issue credit ratings intended to be used for regulatory purposes in the Community. It is therefore necessary to lay down the harmonised conditions and the procedure for the granting, suspension and withdrawal of such registration.
- (44) This Regulation should not replace the established process of recognising External Credit Assessment Institutions (ECAIs) in accordance with Directive 2006/48/EC. The ECAIs already recognised in the Community should apply for registration in accordance with this Regulation.
- (45) A credit rating agency registered by the competent authority of the relevant Member State should be allowed to issue credit ratings throughout the Community. It is therefore necessary to establish a single registration procedure for each credit rating agency which is effective throughout the Community. The registration of a credit rating agency should become effective once the registration decision issued by the competent authority of the home Member State has taken effect under relevant national law.
- (46) It is necessary to establish a single point of entry for the submission of applications for registration. CESR should receive applications for registration and effectively inform the competent authorities in all the Member States. CESR should also provide advice in respect of the completeness of the application to the competent authority of the home Member State. The examination of applications for registration should be carried out at national level by the relevant competent authority. In order to deal efficiently with credit rating agencies, competent authorities should set up operational networks (colleges) supported by an efficient information technology infrastructure. CESR should establish a subcommittee specialised in the field of credit ratings of each of the asset classes rated by credit rating agencies.

(<sup>1</sup>) OJ L 281, 23.11.1995, p. 31.

- (47) Some credit rating agencies are composed of several legal entities which, together, form a group of credit rating agencies. When registering each of the credit rating agencies being part of such a group, the competent authorities of the Member States concerned should coordinate the examination of the applications submitted by credit rating agencies belonging to the same group and the decision-making concerning the granting of registration. It should be possible, however, to refuse registration to a credit rating agency within a group of credit rating agencies when such a credit rating agency does not meet the requirements for registration while other members of such a group comply with all of the requirements for registration under this Regulation. As the college should not be entrusted with power to issue legally binding decisions, the competent authorities of home Member States of the members of the group of credit rating agencies should each issue an individual decision in respect of the credit rating agency established on the territory of the Member State concerned.
- (48) The college should represent the effective platform for an exchange of supervisory information among competent authorities, coordination of their activities and supervisory measures necessary for the effective supervision of credit rating agencies. In particular, the college should facilitate the monitoring of the fulfilment of conditions for the endorsement of credit ratings issued in third countries, certification, outsourcing arrangements, and exemptions provided for in this Regulation. The activities of the college should contribute to the harmonised application of rules under this Regulation and to the convergence of supervisory practices.
- (49) In order to enhance the practical coordination of activities of the college, its members should select among themselves a facilitator. The facilitator should chair the meetings of the college, establish its written coordination arrangements and coordinate its actions. During the registration process, the facilitator should assess the need to extend the period for examination of applications, coordinate such examination, and liaise with CESR.
- (50) In November 2008, the Commission set up a high level group with the task of examining the future European supervisory architecture in the field of financial services, including the role of CESR.
- (51) The current supervisory architecture should not be considered as the long-term solution for the oversight of credit rating agencies. Colleges of competent authorities, which are expected to streamline supervisory cooperation and convergence in this area in the Community, are a considerable step forward, but may not substitute all the advantages of more consolidated supervision of the credit rating industry. The crisis in international financial markets has clearly demonstrated that it is appropriate to examine further the need for wide-ranging reforms of the regulatory and supervisory model of the Community financial sector. In order to achieve the necessary level of Community supervisory convergence and cooperation and to underpin the stability of the financial system, further wide-ranging reforms of the regulatory and supervisory model of the Community financial sector are highly needed and should be put forward swiftly by the Commission with due consideration to the conclusions presented by the group of experts chaired by Jacques de Larosière on 25 February 2009. The Commission should, as soon as possible, and in any event by 1 July 2010, report to the European Parliament, the Council and other institutions concerned any findings in this respect and should put forward any legislative proposal needed to tackle the shortcomings identified as regards supervisory coordination and cooperation arrangements.
- (52) Significant changes in the endorsement regime, outsourcing arrangements as well as the opening and closing of branches should, inter alia, be considered as material changes to the conditions for initial registration of a credit rating agency.
- (53) The supervision of a credit rating agency should be carried out by the competent authority of the home Member State in cooperation with the competent authorities of the other Member States concerned, using the relevant college and keeping CESR appropriately involved.
- (54) The ability of the competent authority of the home Member State and other members of the relevant college to assess and monitor compliance of a credit rating agency with the obligations provided for under this Regulation should not be limited by any outsourcing arrangements entered into by the credit rating agency. The credit rating agency should remain responsible for any of its obligations under this Regulation in the event of the use of outsourcing arrangements.
- (55) In order to maintain a high level of investor and consumer confidence and enable the ongoing supervision of credit ratings issued in the Community, credit rating agencies whose headquarters are located outside the Community should be required to set up a subsidiary in the Community in order to allow for the efficient supervision of their activities in the Community and the effective use of the endorsement regime. The emergence of new actors on the credit rating agency market should also be encouraged.
- (56) The competent authorities should be able to use powers defined in this Regulation in relation to credit rating agencies, persons involved in credit rating activities, rated entities and related third parties, third parties to whom the credit rating agencies have outsourced certain functions or activities, and other persons otherwise related or connected to credit rating agencies or credit rating activities. Such persons should include shareholders or members of the supervisory or administrative boards of the credit rating agencies and rated entities.
- (57) The provisions of this Regulation regarding supervisory fees should be without prejudice to relevant provisions of national law governing supervisory or similar fees.



- (58) It is appropriate to create a mechanism to ensure the effective enforcement of this Regulation. The competent authorities of the Member States should have at their disposal the necessary means to ensure that ratings issued in the Community are issued in compliance with this Regulation. The use of these supervisory measures should always be coordinated within the relevant college. Measures such as the withdrawal of registration or the suspension of the use for regulatory purposes of credit ratings should be imposed when they are considered to be proportionate to the significance of the breach of the obligations arising from this Regulation. In exercising their supervisory powers, competent authorities should have due regard to the interests of investors and market stability. Since the independence of a credit rating agency in the process of issuing its credit ratings should be preserved, neither the competent authorities nor the Member States should interfere in relation to the substance of credit ratings and the methodologies by which a credit rating agency determines credit ratings in order to avoid credit ratings to be compromised. In the event that a credit rating agency is subjected to pressure, it should notify the Commission and CESR. The Commission should examine on a case-by-case basis whether further action is to be taken against the Member State concerned for failure to comply with its obligations under this Regulation.
- (59) It is desirable to ensure that decision-making referred to in this Regulation be based on close cooperation between the Member States' competent authorities, and the adoption of the registration decisions should therefore take place on the basis of an agreement. This is a necessary prerequisite for the efficient process of registration and performance of supervision. The decision-making should be effective, expeditious and consensual.
- (60) For the efficiency of supervision and in order to avoid duplication of tasks, the competent authorities of the Member States should cooperate.
- (61) It is also important to provide for exchange of information between competent authorities responsible for supervision of credit rating agencies under this Regulation and competent authorities supervising financial institutions, in particular those responsible for prudential supervision or financial stability in the Member States.
- (62) The competent authorities of Member States other than the competent authority of the home Member State should be able to intervene and take appropriate supervisory measures, after informing CESR and the competent authority of the home Member State and after consulting the relevant college in the event that they have established that a registered credit rating agency whose ratings are used within their territory breaches the obligations arising from this Regulation.
- (63) Unless this Regulation provides for a specific procedure as regards registration, certification or withdrawal thereof, the adoption of supervisory measures or the performance of supervisory powers, the national law governing such procedures including linguistic regimes, professional secrecy and legal professional privilege, should apply and the rights of the credit rating agencies and other persons under that law should not be affected.
- (64) It is necessary to enhance convergence of the powers at the disposal of the competent authorities in order to achieve an equivalent intensity of enforcement across the internal market.
- (65) CESR should ensure coherence in the application of this Regulation. It should enhance and facilitate the cooperation and coordination of competent authorities in supervisory activities and issue guidance where appropriate. CESR should therefore establish a mediation mechanism and peer review in order to facilitate a coherent approach by the competent authorities.
- (66) Member States should lay down rules on penalties applicable to infringements of the provisions of this Regulation and ensure that they are implemented. Those penalties should be effective, proportionate and dissuasive and should at least cover cases of gross professional misconduct and lack of due diligence. It should be possible for Member States to provide for administrative or criminal penalties. CESR should establish guidelines on the convergence of practices relating to such penalties.
- (67) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data as laid down in Directive 95/46/EC.
- (68) This Regulation should also provide for rules relating to exchange of information with competent authorities in third countries, particularly with those responsible for the supervision of the credit rating agencies involved in endorsement and certification.
- (69) Without prejudice to the application of Community law, any claim against credit rating agencies in relation to any infringement of the provisions of this Regulation should be made in accordance with the applicable national law on civil liability.
- (70) The measures necessary for the implementation of this Regulation 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 <sup>(1)</sup>.
- (71) In particular, the Commission should be empowered, while taking account of international developments, to amend Annexes I and II, which lay down the specific criteria for assessing the compliance of a credit rating agency with its duties in terms of internal organisation, operational arrangements, rules on employees, presentation of credit ratings and disclosure, and to specify or amend the criteria for determining the equivalence of the regulatory and supervisory legal framework of third countries with the provisions of this Regulation. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, inter alia, by supplementing it

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

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.

- (72) With a view to taking into account further developments in the financial markets, the Commission should submit a report to the European Parliament and the Council assessing the application of this Regulation, in particular the regulatory reliance on credit ratings as well as the appropriateness of the remuneration of the credit rating agency by the rated entity. In the light of that assessment, the Commission should put forward appropriate legislative proposals.
- (73) The Commission should also submit a report to the European Parliament and the Council assessing incentives for issuers to use credit rating agencies established in the Community for a proportion of their ratings, possible alternatives to the 'issuer-pays' model including the creation of a public Community credit rating agency, and convergence of national rules concerning infringements of the provisions of this Regulation. In the light of that assessment, the Commission should put forward appropriate legislative proposals.
- (74) The Commission should also submit a report to the European Parliament and the Council assessing developments in the regulatory and supervisory framework for credit rating agencies in third countries and the effects of those developments and of transitional provisions referred to in this Regulation on the stability of the financial markets in the Community.
- (75) Since the objective of this Regulation, namely to ensure a high level of consumer and investor protection by laying down a common framework with regard to the quality of credit ratings to be issued in the internal market, cannot be sufficiently achieved by the Member States, given the current scarcity of national legislation in this field and the fact that the majority of existing credit rating agencies are established outside the Community, and can therefore 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 Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

#### TITLE I

#### SUBJECT MATTER, SCOPE AND DEFINITIONS

##### Article 1

##### Subject matter

This Regulation introduces a common regulatory approach in order to enhance the integrity, transparency, responsibility, good governance and reliability of credit rating activities, contributing to the quality of credit ratings issued in the Community, thereby contributing to the smooth functioning of the internal market

while achieving a high level of consumer and investor protection. It lays down conditions for the issuing of credit ratings and rules on the organisation and conduct of credit rating agencies to promote their independence and the avoidance of conflicts of interest.

#### Article 2

##### Scope

1. This Regulation applies to credit ratings issued by credit rating agencies registered in the Community and which are disclosed publicly or distributed by subscription.
2. This Regulation does not apply to:
  - (a) private credit ratings produced pursuant to an individual order and provided exclusively to the person who placed the order and which are not intended for public disclosure or distribution by subscription;
  - (b) credit scores, credit scoring systems or similar assessments related to obligations arising from consumer, commercial or industrial relationships;
  - (c) credit ratings produced by export credit agencies in accordance with point 1.3 of Part 1 of Annex VI to Directive 2006/48/EC; or
  - (d) credit ratings produced by the central banks and which:
    - (i) are not paid for by the rated entity;
    - (ii) are not disclosed to the public;
    - (iii) are issued in accordance with the principles, standards and procedures which ensure the adequate integrity and independence of credit rating activities as provided for by this Regulation; and
    - (iv) do not relate to financial instruments issued by the respective central banks' Member States.

3. A credit rating agency shall apply for registration under this Regulation as a condition for being recognised as an External Credit Assessment Institution (ECAI) in accordance with Part 2 of Annex VI to Directive 2006/48/EC, unless it only issues the credit ratings referred to in paragraph 2.

4. In order to ensure the uniform application of paragraph 2(d), the Commission may, upon submission of a request by a Member State, in accordance with the regulatory procedure referred to in Article 38(3) and in accordance with paragraph 2(d) of this Article, adopt a decision stating that a central bank falls within the scope of that point and that its credit ratings are therefore exempt from the application of this Regulation.

The Commission shall publish on its website the list of central banks falling within the scope of paragraph 2(d) of this Article.

## Article 3

**Definitions**

1. For the purpose of this Regulation, the following definitions shall apply:

- (a) 'credit rating' means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories;
- (b) 'credit rating agency' means a legal person whose occupation includes the issuing of credit ratings on a professional basis;
- (c) 'home Member State' means the Member State in which the credit rating agency has its registered office;
- (d) 'rating analyst' means a person who performs analytical functions that are necessary for the issuing of a credit rating;
- (e) 'lead rating analyst' means a person with primary responsibility for elaborating a credit rating or for communicating with the issuer with respect to a particular credit rating or, generally, with respect to the credit rating of a financial instrument issued by that issuer and, where relevant, for preparing recommendations to the rating committee in relation to such rating;
- (f) 'rated entity' means a legal person whose creditworthiness is explicitly or implicitly rated in the credit rating, whether or not it has solicited that credit rating and whether or not it has provided information for that credit rating;
- (g) 'regulatory purposes' means the use of credit ratings for the specific purpose of complying with Community law, as implemented by the national legislation of the Member States;
- (h) 'rating category' means a rating symbol, such as a letter or numerical symbol which might be accompanied by appending identifying characters, used in a credit rating to provide a relative measure of risk to distinguish the different risk characteristics of the types of rated entities, issuers and financial instruments or other assets;
- (i) 'related third party' means the originator, arranger, sponsor, servicer or any other party that interacts with a credit rating agency on behalf of a rated entity, including any person directly or indirectly linked to that rated entity by control;
- (j) 'control' means the relationship between a parent undertaking and a subsidiary, as described in Article 1 of Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts <sup>(1)</sup>, or a close link between any natural or legal person and an undertaking;

<sup>(1)</sup> OJ L 193, 18.7.1983, p. 1.

- (k) 'financial instrument' means any of the instruments listed in Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments <sup>(2)</sup>;
- (l) 'structured finance instrument' means a financial instrument or other assets resulting from a securitisation transaction or scheme referred to in Article 4(36) of Directive 2006/48/EC;
- (m) 'group of credit rating agencies' means a group of undertakings established in the Community consisting of a parent undertaking and its subsidiaries within the meaning of Articles 1 and 2 of Directive 83/349/EEC as well as undertakings linked to each other by a relationship within the meaning of Article 12(1) of Directive 83/349/EEC and whose occupation includes the issuing of credit ratings. For the purposes of Article 4(3)(a), a group of credit rating agencies shall also include credit rating agencies established in third countries;
- (n) 'senior management' means the person or persons who effectively direct the business of the credit rating agency and the member or members of its administrative or supervisory board;
- (o) 'credit rating activities' means data and information analysis and the evaluation, approval, issuing and review of credit ratings.

2. For the purposes of paragraph 1(a), the following shall not be considered to be credit ratings:

- (a) recommendations within the meaning of Article 1(3) of Commission Directive 2003/125/EC <sup>(3)</sup>;
- (b) investment research as defined in Article 24(1) of Directive 2006/73/EC <sup>(4)</sup> and other forms of general recommendation, such as 'buy', 'sell' or 'hold', relating to transactions in financial instruments or to financial obligations; or
- (c) opinions about the value of a financial instrument or a financial obligation.

## Article 4

**Use of credit ratings**

1. Credit institutions as defined in Directive 2006/48/EC, investment firms as defined in Directive 2004/39/EC, insurance undertakings subject to the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance <sup>(5)</sup>,

<sup>(2)</sup> OJ L 145, 30.4.2004, p. 1.

<sup>(3)</sup> OJ L 339, 24.12.2003, p. 73.

<sup>(4)</sup> 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 (OJ L 241, 2.9.2006, p. 26).

<sup>(5)</sup> OJ L 228, 16.8.1973, p. 3.

assurance undertakings as defined in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance <sup>(1)</sup>, reinsurance undertakings as defined in Directive 2005/68/EC of the European Parliament and the Council of 16 November 2005 on reinsurance <sup>(2)</sup>, undertakings for collective investment in transferable securities (UCITS) as defined in Directive 85/611/EEC and institutions for occupational retirement provision as defined in Directive 2003/41/EC may use credit ratings for regulatory purposes only if they are issued by credit rating agencies established in the Community and registered in accordance with this Regulation.

Where a prospectus published under Directive 2003/71/EC and Regulation (EC) No 809/2004 contains a reference to a credit rating or credit ratings, the issuer, offeror, or person asking for admission to trading on a regulated market shall ensure that the prospectus also includes clear and prominent information stating whether or not such credit ratings are issued by a credit rating agency established in the Community and registered under this Regulation.

2. A credit rating agency established in the Community and registered in accordance with this Regulation shall be deemed to have issued a credit rating when the credit rating has been published on the credit rating agency's website or by other means or distributed by subscription and presented and disclosed in accordance with the obligations of Article 10, clearly identifying that the credit rating is endorsed in accordance with paragraph 3 of this Article.

3. A credit rating agency established in the Community and registered in accordance with this Regulation may endorse a credit rating issued in a third country only when credit rating activities resulting in the issuing of such a credit rating comply with the following conditions:

- (a) the credit rating activities resulting in the issuing of the credit rating to be endorsed are undertaken in whole or in part by the endorsing credit rating agency or by credit rating agencies belonging to the same group;
- (b) the credit rating agency has verified and is able to demonstrate on an ongoing basis to the competent authority of the home Member State that the conduct of credit rating activities by the third-country credit rating agency resulting in the issuing of the credit rating to be endorsed fulfils requirements which are at least as stringent as the requirements set out in Articles 6 to 12;
- (c) the ability of the competent authority of the home Member State of the endorsing credit rating agency or the college of competent authorities referred to in Article 29 (college) to assess and monitor the compliance of the credit rating agency established in the third country with the requirements referred to in point (b) is not limited;

- (d) the credit rating agency makes available on request to the competent authority of the home Member State all the information necessary to enable that competent authority to supervise on an ongoing basis the compliance with the requirements of this Regulation;
- (e) there is an objective reason for the credit rating to be elaborated in a third country;
- (f) the credit rating agency established in the third country is authorised or registered, and is subject to supervision, in that third country;
- (g) the regulatory regime in that third country prevents interference by the competent authorities and other public authorities of that third country with the content of credit ratings and methodologies; and
- (h) there is an appropriate cooperation arrangement between the competent authority of the home Member State of the endorsing credit rating agency and the relevant competent authority of the credit rating agency established in a third country. The competent authority of the home Member State shall ensure that such cooperation arrangements shall specify at least:
  - (i) the mechanism for the exchange of information between the competent authorities concerned; and
  - (ii) the procedures concerning the coordination of supervisory activities in order to enable the competent authority of the home Member State of the endorsing credit rating agency to monitor credit rating activities resulting in the issuing of the endorsed credit rating on an ongoing basis.

4. A credit rating endorsed in accordance with paragraph 3 shall be considered to be a credit rating issued by a credit rating agency established in the Community and registered in accordance with this Regulation.

A credit rating agency established in the Community and registered in accordance with this Regulation shall not use such endorsement with the intention of avoiding the requirements of this Regulation.

5. The credit rating agency that has endorsed a credit rating issued in a third country in accordance with paragraph 3 shall remain fully responsible for such a credit rating and for the fulfilment of conditions set out therein.

6. Where the Commission has recognised, in accordance with Article 5(6), the legal and supervisory framework of a third country as equivalent to the requirements of this Regulation and the cooperation arrangements referred to in Article 5(7) are operational, the credit rating agency endorsing credit ratings issued in that third country shall no longer be required to verify or demonstrate that the condition laid down in paragraph 3(g) of this Article is fulfilled.

<sup>(1)</sup> OJ L 345, 19.12.2002, p. 1.

<sup>(2)</sup> OJ L 323, 9.12.2005, p. 1.



## Article 5

**Equivalence and certification based on equivalence**

1. The credit ratings that are related to entities established or financial instruments issued in third countries and that are issued by a credit rating agency established in a third country may be used in the Community under Article 4(1) without being endorsed in accordance with Article 4(3), provided that:

- (a) the credit rating agency is authorised or registered in and is subject to supervision in that third country;
- (b) the Commission has adopted an equivalence decision in accordance with paragraph 6 of this Article, recognising the legal and supervisory framework of that third country as equivalent to the requirements of this Regulation;
- (c) the cooperation arrangements referred to in paragraph 7 of this Article are operational;
- (d) the credit ratings issued by the credit rating agency and its credit rating activities are not of systemic importance to the financial stability or integrity of the financial markets of one or more Member States; and
- (e) the credit rating agency is certified in accordance with paragraph 2 of this Article.

2. The credit rating agency referred to in paragraph 1 may apply for certification. The application shall be submitted to the Committee of European Securities Regulators (CESR) in accordance with the relevant provisions of Article 15. Within five working days of receipt of the application for certification, CESR shall send the application to the competent authorities of all Member States, inviting them to consider becoming a member of the relevant college in accordance with Article 29(3)(b). The competent authorities that have decided to become members of the college shall notify CESR accordingly within 10 working days of receipt of CESR's invitation. The competent authorities that notify CESR in accordance with this paragraph shall be members of the college. Within twenty working days of receipt of the application for certification, CESR shall draw up and publish on its website a list of the competent authorities that are members of the college. Within 10 working days of the publication, the members of the college shall select a facilitator in accordance with criteria in Article 29(5). Following the establishment of the college, its composition and functioning shall be governed by Article 29.

3. The application for certification shall be examined in accordance with the procedure set out in Article 16. The certification decision shall be based on the criteria set out in points (a) to (d) of paragraph 1 of this Article.

The certification decision shall be notified and published in accordance with Article 18.

4. The credit rating agency may also separately apply to be exempted:

- (a) on a case-by-case basis from complying with some or all of the requirements set out in Section A of Annex I and Article 7(4) if the credit rating agency is able to demonstrate that the requirements are not proportionate in view of the

nature, scale and complexity of its business and the nature and range of its issuing of credit ratings;

- (b) from the requirement of physical presence in the Community where such a requirement would be too burdensome and disproportionate in view of the nature, scale and complexity of its business and the nature and range of its issuing of credit ratings.

When assessing that application, the competent authorities shall take into consideration the size of the applicant credit rating agency, having regard to the nature, scale and complexity of its business and the nature and range of its issuing of credit ratings, as well as the impact of the credit ratings issued by the credit rating agency on the financial stability and integrity of the financial markets of one or more Member States. On the basis of those considerations, the competent authority may grant such exemption to the credit rating agency.

5. The decisions on the exemptions under paragraph 4 of this Article shall be subject to the relevant provisions and procedures set out in Article 16 with the exception of the second subparagraph of paragraph 7 of that Article. In the event of continued absence of agreement among the members of the relevant college on whether to grant an exemption to the credit rating agency, the facilitator shall adopt a fully reasoned decision.

For the purposes of certification, including the granting of exemptions, and supervision, the facilitator shall perform the tasks of the competent authority of the home Member State where relevant.

6. The Commission may adopt an equivalence decision in accordance with the regulatory procedure referred to in Article 38(3), stating that the legal and supervisory framework of a third country ensures that credit rating agencies authorised or registered in that third country comply with legally binding requirements which are equivalent to the requirements resulting from this Regulation and which are subject to effective supervision and enforcement in that third country.

A third-country legal and supervisory framework may be considered equivalent to this Regulation if that framework fulfils at least the following conditions:

- (a) credit rating agencies in that third country are subject to authorisation or registration and are subject to effective supervision and enforcement on an ongoing basis;
- (b) credit rating agencies in that third country are subject to legally binding rules which are equivalent to those set out in Articles 6 to 12 and Annex I; and
- (c) the regulatory regime in that third country prevents interference by the supervisory authorities and other public authorities of that third country with the content of credit ratings and methodologies.

The Commission shall specify further or amend the criteria set out in points (a) to (c) of the second subparagraph in order to take account of developments on financial markets. Those measures, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 38(2).



7. The facilitator shall establish cooperation agreements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 6. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between the competent authorities concerned; and
- (b) the procedures concerning the coordination of supervisory activities.

CESR shall coordinate the development of cooperation agreements between the competent authorities of Member States and the relevant competent authorities of third countries whose legal and supervisory frameworks have been considered equivalent to this Regulation in accordance with paragraph 6.

8. Articles 20, 24 and 25 shall apply *mutatis mutandis* to certified credit rating agencies and to credit ratings issued by them.

## TITLE II

### ISSUING OF CREDIT RATINGS

#### Article 6

#### **Independence and avoidance of conflicts of interest**

1. A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating is not affected by any existing or potential conflict of interest or business relationship involving the credit rating agency issuing the credit rating, its managers, rating analysts, employees, any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control.

2. In order to ensure compliance with paragraph 1, a credit rating agency shall comply with the requirements set out in Sections A and B of Annex I.

3. At the request of a credit rating agency, the competent authority of the home Member State may exempt a credit rating agency from complying with the requirements of points 2, 5 and 6 of Section A of Annex I and Article 7(4) if the credit rating agency is able to demonstrate that those requirements are not proportionate in view of the nature, scale and complexity of its business and the nature and range of issue of credit ratings and that:

- (a) the credit rating agency has fewer than 50 employees;
- (b) the credit rating agency has implemented measures and procedures, in particular internal control mechanisms, reporting arrangements and measures ensuring independence of rating analysts and persons approving credit ratings, which ensure the effective compliance with the objectives of this Regulation; and

- (c) the size of the credit rating agency is not determined in such a way as to avoid compliance with the requirements of this Regulation by a credit rating agency or a group of credit rating agencies.

In the case of a group of credit rating agencies, competent authorities shall ensure that at least one of the credit rating agencies in the group is not exempted from complying with the requirements of points 2, 5 and 6 of Section A of Annex I and Article 7(4).

#### Article 7

#### **Rating analysts, employees and other persons involved in the issuing of credit ratings**

1. A credit rating agency shall ensure that rating analysts, its employees and any other natural person whose services are placed at its disposal or under its control and who are directly involved in credit rating activities have appropriate knowledge and experience for the duties assigned.

2. A credit rating agency shall ensure that persons referred to in paragraph 1 shall not be allowed to initiate or participate in negotiations regarding fees or payments with any rated entity, related third party or any person directly or indirectly linked to the rated entity by control.

3. A credit rating agency shall ensure that persons referred to in paragraph 1 meet the requirements set out in Section C of Annex I.

4. A credit rating agency shall establish an appropriate gradual rotation mechanism with regard to the rating analysts and persons approving credit ratings as defined in Section C of Annex I. That rotation mechanism shall be undertaken in phases on the basis of individuals rather than of a complete team.

5. Compensation and performance evaluation of rating analysts and persons approving the credit ratings shall not be contingent on the amount of revenue that the credit rating agency derives from the rated entities or related third parties.

#### Article 8

#### **Methodologies, models and key rating assumptions**

1. A credit rating agency shall disclose to the public the methodologies, models and key rating assumptions it uses in its credit rating activities as defined in point 5 of Part I of Section E of Annex I.

2. A credit rating agency shall adopt, implement and enforce adequate measures to ensure that the credit ratings it issues are based on a thorough analysis of all the information that is available to it and that is relevant to its analysis according to its rating methodologies.

It shall adopt all necessary measures so that the information it uses in assigning a credit rating is of sufficient quality and from reliable sources.

3. A credit rating agency shall use rating methodologies that are rigorous, systematic, continuous and subject to validation based on historical experience, including back-testing.

4. Where a credit rating agency is using an existing credit rating prepared by another credit rating agency with respect to underlying assets or structured finance instruments, it shall not refuse to issue a credit rating of an entity or a financial instrument because a portion of the entity or the financial instrument had been previously rated by another credit rating agency.

A credit rating agency shall record all instances where in its credit rating process it departs from existing credit ratings prepared by another credit rating agency with respect to underlying assets or structured finance instruments providing a justification for the differing assessment.

5. A credit rating agency shall monitor credit ratings and review its credit ratings and methodologies on an ongoing basis and at least annually, in particular where material changes occur that could have an impact on a credit rating. A credit rating agency shall establish internal arrangements to monitor the impact of changes in macroeconomic or financial market conditions on credit ratings.

6. When methodologies, models or key rating assumptions used in credit rating activities are changed, a credit rating agency shall:

- (a) immediately, using the same means of communication as used for the distribution of the affected credit ratings, disclose the likely scope of credit ratings to be affected;
- (b) review the affected credit ratings as soon as possible and no later than six months after the change, in the meantime placing those ratings under observation; and
- (c) re-rate all credit ratings that have been based on those methodologies, models or key rating assumptions if, following the review, the overall combined effect of the changes affects those credit ratings.

#### Article 9

### Outsourcing

Outsourcing of important operational functions shall not be undertaken in such a way as to impair materially the quality of the credit rating agency's internal control and the ability of the competent authorities to supervise the credit rating agency's compliance with obligations under this Regulation.

#### Article 10

### Disclosure and presentation of credit ratings

1. A credit rating agency shall disclose any credit rating, as well as any decision to discontinue a credit rating, on a non-selective basis and in a timely manner. In the event of a decision to discontinue a credit rating, the information disclosed shall include full reasons for the decision.

The first subparagraph shall also apply to credit ratings that are distributed by subscription.

2. Credit rating agencies shall ensure that credit ratings are presented and processed in accordance with the requirements set out in Section D of Annex I.

3. When a credit rating agency issues credit ratings for structured finance instruments, it shall ensure that rating categories that are attributed to structured finance instruments are clearly differentiated using an additional symbol which distinguishes them from rating categories used for any other entities, financial instruments or financial obligations.

4. A credit rating agency shall disclose its policies and procedures regarding unsolicited credit ratings.

5. When a credit rating agency issues an unsolicited credit rating, it shall state prominently in the credit rating whether or not the rated entity or related third party participated in the credit rating process and whether the credit rating agency had access to the accounts and other relevant internal documents of the rated entity or a related third party.

Unsolicited credit ratings shall be identified as such.

6. A credit rating agency shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the credit ratings or any credit rating activities of the credit rating agency.

#### Article 11

### General and periodic disclosures

1. A credit rating agency shall fully disclose to the public and update immediately information relating to the matters set out in Part I of Section E of Annex I.

2. A credit rating agency shall make available in a central repository established by CESR information on its historical performance data including the ratings transition frequency and information about credit ratings issued in the past and on their changes. A credit rating agency shall provide information to that

repository on a standard form as provided for by CESR. CESR shall make that information accessible to the public and shall publish summary information on the main developments observed on an annual basis.

3. A credit rating agency shall provide annually to the competent authority of its home Member State and to CESR information relating to matters set out in point 2 of Part II of Section E Annex I. The competent authority of the home Member State shall disclose that information to the members of the relevant college.

#### Article 12

### Transparency report

A credit rating agency shall publish annually a transparency report which includes information on matters set out in Part III of Section E of Annex I. The credit rating agency shall publish its transparency report at the latest three months after the end of each financial year and shall ensure that it remains available on the website of the agency for at least five years.

#### Article 13

### Public disclosure fees

A credit rating agency shall not charge a fee for the information provided in accordance with Articles 8 to 12.

## TITLE III

### SURVEILLANCE OF CREDIT RATING ACTIVITIES

#### CHAPTER I

### Registration procedure

#### Article 14

### Requirement for registration

1. A credit rating agency shall apply for registration for the purposes of Article 2(1) provided that it is a legal person established in the Community.

2. The registration shall be effective for the entire territory of the Community once the registration decision issued by the competent authority of the home Member State as referred to in Article 16(7) or Article 17(7) has taken effect under the relevant national law.

3. A registered credit rating agency shall comply at all times with the conditions for initial registration.

A credit rating agency shall, without undue delay, notify CESR, the competent authority of its home Member State and the facilitator of any material changes to the conditions for initial registration, including any opening or closing of a branch within the Community.

4. Without prejudice to Articles 16 or 17, the competent authority of the home Member State shall register the credit rating agency if it concludes from the examination of the application that the credit rating agency complies with the conditions for the issuing of credit ratings set out in this Regulation, taking into consideration Articles 4 and 6.

5. Competent authorities shall not impose requirements regarding registration which are not provided for in this Regulation.

#### Article 15

### Application for registration

1. The credit rating agency shall submit an application for registration to CESR. The application shall contain information on the matters set out in Annex II.

2. Where a group of credit rating agencies applies for registration, the members of the group shall mandate one of their number to submit all the applications to CESR on behalf of the group. The mandated credit rating agency shall provide the information on the matters set out in Annex II for each member of the group.

3. A credit rating agency shall submit its application in the language which is required under the law of its home Member State and also in a language customary in the sphere of international finance.

An application for registration sent by CESR to the competent authority of the home Member State shall be considered to be an application submitted by the credit rating agency concerned.

4. Within five working days of receipt of the application, CESR shall transmit copies of the application to the competent authorities of all Member States.

Within 10 working days of receipt of the application, CESR shall provide advice to the competent authority of the home Member State on the completeness of the application.

5. Within 25 working days of receipt of the application, the competent authority of the home Member State and the members of the relevant college shall assess whether the application is complete, taking into account the advice of CESR referred to in paragraph 4. If the application is not complete, the competent authority of the home Member State shall set a deadline by which the credit rating agency is to provide additional information to it and to CESR and shall notify the members of the college and CESR accordingly.

After assessing an application as complete, the competent authority of the home Member State shall notify the credit rating agency, the members of the college and CESR accordingly.

6. Within five working days of receipt of the additional information referred to in paragraph 5, CESR shall transmit the additional information to the competent authorities of all other Member States.

*Article 16***Examination of the application for registration of a credit rating agency by the competent authorities**

1. The competent authority of the home Member State and the competent authorities which are members of the relevant college shall, within 60 working days of the notification referred to in the second subparagraph of Article 15(5):

- (a) jointly examine the application for registration; and
- (b) do everything reasonable within their power to reach an agreement on whether to grant or refuse registration of the credit rating agency based on the compliance of the credit rating agency with the conditions set out in this Regulation.

2. The facilitator may extend the period of examination by 30 working days, in particular if the credit rating agency:

- (a) envisages endorsing credit ratings as referred to in Article 4(3);
- (b) envisages using outsourcing; or
- (c) requests exemption from compliance in accordance with Article 6(3).

3. The facilitator shall coordinate the examination of the application submitted by the credit rating agency and shall ensure that all information necessary to carry out the examination of the application is shared among the members of the relevant college.

4. The competent authority of the home Member State shall prepare a fully reasoned draft decision following the agreement referred to in paragraph 1(b) and shall submit it to the facilitator.

In the absence of agreement among the members of the relevant college, the competent authority of the home Member State shall prepare a fully reasoned draft refusal decision based on the written opinions of the members of the college who oppose registration and shall submit it to the facilitator. The members of the college who are in favour of registration shall prepare and submit a detailed explanation of their opinions to the facilitator.

5. Within 60 working days of the notification referred to in the second subparagraph of Article 15(5), and in any event within 90 working days thereof in the event that paragraph 2 applies, the facilitator shall communicate to CESR a fully reasoned draft registration or refusal decision accompanied by the detailed explanations referred to in the second subparagraph of paragraph 4.

6. Within 20 working days of receipt of the communication referred to in paragraph 5, CESR shall provide its advice on the compliance of the credit rating agency with the requirements for the registration to the members of the relevant college. Following receipt of CESR's advice, the members of the college shall re-examine the draft decision.

7. The competent authority of the home Member State shall adopt a fully reasoned registration or refusal decision within 15 working days of receipt of CESR's advice. If the competent

authority of the home Member State departs from CESR's advice, it shall provide full reasons. If CESR has provided no advice, the competent authority of the home Member State shall adopt its decision within 30 working days of the communication to CESR of the draft decision in accordance with paragraph 5.

In the event of a continued absence of agreement among the members of the relevant college, the competent authority of the home Member State shall adopt a fully reasoned refusal decision, which shall identify the dissenting competent authorities and shall include a description of their opinions.

*Article 17***Examination of the applications for registration of a group of credit rating agencies by the competent authorities**

1. The facilitator and the competent authorities who are members of the relevant college shall, within 60 working days of the notification referred to in the second subparagraph of Article 15(5):

- (a) jointly examine the applications for registration; and
- (b) do everything reasonable within their power to reach an agreement on whether to grant or refuse registration of the members of the group of credit rating agencies based on the compliance of those credit rating agencies with the conditions set out in this Regulation.

2. The facilitator may extend the period of examination by 30 working days, in particular if any of credit rating agencies in the group:

- (a) envisages endorsing credit ratings as referred to in Article 4(3);
- (b) envisages using outsourcing; or
- (c) requests exemption from compliance in accordance with Article 6(3).

3. The facilitator shall coordinate the examination of the applications submitted by the group of credit rating agencies and shall ensure that all information necessary to carry out the examination of the applications is shared among the members of the relevant college.

4. The competent authorities of the home Member States shall prepare individual fully reasoned draft decisions for each credit rating agency of the group following the agreement referred to in paragraph 1(b) and shall submit it to the facilitator.

In the absence of agreement among the members of the relevant college, the competent authorities of the home Member States shall prepare fully reasoned draft refusal decisions based on the written opinions of the members of the college who oppose registration and shall submit them to the facilitator. The members of the college who are in favour of registration shall prepare and submit a detailed explanation of their opinions to the facilitator.

5. Within 60 working days of the notification as referred to in the second subparagraph of Article 15(5), and in any event within



90 working days thereof in the event that paragraph 2 applies, the facilitator shall communicate to CESR fully reasoned individual draft registration or refusal decisions accompanied by the detailed explanations referred to in the second subparagraph of paragraph 4.

6. Within 20 working days of receipt of the communication referred to in paragraph 5, CESR shall provide its advice on the compliance of the credit rating agencies of the group with the requirements for the registration to the members of the relevant college. Following receipt of CESR's advice, the members of the college shall re-examine the draft decisions.

7. The competent authorities of the home Member States shall adopt fully reasoned registration or refusal decisions within 15 working days of receipt of the advice of CESR. If the competent authorities of the home Member States depart from CESR's advice, they shall provide full reasons. If CESR has provided no advice, the competent authorities of the home Member States shall adopt their decisions within 30 working days of the communication to CESR of the draft decisions in accordance with paragraph 5.

In the event of continued absence of agreement among the members of the relevant college on whether to register any of the credit rating agencies of the group, the competent authority of the home Member State of such credit rating agency shall adopt a fully reasoned refusal decision, which shall identify the dissenting competent authorities and shall include a description of their opinions.

#### Article 18

##### **Notification of the decision on the registration, refusal of registration or the withdrawal of registration of a credit rating agency**

1. Within five working days of the adoption of a decision under Articles 16 or 17 the competent authority of the home Member State shall notify the credit rating agency concerned whether or not it has been registered. Where the competent authority of the home Member State refuses to register the credit rating agency, it shall provide full reasons in its decision.

2. The competent authority of the home Member State shall notify the Commission, CESR and the other competent authorities of any decision under Article 16, 17 or 20.

3. The Commission shall publish in the *Official Journal of the European Union* and on its website a list of credit rating agencies registered in accordance with this Regulation. That list shall be updated within 30 days of the notification referred to in paragraph 2.

#### Article 19

##### **Registration and supervisory fees**

The competent authority of the home Member State may charge registration and/or supervisory fees to the credit rating agency. The registration and/or supervisory fees shall be proportionate to the cost incurred by the competent authority of the home Member State.

#### Article 20

##### **Withdrawal of registration**

1. The competent authority of the home Member State shall withdraw the registration of a credit rating agency where the credit rating agency:

- (a) expressly renounces the registration or has provided no credit ratings for the preceding six months;
- (b) has obtained the registration by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which it was registered; or
- (d) has seriously or repeatedly infringed the provisions of this Regulation governing the operating conditions for credit rating agencies.

2. Where the competent authority of the home Member State considers that one of the conditions referred to in paragraph 1 has been met, it shall notify the facilitator and closely cooperate with members of the relevant college in order to decide whether or not to withdraw the registration of the credit rating agency.

The members of the college shall carry out a joint assessment and do everything reasonable within their power to reach an agreement on the necessity to withdraw the registration to the credit rating agency.

In the absence of agreement, the competent authority of the home Member State shall, at the request of any of the other members of the college or on its own initiative, request advice from CESR. CESR shall provide its advice within 15 working days of receipt of such request.

The competent authority of each home Member State shall adopt an individual withdrawal decision on the basis of the agreement reached within the college.

In the absence of an agreement between the members of the college within 30 working days of notification to the facilitator as referred to in the first subparagraph, the competent authority of the home Member State may adopt an individual withdrawal decision. Any deviation of its decision from the opinions expressed by the other members of the college and, where appropriate, the advice provided by CESR shall be fully reasoned.

3. The competent authority of a Member State in which credit ratings issued by the credit rating agency concerned are used and which considers that one of the conditions referred to in paragraph 1 has been met may request the relevant college to examine whether the conditions for withdrawal of registration are met. If the competent authority of the home Member State decides not to withdraw the registration of the credit rating agency concerned, it shall provide full reasons.

4. The decision on the withdrawal of registration shall take immediate effect throughout the Community, subject to the transitional period for the use of credit ratings referred to in Article 24(2).



## CHAPTER II

**CESR and competent authorities**

## Article 21

**Committee of European Securities Regulators**

1. CESR shall provide advice to the competent authorities in the cases provided for in this Regulation. The competent authorities shall consider that advice before taking any final decision under this Regulation.

2. By 7 June 2010, CESR shall issue guidance on:

- (a) the registration process and coordination arrangements between competent authorities and with CESR, including on the information set out in Annex II, and language regime for applications submitted to CESR;
- (b) the operational functioning of the colleges, including on the modalities for determining the membership to the colleges, the application of the criteria for the selection of the facilitator referred to in Article 29(5)(a) to (d), the written arrangements for the operation of colleges and the coordination arrangements between colleges;
- (c) the application of the endorsement regime under Article 4(3) by competent authorities; and
- (d) common standards on the presentation of the information, including structure, format, method and period of reporting, that credit rating agencies shall disclose in accordance with Article 11(2) and point 1 of Part II of Section E of Annex I.

3. By 7 September 2010, CESR shall issue guidance on:

- (a) enforcement practices and activities to be conducted by competent authorities under this Regulation;
- (b) common standards for assessment of compliance of credit rating methodologies with the requirements set out in Article 8(3);
- (c) types of measures referred to in Article 24(1)(d) to ensure that credit rating agencies continue to comply with legal requirements; and
- (d) information that the credit rating agency must provide for the application for certification and for the assessment of its systemic importance to the financial stability or integrity of financial markets referred to in Article 5.

4. CESR shall publish, annually and for the first time by 7 December 2010, a report on the application of this Regulation. That report shall contain, in particular, an assessment of the implementation of Annex I by the credit rating agencies registered under this Regulation.

5. CESR shall cooperate with the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC<sup>(1)</sup> and the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC<sup>(2)</sup> and shall consult those Committees before publishing guidance referred to in paragraphs 2 and 3.

## Article 22

**Competent authorities**

1. By 7 June 2010, each Member State shall designate a competent authority for the purpose of this Regulation.

2. Competent authorities shall be adequately staffed, with regard to capacity and expertise, in order to be able to apply this Regulation.

## Article 23

**Powers of competent authorities**

1. In carrying out their duties under this Regulation, neither the competent authorities nor any other public authorities of a Member State shall interfere with the content of credit ratings or methodologies.

2. In order to carry out their duties under this Regulation, the competent authorities shall, in conformity with national law, have all the supervisory and investigatory powers that are necessary for the exercise of their functions. They shall exercise their powers:

- (a) directly;
- (b) in collaboration with other authorities; or
- (c) by application to the competent judicial authorities.

3. In order to carry out their duties under this Regulation, the competent authorities shall, in conformity with national law, have the power in their supervisory capacity to:

- (a) access any document in any form and to receive or take a copy thereof;
- (b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections with or without announcement; and
- (d) require records of telephone and data traffic.

The competent authorities may use the powers referred to in the first subparagraph only in relation to credit rating agencies, persons involved in credit rating activities, rated entities and related third parties, third parties to whom the credit rating agencies have outsourced certain functions or activities, and persons otherwise

<sup>(1)</sup> OJ L 25, 29.1.2009, p. 23.

<sup>(2)</sup> OJ L 25, 29.1.2009, p. 28.

related or connected to credit rating agencies or credit rating activities.

#### Article 24

##### **Supervisory measures by the competent authorities of the home Member State**

1. Where the competent authority of the home Member State has established that a registered credit rating agency breaches the obligations arising from this Regulation, it may take the following measures:

- (a) withdraw the registration of that credit rating agency in accordance with Article 20;
- (b) temporarily prohibit that credit rating agency from issuing credit ratings with effect throughout the Community;
- (c) suspend the use, for regulatory purposes, of the credit ratings issued by that credit rating agency with effect throughout the Community;
- (d) take appropriate measures to ensure that credit rating agencies continue to comply with legal requirements;
- (e) issue public notices;
- (f) refer matters for criminal prosecution to its relevant national authorities.

2. Credit ratings may continue to be used for regulatory purposes following the adoption of measures in points (a) and (c) of paragraph 1 during a period not exceeding:

- (a) ten working days if there are credit ratings of the same financial instrument or entity issued by other credit rating agencies registered under this Regulation; or
- (b) three months if there are no credit ratings of the same financial instrument or entity issued by other credit rating agencies registered under this Regulation.

A competent authority may extend the period referred to in point (b) of the first subparagraph by three months in exceptional circumstances relating to the potential for market disruption or financial instability.

3. Before taking any measures referred to in paragraph 1, the competent authority of the home Member State shall notify the facilitator and shall consult the members of the relevant college. The members of the college shall do everything reasonable within their power to reach an agreement on the necessity to take any measures referred to in paragraph 1.

In the absence of agreement between the members of the college, the competent authority of the home Member State shall, at the request of any member of the college or on its own initiative, request advice from CESR. CESR shall provide its advice within 10 working days of receipt of such request.

In the absence of agreement between the members of the college on whether to take any measures referred to in paragraph 1 within 15 working days after the matter was notified to the facilitator as referred to in the first subparagraph, the competent authority of the home Member State may adopt a decision. Any deviation of that decision from the opinions expressed by the other members of the college and, where appropriate, the advice provided by CESR shall be fully reasoned. The competent authority of the home Member State shall notify its decision, without undue delay, to the facilitator and CESR.

This paragraph shall apply without prejudice to Article 20.

#### Article 25

##### **Supervisory measures by competent authorities other than the competent authority of the home Member State**

1. Where the competent authority of a Member State has established that a registered credit rating agency whose ratings are used within its territory breaches the obligations arising from this Regulation, it may take the following measures:

- (a) adopt the supervisory measures referred to in Article 24(1)(e) and (f);
- (b) adopt measures referred to in Article 24(1)(d) within its jurisdiction and, where so doing, duly consider the measures already taken or envisaged by the competent authority of the home Member State;
- (c) impose the suspension of the use of credit ratings of that credit rating agency for regulatory purposes by institutions referred to in Article 4(1) whose registered office is located within its jurisdiction, subject to the transitional period referred to in Article 24(2);
- (d) request the relevant college to examine whether the measures referred to in points (b), (c) or (d) of Article 24(1) are needed.

2. Before the adoption of measures referred to in points (a), (b) or (c) of paragraph 1, the competent authority shall notify the facilitator and consult the members of the relevant college. The members of the college shall do everything reasonable within their power to reach an agreement on the necessity to take any measures referred to in points (a) and (b) of paragraph 1. In the event of disagreement, the facilitator shall, at the request of any of the members of the college or on its own initiative, request advice from CESR. CESR shall provide its advice within 10 working days of receipt of such request.

3. In the absence of an agreement between the members of the relevant college within 15 working days of the matter being notified to the facilitator in accordance with paragraph 2, the competent authority of the Member State concerned may adopt a decision. Any deviation of its decision from the opinions expressed by the other members of the college and, where appropriate, the advice provided by CESR shall be fully reasoned. The competent authority of the Member State concerned shall notify its decision, without undue delay, to the facilitator and CESR.

4. This Article shall apply without prejudice to Article 20.

## CHAPTER III

**Cooperation between competent authorities**

## Article 26

**Obligation to cooperate**

1. The competent authorities shall cooperate where it is necessary for the purposes of this Regulation, including in cases where the conduct under investigation does not constitute an infringement of any legislative or regulatory provision in force in the Member State concerned.

2. The competent authorities shall also cooperate closely with the competent authorities responsible for supervision of the undertakings referred to in Article 4(1).

## Article 27

**Exchange of information**

1. The competent authorities shall, without undue delay, supply each other with the information required for the purposes of carrying out their duties under this Regulation.

2. The competent authorities may transmit to the competent authorities responsible for supervising the undertakings referred to in Article 4(1), central banks, the European System of Central Banks and the European Central Bank, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks. Similarly, such authorities or bodies shall not be prevented from communicating to the competent authorities information that the competent authorities may need in order to carry out their duties under this Regulation.

## Article 28

**Cooperation in case of a request with regard to on-site inspections or investigations**

1. The competent authority of one Member State may request the assistance of the competent authority of another Member State with regard to on-site inspections or investigations.

The competent authority making such request shall inform CESR of any request referred to in the first subparagraph. In the event of an investigation or inspection with cross-border effect, the competent authorities may request CESR to assume coordination of the investigation or inspection.

2. Where a competent authority receives a request from a competent authority of another Member State to carry out an on-site inspection or an investigation, it shall:

- (a) carry out the on-site inspection or investigation itself;
- (b) allow the competent authority which submitted the request to participate in an on-site inspection or investigation;

- (c) allow the competent authority which submitted the request to carry out the on-site inspection or investigation itself;
- (d) appoint auditors or experts to carry out the on-site inspection or investigation; or
- (e) share specific tasks related to supervisory activities with the other competent authorities.

## Article 29

**Colleges of competent authorities**

1. Within 10 working days of receipt of an application for registration under Article 15, the competent authority of the home Member State, or, in the case of a group of credit rating agencies, the competent authority of the home Member State of the credit rating agency mandated under Article 15(2), shall establish a college of competent authorities in order to facilitate the exercise of the tasks referred to in Articles 4, 5, 6, 16, 17, 20, 24, 25 and 28.

2. The college shall comprise the competent authority of the home Member State and the competent authorities referred to in paragraph 3 in the case of a single agency, or the competent authorities of the home Member States and the competent authorities referred to in paragraph 3 in the case of a group of rating agencies.

3. A competent authority other than the competent authority of the home Member State may at any time decide to become a member of the college provided that:

- (a) a branch which is a part of the credit rating agency or of one of the undertakings in the group of credit rating agencies is established within its jurisdiction; or
- (b) the use for regulatory purposes of credit ratings issued by the credit rating agency or the group of credit rating agencies concerned is widespread or has or is likely to have a significant impact within its jurisdiction.

4. The competent authorities other than the members of the college as referred to in paragraph 3 in the jurisdictions of which the credit ratings issued by the credit rating agency or by the group of credit rating agencies concerned are used may participate in a meeting or in an activity of the college.

5. Within 15 working days of the establishment of the college, its members shall select a facilitator, consulting CESR in the absence of agreement. For that purpose, at least the following criteria shall be taken into account:

- (a) the relationship between the competent authority and the credit rating agency or the group of credit rating agencies;
- (b) the extent to which credit ratings will be used for regulatory purposes in a particular territory or territories;
- (c) the place in the Community where the credit rating agency or group of credit rating agencies pursues or is planning to pursue the most important part of its credit rating activities; and

- (d) administrative convenience, burden optimisation, and an appropriate distribution of the workload.

Members of the college shall review the selection of the facilitator at least every five years to ensure the selected facilitator remains the most appropriate following the criteria referred to in the first subparagraph.

6. The facilitator shall chair the meetings of the college, coordinate the actions of the college and ensure efficient exchange of information among members of the college.

7. In order to ensure close cooperation between competent authorities within the college, the facilitator shall, within 10 working days of his or her selection, establish written coordination arrangements within the framework of the college regarding the following matters:

- (a) information to be exchanged between competent authorities;
- (b) the decision-making process between the competent authorities, without prejudice to Articles 16, 17, and 20;
- (c) cases in which the competent authorities must consult each other;
- (d) cases in which the competent authorities must apply the mediation mechanism referred to in Article 31; and
- (e) cases in which the competent authorities may delegate supervisory tasks in accordance with Article 30.

8. In the absence of agreement concerning the written coordination arrangements under paragraph 7, any member of the college may refer the matter to CESR. The facilitator shall give due consideration to any advice provided by CESR concerning the written coordination arrangements before agreeing their final text. The written coordination arrangements shall be set out in a single document containing full reasons for any significant deviation from the advice of CESR. The facilitator shall transmit the written coordination arrangements to the members of the college and to CESR.

#### Article 30

##### Delegation of tasks between competent authorities

The competent authority of the home Member State may delegate any of its tasks to the competent authority of another Member State subject to the agreement of that authority. Delegation of tasks shall not affect the responsibility of the delegating competent authority.

#### Article 31

##### Mediation

1. CESR shall establish a mediation mechanism to assist in finding a common view among the competent authorities concerned.

2. In the event of disagreement between competent authorities concerning an examination or action under this Regulation,

they shall refer the matter to CESR for mediation. The competent authorities concerned shall give due consideration to the advice of CESR and shall provide full reasons for any deviation from that advice.

#### Article 32

##### Professional secrecy

1. The obligation of professional secrecy shall apply to all persons who work or who have worked for CESR, for the competent authority or for any authority or person to whom the competent authority has delegated tasks, including auditors and experts contracted by the competent authority. Information covered by professional secrecy shall not be disclosed to another person or authority except where such disclosure is necessary for legal proceedings.

2. All the information exchanged between CESR and the competent authorities and between competent authorities under this Regulation shall be considered confidential, except where CESR or the competent authority concerned states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings.

#### Article 33

##### Disclosure of information from another Member State

The competent authority of a Member State may disclose the information received from a competent authority of another Member State only if it has obtained the express agreement of the competent authority that transmitted the information and, where applicable, the information is disclosed only for the purposes for which that competent authority gave its agreement, or where such disclosure is necessary for legal proceedings.

#### CHAPTER IV

##### Cooperation with third countries

#### Article 34

##### Agreement on exchange of information

The competent authorities may conclude cooperation agreements on exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 32.

Such exchange of information shall be intended for the performance of the tasks of those competent authorities.

With regard to transfer of personal data to a third country, Member States shall apply Directive 95/46/EC.

#### Article 35

##### Disclosure of information from third countries

The competent authority of a Member State may disclose the information received from competent authorities of third



countries only if it has obtained the express agreement of the competent authority that has transmitted the information and, where applicable, the information is disclosed only for the purposes for which that competent authority gave its agreement, or where such disclosure is necessary for legal proceedings.

#### TITLE IV

### PENALTIES, COMMITTEE PROCEDURE, REPORTING AND TRANSITIONAL AND FINAL PROVISIONS

#### CHAPTER I

#### *Penalties, committee procedure and reporting*

##### Article 36

#### **Penalties**

Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Member States shall ensure that the competent authority disclose to the public every penalty that has been imposed for infringement of this Regulation, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

By 7 December 2010 the Member States shall notify the rules referred to in the first subparagraph to the Commission. They shall notify the Commission without delay of any subsequent amendment thereto.

##### Article 37

#### **Amendments to Annexes**

The Commission may amend the Annexes in order to take account of developments, including international developments, on financial markets, in particular in relation to new financial instruments and with regard to convergence of supervisory practice.

Those measures, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 38(2).

##### Article 38

#### **Committee procedure**

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>(1)</sup>.

<sup>(1)</sup> OJ L 191, 13.7.2001, p. 45.

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. Where reference is made to this paragraph, Article 5 and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

#### Article 39

#### **Reports**

1. By 7 December 2012, the Commission shall make an assessment of the application of this Regulation, including an assessment of the reliance on credit ratings in the Community, the impact on the level of concentration in the credit rating market, the cost and benefit of impacts of the Regulation and of the appropriateness of the remuneration of the credit rating agency by the rated entity (issuer-pays model), and submit a report thereon to the European Parliament and the Council.

2. By 7 December 2010, the Commission shall, in the light of discussions with the competent authorities, assess the application of Title III of this Regulation, in particular of the cooperation of the competent authorities, the legal status of CESR and supervisory practices. The Commission shall present a report on those matters to the European Parliament and to the Council, accompanied, where appropriate, by proposals for a review of that Title.

That report shall include a reference to the Commission proposal of 12 November 2008 for a regulation on credit rating agencies and to the report of the Committee on Economic and Monetary Affairs of the European Parliament of 23 March 2009 relating to that proposal.

3. By 7 December 2010, the Commission shall, in the light of developments in the regulatory and supervisory framework for credit rating agencies in third countries, present a report to the European Parliament and to the Council concerning the effects of those developments and of the transitional provisions referred to in Article 40 on the stability of financial markets in the Community.

#### CHAPTER II

#### **Transitional and final provisions**

##### Article 40

#### **Transitional provision**

Credit rating agencies operating in the Community before 7 June 2010 (existing credit rating agencies), which intend to apply for registration under this Regulation, shall adopt all necessary measures to comply with its provisions by 7 September 2010.



Credit rating agencies shall submit their application for registration no earlier than 7 June 2010. Existing credit rating agencies shall submit their application for registration by 7 September 2010

Existing credit rating agencies may continue issuing credit ratings which may be used for regulatory purposes by the financial institutions referred to in Article 4(1) unless registration is refused. Where registration is refused, Article 24(2) shall apply.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 16 September 2009.

*For the European Parliament*  
*The President*  
J. BUZEK

*For the Council*  
*The President*  
C. MALMSTRÖM

*Article 41*

**Entry into force**

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from its date of entry into force. However:

- Article 4(1) shall apply from 7 December 2010 and
- points (f), (g) and (h) of Article 4(3) shall apply from 7 June 2011.

## ANNEX I

**INDEPENDENCE AND AVOIDANCE OF CONFLICTS OF INTEREST****Section A****Organisational requirements**

1. The credit rating agency shall have an administrative or supervisory board. Its senior management shall ensure that:
  - (a) credit rating activities are independent, including from all political and economic influences or constraints;
  - (b) conflicts of interest are properly identified, managed and disclosed;
  - (c) the credit rating agency complies with the remaining requirements of this Regulation.
2. A credit rating agency shall be organised in a way that ensures that its business interest does not impair the independence or accuracy of the credit rating activities.

The senior management of a credit rating agency shall be of good repute and sufficiently skilled and experienced, and shall ensure the sound and prudent management of the credit rating agency.

At least one third, but no less than two, of the members of the administrative or supervisory board of a credit rating agency shall be independent members who are not involved in credit rating activities.

The compensation of the independent members of the administrative or supervisory board shall not be linked to the business performance of the credit rating agency and shall be arranged so as to ensure the independence of their judgement. The term of office of the independent members of the administrative or supervisory board shall be for a pre-agreed fixed period not exceeding five years and shall not be renewable. The dismissal of independent members of the administrative or supervisory board shall take place only in case of misconduct or professional underperformance.

The majority of members of the administrative or supervisory board, including its independent members, shall have sufficient expertise in financial services. Provided that the credit rating agency issues credit ratings of structured finance instruments, at least one independent member and one other member of the board shall have in-depth knowledge and experience at a senior level of the markets in structured finance instruments.

In addition to the overall responsibility of the board, the independent members of the administrative or supervisory board shall have the specific task of monitoring:

- (a) the development of the credit rating policy and of the methodologies used by the credit rating agency in its credit rating activities;
- (b) the effectiveness of the internal quality control system of the credit rating agency in relation to credit rating activities;
- (c) the effectiveness of measures and procedures instituted to ensure that any conflicts of interest are identified, eliminated or managed and disclosed; and
- (d) the compliance and governance processes, including the efficiency of the review function referred to in point 9 of this Section.

Opinions of the independent members of administrative or supervisory board issued on the matters referred to in points (a) to (d) shall be presented to the board periodically and shall be made available to the competent authority on request.

3. A credit rating agency shall establish adequate policies and procedures to ensure compliance with its obligations under this Regulation.
4. A credit rating agency shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

Those internal control mechanisms shall be designed to secure compliance with decisions and procedures at all levels of the credit rating agency.

A credit rating agency shall implement and maintain decision-making procedures and organisational structures which clearly and in a documented manner specify reporting lines and allocate functions and responsibilities.

5. A credit rating agency shall establish and maintain a permanent and effective compliance function department (compliance function) which operates independently. The compliance function shall monitor and report on compliance of the credit rating agency and its employees with the credit rating agency's obligations under this Regulation. The compliance function shall:
  - (a) monitor and, on a regular basis, assess the adequacy and effectiveness of the measures and procedures put in place in accordance with point 3, and the actions taken to address any deficiencies in the credit rating agency's compliance with its obligations;
  - (b) advise and assist the managers, rating analysts, employees as well as any other natural person whose services are placed at the disposal or under the control of the credit rating agency or any person directly or indirectly linked to it by control who is responsible for carrying out credit rating activities, to comply with the credit rating agency's obligations under this Regulation.
6. In order to enable the compliance function to discharge its responsibilities properly and independently, a credit rating agency shall ensure that the following conditions are satisfied:
  - (a) the compliance function has the necessary authority, resources, expertise and access to all relevant information;
  - (b) a compliance officer is appointed and is responsible for the compliance function and for any reporting with regard to compliance required by point 3;
  - (c) the managers, rating analysts, employees and any other natural person whose services are placed at the disposal or under the control of the credit rating agency or any person directly or indirectly linked to it by control who is involved in the compliance function is not involved in the performance of credit rating activities they monitor;
  - (d) the compensation of the compliance officer is not linked to the business performance of the credit rating agency and is arranged so as to ensure the independence of his or her judgement.

The compliance officer shall ensure that any conflicts of interest relating to the persons placed at the disposal of the compliance function are properly identified and eliminated.

The compliance officer shall report regularly on the carrying out of his or her duties to senior management and the independent members of the administrative or supervisory board.

7. A credit rating agency shall establish appropriate and effective organisational and administrative arrangements to prevent, identify, eliminate or manage and disclose any conflicts of interest referred to in point 1 of Section B. It shall arrange for records to be kept of all significant threats to the independence of the credit rating activities, including those to the rules on rating analysts referred to in Section C, as well as the safeguards applied to mitigate those threats.
8. A credit rating agency shall employ appropriate systems, resources and procedures to ensure continuity and regularity in the performance of its credit rating activities.
9. A credit rating agency shall establish a review function responsible for periodically reviewing its methodologies, models and key rating assumptions, such as mathematical or correlation assumptions, and any significant changes or modifications thereto as well as the appropriateness of those methodologies, models and key rating assumptions where they are used or intended to be used for the assessment of new financial instruments.

That review function shall be independent of the business lines which are responsible for credit rating activities and report to the members of the administrative or supervisory board referred to in point 2 of this Section.

10. A credit rating agency shall monitor and evaluate the adequacy and effectiveness of its systems, internal control mechanisms and arrangements established in accordance with this Regulation and take appropriate measures to address any deficiencies.

**Section B****Operational requirements**

1. A credit rating agency shall identify, eliminate or manage and disclose, clearly and prominently, any actual or potential conflicts of interest that may influence the analyses and judgments of its rating analysts, employees, or any other natural person whose services are placed at the disposal or under the control of the credit rating agency and who are directly involved in the issuing of credit rating and persons approving credit ratings.
2. A credit rating agency shall disclose to the public the names of the rated entities or related third parties from which it receives more than 5 % of its annual revenue.
3. A credit rating agency shall not issue a credit rating in any of the following circumstances, or shall, in the case of an existing credit rating, immediately disclose where the credit rating is potentially affected by the following:
  - (a) the credit rating agency or persons referred to in point 1, directly or indirectly owns financial instruments of the rated entity or a related third party or has any other direct or indirect ownership interest in that entity or party, other than holdings in diversified collective investment schemes, including managed funds such as pension funds or life insurance;
  - (b) the credit rating is issued with respect to the rated entity or a related third party directly or indirectly linked to the credit rating agency by control;
  - (c) a person referred to in point 1 is a member of the administrative or supervisory board of the rated entity or a related third party; or
  - (d) a rating analyst who participated in determining a credit rating, or a person who approved a credit rating, has had a relationship with the rated entity or a related third party which may cause a conflict of interests.

A credit rating agency shall also immediately assess whether there are grounds for re-rating or withdrawing the existing credit rating.

4. A credit rating agency shall not provide consultancy or advisory services to the rated entity or a related third party regarding the corporate or legal structure, assets, liabilities or activities of that rated entity or related third party.

A credit rating agency may provide services other than issue of credit ratings (ancillary services). Ancillary services are not part of credit rating activities; they comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis as well as related distribution services.

A credit rating agency shall ensure that the provision of ancillary services does not present conflicts of interest with its credit rating activities and shall disclose in the final ratings reports any ancillary services provided for the rated entity or any related third party.

5. A credit rating agency shall ensure that rating analysts or persons who approve ratings do not make proposals or recommendations, either formally or informally, regarding the design of structured finance instruments on which the credit rating agency is expected to issue a credit rating.
6. A credit rating agency shall design its reporting and communication channels so as to ensure the independence of the persons referred to in point 1 from the other activities of the credit rating agency carried out on a commercial basis.
7. A credit rating agency shall arrange for adequate records and, where appropriate, audit trails of its credit rating activities to be kept. Those records shall include:
  - (a) for each credit rating decision, the identity of the rating analysts participating in the determination of the credit rating, the identity of the persons who have approved the credit rating, information as to whether the credit rating was solicited or unsolicited, and the date on which the credit rating action was taken;
  - (b) the account records relating to fees received from any rated entity or related third party or any user of ratings;
  - (c) the account records for each subscriber to the credit ratings or related services;



- (d) the records documenting the established procedures and methodologies used by the credit rating agency to determine credit ratings;
  - (e) the internal records and files, including non-public information and work papers, used to form the basis of any credit rating decision taken;
  - (f) credit analysis reports, credit assessment reports and private credit rating reports and internal records, including non-public information and work papers, used to form the basis of the opinions expressed in such reports;
  - (g) records of the procedures and measures implemented by the credit rating agency to comply with this Regulation; and
  - (h) copies of internal and external communications, including electronic communications, received and sent by the credit rating agency and its employees, that relate to credit rating activities.
8. Records and audit trails referred to in point 7 shall be kept at the premises of the registered credit rating agency for at least five years and be made available upon request to the competent authorities of the Member States concerned.

Where the registration of a credit rating agency is withdrawn, the records shall be kept for an additional term of at least three years.

9. Records which set out the respective rights and obligations of the credit rating agency and the rated entity or its related third parties under an agreement to provide credit rating services shall be retained for at least the duration of the relationship with that rated entity or its related third parties.

### Section C

#### Rules on rating analysts and other persons directly involved in credit rating activities

1. Rating analysts, employees of the credit rating agency as well as any other natural person whose services are placed at the disposal or under the control of the credit rating agency and who is directly involved in credit rating activities, and persons closely associated with them within the meaning of Article 1(2) of Directive 2004/72/EC <sup>(1)</sup>, shall not buy or sell or engage in any transaction in any financial instrument issued, guaranteed, or otherwise supported by any rated entity within their area of primary analytical responsibility other than holdings in diversified collective investment schemes, including managed funds such as pension funds or life insurance.
2. No person referred to in point 1 shall participate in or otherwise influence the determination of a credit rating of any particular rated entity if that person:
  - (a) owns financial instruments of the rated entity, other than holdings in diversified collective investment schemes;
  - (b) owns financial instruments of any entity related to a rated entity, the ownership of which may cause or may be generally perceived as causing a conflict of interest, other than holdings in diversified collective investment schemes;
  - (c) has had a recent employment, business or other relationship with the rated entity that may cause or may be generally perceived as causing a conflict of interest.
3. Credit rating agencies shall ensure that persons referred to in point 1:
  - (a) take all reasonable measures to protect property and records in possession of the credit rating agency from fraud, theft or misuse, taking into account the nature, scale and complexity of their business and the nature and range of their credit rating activities;
  - (b) do not disclose any information about credit ratings or possible future credit ratings of the credit rating agency, except to the rated entity or its related third party;

<sup>(1)</sup> Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ L 162, 30.4.2004, p. 70).

- (c) do not share confidential information entrusted to the credit rating agency with rating analysts and employees of any person directly or indirectly linked to it by control, as well as with any other natural person whose services are placed at the disposal or under the control of any person directly or indirectly linked to it by control, and who is directly involved in the credit rating activities; and
  - (d) do not use or share confidential information for the purpose of trading financial instruments, or for any other purpose except the conduct of the credit rating activities.
4. Persons referred to in point 1 shall not solicit or accept money, gifts or favours from anyone with whom the credit rating agency does business.
  5. If a person referred to in point 1 considers that any other such person has engaged in conduct that he or she considers to be illegal, he or she shall report such information immediately to the compliance officer without negative consequences to him or herself.
  6. Where a rating analyst terminates his or her employment and joins a rated entity, which he or she has been involved in rating, or a financial firm, with which he or she has had dealings as part of his or her duties at the credit rating agency, the credit rating agency shall review the relevant work of the rating analyst over two years preceding his or her departure.
  7. A person referred to in point 1 shall not take up a key management position with the rated entity or its related third party within six months of the credit rating.
  8. For the purpose of Article 7(4), credit rating agencies shall ensure that:
    - (a) the lead rating analysts shall not be involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding four years;
    - (b) the rating analysts shall not be involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding five years;
    - (c) the persons approving credit ratings shall not be involved in credit rating activities related to the same rated entity or its related third parties for a period exceeding seven years.

The persons referred to points (a), (b) and (c) of the first subparagraph shall not be involved in credit rating activities related to the rated entity or related third parties referred to in those points within two years of end of the periods set out in those points.

## Section D

### Rules on the presentation of credit ratings

#### I. *General obligations*

1. A credit rating agency shall ensure that any credit rating states clearly and prominently the name and job title of the lead rating analyst in a given credit rating activity and the name and position of the person primarily responsible for approving the credit rating.
2. A credit rating agency shall ensure that at least:
  - (a) all substantially material sources, including the rated entity or, where appropriate, a related third party, which were used to prepare the credit rating are indicated together with an indication as to whether the credit rating has been disclosed to that rated entity or its related third party and amended following that disclosure before being issued;
  - (b) the principal methodology or version of methodology that was used in determining the rating is clearly indicated, with a reference to its comprehensive description; where the credit rating is based on more than one methodology, or where reference only to the principal methodology might cause investors to overlook other important aspects of the credit rating, including any significant adjustments and deviations, the credit rating agency shall explain this fact in the credit rating and indicate how the different methodologies or these other aspects are taken into account in the credit rating;

- (c) the meaning of each rating category, the definition of default or recovery and any appropriate risk warning, including a sensitivity analysis of the relevant key rating assumptions, such as mathematical or correlation assumptions, accompanied by worst-case scenario credit ratings as well as best-case scenario credit ratings are explained;
  - (d) the date at which the credit rating was first released for distribution and when it was last updated is indicated clearly and prominently; and
  - (e) information is given as to whether the credit rating concerns a newly issued financial instrument and whether the credit rating agency is rating the financial instrument for the first time.
3. The credit rating agency shall inform the rated entity at least 12 hours before publication of the credit rating and of the principal grounds on which the rating is based in order to give the entity an opportunity to draw attention of the credit rating agency to any factual errors.
4. A credit rating agency shall state clearly and prominently when disclosing credit ratings any attributes and limitations of the credit rating. In particular, a credit rating agency shall prominently state when disclosing any credit rating whether it considers satisfactory the quality of information available on the rated entity and to what extent it has verified information provided to it by the rated entity or its related third party. If a credit rating involves a type of entity or financial instrument for which historical data is limited, the credit rating agency shall make clear, in a prominent place, such limitations of the credit rating.

In a case where the lack of reliable data or the complexity of the structure of a new type of financial instrument or the quality of information available is not satisfactory or raises serious questions as to whether a credit rating agency can provide a credible credit rating, the credit rating agency shall refrain from issuing a credit rating or withdraw an existing rating.

5. When announcing a credit rating, a credit rating agency shall explain in its press releases or reports the key elements underlying the credit rating.

Where the information laid down in points 1, 2 and 4 would be disproportionate in relation to the length of the report distributed, it shall suffice to make clear and prominent reference in the report itself to the place where such disclosures can be directly and easily accessed, including a direct web link to the disclosure on an appropriate website of the credit rating agency.

## II. *Additional obligations in relation to credit ratings of structured finance instruments*

1. Where a credit rating agency rates a structured finance instrument, it shall provide in the credit rating all information about loss and cash-flow analysis it has performed or is relying upon and an indication of any expected change in the credit rating.
2. A credit rating agency shall state what level of assessment it has performed concerning the due diligence processes carried out at the level of underlying financial instruments or other assets of structured finance instruments. The credit rating agency shall disclose whether it has undertaken any assessment of such due diligence processes or whether it has relied on a third-party assessment, indicating how the outcome of such assessment impacts on the credit rating.
3. Where a credit rating agency issues credit ratings of structured finance instruments, it shall accompany the disclosure of methodologies, models and key rating assumptions with guidance which explains assumptions, parameters, limits and uncertainties surrounding the models and rating methodologies used in such credit ratings, including simulations of stress scenarios undertaken by the agencies when establishing the ratings. Such guidance shall be clear and easily comprehensible.
4. A credit rating agency shall disclose, on an ongoing basis, information about all structured finance products submitted to it for their initial review or for preliminary rating. Such disclosure shall be made whether or not issuers contract with the credit rating agency for a final rating.

## Section E

### Disclosures

#### I. *General disclosures*

A credit rating agency shall generally disclose the fact that it is registered in accordance with this Regulation and the following information:

1. any actual and potential conflicts of interest referred to in point 1 of Section B;
2. a list of its ancillary services;
3. the policy of the credit rating agency concerning the publication of credit ratings and other related communications;
4. the general nature of its compensation arrangements;
5. the methodologies, and descriptions of models and key rating assumptions such as mathematical or correlation assumptions used in its credit rating activities as well as their material changes;
6. any material modification to its systems, resources or procedures; and
7. where relevant, its code of conduct.

#### II. *Periodic disclosures*

A credit rating agency shall periodically disclose the following information:

1. every six months, data about the historical default rates of its rating categories, distinguishing between the main geographical areas of the issuers and whether the default rates of these categories have changed over time;
2. annually, the following information:
  - (a) a list of the largest 20 clients of the credit rating agency by revenue generated from them; and
  - (b) a list of those clients of the credit rating agency whose contribution to the growth rate in the generation of revenue of the credit rating agency in the previous financial year exceeded the growth rate in the total revenues of the credit rating agency in that year by a factor of more than 1,5 times. Any such client shall be included on the list only where, in that year, it accounted for more than 0,25 % of the worldwide total revenues of the credit rating agency at global level.

For the purposes of this point, 'client' means an entity, its subsidiaries, and associated entities in which the entity has holdings of more than 20 %, as well as any other entities in respect of which it has negotiated the structuring of a debt issue on behalf of a client and where a fee was paid, directly or indirectly, to the credit rating agency for the rating of that debt issue.

#### III. *Transparency report*

A credit rating agency shall make available annually the following information:

1. detailed information on legal structure and ownership of the credit rating agency, including information on holdings within the meaning of Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market <sup>(1)</sup>;
2. a description of the internal control mechanisms ensuring quality of its credit rating activities;
3. statistics on the allocation of its staff to new credit ratings, credit rating reviews, methodology or model appraisal and senior management;

<sup>(1)</sup> OJ L 390, 31.12.2004, p. 38.



4. a description of its record-keeping policy;
  5. the outcome of the annual internal review of its independent compliance function;
  6. a description of its management and rating analyst rotation policy;
  7. financial information on the revenue of the credit rating agency divided into fees from credit rating and non-credit-rating activities with a comprehensive description of each; and
  8. a governance statement within the meaning of Article 46a(1) of Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies <sup>(1)</sup>. For the purposes of that statement, the information referred to in Article 46a(1)(d) of that Directive shall be provided by the credit rating agency irrespective of whether it is subject to Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids <sup>(2)</sup>.
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<sup>(1)</sup> OJ L 222, 14.8.1978, p. 11.

<sup>(2)</sup> OJ L 142, 30.4.2004, p. 12.

## ANNEX II

**INFORMATION TO BE PROVIDED IN THE APPLICATION FOR REGISTRATION**

1. Full name of the credit rating agency, address of the registered office within the Community
  2. Name and contact details of a contact person and of the compliance officer
  3. Legal status
  4. Class of credit ratings for which the credit rating agency is applying to be registered
  5. Ownership structure
  6. Organisational structure and corporate governance
  7. Financial resources to perform credit rating activities
  8. Staffing of credit rating agency and its expertise
  9. Information regarding subsidiaries of credit rating agency
  10. Description of the procedures and methodologies used to issue and review credit ratings
  11. Policies and procedures to identify, manage and disclose any conflicts of interests
  12. Information regarding rating analysts
  13. Compensation and performance evaluation arrangements
  14. Services other than credit rating activities, which the credit rating agency intends to provide
  15. Programme of operations, including indications of where the main business activities are expected to be carried out, branches to be established, and setting out the type of business envisaged
  16. Documents and detailed information related to the expected use of endorsement
  17. Documents and detailed information related to the expected outsourcing arrangements including information on entities assuming outsourcing functions.
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## DIRECTIVES

## 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)

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 <sup>(1)</sup>,

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) <sup>(2)</sup> has been substantially amended several times <sup>(3)</sup>. 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 <sup>(4)</sup>.

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

<sup>(2)</sup> OJ L 375, 31.12.1985, p. 3.

<sup>(3)</sup> See Annex III, Part A.

<sup>(4)</sup> OJ L 145, 30.4.2004, p. 1.

- (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) <sup>(1)</sup>.
- (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.

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

- (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 <sup>(1)</sup> 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 <sup>(2)</sup>, 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.

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

(2) OJ L 177, 30.6.2006, p. 201.

- (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 <sup>(1)</sup>.
- (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.

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

- (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 <sup>(1)</sup>, 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:

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<sup>(1)</sup> OJ C 321, 31.12.2003, p. 1.

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## CHAPTER I

**SUBJECT MATTER, SCOPE AND DEFINITIONS***Article 1*

1. This Directive applies to undertakings for collective investment in transferable securities (UCITS) established within the territories of the Member States.

2. For the purposes of this Directive, and subject to Article 3, UCITS means an undertaking:

- (a) with the sole object of collective investment in transferable securities or in other liquid financial assets referred to in Article 50(1) of capital raised from the public and which operate on the principle of risk-spreading; and
- (b) with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption.

Member States may allow UCITS to consist of several investment compartments.

3. The undertakings referred to in paragraph 2 may be constituted in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies).

For the purposes of this Directive:

- (a) 'common funds' shall also include unit trusts;
- (b) 'units' of UCITS shall also include shares of UCITS.

4. Investment companies, the assets of which are invested through the intermediary of subsidiary companies, mainly other than in transferable securities, shall not be subject to this Directive.

5. The Member States shall prohibit UCITS which are subject to this Directive from transforming themselves into collective investment undertakings which are not covered by this Directive.

6. Subject to the provisions in Community law governing capital movements and subject to Articles 91 and 92 and the second subparagraph of Article 108(1), no Member State shall apply any other provisions in the field covered by this Directive to UCITS established in another Member State or to the units issued by such UCITS, where those UCITS market their units within the territory of that Member State.

7. Without prejudice to this Chapter, a Member State may apply to UCITS established within its territory requirements which are stricter than or additional to those laid down in this Directive, provided that they are of general application and do not conflict with the provisions of this Directive.

#### Article 2

1. For the purposes of this Directive the following definitions apply:

- (a) 'depository' means an institution entrusted with the duties set out in Articles 22 and 32 and subject to the other provisions laid down in Chapter IV and Section 3 of Chapter V;
- (b) 'management company' means a company, the regular business of which is the management of UCITS in the form of common funds or of investment companies (collective portfolio management of UCITS);
- (c) 'management company's home Member State' means the Member State in which the management company has its registered office;
- (d) 'management company's host Member State' means a Member State, other than the home Member State, within the territory of which a management company has a branch or provides services;
- (e) 'UCITS home Member State' means the Member State in which the UCITS is authorised pursuant to Article 5;
- (f) 'UCITS host Member State' means a Member State, other than the UCITS home Member State, in which the units of the UCITS are marketed;
- (g) 'branch' means a place of business which is a part of the management company, which has no legal personality and which provides the services for which the management company has been authorised;
- (h) 'competent authorities' means the authorities which each Member State designates under Article 97;
- (i) 'close links' means a situation in which two or more natural or legal persons are linked by either:
  - (i) 'participation', which means the ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking; or
  - (ii) 'control', which means the relationship between a 'parent undertaking' and a 'subsidiary', as defined in Articles 1 and 2 of Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts <sup>(1)</sup> and in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking;
- (j) 'qualifying holding' means a direct or indirect holding in a management company which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the management company in which that holding subsists;
- (k) 'initial capital' means the funds as referred to in Article 57(a) and (b) of Directive 2006/48/EC;
- (l) 'own funds' means own funds as referred to in Title V, Chapter 2, Section 1 of Directive 2006/48/EC;
- (m) 'durable medium' means an instrument which enables an investor to store information addressed personally to that investor in a way that is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;
- (n) 'transferable securities' means:
  - (i) shares in companies and other securities equivalent to shares in companies (shares);
  - (ii) bonds and other forms of securitised debt (debt securities);
  - (iii) any other negotiable securities which carry the right to acquire any such transferable securities by subscription or exchange;
- (o) 'money market instruments' means instruments normally dealt in on the money market which are liquid and have a value which can be accurately determined at any time;
- (p) 'mergers' means an operation whereby:
  - (i) one or more UCITS or investment compartments thereof, the 'merging UCITS', on being dissolved without going into liquidation, transfer all of their assets and liabilities to another existing UCITS or an investment compartment thereof, the 'receiving UCITS', in exchange for the issue to their unit-holders of units of the receiving UCITS and, if applicable, a cash payment not exceeding 10 % of the net asset value of those units;
  - (ii) two or more UCITS or investment compartments thereof, the 'merging UCITS', on being dissolved without going into liquidation, transfer all of their assets and liabilities to a UCITS which they form or an investment compartment thereof, the 'receiving UCITS', in exchange for the issue to their unit-holders of units of the receiving UCITS and, if applicable, a cash payment not exceeding 10 % of the net asset value of those units;
  - (iii) one or more UCITS or investment compartments thereof, the 'merging UCITS', which continue to exist until the liabilities have been discharged, transfer their net assets to another investment compartment of the same UCITS, to a UCITS which they form or to another existing UCITS or an investment compartment thereof, the 'receiving UCITS';

<sup>(1)</sup> OJ L 193, 18.7.1983, p. 1.



- (q) 'cross-border merger' means a merger of UCITS:
- (i) at least two of which are established in different Member States; or
  - (ii) established in the same Member State into a newly constituted UCITS established in another Member State;
- (r) 'domestic merger' means a merger between UCITS established in the same Member State where at least one of the involved UCITS has been notified pursuant to Article 93.

2. For the purposes of paragraph 1(b), the regular business of a management company shall include the functions referred to in Annex II.

3. For the purposes of paragraph 1(g), all the places of business established in the same Member State by a management company with its head office in another Member State shall be regarded as a single branch.

4. For the purposes of point (i)(ii) of paragraph 1, the following shall apply:

- (a) a subsidiary undertaking of a subsidiary undertaking shall also be considered to be a subsidiary of the parent undertaking which is at the head of those undertakings;
- (b) situations in which two or more natural or legal persons are permanently linked to the same person by a control relationship shall also be regarded as constituting a close links between such persons.

5. For the purposes of paragraph 1(j), the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market<sup>(1)</sup> shall be taken into account.

6. For the purposes of paragraph 1(l), Articles 13 to 16 of Directive 2006/49/EC shall apply *mutatis mutandis*.

7. For the purposes of paragraph 1(n), transferable securities shall exclude the techniques and instruments referred to in Article 51.

#### Article 3

The following undertakings are not subject to this Directive:

- (a) collective investment undertakings of the closed-ended type;
- (b) collective investment undertakings which raise capital without promoting the sale of their units to the public within the Community or any part of it;

- (c) collective investment undertakings the units of which, under the fund rules or the instruments of incorporation of the investment company, may be sold only to the public in third countries;
- (d) categories of collective investment undertakings prescribed by the regulations of the Member States in which such collective investment undertakings are established, for which the rules laid down in Chapter VII and Article 83 are inappropriate in view of their investment and borrowing policies.

#### Article 4

For the purposes of this Directive, a UCITS shall be deemed to be established in its home Member State.

### CHAPTER II

#### AUTHORISATION OF UCITS

#### Article 5

1. No UCITS shall pursue activities as such unless it has been authorised in accordance with this Directive.

Such authorisation shall be valid for all Member States.

2. A common fund shall be authorised only if the competent authorities of its home Member State have approved the application of the management company to manage that common fund, the fund rules and the choice of depositary. An investment company shall be authorised only if the competent authorities of its home Member State have approved both its instruments of incorporation and the choice of depositary, and, where relevant, the application of the designated management company to manage that investment company.

3. Without prejudice to paragraph 2, if the UCITS is not established in the management company's home Member State, the competent authorities of the UCITS home Member State shall decide, on the application of the management company, to manage the UCITS pursuant to Article 20. Authorisation shall not be subject either to a requirement that the UCITS be managed by a management company having its registered office in the UCITS home Member State or that the management company pursue or delegate any activities in the UCITS home Member State.

4. The competent authorities of the UCITS home Member State shall not authorise a UCITS if:

- (a) they establish that the investment company does not comply with the preconditions laid down in Chapter V; or
- (b) the management company is not authorised for the management of UCITS in its home Member State.

<sup>(1)</sup> OJ L 390, 31.12.2004, p. 38.

Without prejudice to Article 29(2), the management company or, where applicable, the investment company, shall be informed, within two months of the submission of a complete application, whether or not authorisation of the UCITS has been granted.

The competent authorities of the UCITS home Member State shall not authorise a UCITS if the directors of the depositary are not of sufficiently good repute or are not sufficiently experienced also in relation to the type of UCITS to be managed. To that end, the names of the directors of the depositary and of every person succeeding them in office shall be communicated forthwith to the competent authorities.

Directors shall mean those persons who, under the law or the instruments of incorporation, represent the depositary, or who effectively determine the policy of the depositary.

5. The competent authorities of the UCITS home Member State shall not grant authorisation if the UCITS is legally prevented (for example, through a provision in the fund rules or instruments of incorporation) from marketing its units in its home Member State.

6. Neither the management company nor the depositary shall be replaced, nor shall the fund rules or the instruments of incorporation of the investment company be amended, without the approval of the competent authorities of the UCITS home Member State.

7. The Member States shall ensure that complete information on the laws, regulations and administrative provisions implementing this Directive which relate to the constitution and functioning of the UCITS are easily accessible at a distance or by electronic means. Member States shall ensure that such information is available at least in a language customary in the sphere of international finance, provided in a clear and unambiguous manner, and kept up to date.

### CHAPTER III

#### OBLIGATIONS REGARDING MANAGEMENT COMPANIES

##### SECTION 1

##### *Conditions for taking up business*

##### *Article 6*

1. Access to the business of management companies shall be subject to prior authorisation to be granted by the competent authorities of the management company's home Member State. Authorisation granted under this Directive to a management company shall be valid for all Member States.

2. No management company shall engage in activities other than the management of UCITS authorised under this Directive, with the exception of the additional management of other collective investment undertakings which are not covered by this Directive and for which the management company is subject to prudential supervision but the units of which cannot be marketed in other Member States under this Directive.

The activity of management of UCITS shall include, for the purpose of this Directive, the functions referred to in Annex II.

3. By way of derogation from paragraph 2, Member States may authorise management companies to provide, in addition to the management of UCITS, the following services:

- (a) management of portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Annex I, Section C to Directive 2004/39/EC; and
- (b) as non-core services:
  - (i) investment advice concerning one or more of the instruments listed in Annex I, Section C to Directive 2004/39/EC;
  - (ii) safekeeping and administration in relation to units of collective investment undertakings.

Management companies shall not be authorised under this Directive to provide only the services referred to in this paragraph, or to provide non-core services without being authorised for the services referred to in point (a) of the first subparagraph.

4. Article 2(2) and Articles 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies.

##### *Article 7*

1. Without prejudice to other conditions of general application laid down by national law, the competent authorities shall not grant authorisation to a management company unless the following conditions are met:

- (a) the management company has an initial capital of at least EUR 125 000, taking into account the following:
  - (i) when the value of the portfolios of the management company exceeds EUR 250 000 000, the management company must be required to provide an additional amount of own funds which is equal to 0,02 % of the amount by which the value of the portfolios of the management company exceeds EUR 250 000 000 but the required total of the initial capital and the additional amount must not, however, exceed EUR 10 000 000;
  - (ii) for the purposes of this paragraph, the following portfolios must be deemed to be the portfolios of the management company:
    - common funds managed by the management company including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation,

- investment companies for which the management company is the designated management company,
  - other collective investment undertakings managed by the management company including portfolios for which it has delegated the management function but excluding portfolios that it is managing under delegation;
- (iii) irrespective of the amount of those requirements, the own funds of the management company must at no time be less than the amount prescribed in Article 21 of Directive 2006/49/EC;
- (b) the persons who effectively conduct the business of a management company are of sufficiently good repute and are sufficiently experienced also in relation to the type of UCITS managed by the management company, the names of those persons and of every person succeeding them in office being communicated forthwith to the competent authorities and the conduct of the business of a management company being decided by at least two persons meeting such conditions;
- (c) the application for authorisation is accompanied by a programme of activity setting out, at least, the organisational structure of the management company; and
- (d) the head office and the registered office of the management company are located in the same Member State.

For the purposes of point (a) of the first subparagraph, Member States may authorise management companies not to provide up to 50 % of the additional amount of own funds referred to in point (i) of point (a) if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in a Member State, or in a third country where it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Community law.

2. Where close links exist between the management company and other natural or legal persons, the competent authorities shall grant authorisation only if those close links do not prevent the effective exercise of their supervisory functions.

The competent authorities shall also refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the management company has close links, or difficulties involved in their enforcement, prevent the effective exercise of their supervisory functions.

The competent authorities shall require management companies to provide them with the information they require to monitor compliance with the conditions referred to in this paragraph on a continuous basis.

3. The competent authorities shall inform the applicant within six months of the submission of a complete application whether or not authorisation has been granted. Reasons shall be given where an authorisation is refused.

4. A management company may start business as soon as authorisation has been granted.

5. The competent authorities may withdraw the authorisation issued to a management company subject to this Directive only where that company:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive more than six months previously, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer fulfils the conditions under which authorisation was granted;
- (d) no longer complies with Directive 2006/49/EC if its authorisation also covers the discretionary portfolio management service referred to in Article 6(3)(a) of this Directive;
- (e) has seriously or systematically infringed the provisions adopted pursuant to this Directive; or
- (f) falls within any of the cases where national law provides for withdrawal.

#### Article 8

1. The competent authorities shall not grant authorisation to take up the business of management companies until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of a management company, they are not satisfied as to the suitability of the shareholders or members referred to in the first subparagraph.

2. In the case of branches of management companies that have registered offices outside the Community and are taking up or pursuing business, the Member States shall not apply provisions that result in treatment more favourable than that accorded to branches of management companies that have registered offices in Member States.

3. The competent authorities of the other Member State involved shall be consulted beforehand in relation to the authorisation of any management company which is one of the following:

- (a) a subsidiary of another management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State;

- (b) a subsidiary of the parent undertaking of another management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State; or
- (c) a company controlled by the same natural or legal persons as control another management company, an investment firm, a credit institution or an insurance undertaking authorised in another Member State.

## SECTION 2

**Relations with third countries***Article 9*

1. Relations with third countries shall be regulated in accordance with the relevant rules laid down in Article 15 of Directive 2004/39/EC.

For the purposes of this Directive, the terms 'investment firm' and 'investment firms' referred to in Article 15 of Directive 2004/39/EC shall mean, respectively, 'management company' and 'management companies'; the term 'providing investment services' referred to in Article 15(1) of Directive 2004/39/EC shall mean 'providing services'.

2. Member States shall inform the Commission of any general difficulties which UCITS encounter in marketing their units in any third country.

## SECTION 3

**Operating conditions***Article 10*

1. The competent authorities of the management company's home Member State shall require that the management company which they have authorised complies at all times with the conditions laid down in Article 6 and Article 7(1) and (2).

The own funds of a management company shall not fall below the level specified in Article 7(1)(a). If they do, however, the competent authorities may, where the circumstances so justify, allow such firms a limited period in which to rectify their situations or cease their activities.

2. The prudential supervision of a management company shall be the responsibility of the competent authorities of the management company's home Member State, whether the management company establishes a branch or provides services in another Member State or not, without prejudice to those provisions of this Directive which confer responsibility to the competent authorities of a management company's host Member State.

*Article 11*

1. Qualifying holdings in management companies shall be subject to the same rules as those laid down in Articles 10, 10a and 10b of Directive 2004/39/EC.

2. For the purposes of this Directive, the terms 'investment firm' and 'investment firms' referred to in Article 10 of Directive 2004/39/EC, mean, respectively, 'management company' and 'management companies'.

*Article 12*

1. Each Member State shall draw up prudential rules which management companies authorised in that Member State, with regard to the activity of management of UCITS authorised according to this Directive, shall observe at all times.

In particular, the competent authorities of the management company's home Member State, having regard also to the nature of the UCITS managed by a management company, shall require that each such company:

- (a) has sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms including, in particular, rules for personal transactions by its employees or for the holding or management of investments in financial instruments in order to invest on its own account and ensuring, at least, that each transaction involving the UCITS may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the UCITS managed by the management company are invested according to the fund rules or the instruments of incorporation and the legal provisions in force;
- (b) is structured and organised in such a way as to minimise the risk of UCITS' or clients' interests being prejudiced by conflicts of interest between the company and its clients, between two of its clients, between one of its clients and a UCITS, or between two UCITS.

2. Each management company the authorisation of which also covers the discretionary portfolio management service referred to in Article 6(3)(a) shall:

- (a) not be permitted to invest all or a part of the investor's portfolio in units of collective investment undertakings it manages, unless it receives prior general approval from the client;
- (b) be subject with regard to the services referred to in Article 6(3) to the provisions laid down in Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes <sup>(1)</sup>.

<sup>(1)</sup> OJ L 84, 26.3.1997, p. 22.



3. Without prejudice to Article 116, the Commission shall adopt, by 1 July 2010, implementing measures specifying the procedures and arrangements as referred to under point (a) of the second subparagraph of paragraph 1 and the structures and organisational requirements to minimise conflicts of interests as referred to under point (b) of the second subparagraph of paragraph 1.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### Article 13

1. If the law of the management company's home Member State allows management companies to delegate to third parties for the purpose of a more efficient conduct of the companies' business, to carry out on their behalf one or more of their own functions, all of the following preconditions shall be complied with:

- (a) the management company must inform the competent authorities of its home Member State in an appropriate manner; the competent authorities of the management company's home Member State must, without delay, transmit the information to the competent authorities of the UCITS home Member State;
- (b) the mandate must not prevent the effectiveness of supervision over the management company, and, in particular, must not prevent the management company from acting, or the UCITS from being managed, in the best interests of its investors;
- (c) when the delegation concerns the investment management, the mandate must be given only to undertakings which are authorised or registered for the purpose of asset management and subject to prudential supervision; the delegation must be in accordance with investment-allocation criteria periodically laid down by the management companies;
- (d) where the mandate concerns the investment management and is given to a third-country undertaking, cooperation between the supervisory authorities concerned must be ensured;
- (e) a mandate with regard to the core function of investment management must not be given to the depositary or to any other undertaking whose interests may conflict with those of the management company or the unit-holders;
- (f) measures must exist which enable the persons who conduct the business of the management company to monitor effectively at any time the activity of the undertaking to which the mandate is given;
- (g) the mandate must not prevent the persons who conduct the business of the management company from giving further instructions to the undertaking to which functions are delegated at any time or from withdrawing the mandate with immediate effect when this is in the interest of investors;

- (h) having regard to the nature of the functions to be delegated, the undertaking to which functions will be delegated must be qualified and capable of undertaking the functions in question; and
- (i) the UCITS' prospectuses must list the functions which the management company has been allowed to delegate in accordance with this Article.

2. The liability of the management company or the depositary shall not be affected by delegation by the management company of any functions to third parties. The management company shall not delegate its functions to the extent that it becomes a letter-box entity.

#### Article 14

1. Each Member State shall draw up rules of conduct which management companies authorised in that Member State shall observe at all times. Such rules shall implement at least the principles set out in this paragraph. Those principles shall ensure that a management company:

- (a) acts honestly and fairly in conducting its business activities in the best interests of the UCITS it manages and the integrity of the market;
- (b) acts with due skill, care and diligence, in the best interests of the UCITS it manages and the integrity of the market;
- (c) has and employs effectively the resources and procedures that are necessary for the proper performance of its business activities;
- (d) tries to avoid conflicts of interests and, when they cannot be avoided, ensures that the UCITS it manages are fairly treated; and
- (e) complies with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of its investors and the integrity of the market.

2. Without prejudice to Article 116, the Commission shall adopt, by 1 July 2010, implementing measures, with a view to ensuring that the management company complies with the duties set out in paragraph 1, in particular to:

- (a) establish appropriate criteria for acting honestly and fairly and with due skill, care and diligence in the best interests of the UCITS;
- (b) specify the principles required to ensure that management companies employ effectively the resources and procedures that are necessary for the proper performance of their business activities; and



- (c) define the steps that management companies might reasonably be expected to take to identify, prevent, manage or disclose conflicts of interest as well as to establish appropriate criteria for determining the types of conflicts of interest whose existence may damage the interests of the UCITS.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### Article 15

Management companies or, where relevant, investment companies shall take measures in accordance with Article 92 and establish appropriate procedures and arrangements to ensure that they deal properly with investor complaints and that there are no restrictions on investors exercising their rights in the event that the management company is authorised in a Member State other than the UCITS home Member State. Those measures shall allow investors to file complaints in the official language or one of the official languages of their Member State.

Management companies shall 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.

#### SECTION 4

### ***Freedom of establishment and freedom to provide services***

#### Article 16

1. Member States shall ensure that a management company, authorised by its home Member State, may pursue within their territories the activity for which it has been authorised, either by the establishment of a branch or under the freedom to provide services.

Where a management company so authorised proposes, without establishing a branch, only to market the units of the UCITS it manages as provided for in Annex II in a Member State other than the UCITS home Member State, without proposing to pursue any other activities or services, such marketing shall be subject only to the requirements of Chapter XI.

2. Member States shall not make the establishment of a branch or the provision of the services subject to any authorisation requirement, to any requirement to provide endowment capital or to any other measure having equivalent effect.

3. Subject to the conditions set out in this Article, a UCITS shall be free to designate, or to be managed by a management company authorised in a Member State other than the UCITS home Member State in accordance with the relevant provisions of this Directive, provided that such a management company complies with the provisions of:

- (a) Article 17 or Article 18; and
- (b) Articles 19 and 20.

#### Article 17

1. In addition to meeting the conditions imposed in Articles 6 and 7, a management company wishing to establish a branch within the territory of another Member State to pursue the activities for which it has been authorised shall notify the competent authorities of its home Member State accordingly.

2. Member States shall require every management company wishing to establish a branch within the territory of another Member State to provide the following information and documents, when effecting the notification provided for in paragraph 1:

- (a) the Member State within the territory of which the management company plans to establish a branch;
- (b) a programme of operations setting out the activities and services according to Article 6(2) and (3) envisaged and the organisational structure of the branch, which shall include a description of the risk management process put in place by the management company. It shall also include a description of the procedures and arrangements taken in accordance with Article 15;
- (c) the address in the management company's host Member State from which documents may be obtained; and
- (d) the names of those responsible for the management of the branch.

3. Unless the competent authorities of the management company's home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of a management company, taking into account the activities envisaged, they shall, within two months of receiving all the information referred to in paragraph 2, communicate that information to the competent authorities of the management company's host Member State and shall inform the management company accordingly. They shall also communicate details of any compensation scheme intended to protect investors.

Where the competent authorities of the management company's home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the management company's host Member State, they shall give reasons for such refusal to the management company concerned within two months of receiving all the information. The refusal or any failure to reply shall be subject to the right to apply to the courts in the management company's home Member State.

Where a management company wishes to pursue the activity of collective portfolio management referred to in Annex II, the competent authorities of the management company's home Member State shall enclose with the documentation sent to the competent authorities of the management company's host Member State an attestation that the management company has been authorised pursuant to the provisions of this Directive, a description of the scope of the management company's authorisation and details of any restriction on the types of UCITS that the management company is authorised to manage.

4. A management company which pursues activities by a branch within the territory of the host Member State shall comply with the rules drawn up by the management company's host Member State pursuant to Article 14.

5. The competent authorities of the management company's host Member State shall be responsible for supervising compliance with paragraph 4.

6. Before the branch of a management company starts business, the competent authorities of the management company's host Member State shall, within two months of receiving the information referred to in paragraph 2, prepare for supervising the compliance of the management company with the rules under their responsibility.

7. On receipt of a communication from the competent authorities of the management company's host Member State or on the expiry of the period provided for in paragraph 6 without receipt of any communication from those authorities, the branch may be established and start business.

8. In the event of change of any particulars communicated in accordance with paragraph 2(b), (c) or (d), a management company shall give written notice of that change to the competent authorities of the management company's home Member State and of the management company's host Member State at least one month before implementing the change so that the competent authorities of the management company's home Member State may take a decision on the change under paragraph 3 and the competent authorities of the management company's host Member State may do so under paragraph 6.

9. In the event of a change in the particulars communicated in accordance with the first subparagraph of paragraph 3, the competent authorities of the management company's home Member State shall inform the competent authorities of the management company's host Member State accordingly.

The competent authorities of the management company's home Member State shall update the information contained in the attestation referred to in the third subparagraph of paragraph 3 and inform the competent authorities of the management company's host Member State whenever there is a change in the scope of the management company's authorisation or in the details of any restriction on the types of UCITS that the management company is authorised to manage.

#### Article 18

1. Any management company wishing to pursue the activities for which it has been authorised within the territory of another Member State for the first time under the freedom to provide services shall communicate the following information to the competent authorities of the management company's home Member State:

- (a) the Member State within the territory of which the management company intends to operate; and
- (b) a programme of operations stating the activities and services referred to in Article 6(2) and (3) envisaged which shall include a description of the risk management process put in place by the management company. It shall also include a description of the procedures and arrangements taken in accordance with Article 15.

2. The competent authorities of the management company's home Member State shall, within one month of receiving the information referred to in paragraph 1, forward it to the competent authorities of the management company's host Member State.

The competent authorities of the management company's home Member State shall also communicate details of any applicable compensation scheme intended to protect investors.

Where a management company wishes to pursue the activity of collective portfolio management as referred to in Annex II, the competent authorities of the management company's home Member State shall enclose with the documentation sent to the competent authorities of the management company's host Member State an attestation that the management company has been authorised pursuant to the provisions of this Directive, a description of the scope of the management company's authorisation and details of any restriction on the types of UCITS that the management company is authorised to manage.

Notwithstanding Articles 20 and 93, the management company may then start business in the management company's host Member State.

3. A management company which pursues activities under the freedom to provide services shall comply with the rules drawn up by the management company's home Member State pursuant to Article 14.

4. Where the content of the information communicated in accordance with paragraph 1(b) is amended, the management company shall give notice of the amendment in writing to the competent authorities of the management company's home Member State and of the management company's host Member State before implementing the change. The competent authorities of the management company's home Member State shall update the information contained in the attestation referred to in paragraph 2 and inform the competent authorities of the management company's host Member State whenever there is a change in the scope of the management company's authorisation or in the details of any restriction on the types of UCITS that the management company is authorised to manage.

#### Article 19

1. A management company which pursues the activity of collective portfolio management on a cross-border basis by establishing a branch or under the freedom to provide services shall comply with the rules of the management company's home Member State which relate to the organisation of the management company, including delegation arrangements, risk-management procedures, prudential rules and supervision, procedures referred to in Article 12 and the management company's reporting requirements. Those rules shall be no stricter than those applicable to management companies conducting their activities only in their home Member State.

2. The competent authorities of the management company's home Member State shall be responsible for supervising compliance with paragraph 1.

3. A management company which pursues the activity of collective portfolio management on a cross-border basis by establishing a branch or in accordance with the freedom to provide services shall comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS, namely the rules applicable to:

- (a) the setting up and authorisation of the UCITS;
- (b) the issuance and redemption of units and shares;
- (c) investment policies and limits, including the calculation of total exposure and leverage;
- (d) restrictions on borrowing, lending and uncovered sales;
- (e) the valuation of assets and the accounting of the UCITS;
- (f) the calculation of the issue or redemption price, and errors in the calculation of the net asset value and related investor compensation;
- (g) the distribution or reinvestment of the income;
- (h) the disclosure and reporting requirements of the UCITS, including the prospectus, key investor information and periodic reports;
- (i) the arrangements made for marketing;
- (j) the relationship with unit-holders;
- (k) the merging and restructuring of the UCITS;
- (l) the winding-up and liquidation of the UCITS;
- (m) where applicable, the content of the unit-holder register;
- (n) the licensing and supervision fees regarding the UCITS; and
- (o) the exercise of unit-holders' voting rights and other unit-holders' rights in relation to points (a) to (m).

4. The management company shall comply with the obligations set out in the fund rules or in the instruments of incorporation, and the obligations set out in the prospectus, which shall be consistent with the applicable law as referred to in paragraphs 1 and 3.

5. The competent authorities of the UCITS home Member State shall be responsible for supervising compliance with paragraphs 3 and 4.

6. The management company shall decide and be responsible for adopting and implementing all the arrangements and organisational decisions which are necessary to ensure compliance with the rules which relate to the constitution and functioning of the UCITS and with the obligations set out in the fund rules or in the instruments of incorporation, and with the obligations set out in the prospectus.

7. The competent authorities of the management company's home Member State shall be responsible for supervising the adequacy of the arrangements and organisation of the management company so that the management company is in a position to comply with the obligations and rules which relate to the constitution and functioning of all the UCITS it manages.

8. Member States shall ensure that any management company authorised in a Member State is not subject to any additional requirement established in the UCITS home Member State in respect of the subject matter of this Directive, except in the cases expressly referred to in this Directive.

#### Article 20

1. Without prejudice to Article 5, a management company which applies to manage a UCITS established in another Member State shall provide the competent authorities of the UCITS home Member State with the following documentation:

- (a) the written agreement with the depositary referred to in Articles 23 and 33; and
- (b) information on delegation arrangements regarding functions of investment management and administration referred to in Annex II.

If a management company already manages other UCITS of the same type in the UCITS home Member State, reference to the documentation already provided shall be sufficient.

2. In so far as it is necessary to ensure compliance with the rules for which they are responsible, the competent authorities of the UCITS home Member State may ask the competent authorities of the management company's home Member State for clarification and information regarding the documentation referred to in paragraph 1 and, based on the attestation referred to in Articles 17 and 18, as to whether the type of UCITS for which authorisation is requested falls within the scope of the management company's authorisation. Where applicable, the competent authorities of the management company's home Member State shall provide their opinion within 10 working days of the initial request.

3. The competent authorities of the UCITS home Member State may refuse the application of the management company only if:

- (a) the management company does not comply with the rules falling under their responsibility pursuant to Article 19;
- (b) the management company is not authorised by the competent authorities of its home Member State to manage the type of UCITS for which authorisation is requested; or
- (c) the management company has not provided the documentation referred to in paragraph 1.

Before refusing an application, the competent authorities of the UCITS home Member State shall consult the competent authorities of the management company's home Member State.

4. Any subsequent material modifications of the documentation referred to in paragraph 1 shall be notified by the management company to the competent authorities of the UCITS home Member State.

#### Article 21

1. A management company's host Member State may, for statistical purposes, require all management companies with branches within its territory to report periodically on their activities pursued in that host Member State to the competent authorities of that host Member State.

2. A management company's host Member State may require management companies pursuing business within its territory through the establishment of a branch or under the freedom to provide services, to provide the information necessary for the monitoring of their compliance with the rules under the responsibility of the management company's host Member State that apply to them.

Those requirements shall not be more stringent than those which the same Member State imposes on management companies authorised in that Member State for the monitoring of their compliance with the same standards.

Management companies shall ensure that the procedures and arrangements referred to in Article 15 enable the competent authorities of the UCITS home Member State to obtain directly from the management company the information referred to in this paragraph.

3. Where the competent authorities of a management company's host Member State ascertain that a management company that has a branch or provides services within its territory is in breach of one of the rules under their responsibility, those authorities shall require the management company concerned to put an end to that breach and inform the competent authorities of the management company's home Member State thereof.

4. If the management company concerned refuses to provide the management company's host Member State with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in paragraph 3, the competent authorities of the management company's host Member State shall inform the competent authorities of the management company's home Member State accordingly. The competent authorities of the management company's home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the management company concerned provides the information requested by the management company's host Member State pursuant to paragraph 2 or puts an end to the breach. The nature of those measures shall be communicated to the competent authorities of the management company's host Member State.

5. If, despite the measures taken by the competent authorities of the management company's home Member State or because such measures prove to be inadequate or are not available in the Member State in question, the management company continues to refuse to provide the information requested by the management company's host Member State pursuant to paragraph 2, or persists in breaching the legal or regulatory provisions, referred to in the same paragraph, in force in the management company's host Member State, the competent authorities of the management company's host Member State may, after informing the competent authorities of the management company's home Member State, take appropriate measures, including under Articles 98 and 99, to prevent or penalise further irregularities and, in so far as necessary, to prevent that management company from initiating any further transaction within its territory. Member States shall ensure that within their territories it is possible to serve the legal documents necessary for those measures on management companies. Where the service provided within the management company's host Member State is the management of a UCITS, the management company's host Member State may require the management company to cease managing that UCITS.

6. Any measure adopted pursuant to paragraphs 4 or 5 involving measures or penalties shall be properly justified and communicated to the management company concerned. Every such measure shall be subject to the right to apply to the courts in the Member State which adopted it.

7. Before following the procedure laid down in paragraphs 3, 4 or 5 the competent authorities of the management company's host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided. The Commission and the competent authorities of the other Member States concerned shall be informed of such measures at the earliest opportunity.

After consulting the competent authorities of the Member States concerned, the Commission may decide that the Member State in question must amend or abolish those measures.

8. The competent authorities of the management company's home Member State shall consult the competent authorities of the UCITS home Member State before withdrawing the authorisation of the management company. In such cases, the competent authorities of the UCITS home Member State shall take appropriate measures to safeguard investors' interests. Those measures may include decisions preventing the management company concerned from initiating any further transactions within its territory.

Every two years the Commission shall issue a report on such cases.

9. Member States shall inform the Commission of the number and type of cases in which they refuse authorisation under Article 17 or an application under Article 20 and of any measures taken in accordance with paragraph 5 of this Article.

Every two years the Commission shall issue a report on such cases.



## CHAPTER IV

**OBLIGATIONS REGARDING THE DEPOSITARY***Article 22*

1. The assets of a common fund shall be entrusted to a depositary for safe-keeping.
2. A depositary's liability as referred to in Article 24 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.
3. A depositary shall:
  - (a) ensure that the sale, issue, repurchase, redemption and cancellation of units effected on behalf of a common fund or by a management company are carried out in accordance with the applicable national law and the fund rules;
  - (b) ensure that the value of units is calculated in accordance with the applicable national law and the fund rules;
  - (c) carry out the instructions of the management company, unless they conflict with the applicable national law or the fund rules;
  - (d) ensure that in transactions involving a common fund's assets any consideration is remitted to it within the usual time limits;
  - (e) ensure that a common fund's income is applied in accordance with the applicable national law and the fund rules.

*Article 23*

1. A depositary shall either have its registered office or be established in the UCITS home Member State.
2. A depositary shall be an institution which is subject to prudential regulation and ongoing supervision. It shall also furnish sufficient financial and professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function.
3. Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries.
4. The depositary shall enable the competent authorities of the UCITS home Member State to obtain, on request, all information that the depositary has obtained while discharging its duties and that is necessary for the competent authorities to supervise the UCITS compliance with this Directive.

5. Where the management company's home Member State is not the UCITS home Member State, the depositary shall sign a written agreement with the management company regulating the flow of information deemed necessary to allow it to perform the functions set out in Article 22 and in other laws, regulations or administrative provisions which are relevant for depositaries in the UCITS home Member State.

6. The Commission may adopt implementing measures in relation to the measures to be taken by a depositary in order to fulfil its duties regarding a UCITS managed by a management company established in another Member State, including the particulars that need to be included in the standard agreement to be used by the depositary and the management company in accordance with paragraph 5.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

*Article 24*

A depositary shall, in accordance with the national law of the UCITS home Member State, be liable to the management company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.

Liability to unit-holders may be invoked directly or indirectly through the management company, depending on the legal nature of the relationship between the depositary, the management company and the unit-holders.

*Article 25*

1. No company shall act as both management company and depositary.
2. In the context of their respective roles, the management company and the depositary shall act independently and solely in the interest of the unit-holders.

*Article 26*

The law or the fund rules shall lay down the conditions for the replacement of the management company and the depositary and rules to ensure the protection of unit-holders in the event of such replacement.



## CHAPTER V

**OBLIGATIONS REGARDING INVESTMENT COMPANIES**

## SECTION 1

***Conditions for taking up business****Article 27*

Access to the business of an investment company shall be subject to prior authorisation to be granted by the competent authorities of the investment company's home Member State.

Member States shall determine the legal form which an investment company must take.

The registered office of the investment company shall be situated in the investment company's home Member State.

*Article 28*

No investment company may engage in activities other than those referred to in Article 1(2).

*Article 29*

1. Without prejudice to other conditions of general application laid down by national law, the competent authorities of the investment company's home Member State shall not grant authorisation to an investment company that has not designated a management company unless the investment company has a sufficient initial capital of at least EUR 300 000.

In addition, when an investment company has not designated a management company authorised pursuant to this Directive, the following conditions shall apply:

- (a) the authorisation must not be granted unless the application for authorisation is accompanied by a programme of operations setting out, at least, the organisational structure of the investment company;
- (b) the directors of the investment company must be of sufficiently good repute and be sufficiently experienced also in relation to the type of business pursued by the investment company and, to that end: the names of the directors and of every person succeeding them in office must be communicated forthwith to the competent authorities; the conduct of an investment company's business must be decided by at least two persons meeting such conditions; and 'directors' shall mean those persons who, under the law or the instruments of incorporation, represent the investment company, or who effectively determine the policy of the company; and
- (c) where close links exist between the investment company and other natural or legal persons, the competent authorities must grant authorisation only if those close links do not prevent the effective exercise of their supervisory functions.

The competent authorities of the investment company's home Member State shall also refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the investment company has close links, or difficulties involved in their enforcement, prevent the effective exercise of their supervisory functions.

The competent authorities of the investment company's home Member State shall require investment companies to provide them with the information they need.

2. Where an investment company has not designated a management company, the investment company shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted. Reasons shall be given whenever an authorisation is refused.

3. An investment company may start business as soon as authorisation has been granted.

4. The competent authorities of the investment company's home Member State may withdraw the authorisation issued to an investment company subject to this Directive only where that company:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased the activity covered by this Directive more than six months previously, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer fulfils the conditions under which authorisation was granted;
- (d) has seriously or systematically infringed the provisions adopted pursuant to this Directive; or
- (e) falls within any of the cases where national law provides for withdrawal.

## SECTION 2

***Operating conditions****Article 30*

Articles 13 and 14 shall apply *mutatis mutandis* to investment companies that have not designated a management company authorised pursuant to this Directive.

For the purpose of the Articles referred to in the first paragraph, 'management company' means 'investment company'.

Investment companies shall manage only assets of their own portfolio and shall not, under any circumstances, receive any mandate to manage assets on behalf of a third party.

*Article 31*

Each investment company's home Member State shall draw up prudential rules which shall be observed at all times by investment companies that have not designated a management company authorised pursuant to this Directive.

In particular, the competent authorities of the investment company's home Member State, having regard also to the nature of the investment company, shall require that the company has sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms including, in particular, rules for personal transactions by its employees or for the holding or management of investments in financial instruments in order to invest its initial capital and ensuring, at least, that each transaction involving the company may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected and that the assets of the investment company are invested according to the instruments of incorporation and the legal provisions in force.

## SECTION 3

***Obligations regarding the depositary****Article 32*

1. The assets of an investment company shall be entrusted to a depositary for safe-keeping.

2. A depositary's liability as referred to in Article 34 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping.

3. A depositary shall ensure the following:

- (a) that the sale, issue, repurchase, redemption and cancellation of units effected by or on behalf of an investment company are carried out in accordance with the law and with the investment company's instruments of incorporation;
- (b) that in transactions involving an investment company's assets any consideration is remitted to it within the usual time limits; and
- (c) that an investment company's income is applied in accordance with the law and its instruments of incorporation.

4. An investment company's home Member State may decide that investment companies established on its territory which market their units exclusively through one or more stock exchanges on which their units are admitted to official listing are not required to have depositaries within the meaning of this Directive.

Articles 76, 84 and 85 shall not apply to such investment companies. However, the rules for the valuation of such investment companies' assets shall be stated in the applicable national law or in their instruments of incorporation.

5. An investment company's home Member State may decide that investment companies established on its territory which market at least 80 % of their units through one or more stock exchanges designated in their instruments of incorporation are not required to have depositaries within the meaning of this Directive provided that their units are admitted to official listing on the stock exchanges of those Member States within the territories of which the units are marketed, and that any transactions which such an investment company may effect outwith stock exchanges are effected at stock exchange prices only.

The instruments of incorporation of an investment company shall specify the stock exchange in the country of marketing the prices on which shall determine the prices at which that investment company will effect any transactions outwith stock exchanges in that country.

A Member State shall avail itself of the derogation provided for in the first subparagraph only if it considers that unit-holders have protection equivalent to that of unit-holders in UCITS which have depositaries within the meaning of this Directive.

Investment companies referred to in this paragraph and in paragraph 4, shall, in particular:

- (a) in the absence of national law to this effect, state in their instruments of incorporation the methods of calculation of the net asset values of their units;
- (b) intervene on the market to prevent the stock exchange values of their units from deviating by more than 5 % from their net asset values;
- (c) establish the net asset values of their units, communicate them to the competent authorities at least twice a week and publish them twice a month.

At least twice a month, an independent auditor shall ensure that the calculation of the value of units is effected in accordance with the law and the instruments of incorporation of the investment company.

On such occasions, the auditor shall ensure that the investment company's assets are invested in accordance with the rules laid down by law and the instruments of incorporation of the investment company.

6. Member States shall inform the Commission of the identities of the investment companies benefiting from the derogations provided for in paragraphs 4 and 5.

*Article 33*

1. A depositary shall either have its registered office or be established in the same Member State as that of the investment company.

2. A depositary shall be an institution which is subject to prudential regulation and ongoing supervision.

3. Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries.

4. The depositary shall enable the competent authorities of the UCITS home Member State to obtain, on request, all information that the depositary has obtained while discharging its duties and that is necessary for the competent authorities to supervise compliance of the UCITS with this Directive.

5. Where the management company's home Member State is not the UCITS home Member State, the depositary shall sign a written agreement with the management company regulating the flow of information deemed necessary to allow it to perform the functions set out in Article 32 and in other laws, regulations or administrative provisions which are relevant for depositaries in the UCITS home Member State.

6. The Commission may adopt implementing measures in relation to the measures to be taken by a depositary in order to fulfil its duties regarding a UCITS managed by a management company established in another Member State, including the particulars that need to be included in the standard agreement to be used by the depositary and the management company in accordance with paragraph 5.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### Article 34

A depositary shall, in accordance with the national law of the investment company's home Member State, be liable to the investment company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations, or its improper performance of them.

#### Article 35

1. No company shall act as both investment company and depositary.

2. In carrying out its role as depositary, the depositary shall act solely in the interests of the unit-holders.

#### Article 36

The law or the instruments of incorporation of the investment company shall lay down the conditions for the replacement of the depositary and rules to ensure the protection of unit-holders in the event of such replacement.

### CHAPTER VI

## MERGERS OF UCITS

### SECTION 1

#### *Principle, authorisation and approval*

#### Article 37

For the purposes of this Chapter, a UCITS shall include investment compartments thereof.

#### Article 38

1. Member States shall, subject to the conditions set out in this Chapter and irrespective of the manner in which UCITS are constituted under Article 1(3), allow for cross-border and domestic mergers as defined in Article 2(1)(q) and (r) in accordance with one or more of the merger techniques provided for in Article 2(1)(p).

2. The merger techniques used for cross-border mergers as defined in Article 2(1)(q) must be provided for under the laws of the merging UCITS home Member State.

The merger techniques used for domestic mergers as defined in Article 2(1)(r) must be provided for under the laws of the Member State, in which the UCITS are established.

#### Article 39

1. Mergers shall be subject to prior authorisation by the competent authorities of the merging UCITS home Member State.

2. The merging UCITS shall provide the following information to the competent authorities of its home Member State:

- (a) the common draft terms of the proposed merger duly approved by the merging UCITS and the receiving UCITS;
- (b) an up-to-date version of the prospectus and the key investor information, referred to in Article 78, of the receiving UCITS, if established in another Member State;
- (c) a statement by each of the depositaries of the merging and the receiving UCITS confirming that, in accordance with Article 41, they have verified compliance of the particulars set out in points (a), (f) and (g) of Article 40(1) with the requirements of this Directive and the fund rules or instruments of incorporation of their respective UCITS; and
- (d) the information on the proposed merger that the merging and the receiving UCITS intend to provide to their respective unit-holders.

That information shall be provided in such a manner as to enable the competent authorities of both the merging and the receiving UCITS home Member State to read them in the official language or one of the official languages of that Member State or those Member States, or in a language approved by those competent authorities.

3. Once the file is complete, the competent authorities of the merging UCITS home Member State shall immediately transmit copies of the information referred to in paragraph 2 to the competent authorities of the receiving UCITS home Member State. The competent authorities of the merging and the receiving UCITS home Member State shall, respectively, consider the potential impact of the proposed merger on unit-holders of the merging and the receiving UCITS to assess whether appropriate information is being provided to unit-holders.

If the competent authorities of the merging UCITS home Member State consider it necessary, they may require, in writing, that the information to unit-holders of the merging UCITS be clarified.

If the competent authorities of the receiving UCITS home Member State consider it necessary, they may require, in writing, and no later than 15 working days of receipt of the copies of the complete information referred to in paragraph 2, that the receiving UCITS modify the information to be provided to its unit-holders.

In such a case, the competent authorities of the receiving UCITS home Member State shall send an indication of their dissatisfaction to the competent authorities of the merging UCITS home Member State. They shall inform the competent authorities of the merging UCITS home Member State whether they are satisfied with the modified information to be provided to the unit-holders of the receiving UCITS within 20 working days of being notified thereof.

4. The competent authorities of the merging UCITS home Member State shall authorise the proposed merger if the following conditions are met:

- (a) the proposed merger complies with all of the requirements of Articles 39 to 42;
- (b) the receiving UCITS has been notified, in accordance with Article 93, to market its units in all Member States where the merging UCITS is either authorised or has been notified to market its units in accordance with Article 93; and
- (c) the competent authorities of the merging and the receiving UCITS home Member State are satisfied with the proposed information to be provided to unit-holders, or no indication of dissatisfaction from the competent authorities of the receiving UCITS home Member State has been received under the fourth subparagraph of paragraph 3.

5. If the competent authorities of the merging UCITS home Member State consider that the file is not complete, they shall request additional information within 10 working days of receiving the information referred to in paragraph 2.

The competent authorities of the merging UCITS home Member State shall inform the merging UCITS, within 20 working days of submission of the complete information, in accordance with paragraph 2, whether or not the merger has been authorised.

The competent authorities of the merging UCITS home Member State shall also inform the competent authorities of the receiving UCITS home Member State of their decision.

6. Member States may, in accordance with the second subparagraph of Article 57(1), provide for a derogation from Articles 52 to 55 for receiving UCITS.

#### Article 40

1. Member States shall require that the merging and the receiving UCITS draw up common draft terms of merger.

The common draft terms of merger shall set out the following particulars:

- (a) an identification of the type of merger and of the UCITS involved;
- (b) the background to and rationale for the proposed merger;
- (c) the expected impact of the proposed merger on the unit-holders of both the merging and the receiving UCITS;
- (d) the criteria adopted for valuation of the assets and, where applicable, the liabilities on the date for calculating the exchange ratio as referred to in Article 47(1);
- (e) the calculation method of the exchange ratio;
- (f) the planned effective date of the merger;
- (g) the rules applicable, respectively, to the transfer of assets and the exchange of units; and
- (h) in the case of a merger pursuant to point (p)(ii) of Article 2(1) and, where applicable, point (p)(iii) of Article 2(1), the fund rules or instruments of incorporation of the newly constituted receiving UCITS.

The competent authorities shall not require that any additional information is included in the common draft terms of mergers.

2. The merging UCITS and the receiving UCITS may decide to include further items in the common draft terms of merger.

#### SECTION 2

##### **Third-party control, information of unit-holders and other rights of unit-holders**

#### Article 41

Member States shall require that the depositaries of the merging and of the receiving UCITS verify the conformity of the particulars set out in points (a), (f) and (g) of Article 40(1) with the requirements of this Directive and the fund rules or instruments of incorporation of their respective UCITS.



*Article 42*

1. The law of the merging UCITS home Member States shall entrust either a depositary or an independent auditor, approved in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts <sup>(1)</sup>, to validate the following:

- (a) the criteria adopted for valuation of the assets and, where applicable, the liabilities on the date for calculating the exchange ratio, as referred to in Article 47(1);
- (b) where applicable, the cash payment per unit; and
- (c) the calculation method of the exchange ratio as well as the actual exchange ratio determined at the date for calculating that ratio, as referred to in Article 47(1).

2. The statutory auditors of the merging UCITS or the statutory auditor of the receiving UCITS shall be considered independent auditors for the purposes of paragraph 1.

3. A copy of the reports of the independent auditor, or, where applicable, the depositary shall be made available on request and free of charge to the unit-holders of both the merging UCITS and the receiving UCITS and to their respective competent authorities.

*Article 43*

1. Member States shall require merging and receiving UCITS to provide appropriate and accurate information on the proposed merger to their respective unit-holders so as to enable them to make an informed judgement of the impact of the proposal on their investment.

2. That information shall be provided to unit-holders of the merging and of the receiving UCITS only after the competent authorities of the merging UCITS home Member State have authorised the proposed merger under Article 39.

It shall be provided at least 30 days before the last date for requesting repurchase or redemption or, where applicable, conversion without additional charge under Article 45(1).

3. The information to be provided to unit-holders of the merging and of the receiving UCITS, shall include appropriate and accurate information on the proposed merger such as to enable them to take an informed decision on the possible impact thereof on their investment and to exercise their rights under Articles 44 and 45.

It shall include the following:

- (a) the background to and the rationale for the proposed merger;

<sup>(1)</sup> OJ L 157, 9.6.2006, p. 87.

- (b) the possible impact of the proposed merger on unit-holders, including but not limited to any material differences in respect of investment policy and strategy, costs, expected outcome, periodic reporting, possible dilution in performance, and, where relevant, a prominent warning to investors that their tax treatment may be changed following the merger;

- (c) any specific rights unit-holders have in relation to the proposed merger, including but not limited to the right to obtain additional information, the right to obtain a copy of the report of the independent auditor or the depositary on request, and the right to request the repurchase or redemption or, where applicable, the conversion of their units without charge as specified in Article 45(1) and the last date for exercising that right;

- (d) the relevant procedural aspects and the planned effective date of the merger; and

- (e) a copy of the key investor information, referred to in Article 78, of the receiving UCITS.

4. If the merging or the receiving UCITS has been notified in accordance with Article 93, the information referred to in paragraph 3 shall be provided in the official language, or one of the official languages, of the relevant UCITS host Member State, or in a language approved by its competent authorities. The UCITS required to provide the information shall be responsible for producing the translation. That translation shall faithfully reflect the content of the original.

5. The Commission may adopt implementing measures specifying the detailed content, format and method by which to provide the information referred to in paragraphs 1 and 3.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

*Article 44*

Where the national laws of Member States require approval by the unit-holders of mergers between UCITS, Member States shall ensure that such approval does not require more than 75 % of the votes actually cast by unit-holders present or represented at the general meeting of unit-holders.

The first paragraph shall be without prejudice to any presence quorum provided for under national laws. Member States shall impose neither more stringent presence quorums for cross-border than for domestic mergers nor more stringent presence quorums for UCITS mergers than for mergers of corporate entities.



*Article 45*

1. The laws of Member States shall provide that unit-holders of both the merging and the receiving UCITS have the right to request, without any charge other than those retained by the UCITS to meet disinvestment costs, 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 any other company with which the management company is linked by common management or control, or by a substantial direct or indirect holding. That right shall become effective from the moment that the unit-holders of the merging UCITS and those of the receiving UCITS, have been informed of the proposed merger in accordance with Article 43 and shall cease to exist five working days before the date for calculating the exchange ratio referred to in Article 47(1).

2. Without prejudice to paragraph 1, for mergers between UCITS and by way of derogation from Article 84(1), Member States may allow the competent authorities to require or to allow the temporary suspension of the subscription, repurchase or redemption of units provided that such suspension is justified for the protection of the unit-holders.

## SECTION 3

***Costs and entry into effect****Article 46*

Except in cases where UCITS have not designated a management company, Member States shall ensure that any legal, advisory or administrative costs associated with the preparation and the completion of the merger shall not be charged to the merging or the receiving UCITS, or to any of their unit-holders.

*Article 47*

1. For domestic mergers, the laws of the Member States shall determine the date on which a merger takes effect as well as the date for calculating the exchange ratio of units of the merging UCITS into units of the receiving UCITS and, where applicable, for determining the relevant net asset value for cash payments.

For cross-border mergers, the laws of the receiving UCITS home Member State shall determine those dates. Member States shall ensure that, where applicable, those dates are after the approval of the merger by unit-holders of the receiving UCITS or the merging UCITS.

2. The entry into effect of the merger shall be made public through all appropriate means in the manner prescribed by the laws of the receiving UCITS home Member State, and shall be notified to the competent authorities of the home Member States of the receiving and the merging UCITS.

3. A merger which has taken effect as provided for in paragraph 1 shall not be declared null and void.

*Article 48*

1. A merger effected in accordance with point (p)(i) of Article 2(1) shall have the following consequences:

- (a) all the assets and liabilities of the merging UCITS are transferred to the receiving UCITS or, where applicable, to the depositary of the receiving UCITS;
- (b) the unit-holders of the merging UCITS become unit-holders of the receiving UCITS and, where applicable, they are entitled to a cash payment not exceeding 10 % of the net asset value of their units in the merging UCITS; and
- (c) the merging UCITS cease to exist on the entry into effect of the merger.

2. A merger effected in accordance with point (p)(ii) of Article 2(1) shall have the following consequences:

- (a) all the assets and liabilities of the merging UCITS are transferred to the newly constituted receiving UCITS or, where applicable, to the depositary of the receiving UCITS;
- (b) the unit-holders of the merging UCITS become unit-holders of the newly constituted receiving UCITS and, where applicable, they are entitled to a cash payment not exceeding 10 % of the net asset value of their units in the merging UCITS; and
- (c) the merging UCITS cease to exist on the entry into effect of the merger.

3. A merger effected in accordance with point (p)(iii) of Article 2(1) shall have the following consequences:

- (a) the net assets of the merging UCITS are transferred to the receiving UCITS or, where applicable, the depositary of the receiving UCITS;
- (b) the unit-holders of the merging UCITS become unit-holders of the receiving UCITS; and
- (c) the merging UCITS continues to exist until the liabilities have been discharged.

4. Member States shall provide for the establishment of a procedure whereby the management company of the receiving UCITS confirms to the depositary of the receiving UCITS that transfer of assets and, where applicable, liabilities is complete. Where the receiving UCITS has not designated a management company, it shall give that confirmation to the depositary of the receiving UCITS.

## CHAPTER VII

**OBLIGATIONS CONCERNING THE INVESTMENT POLICIES OF UCITS***Article 49*

Where UCITS comprise more than one investment compartment, each compartment shall be regarded as a separate UCITS for the purposes of this Chapter.

*Article 50*

1. The investments of a UCITS shall comprise only one or more of the following:

- (a) transferable securities and money market instruments admitted to or dealt in on a regulated market as defined in Article 4(1)(14) of Directive 2004/39/EC;
- (b) transferable securities and money market instruments dealt in on another regulated market in a Member State, which operates regularly and is recognised and open to the public;
- (c) transferable securities and money market instruments admitted to official listing on a stock exchange in a third country or dealt in on another regulated market in a third country which operates regularly and is recognised and open to the public provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the instruments of incorporation of the investment company;
- (d) recently issued transferable securities, provided that:
  - (i) the terms of issue include an undertaking that an application will be made for admission to official listing on a stock exchange or to another regulated market which operates regularly and is recognised and open to the public, provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the instruments of incorporation of the investment company; and
  - (ii) the admission referred to in point (i) is secured within a year of issue;
- (e) units of UCITS authorised according to this Directive or other collective investment undertakings within the meaning of Article 1(2)(a) and (b), whether or not established in a Member State, provided that:
  - (i) such other collective investment undertakings are authorised under laws which provide that they are subject to supervision considered by the competent authorities of the UCITS home Member State to be equivalent to that laid down in Community law, and that cooperation between authorities is sufficiently ensured;
  - (ii) the level of protection for unit-holders in the other collective investment undertakings is equivalent to that provided for unit-holders in a UCITS, and in particular that the rules on asset segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments are equivalent to the requirements of this Directive;
  - (iii) the business of the other collective investment undertakings is reported in half-yearly and annual reports to enable an assessment to be made of the assets and liabilities, income and operations over the reporting period; and
  - (iv) no more than 10 % of the assets of the UCITS or of the other collective investment undertakings, whose acquisition is contemplated, can, according to their fund rules or instruments of incorporation, be invested in aggregate in units of other UCITS or other collective investment undertakings;
- (f) deposits with credit institutions which are repayable on demand or have the right to be withdrawn, and maturing in no more than 12 months, provided that the credit institution has its registered office in a Member State or, if the credit institution has its registered office in a third country, provided that it is subject to prudential rules considered by the competent authorities of the UCITS home Member State as equivalent to those laid down in Community law;
- (g) financial derivative instruments, including equivalent cash-settled instruments, dealt in on a regulated market referred to in points (a), (b) and (c) or financial derivative instruments dealt in over-the-counter (OTC) derivatives, provided that:
  - (i) the underlying of the derivative consists of instruments covered by this paragraph, financial indices, interest rates, foreign exchange rates or currencies, in which the UCITS may invest according to its investment objectives as stated in its fund rules or instruments of incorporation;
  - (ii) the counterparties to OTC derivative transactions are institutions subject to prudential supervision, and belonging to the categories approved by the competent authorities of the UCITS home Member State; and
  - (iii) the OTC derivatives are subject to reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the UCITS' initiative; or

- (h) money market instruments other than those dealt in on a regulated market, which fall under Article 2(1)(o), if the issuer or issuer of such instruments is itself regulated for the purpose of protecting investors and savings, provided that they are:
- (i) issued or guaranteed by a central, regional or local authority or central bank of a Member State, the European Central Bank, the Community or the European Investment Bank, a third country or, in the case of a Federal State, by one of the members making up the federation, or by a public international body to which one or more Member States belong;
  - (ii) issued by an undertaking any securities of which are dealt in on regulated markets referred to in points (a), (b) or (c);
  - (iii) issued or guaranteed by an establishment subject to prudential supervision, in accordance with criteria defined by Community law, or by an establishment which is subject to and complies with prudential rules considered by the competent authorities to be at least as stringent as those laid down by Community law; or
  - (iv) issued by other bodies belonging to the categories approved by the competent authorities of the UCITS home Member State provided that investments in such instruments are subject to investor protection equivalent to that laid down in points (i), (ii) or (iii) and provided that the issuer is a company whose capital and reserves amount to at least EUR 10 000 000 and which presents and publishes its annual accounts in accordance with Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies <sup>(1)</sup>, is an entity which, within a group of companies which includes one or several listed companies, is dedicated to the financing of the group or is an entity which is dedicated to the financing of securitisation vehicles which benefit from a banking liquidity line.

2. A UCITS shall not, however:

- (a) invest more than 10 % of its assets in transferable securities or money market instruments other than those referred to in paragraph 1; or
- (b) acquire either precious metals or certificates representing them.

UCITS may hold ancillary liquid assets.

3. An investment company may acquire movable or immovable property which is essential for the direct pursuit of its business.

<sup>(1)</sup> OJ L 222, 14.8.1978, p. 11.

#### Article 51

1. A management or investment company shall employ a risk-management process which enables it to monitor and measure at any time the risk of the positions and their contribution to the overall risk profile of the portfolio.

It shall employ a process for accurate and independent assessment of the value of OTC derivatives.

It shall communicate to the competent authorities of its home Member State regularly in regard to the types of derivative instruments, the underlying risks, the quantitative limits and the methods which are chosen in order to estimate the risks associated with transactions in derivative instruments regarding each managed UCITS.

2. Member States may authorise UCITS to employ techniques and instruments relating to transferable securities and money market instruments under the conditions and within the limits which they lay down provided that such techniques and instruments are used for the purpose of efficient portfolio management.

When those operations concern the use of derivative instruments, the conditions and limits shall conform to the provisions laid down in this Directive.

Under no circumstances shall those operations cause the UCITS to diverge from its investment objectives as laid down in the UCITS' fund rules, instruments of incorporation or prospectus.

3. A UCITS shall ensure that its global exposure relating to derivative instruments does not exceed the total net value of its portfolio.

The exposure is calculated taking into account the current value of the underlying assets, the counterparty risk, future market movements and the time available to liquidate the positions. This shall also apply to the third and fourth subparagraphs.

A UCITS may invest, as a part of its investment policy and within the limit laid down in Article 52(5), in financial derivative instruments provided that the exposure to the underlying assets does not exceed in aggregate the investment limits laid down in Article 52. Member States may provide that, when a UCITS invests in index-based financial derivative instruments, those investments are not required to be combined for the purposes of the limits laid down in Article 52.

When transferable securities or money market instruments embed a derivative, the derivative shall be taken into account when complying with the requirements of this Article.

4. Without prejudice to Article 116, the Commission shall adopt, by 1 July 2010, implementing measures specifying the following:

- (a) criteria for assessing the adequacy of the risk management process employed by the management company in accordance with the first subparagraph of paragraph 1;
- (b) detailed rules regarding the accurate and independent assessment of the value of OTC derivatives; and

- (c) detailed rules regarding the content of and procedure to be followed for communicating the information referred to in the third subparagraph of paragraph 1 to the competent authorities of the management company's home Member State.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### Article 52

1. A UCITS shall invest no more than:
- (a) 5 % of its assets in transferable securities or money market instruments issued by the same body; or
- (b) 20 % of its assets in deposits made with the same body.

The risk exposure to a counterparty of the UCITS in an OTC derivative transaction shall not exceed either:

- (a) 10 % of its assets when the counterparty is a credit institution referred to in Article 50(1)(f); or
- (b) 5 % of its assets, in other cases.

2. Member States may raise the 5 % limit laid down in the first subparagraph of paragraph 1 to a maximum of 10 %. If they do so, however, the total value of the transferable securities and the money market instruments held by the UCITS in the issuing bodies in each of which it invests more than 5 % of its assets shall not exceed 40 % of the value of its assets. That limitation shall not apply to deposits or OTC derivative transactions made with financial institutions subject to prudential supervision.

Notwithstanding the individual limits laid down in paragraph 1, a UCITS shall not combine, where this would lead to investment of more than 20 % of its assets in a single body, any of the following:

- (a) investments in transferable securities or money market instruments issued by that body;
- (b) deposits made with that body; or
- (c) exposures arising from OTC derivative transactions undertaken with that body.

3. Member States may raise the 5 % limit laid down in the first subparagraph of paragraph 1 to a maximum of 35 % if the transferable securities or money market instruments are issued or guaranteed by a Member State, by its local authorities, by a third country or by a public international body to which one or more Member States belong.

4. Member States may raise the 5 % limit laid down in the first subparagraph of paragraph 1 to a maximum of 25 % where bonds are issued by a credit institution which has its registered office in a Member State and is subject by law to special public supervision designed to protect bond-holders. In particular, sums deriving from the issue of those bonds shall be invested in accordance with the law in assets which, during the whole period of validity

of the bonds, are capable of covering claims attaching to the bonds and which, in the event of failure of the issuer, would be used on a priority basis for the reimbursement of the principal and payment of the accrued interest.

Where a UCITS invests more than 5 % of its assets in the bonds referred to in the first subparagraph which are issued by a single issuer, the total value of these investments shall not exceed 80 % of the value of the assets of the UCITS.

Member States shall send to the Commission a list of the categories of bonds referred to in the first subparagraph together with the categories of issuers authorised, in accordance with the laws and supervisory arrangements mentioned in that subparagraph, to issue bonds complying with the criteria set out in this Article. A notice specifying the status of the guarantees offered shall be attached to those lists. The Commission shall immediately forward that information to the other Member States together with any comments which it considers appropriate and shall make the information available to the public. Such communications may be the subject of exchanges of views within the European Securities Committee referred to in Article 112(1).

5. The transferable securities and money market instruments referred to in paragraphs 3 and 4 shall not be taken into account for the purpose of applying the limit of 40 % referred to in paragraph 2.

The limits provided for in paragraphs 1 to 4 shall not be combined, and thus investments in transferable securities or money market instruments issued by the same body or in deposits or derivative instruments made with this body carried out in accordance with paragraphs 1 to 4 shall not exceed in total 35 % of the assets of the UCITS.

Companies which are included in the same group for the purposes of consolidated accounts, as defined in Directive 83/349/EEC or in accordance with recognised international accounting rules, shall be regarded as a single body for the purpose of calculating the limits contained in this Article.

Member States may allow cumulative investment in transferable securities and money market instruments within the same group up to a limit of 20 %.

#### Article 53

1. Without prejudice to the limits laid down in Article 56, Member States may raise the limits laid down in Article 52 to a maximum of 20 % for investment in shares or debt securities issued by the same body when, according to the fund rules or instruments of incorporation, the aim of the UCITS' investment policy is to replicate the composition of a certain stock or debt securities index which is recognised by the competent authorities, on the following basis:

- (a) its composition is sufficiently diversified;
- (b) the index represents an adequate benchmark for the market to which it refers; and
- (c) it is published in an appropriate manner.



2. Member States may raise the limit laid down in paragraph 1 to a maximum of 35 % where that proves to be justified by exceptional market conditions in particular in regulated markets where certain transferable securities or money market instruments are highly dominant. The investment up to that limit shall be permitted only for a single issuer.

#### Article 54

1. By way of derogation from Article 52, Member States may authorise UCITS to invest in accordance with the principle of risk-spreading up to 100 % of their assets in different transferable securities and money market instruments issued or guaranteed by a Member State, one or more of its local authorities, a third country, or a public international body to which one or more Member States belong.

The competent authorities of the UCITS home Member State shall grant such a derogation only if they consider that unit-holders in the UCITS have protection equivalent to that of unit-holders in UCITS complying with the limits laid down in Article 52.

Such a UCITS shall hold securities from at least six different issues, but securities from any single issue shall not account for more than 30 % of its total assets.

2. The UCITS referred to in paragraph 1 shall make express mention in the fund rules or in the instruments of incorporation of the investment company of the Member States, local authorities, or public international bodies issuing or guaranteeing securities in which they intend to invest more than 35 % of their assets.

Such fund rules or instruments of incorporation shall be approved by the competent authorities.

3. Each UCITS referred to in paragraph 1 shall include a prominent statement in its prospectus and marketing communications drawing attention to such authorisation and indicating the Member States, local authorities, or public international bodies in the securities of which it intends to invest or has invested more than 35 % of its assets.

#### Article 55

1. A UCITS may acquire the units of UCITS or other collective investment undertakings referred to in Article 50(1)(e), provided that no more than 10 % of its assets are invested in units of a single UCITS or other collective investment undertaking. Member States may raise that limit to a maximum of 20 %.

2. Investments made in units of collective investment undertakings other than UCITS shall not exceed, in aggregate, 30 % of the assets of the UCITS.

Member States may, where a UCITS has acquired units of another UCITS or collective investment undertakings, provide that the assets of the respective UCITS or other collective investment undertakings are not required to be combined for the purposes of the limits laid down in Article 52.

3. Where a UCITS invests in the units of other UCITS or collective investment undertakings that are managed, directly or by delegation, by the same management company or by any other company with which the management company is linked by common management or control, or by a substantial direct or indirect holding, that management company or other company shall not charge subscription or redemption fees on account of the UCITS' investment in the units of such other UCITS or collective investment undertakings.

A UCITS that invests a substantial proportion of its assets in other UCITS or collective investment undertakings shall disclose in its prospectus the maximum level of the management fees that may be charged both to the UCITS itself and to the other UCITS or collective investment undertakings in which it intends to invest. It shall indicate in its annual report the maximum proportion of management fees charged both to the UCITS itself and to the other UCITS or collective investment undertaking in which it invests.

#### Article 56

1. An investment company or a management company acting in connection with all of the common funds which it manages and which fall within the scope of this Directive shall not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body.

Pending further coordination, Member States shall take account of existing rules defining the principle stated in the first subparagraph in the law of other Member States.

2. A UCITS may acquire no more than:

- (a) 10 % of the non-voting shares of a single issuing body;
- (b) 10 % of the debt securities of a single issuing body;
- (c) 25 % of the units of a single UCITS or other collective investment undertaking within the meaning of Article 1(2)(a) and (b); or
- (d) 10 % of the money market instruments of a single issuing body.

The limits laid down in points (b), (c) and (d) may be disregarded at the time of acquisition if at that time the gross amount of the debt securities or of the money market instruments, or the net amount of the securities in issue, cannot be calculated.



3. A Member State may waive the application of paragraphs 1 and 2 as regards:

- (a) transferable securities and money market instruments issued or guaranteed by a Member State or its local authorities;
- (b) transferable securities and money market instruments issued or guaranteed by a third country;
- (c) transferable securities and money market instruments issued by a public international body to which one or more Member States belong;
- (d) shares held by a UCITS in the capital of a company incorporated in a third country investing its assets mainly in the securities of issuing bodies having their registered offices in that country, where under the legislation of that country such a holding represents the only way in which the UCITS can invest in the securities of issuing bodies of that country; or
- (e) shares held by an investment company or investment companies in the capital of subsidiary companies pursuing only the business of management, advice or marketing in the country where the subsidiary is established, in regard to the repurchase of units at unit-holders' request exclusively on its or their behalf.

The derogation referred to in point (d) of the first subparagraph of this paragraph shall apply only if in its investment policy the company from the third country complies with the limits laid down in Articles 52 and 55 and in paragraphs 1 and 2 of this Article. Where the limits set in Articles 52 and 55 are exceeded, Article 57 shall apply *mutatis mutandis*.

#### Article 57

1. UCITS are not required to comply with the limits laid down in this Chapter when exercising subscription rights attaching to transferable securities or money market instruments which form part of their assets.

While ensuring observance of the principle of risk spreading, Member States may allow recently authorised UCITS to derogate from Articles 52 to 55 for six months following the date of their authorisation.

2. If the limits referred to in paragraph 1 are exceeded for reasons beyond the control of a UCITS or as a result of the exercise of subscription rights, that UCITS shall adopt as a priority objective for its sales transactions the remedying of that situation, taking due account of the interests of its unit-holders.

## CHAPTER VIII

### MASTER-FEEDER STRUCTURES

#### SECTION 1

#### Scope and approval

#### Article 58

1. A feeder UCITS is a UCITS, or an investment compartment thereof, which has been approved to invest, by way of derogation from Article 1(2)(a), Articles 50, 52 and 55, and Article 56(2)(c), at least 85 % of its assets in units of another UCITS or investment compartment thereof (the master UCITS).

2. A feeder UCITS may hold up to 15 % of its assets in one or more of the following:

- (a) ancillary liquid assets in accordance with the second subparagraph of Article 50(2);
- (b) financial derivative instruments, which may be used only for hedging purposes, in accordance with Article 50(1)(g) and Article 51(2) and (3);
- (c) movable and immovable property which is essential for the direct pursuit of the business, if the feeder UCITS is an investment company.

For the purposes of compliance with Article 51(3), the feeder UCITS shall calculate its global exposure related to financial derivative instruments by combining its own direct exposure under point (b) of the first subparagraph with either:

- (a) the master UCITS' actual exposure to financial derivative instruments in proportion to the feeder UCITS' investment into the master UCITS; or
- (b) the master UCITS' potential maximum global exposure to financial derivative instruments provided for in the master UCITS' fund rules or instruments of incorporation in proportion to the feeder UCITS investment into the master UCITS.

3. A master UCITS is a UCITS, or an investment compartment thereof, which:

- (a) has, among its unit-holders, at least one feeder UCITS;
- (b) is not itself a feeder UCITS; and
- (c) does not hold units of a feeder UCITS.

4. The following derogations for a master UCITS shall apply:

- (a) if a master UCITS has at least two feeder UCITS as unit-holders, Article 1(2)(a) and Article 3(b) shall not apply, giving the master UCITS the choice whether or not to raise capital from other investors;

- (b) If a master UCITS does not raise capital from the public in a Member State other than that in which it is established, but only has one or more feeder UCITS in that Member State, Chapter XI and the second subparagraph of Article 108(1) shall not apply.

#### Article 59

1. Member States shall ensure that the investment of a feeder UCITS into a given master UCITS which exceeds the limit applicable under Article 55(1) for investments into other UCITS be subject to prior approval by the competent authorities of the feeder UCITS home Member State.

2. The feeder UCITS shall be informed within 15 working days following the submission of a complete file, whether or not the competent authorities have approved the feeder UCITS' investment into the master UCITS.

3. The competent authorities of the feeder UCITS home Member State shall grant approval if the feeder UCITS, its depositary and its auditor, as well as the master UCITS, comply with all the requirements set out in this Chapter. For such purposes, the feeder UCITS shall provide to the competent authorities of its home Member State the following documents:

- (a) the fund rules or instruments of incorporation of the feeder UCITS and the master UCITS;
- (b) the prospectus and the key investor information referred to in Article 78 of the feeder and the master UCITS;
- (c) the agreement between the feeder and the master UCITS or the internal conduct of business rules referred to in Article 60(1);
- (d) where applicable, the information to be provided to unit-holders referred to in Article 64(1);
- (e) if the master UCITS and the feeder UCITS have different depositaries, the information-sharing agreement referred to in Article 61(1) between their respective depositaries; and
- (f) if the master UCITS and the feeder UCITS have different auditors, the information-sharing agreement referred to in Article 62(1) between their respective auditors.

Where the feeder UCITS is established in a Member State other than the master UCITS home Member State, the feeder UCITS shall also provide an attestation by the competent authorities of the master UCITS home Member State that the master UCITS is a UCITS, or an investment compartment thereof, which fulfils the conditions set out in Article 58(3)(b) and (c). Documents shall be provided by the feeder UCITS in the official language, or one of the official languages, of the feeder UCITS home Member State or in a language approved by its competent authorities.

#### SECTION 2

### Common provisions for feeder and master UCITS

#### Article 60

1. Member States shall require that the master UCITS provide the feeder UCITS with all documents and information necessary for the latter to meet the requirements laid down in this Directive. For this purpose, the feeder UCITS shall enter into an agreement with the master UCITS.

The feeder UCITS shall not invest in excess of the limit applicable under Article 55(1) in units of that master UCITS until the agreement referred to in the first subparagraph has become effective. That agreement shall be made available, on request and free of charge, to all unit-holders.

In the event that both master and feeder UCITS are managed by the same management company, the agreement may be replaced by internal conduct of business rules ensuring compliance with the requirements set out in this paragraph.

2. The master and the feeder UCITS shall take appropriate measures to coordinate the timing of their net asset value calculation and publication in order to avoid market timing in their units, preventing arbitrage opportunities.

3. Without prejudice to Article 84, if a master UCITS temporarily suspends the repurchase, redemption or subscription of its units, whether at its own initiative or at the request of its competent authorities, each of its feeder UCITS is entitled to suspend the repurchase, redemption or subscription of its units notwithstanding the conditions laid down in Article 84(2) within the same period of time as the master UCITS.

4. If a master UCITS is liquidated, the feeder UCITS shall also be liquidated, unless the competent authorities of its home Member State approve:

- (a) the investment of at least 85 % of the assets of the feeder UCITS in units of another master UCITS; or
- (b) the amendment of its fund rules or instruments of incorporation in order to enable the feeder UCITS to convert into a UCITS which is not a feeder UCITS.

Without prejudice to specific national provisions regarding compulsory liquidation, the liquidation of a master UCITS shall take place no sooner than three months after the master UCITS has informed all of its unit-holders and the competent authorities of the feeder UCITS home Member State of the binding decision to liquidate.

5. If a master UCITS merges with another UCITS or is divided into two or more UCITS, the feeder UCITS shall be liquidated, unless the competent authorities of the feeder UCITS home Member State grant approval to the feeder UCITS to:

- (a) continue to be a feeder UCITS of the master UCITS or another UCITS resulting from the merger or division of the master UCITS;

- (b) invest at least 85 % of its assets in units of another master UCITS not resulting from the merger or the division; or
- (c) amend its fund rules or its instruments of incorporation in order to convert into a UCITS which is not a feeder UCITS.

No merger or division of a master UCITS shall become effective, unless the master UCITS has provided all of its unit-holders and the competent authorities of its feeder UCITS home Member States with the information referred to, or comparable with that referred to, in Article 43 by 60 days before the proposed effective date.

Unless the competent authorities of the feeder UCITS home Member State has granted approval pursuant to point (a) of the first subparagraph, the master UCITS shall enable the feeder UCITS to repurchase or redeem all units in the master UCITS before the merger or division of the master UCITS becomes effective.

6. The Commission may adopt implementing measures specifying:

- (a) the content of the agreement or of the internal conduct of business rules referred to in paragraph 1;
- (b) which measures referred to in paragraph 2 are deemed appropriate; and
- (c) the procedures for the required approvals pursuant to paragraphs 4 and 5 in the event of a liquidation, merger or division of a master UCITS.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

### SECTION 3

#### **Depositories and auditors**

##### *Article 61*

1. Member States shall require that, if the master and the feeder UCITS have different depositaries, those depositaries enter into an information-sharing agreement in order to ensure the fulfilment of the duties of both depositaries.

The feeder UCITS shall not invest in units of the master UCITS until such agreement has become effective.

Where they comply with the requirements laid down in this Chapter, neither the depositary of the master UCITS nor that of the feeder UCITS shall be found to be in breach of any rules that restrict the disclosure of information or relate to data protection where such rules are provided for in a contract or in a law, regulation or administrative provision. Such compliance shall not give rise to any liability on the part of such depositary or any person acting on its behalf.

Member States shall require that the feeder UCITS or, when applicable, the management company of the feeder UCITS be in charge of communicating to the depositary of the feeder UCITS any information about the master UCITS which is required for the completion of the duties of the depositary of the feeder UCITS.

2. The depositary of the master UCITS shall immediately inform the competent authorities of the master UCITS home Member State, the feeder UCITS or, where applicable, the management company and the depositary of the feeder UCITS about any irregularities it detects with regard to the master UCITS which are deemed to have a negative impact on the feeder UCITS.

3. The Commission may adopt implementing measures further specifying the following:

- (a) the particulars that need to be included in the agreement referred to in paragraph 1; and
- (b) the types of irregularities referred to in paragraph 2 which are deemed to have a negative impact on the feeder UCITS.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

##### *Article 62*

1. Member States shall require that if the master and the feeder UCITS have different auditors, those auditors enter into an information-sharing agreement in order to ensure the fulfilment of the duties of both auditors, including the arrangements taken to comply with the requirements of paragraph 2.

The feeder UCITS shall not invest in units of the master UCITS until such agreement has become effective.

2. In its audit report, the auditor of the feeder UCITS shall take into account the audit report of the master UCITS. If the feeder and the master UCITS have different accounting years, the auditor of the master UCITS shall make an ad hoc report on the closing date of the feeder UCITS.

The auditor of the feeder UCITS shall, in particular, report on any irregularities revealed in the audit report of the master UCITS and on their impact on the feeder UCITS.

3. Where they comply with the requirements laid down in this Chapter, neither the auditor of the master UCITS nor that of the feeder UCITS shall be found to be in breach of any rules that restrict the disclosure of information or relate to data protection where such rules are provided for in a contract or in a law, regulation or administrative provision. Such compliance shall not give rise to any liability on the part of such auditor or any person acting on its behalf.

4. The Commission may adopt implementing measures specifying the content of the agreement referred to in the first subparagraph of paragraph 1.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### SECTION 4

### **Compulsory information and marketing communications by the feeder UCITS**

#### Article 63

1. Member States shall require that, in addition to the information provided for in Schedule A of Annex I, the prospectus of the feeder UCITS contains the following information:

- (a) a declaration that the feeder UCITS is a feeder of a particular master UCITS and as such permanently invests 85 % or more of its assets in units of that master UCITS;
- (b) the investment objective and policy, including the risk profile and whether the performance of the feeder and the master UCITS are identical, or to what extent and for which reasons they differ, including a description of investment made in accordance with Article 58(2);
- (c) a brief description of the master UCITS, its organisation, its investment objective and policy, including the risk profile, and an indication of how the prospectus of the master UCITS may be obtained;
- (d) a summary of the agreement entered into between the feeder UCITS and the master UCITS or of the internal conduct of business rules pursuant to Article 60(1);
- (e) how the unit-holders may obtain further information on the master UCITS and the agreement entered into between the feeder UCITS and the master UCITS pursuant to Article 60(1);
- (f) a description of all remuneration or reimbursement of costs payable by the feeder UCITS by virtue of its investment in units of the master UCITS, as well as of the aggregate charges of the feeder UCITS and the master UCITS; and
- (g) a description of the tax implications of the investment into the master UCITS for the feeder UCITS.

2. In addition to the information provided for in Schedule B of Annex I, the annual report of the feeder UCITS shall include a statement on the aggregate charges of the feeder UCITS and the master UCITS.

The annual and the half-yearly reports of the feeder UCITS shall indicate how the annual and the half-yearly report of the master UCITS can be obtained.

3. In addition to the requirements laid down in Articles 74 and 82, the feeder UCITS shall send the prospectus, the key investor information referred to in Article 78 and any amendment thereto, as well as the annual and half-yearly reports of the master UCITS, to the competent authorities of its home Member State.

4. A feeder UCITS shall disclose in any relevant marketing communications that it permanently invests 85 % or more of its assets in units of such master UCITS.

5. A paper copy of the prospectus, and the annual and half-yearly reports of the master UCITS shall be delivered by the feeder UCITS to investors on request and free of charge.

#### SECTION 5

### **Conversion of existing UCITS into feeder UCITS and change of master UCITS**

#### Article 64

1. Member States shall require that a feeder UCITS which already pursues activities as a UCITS, including those of a feeder UCITS of a different master UCITS, shall provide the following information to its unit-holders:

- (a) a statement that the competent authorities of the feeder UCITS home Member State approved the investment of the feeder UCITS in units of such master UCITS;
- (b) the key investor information referred to in Article 78 concerning the feeder and the master UCITS;
- (c) the date when the feeder UCITS is to start to invest in the master UCITS or, if it has already invested therein, the date when its investment will exceed the limit applicable under Article 55(1); and
- (d) a statement that the unit-holders have the right to request within 30 days the repurchase or redemption of their units without any charges other than those retained by the UCITS to cover disinvestment costs; that right shall become effective from the moment the feeder UCITS has provided the information referred to in this paragraph.

That information shall be provided at least 30 days before the date referred to in point (c) of the first subparagraph.

2. In the event that the feeder UCITS has been notified in accordance with Article 93, the information referred to in paragraph 1 shall be provided in the official language, or one of the official languages, of the feeder UCITS host Member State or in a language approved by its competent authorities. The feeder UCITS shall be responsible for producing the translation. That translation shall faithfully reflect the content of the original.

3. Member States shall ensure that the feeder UCITS does not invest into the units of the given master UCITS in excess of the limit applicable under Article 55(1) before the period of 30 days referred to in the second subparagraph of paragraph 1 has elapsed.



4. The Commission may adopt implementing measures specifying:

- (a) the format and the manner in which to provide the information referred to in paragraph 1; or
- (b) in the event that the feeder UCITS transfers all or parts of its assets to the master UCITS in exchange for units, the procedure for valuing and auditing such a contribution in kind and the role of the depositary of the feeder UCITS in that process.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### SECTION 6

### **Obligations and competent authorities**

#### *Article 65*

1. The feeder UCITS shall monitor effectively the activity of the master UCITS. In performing that obligation, the feeder UCITS may rely on information and documents received from the master UCITS or, where applicable, its management company, depositary and auditor, unless there is reason to doubt their accuracy.

2. Where, in connection with an investment in the units of the master UCITS, a distribution fee, commission or other monetary benefit is received by the feeder UCITS, its management company, or any person acting on behalf of either the feeder UCITS or the management company of the feeder UCITS, the fee, commission or other monetary benefit shall be paid into the assets of the feeder UCITS.

#### *Article 66*

1. The master UCITS shall immediately inform the competent authorities of its home Member State of the identity of each feeder UCITS which invests in its units. If the master UCITS and the feeder UCITS are established in different Member States, the competent authorities of the master UCITS home Member State shall immediately inform those of the feeder UCITS home Member State of such investment.

2. The master UCITS shall not charge subscription or redemption fees for the investment of the feeder UCITS into its units or the divestment thereof.

3. The master UCITS shall ensure the timely availability of all information that is required in accordance with this Directive, other Community law, the applicable national law, the fund rules or the instruments of incorporation to the feeder UCITS or, where applicable, its management company, and to the competent authorities, the depositary and the auditor of the feeder UCITS.

#### *Article 67*

1. If the master UCITS and the feeder UCITS are established in the same Member State, the competent authorities shall immediately inform the feeder UCITS of any decision, measure, observation of non-compliance with the conditions of this Chapter or of any information reported pursuant to Article 106(1) with regard to the master UCITS or, where applicable, its management company, depositary or auditor.

2. If the master UCITS and the feeder UCITS are established in different Member States, the competent authorities of the master UCITS home Member State shall immediately communicate any decision, measure, observation of non-compliance with the conditions of this Chapter or information reported pursuant to Article 106(1) with regard to the master UCITS or, where applicable, its management company, depositary or auditor, to the competent authorities of the feeder UCITS home Member State. The latter shall then immediately inform the feeder UCITS.

#### CHAPTER IX

### **OBLIGATIONS CONCERNING INFORMATION TO BE PROVIDED TO INVESTORS**

#### SECTION 1

### ***Publication of a prospectus and periodical reports***

#### *Article 68*

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

- (a) a prospectus;
- (b) an annual report for each financial year; and
- (c) a half-yearly report covering the first six months of the financial year.

2. The annual and half-yearly reports shall be published within the following time limits, with effect from the end of the period to which they relate:

- (a) four months in the case of the annual report; or
- (b) two months in the case of the half-yearly report.

#### *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.



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).

3. The annual report shall include a balance-sheet or a statement of assets and liabilities, a detailed income and expenditure account for the financial year, a report on the activities of the financial year and the other information provided for in Schedule B of Annex I as well as any significant information which will enable investors to make an informed judgement on the development of the activities of the UCITS and its results.

4. The half-yearly report shall include at least the information provided for in Sections I to IV of Schedule B of Annex I. Where a UCITS has paid or proposes to pay an interim dividend, the figures must indicate the results after tax for the half-year concerned and the interim dividend paid or proposed.

#### Article 70

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.

4. Upon request of an investor, the management company shall also provide supplementary information relating to the quantitative limits that apply in the risk management of the UCITS, to the methods chosen to this end and to the recent evolution of the main risks and yields of the instrument categories.

#### Article 71

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.

2. The documents referred to in paragraph 1 are not, however, required to be annexed to the prospectus provided that the investor is informed that, on request, he or she will be sent those documents or be apprised of the place where, in each Member State in which the units are marketed, he or she may consult them.

#### Article 72

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

#### Article 73

The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC. The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

#### Article 74

UCITS shall send their prospectus and any amendments thereto, as well as their annual and half-yearly reports, to the competent authorities of the UCITS home Member State. UCITS shall provide that documentation to the competent authorities of the management company's home Member State on request.

#### Article 75

1. The prospectus and the latest published annual and half-yearly reports shall be provided to investors on request and free of charge.

2. The prospectus may be provided in a durable medium or by means of a website. A paper copy shall be delivered to the investors on request and free of charge.

3. The annual and half-yearly reports shall be available to investors in the manner specified in the prospectus and in the key investor information referred to in Article 78. A paper copy of the annual and half-yearly reports shall be delivered to the investors on request and free of charge.

4. The Commission may adopt implementing measures which define the specific conditions which need to be met when providing the prospectus in a durable medium other than paper or by means of a website which does not constitute a durable medium.

Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

### SECTION 2

#### **Publication of other information**

#### Article 76

A UCITS shall make public in an appropriate manner the issue, sale, repurchase or redemption price of its units each time it issues, sells, repurchases or redeems them, and at least twice a month.

The competent authorities may, however, permit a UCITS to reduce the frequency to once a month on condition that such derogation does not prejudice the interests of the unit-holders.

*Article 77*

All marketing communications to investors shall be clearly identifiable as such. They shall be fair, clear and not misleading. In particular, any marketing communication comprising an invitation to purchase units of UCITS that contains specific information about a UCITS shall make no statement that contradicts or diminishes the significance of the information contained in the prospectus and the key investor information referred to in Article 78. It shall indicate that a prospectus exists and that the key investor information referred to in Article 78 is available. It shall specify where and in which language such information or documents may be obtained by investors or potential investors or how they may obtain access to them.

## SECTION 3

**Key investor information***Article 78*

1. Member States shall 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. That document shall be referred to as 'key investor information' in this Directive. The words 'key investor information' shall be clearly stated in that document, in one of the languages referred to in Article 94(1)(b).

2. Key investor information shall include appropriate information about the essential characteristics of the UCITS concerned, which is 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, to take investment decisions on an informed basis.

3. Key investor information shall provide information on the following essential elements in respect of the UCITS concerned:

- (a) identification of the UCITS;
- (b) a short description of its investment objectives and investment policy;
- (c) past-performance presentation or, where relevant, performance scenarios;
- (d) costs and associated charges; and
- (e) risk/reward profile of the investment, including appropriate guidance and warnings in relation to the risks associated with investments in the relevant UCITS.

Those essential elements shall be comprehensible to the investor without any reference to other documents.

4. Key investor information shall clearly specify where and how to obtain additional information relating to the proposed investment, including but not limited to where and how the prospectus and the annual and half-yearly report can be obtained on request and free of charge at any time, and the language in which such information is available to investors.

5. Key investor information shall be written in a concise manner and in non-technical language. It shall be drawn up in a common format, allowing for comparison, and shall be presented in a way that is likely to be understood by retail investors.

6. Key investor information shall be used without alterations or supplements, except translation, in all Member States where the UCITS is notified to market its units in accordance with Article 93.

7. The Commission shall adopt implementing measures which define the following:

- (a) the detailed and exhaustive content of the key investor information to be provided to investors as referred to in paragraphs 2, 3 and 4;
- (b) the detailed and exhaustive content of the key investor information to be provided to investors in the following specific cases:
  - (i) for UCITS having different investment compartments, the key investor information to be provided to investors subscribing to a specific investment compartment, including how to pass from one investment compartment into another and the costs related thereto;
  - (ii) for UCITS offering different share classes, the key investor information to be provided to investors subscribing to a specific share class;
  - (iii) for fund of funds structures, the key investor information to be provided to investors subscribing to a UCITS, which invests itself in other UCITS or other collective investment undertakings referred to in Article 50(1)(e);
  - (iv) for master-feeder structures, the key investor information to be provided to investors subscribing to a feeder UCITS; and
  - (v) for structured, capital protected and other comparable UCITS, the key investor information to be provided to investors in relation to the special characteristics of such UCITS; and
- (c) the specific details of the format and presentation of the key investor information to be provided to investors as referred to in paragraph 5.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

*Article 79*

1. Key investor information shall constitute pre-contractual information. It shall be fair, clear and not misleading. It shall be consistent with the relevant parts of the prospectus.

2. Member States shall ensure that a person does not incur civil liability solely on the basis of the key investor information, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus. Key investor information shall contain a clear warning in this respect.

*Article 80*

1. Member States shall require that an investment company and, for each of the common funds it manages, a management company, which sells UCITS directly or through another natural or legal person who acts on its behalf and under its full and unconditional responsibility provides investors with key investor information on such UCITS in good time before their proposed subscription of units in such UCITS.

2. Member States shall require that an investment company and, for each of the common funds it manages, a management company, which does not sell UCITS directly or through another natural or legal person who acts on its behalf and under its full and unconditional responsibility to investors provides key investor information to product manufacturers and intermediaries selling or advising investors on potential investments in such UCITS or in products offering exposure to such UCITS upon their request. Member States shall require that the intermediaries selling or advising investors on potential investments in UCITS, provide key investor information to their clients or potential clients.

3. Key investor information shall be provided to investors free of charge.

*Article 81*

1. Member States shall allow investment companies and, for each of the common funds they manage, management companies, to provide key investor information in a durable medium or by means of a website. A paper copy shall be delivered to the investor on request and free of charge.

In addition, an up-to-date version of the key investor information shall be made available on the website of the investment company or management company.

2. The Commission may adopt implementing measures which define the specific conditions which need to be met when providing key investor information in a durable medium other than on paper or by means of a website which does not constitute a durable medium.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

*Article 82*

1. UCITS shall send their key investor information and any amendments thereto, to the competent authorities of their home Member State.

2. The essential elements of key investor information shall be kept up to date.

## CHAPTER X

**GENERAL OBLIGATIONS OF UCITS***Article 83*

1. The following shall not borrow:

- (a) an investment company;
- (b) a management company or depositary acting on behalf of a common fund.

A UCITS may, however, acquire foreign currency by means of a 'back-to-back' loan.

2. By way of derogation from paragraph 1, a Member State may authorise a UCITS to borrow provided that such borrowing is:

- (a) on a temporary basis and represents:
  - in the case of an investment company, no more than 10 % of its assets, or
  - in the case of a common fund, no more than 10 % of the value of the fund; or
- (b) to enable the acquisition of immovable property essential for the direct pursuit of its business and represents, in the case of an investment company, no more than 10 % of its assets.

Where a UCITS is authorised to borrow under points (a) and (b), such borrowing shall not exceed 15 % of its assets in total.

*Article 84*

1. A UCITS shall repurchase or redeem its units at the request of any unit-holder.

2. By way of derogation from paragraph 1:

- (a) a UCITS may, in accordance with the applicable national law, the fund rules or the instruments of incorporation of the investment company, temporarily suspend the repurchase or redemption of its units;

(b) a UCITS home Member State may allow its competent authorities to require the suspension of the repurchase or redemption of units in the interest of the unit-holders or of the public.

The temporary suspension referred to in point (a) of the first subparagraph shall be provided for only in exceptional cases where circumstances so require and where suspension is justified having regard to the interests of the unit-holders.

3. In the event of a temporary suspension under paragraph 2(a), a UCITS shall, without delay, communicate its decision to its home Member State competent authorities and to the competent authorities of all Member States in which it markets its units.

#### Article 85

The rules for the valuation of assets and the rules for calculating the sale or issue price and the repurchase or redemption price of the units of a UCITS shall be laid down in the applicable national law, in the fund rules or in the instruments of incorporation of the investment company.

#### Article 86

The distribution or reinvestment of the income of a UCITS shall be effected in accordance with the law and with the fund rules or the instruments of incorporation of the investment company.

#### Article 87

A UCITS unit shall not be issued unless the equivalent of the net issue price is paid into the assets of the UCITS within the usual time limits. This shall not preclude the distribution of bonus units.

#### Article 88

1. Without prejudice to the application of Articles 50 and 51, the following shall not grant loans or act as a guarantor on behalf of third parties:

- (a) an investment company;
- (b) a management company or depositary acting on behalf of a common fund.

2. Paragraph 1 shall not prevent the undertakings referred to therein from acquiring transferable securities, money market instruments or other financial instruments referred to in points (e), (g) and (h) of Article 50(1) which are not fully paid.

#### Article 89

The following shall not carry out uncovered sales of transferable securities, money market instruments or other financial instruments referred to in points (e), (g) and (h) of Article 50(1):

- (a) an investment company;

(b) a management company or depositary acting on behalf of a common fund.

#### Article 90

The law of the UCITS home Member State or the fund rules shall prescribe the remuneration and the expenditure which a management company is empowered to charge to a common fund and the method of calculation of such remuneration.

The law or the instruments of incorporation of an investment company shall prescribe the nature of the cost to be borne by the company.

### CHAPTER XI

#### **SPECIAL PROVISIONS APPLICABLE TO UCITS WHICH MARKET THEIR UNITS IN MEMBER STATES OTHER THAN THOSE IN WHICH THEY ARE ESTABLISHED**

#### Article 91

1. UCITS host Member States shall ensure that UCITS are able to market their units within their territories upon notification in accordance with Article 93.

2. UCITS host Member States shall not impose any additional requirements or administrative procedures on UCITS as referred to in paragraph 1 in respect of the field governed by this Directive.

3. Member States shall ensure that complete information on the laws, regulations and administrative provisions which do not fall within the field governed by this Directive and which are specifically relevant to the arrangements made for the marketing of units of UCITS, established in another Member State within their territories, is easily accessible from a distance and by electronic means. Member States shall ensure that that information is available in a language customary in the sphere of international finance, is provided in a clear and unambiguous manner and is kept up to date.

4. For the purposes of this Chapter, a UCITS shall include investment compartments thereof.

#### Article 92

UCITS shall, in accordance with the laws, regulations and administrative provisions in force in the Member State where their units are marketed, take the measures necessary to ensure that facilities are available in that Member State for making payments to unit-holders, repurchasing or redeeming units and making available the information which UCITS are required to provide.

#### Article 93

1. If a UCITS proposes to market its units in a Member State other than its home Member State, it shall first submit a notification letter to the competent authorities of its home Member State.



The notification letter shall include information on arrangements made for marketing units of the UCITS in the host Member State, including, where relevant, in respect of share classes. In the context of Article 16(1), it shall include an indication that the UCITS is marketed by the management company that manages the UCITS.

2. A UCITS shall enclose with the notification letter, as referred to in paragraph 1, the latest version of the following:

- (a) its fund rules or its instruments of incorporation, its prospectus and, where appropriate, its latest annual report and any subsequent half-yearly report translated in accordance with the provisions of Article 94(1)(c) and (d); and
- (b) its key investor information referred to in Article 78, translated in accordance with Article 94(1)(b) and (d).

3. The competent authorities of the UCITS home Member State shall verify whether the documentation submitted by the UCITS in accordance with paragraphs 1 and 2 is complete.

The competent authorities of the UCITS home Member State shall transmit the complete documentation referred to in paragraphs 1 and 2 to the competent authorities of the Member State in which the UCITS proposes to market its units, no later than 10 working days of the date of receipt of the notification letter accompanied by the complete documentation provided for in paragraph 2. They shall enclose with the documentation an attestation that the UCITS fulfils the conditions imposed by this Directive.

Upon the transmission of the documentation, the competent authorities of the UCITS home Member State shall immediately notify the UCITS about the transmission. The UCITS may access the market of the UCITS host Member State as from the date of that notification.

4. Member States shall ensure that the notification letter referred to in paragraph 1 and the attestation referred to in paragraph 3 are provided in a language customary in the sphere of international finance, unless the UCITS home and host Member States agree to that notification letter and that attestation being provided in an official language of both Member States.

5. Member States shall ensure that the electronic transmission and filing of the documents referred to in paragraph 3 is accepted by their competent authorities.

6. For the purpose of the notification procedure set out in this Article, the competent authorities of the Member State in which a UCITS proposes to market its units shall not request any additional documents, certificates or information other than those provided for in this Article.

7. The UCITS home Member State shall ensure that the competent authorities of the UCITS host Member State have access, by electronic means, to the documents referred to in paragraph 2 and, if applicable, to any translations thereof. It shall ensure that the UCITS keeps those documents and translations up to date. The UCITS shall notify any amendments to the documents referred to in paragraph 2 to the competent authorities of the UCITS host Member State and shall indicate where those documents can be obtained electronically.

8. In the event of a change in the information regarding the arrangements made for marketing communicated in the notification letter in accordance with paragraph 1, or a change regarding share classes to be marketed, the UCITS shall give written notice thereof to the competent authorities of the host Member State before implementing the change.

#### Article 94

1. Where a UCITS markets its units in a UCITS host Member State, it shall provide to investors within the territory of such Member State all information and documents which it is required pursuant to Chapter IX to provide to investors in its home Member State.

Such information and documents shall be provided to investors in compliance with the following provisions:

- (a) without prejudice to the provisions of Chapter IX, such information or documents shall be provided to investors in the way prescribed by the laws, regulations or administrative provisions of the UCITS host Member State;
- (b) key investor information referred to in Article 78 shall be translated into the official language, or one of the official languages, of the UCITS host Member State or into a language approved by the competent authorities of that Member State;
- (c) information or documents other than key investor information referred to in Article 78 shall be translated, at the choice of the UCITS, into the official language, or one of the official languages, of the UCITS host Member State, into a language approved by the competent authorities of that Member State or into a language customary in the sphere of international finance; and
- (d) translations of information or documents under points (b) and (c) shall be produced under the responsibility of the UCITS and shall faithfully reflect the content of the original information.

2. The requirements set out in paragraph 1 shall also be applicable to any changes to the information and documents referred therein.

3. The frequency of the publication of the issue, sale, repurchase or redemption price of units of UCITS according to Article 76 shall be subject to the laws, regulations and administrative provisions of the UCITS home Member State.

#### Article 95

1. The Commission may adopt implementing measures specifying:

- (a) the scope of the information referred to in Article 91(3);
- (b) the facilitation of access for the competent authorities of the UCITS host Member States to the information or documents referred to in Article 93(1), (2) and (3) in accordance with Article 93(7).



Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

2. The Commission may also adopt implementing measures specifying:

- (a) the form and contents of a standard model notification letter to be used by a UCITS for the purpose of notification referred to in Article 93(1), including an indication as to which documents the translations refer to;
- (b) the form and contents of a standard model attestation to be used by competent authorities of Member States referred to in Article 93(3);
- (c) the procedure for the exchange of information and the use of electronic communication between competent authorities for the purpose of notification under the provisions of Article 93.

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

#### Article 96

For the purpose of pursuing its activities, a UCITS may use the same reference to its legal form (such as investment company or common fund) in its designation in a UCITS host Member State as it uses in its home Member State.

### CHAPTER XII

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

#### Article 97

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

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

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

#### Article 98

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

- (a) directly;
- (b) in collaboration with other authorities;

- (c) under the responsibility of the competent authorities, by delegation to entities to which tasks have been delegated; or
- (d) by application to the competent judicial authorities.

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

- (a) access any document in any form and receive a copy thereof;
- (b) require any person to provide information and, if necessary, to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections;
- (d) require existing telephone and existing data traffic records;
- (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- (f) request the freezing or the sequestration of assets;
- (g) request the temporary prohibition of professional activity;
- (h) require authorised investment companies, management companies or depositaries to provide information;
- (i) adopt any type of measure to ensure that investment companies, management companies or depositaries continue to comply with the requirements of this Directive;
- (j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
- (k) withdraw the authorisation granted to a UCITS, a management company or a depositary;
- (l) refer matters for criminal prosecution; and
- (m) allow auditors or experts to carry out verifications or investigations.

#### Article 99

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

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

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

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

#### Article 100

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

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

#### Article 101

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

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

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

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

3. Where a competent authority of one Member State has good reason to suspect that acts contrary to the provisions of this Directive, are being or have been carried out by entities not subject to that competent authority's supervision on the territory of another Member State, it shall notify the competent authorities of the other Member State thereof in as specific a manner as possible. The recipient authorities shall take appropriate action, shall inform the notifying competent authority of the outcome of that

action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competences of the notifying competent authority.

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

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

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

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

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

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

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

8. Competent authorities may bring to the attention of the Committee of European Securities Regulators, established by Commission Decision 2009/77/EC <sup>(1)</sup>, situations where a request:

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

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

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

#### Article 102

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

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

2. Paragraph 1 shall not prevent the competent authorities of the Member States from exchanging information in accordance with this Directive or other Community law applicable to UCITS or to undertakings contributing towards their business activity. That information shall be subject to the conditions of professional secrecy laid down in paragraph 1.

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

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

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

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

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

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

- (a) authorities with public responsibility for the supervision of credit institutions, investment undertakings, insurance undertakings or other financial organisations, or authorities responsible for the supervision of financial markets;
- (b) bodies involved in the liquidation or bankruptcy of UCITS or undertakings contributing towards their business activity, or bodies involved in similar procedures; or
- (c) persons responsible for carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment undertakings or other financial institutions.

In particular, paragraphs 1 and 4 shall not preclude the performance by the competent authorities listed above of their supervisory functions, or the disclosure to bodies which administer compensation schemes of information necessary for the performance of their functions.

Information exchanged pursuant to the first subparagraph shall be subject to the conditions of professional secrecy imposed in paragraph 1.

<sup>(1)</sup> OJ L 25, 29.1.2009, p. 18.

*Article 103*

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

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

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

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

3. Member States shall communicate to the Commission and to the other Member States the names of the authorities which may receive information pursuant to paragraph 1.

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

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

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

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

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

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

*Article 104*

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

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

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

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

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

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

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



*Article 105*

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

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

*Article 106*

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

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

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

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

*Article 107*

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

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

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

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

*Article 108*

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

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

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

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

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



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

- (a) after informing the competent authorities of the UCITS home Member State, take all the appropriate measures needed in order to protect investors, including the possibility of preventing the UCITS concerned from carrying out any further marketing of its units within the territory of the UCITS host Member State; or
- (b) if necessary, bring the matter to the attention of the Committee of European Securities Regulators.

The Commission shall be informed without delay of any measure taken pursuant to point (a) of the first subparagraph.

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

#### Article 109

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

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

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

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

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

#### Article 110

1. Each management company's host Member State shall ensure that where a management company authorised in another Member State pursues business within its territory through a branch the competent authorities of the management company's home Member State may, after informing the competent authorities of the management company's host Member State, themselves or through the intermediary they instruct for the purpose, carry out on-the-spot verification of the information referred to in Article 109.

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

#### CHAPTER XIII

#### EUROPEAN SECURITIES COMMITTEE

#### Article 111

The Commission may adopt technical amendments to this Directive in the following areas:

- (a) clarification of the definitions in order to ensure uniform application of this Directive throughout the Community; or
- (b) alignment of terminology and the framing of definitions in accordance with subsequent acts on UCITS and related matters.

Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 112(2).

#### Article 112

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC<sup>(1)</sup>.

<sup>(1)</sup> OJ L 191, 13.7.2001, p. 45.

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

SECTION 2

**Transitional and final provisions**

3. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 115

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

By 1 July 2013, the Commission shall submit to the European Parliament and to the Council a report on the application of this Directive.

## CHAPTER XIV

Article 116

**DEROGATIONS, TRANSITIONAL AND FINAL PROVISIONS**

## SECTION 1

**Derogations**

Article 113

1. Solely for the purpose of Danish UCITS, *pantebreve* issued in Denmark shall be treated as equivalent to the transferable securities referred to in Article 50(1)(b).

2. By way of derogation from Articles 22(1) and 32(1), the competent authorities may authorise those UCITS which, on 20 December 1985, had two or more depositaries in accordance with their national law to maintain that number of depositaries if those authorities have guarantees that the functions to be performed under Article 22(3) and Article 32(3) will be performed in practice.

3. By way of derogation from Article 16, the Member States may authorise management companies to issue bearer certificates representing the registered securities of other companies.

Article 114

1. Investment firms, as defined in Article 4(1)(1) of Directive 2004/39/EC, authorised to carry out only the services provided for in Section A(4) and (5) of the Annex to that Directive, may obtain authorisation under this Directive to manage UCITS as management companies. In that case, such investment firms shall give up the authorisation obtained under Directive 2004/39/EC.

2. Management companies already authorised before 13 February 2004 in their home Member State under Directive 85/611/EEC to manage UCITS shall be deemed to be authorised for the purposes of this Article if the laws of that Member State provide that to take up such activity they must comply with conditions equivalent to those imposed in Articles 7 and 8.

1. Member States shall adopt and publish by 30 June 2011, the laws, regulations and administrative provisions necessary to comply with the second subparagraph of Article 1(2), Article 1(3)(b), points (e), (m), (p), (q) and (r) of Article 2(1), Article 2(5), Article 4, Article 5(1) to (4), (6) and (7), Article 6(1), Article 12(1), the introductory phase of Article 13(1), Article 13(1)(a) and (i), Article 15, Article 16(1), Article 16(3), Article 17(1), Article 17(2)(b), the first and third subparagraphs of Article 17(3), Article 17(4) to (7), the second subparagraph of Article 17(9), the introductory part of Article 18(1), Article 18(1)(b), the third and fourth subparagraphs of Article 18(2), Article 18(3) and (4), Articles 19 and 20, Article 21(2) to (6), (8) and (9), Article 22(1), points (a), (d) and (e) of Article 22(3), Article 23(1), (2), (4), and (5), the third paragraph of Article 27, Article 29(2), Article 33(2), (4), and (5), Articles 37 to 42, Article 43(1) to (5), Articles 44 to 49, the introductory phrase of Article 50(1), Article 50(3), the third subparagraph of Article 51(1), Article 54(3), Article 56(1), the introductory phrase of the first subparagraph of Article 56(2), Articles 58 and 59, Article 60(1) to (5), Article 61(1) and (2), Article 62(1), (2) and (3), Article 63, Article 64(1), (2) and (3), Articles 65, 66 and 67, the introductory phrase and Article 68(1)(a), Article 69(1) and (2), Article 70(2) and (3), Articles 71, 72 and 74, Article 75(1), (2) and (3), Articles 77 to 82, Article 83(1)(b), the second indent of Article 83(2)(a), Article 86, Article 88(1)(b), Article 89(b), Articles 90 to 94, Articles 96 to 100, Article 101(1) to (8), the second subparagraph of Article 102(2), Article 102(5), Articles 107 and 108, Article 109(2), (3) and (4), Article 110 and Annex I. They shall forthwith inform the Commission thereof.

They shall apply those measures from 1 July 2011.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to Directive 85/611/EEC shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 117*

Directive 85/611/EEC, as amended by the Directives listed in Annex III, Part A, is repealed with effect from 1 July 2011, 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.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex IV.

References to the simplified prospectus shall be construed as references to the key investor information referred to in Article 78.

*Article 118*

1. This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 1(1), the first subparagraph of Article 1(2), Article 1(3)(a), Article 1(4) to (7), points (a) to (d), (f) to (l), (n) and (o) of Article 2(1), Article 2(2), (3) and (4), Article 2(6) and (7), Article 3, Article 5(5), Article 6(2), (3) and (4), Articles 7 to 11, Article 12(2), Article 13(1)(b) to (h), Article 13(2), Article 14(1), Article 16(2), points (a), (c) and (d) of Article 17(2), the second subparagraph of Article 17(3), Article 17(8), the first subparagraph of Article 17(9), Article 18(1) except the introductory phrase and point (a), the first and second subparagraphs of Article 18(2), Article 21(1) and (7), Article 22(2), Article 22(3)(b) and (c), Article 23(3), Article 24, Articles 25 and 26, the first and second paragraphs of Article 27, Article 28, Article 29(1), (3), and (4), Articles 30, 31 and 32, Article 33(1) and (3), Articles 34, 35 and 36, Article 50(1)(a)

to (h), Article 50(2), the first and second subparagraphs of Article 51(1), Article 51(2) and (3), Articles 52 and 53, Article 54(1) and (2), Article 55, the first subparagraph of Article 56(2), the second subparagraph of Article 56(2), Article 56(3), Article 57, Article 68(2), Article 69(3) and (4), Article 70(1) and (4), Articles 73 and 76, Article 83(1) except point (b), Article 83(2)(a) except the second indent, Articles 84, 85 and 87, Article 88(1) except point (b), Article 88(2), Article 89 except point (b), Article 102(1), the first subparagraph of Article 102(2), Article 102(3) and (4), Articles 103 to 106, Article 109(1), Articles 111, 112, 113, and 117 and Annexes II, III and IV shall apply from 1 July 2011.

2. Member States shall ensure that UCITS replace their simplified prospectus drawn up in accordance with the provisions of Directive 85/611/EEC with key investor information drawn up in accordance with Article 78 as soon as possible and in any event no later than 12 months after the deadline for implementing, in national law, all the implementing measures referred to in Article 78(7) has expired. During that period, the competent authorities of the UCITS host Member States shall continue to accept the simplified prospectus for UCITS marketed on the territory of those Member States.

*Article 119*

This Directive is addressed to the Member States.

Done at Brussels, 13 July 2009.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
E. ERLANDSSON

## ANNEX I

## SCHEDULE A

1. Information concerning the common fund	1. Information concerning the management company including an indication whether the management company is established in a Member State other than the UCITS home Member State	1. Information concerning the investment company
1.1. Name	1.1. Name or style, form in law, registered office and head office if different from the registered office.	1.1. Name or style, form in law, registered office and head office if different from the registered office.
1.2. Date of establishment of the common fund. Indication of duration, if limited.	1.2. Date of incorporation of the company. Indication of duration, if limited.	1.2. Date of incorporation of the company. Indication of duration, if limited.
	1.3. If the company manages other common funds, indication of those other funds.	1.3. In the case of investment companies having different investment compartments, the indication of the compartments.
1.4. Statement of the place where the fund rules, if they are not annexed, and periodic reports may be obtained.		1.4. Statement of the place where the instruments of incorporation, if they are not annexed, and periodical reports may be obtained.
1.5. Brief indications relevant to unit-holders of the tax system applicable to the common fund. Details of whether deductions are made at source from the income and capital gains paid by the common fund to unit-holders.		1.5. Brief indications relevant to unit-holders of the tax system applicable to the company. Details of whether deductions are made at source from the income and capital gains paid by the company to unit-holders.
1.6. Accounting and distribution dates		1.6. Accounting and distribution dates.
1.7. Names of the persons responsible for auditing the accounting information referred to in Article 73.		1.7. Names of the persons responsible for auditing the accounting information referred to in Article 73.
	1.8. Names and positions in the company of the members of the administrative, management and supervisory bodies. Details of their main activities outside the company where these are of significance with respect to that company.	1.8. Names and positions in the company of the members of the administrative, management and supervisory bodies. Details of their main activities outside the company where these are of significance with respect to that company.
	1.9. Amount of the subscribed capital with an indication of the capital paid-up	1.9. Capital

<p>1.10. Details of the types and main characteristics of the units and in particular:</p> <ul style="list-style-type: none"> <li>— the nature of the right (real, personal or other) represented by the unit,</li> <li>— characteristics of the units: registered or bearer. Indication of any denominations which may be provided for,</li> <li>— original securities or certificates providing evidence of title; entry in a register or in an account,</li> <li>— indication of unit-holders' voting rights if these exist,</li> <li>— circumstances in which winding-up of the common fund can be decided on and winding-up procedure, in particular as regards the rights of unit-holders.</li> </ul>		<p>1.10. Details of the types and main characteristics of the units and in particular:</p> <ul style="list-style-type: none"> <li>— original securities or certificates providing evidence of title; entry in a register or in an account,</li> <li>— characteristics of the units: registered or bearer. Indication of any denominations which may be provided for,</li> <li>— indication of unit-holders' voting rights,</li> <li>— circumstances in which winding-up of the investment company can be decided on and winding-up procedure, in particular as regards the rights of unit-holders.</li> </ul>
<p>1.11. Where applicable, indication of stock exchanges or markets where the units are listed or dealt in.</p>		<p>1.11. Where applicable, indication of stock exchanges or markets where the units are listed or dealt in.</p>
<p>1.12. Procedures and conditions of issue and sale of units.</p>		<p>1.12. Procedures and conditions of issue and sale of units.</p>
<p>1.13. Procedures and conditions for repurchase or redemption of units, and circumstances in which repurchase or redemption may be suspended.</p>		<p>1.13. Procedures and conditions for repurchase or redemption of units, and circumstances in which repurchase or redemption may be suspended. In the case of investment companies having different investment compartments, information on how a unit-holder may pass from one compartment into another and the charges applicable in such cases.</p>
<p>1.14. Description of rules for determining and applying income.</p>		<p>1.14. Description of rules for determining and applying income.</p>
<p>1.15. Description of the common fund's investment objectives, including its financial objectives (e.g. capital growth or income), investment policy (e.g. specialisation in geographical or industrial sectors), any limitations on that investment policy and an indication of any techniques and instruments or borrowing powers which may be used in the management of the common fund.</p>		<p>1.15. Description of the company's investment objectives, including its financial objectives (e.g. capital growth or income), investment policy (e.g. specialisation in geographical or industrial sectors), any limitations on that investment policy and an indication of any techniques and instruments or borrowing powers which may be used in the management of the company.</p>



1.16. Rules for the valuation of assets.		1.16. Rules for the valuation of assets.
<p>1.17. Determination of the sale or issue price and the repurchase or redemption price of units, in particular:</p> <ul style="list-style-type: none"> <li>— the method and frequency of the calculation of those prices,</li> <li>— information concerning the charges relating to the sale or issue and the repurchase or redemption of units,</li> <li>— the means, places and frequency of the publication of those prices.</li> </ul>		<p>1.17. Determination of the sale or issue price and the repurchase or redemption price of units, in particular:</p> <ul style="list-style-type: none"> <li>— the method and frequency of the calculation of those prices,</li> <li>— information concerning the charges relating to the sale or issue and the repurchase or redemption of units,</li> <li>— the means, places and frequency of the publication of those prices <sup>(1)</sup>.</li> </ul>
<p>1.18. Information concerning the manner, amount and calculation of remuneration payable by the common fund to the management company, the depositary or third parties, and reimbursement of costs by the common fund to the management company, to the depositary or to third parties.</p>		<p>1.18. Information concerning the manner, amount and calculation of remuneration payable by the company to its directors, and members of the administrative, management and supervisory bodies, to the depositary, or to third parties, and reimbursement of costs by the company to its directors, to the depositary or to third parties.</p>

(<sup>1</sup>) Investment companies within the meaning of Article 32(5) of this Directive shall also indicate:

- the method and frequency of calculation of the net asset value of units,
- the means, place and frequency of the publication of that value,
- the stock exchange in the country of marketing the price on which determines the price of transactions effected outwith stock exchanges in that country.

2. Information concerning the depositary:

2.1. Name or style, form in law, registered office and head office if different from the registered office;

2.2. Main activity.

3. Information concerning the advisory firms or external investment advisers who give advice under contract which is paid for out of the assets of the UCITS:

3.1. Name or style of the firm or name of the adviser;

3.2. Material provisions of the contract with the management company or the investment company which may be relevant to the unit-holders, excluding those relating to remuneration;

3.3. Other significant activities.

4. Information concerning the arrangements for making payments to unit-holders, repurchasing or redeeming units and making available information concerning the UCITS. Such information must in any case be given in the Member State in which the UCITS is established. In addition, where units are marketed in another Member State, such information shall be given in respect of that Member State in the prospectus published there.

5. Other investment information:

5.1. Historical performance of the UCITS (where applicable) — such information may be either included in or attached to the prospectus;

- 5.2. Profile of the typical investor for whom the UCITS is designed.
6. Economic information:
- 6.1. Possible expenses or fees, other than the charges mentioned in point 1.17, distinguishing between those to be paid by the unit-holder and those to be paid out of the assets of the UCITS.

## SCHEDULE B

### Information to be included in the periodic reports

- I. *Statement of assets and liabilities:*
- transferable securities,
  - bank balances,
  - other assets,
  - total assets,
  - liabilities,
  - net asset value.
- II. *Number of units in circulation*
- III. *Net asset value per unit*
- IV. *Portfolio, distinguishing between:*
- (a) transferable securities admitted to official stock exchange listing;
  - (b) transferable securities dealt in on another regulated market;
  - (c) recently issued transferable securities of the type referred to in Article 50(1)(d);
  - (d) other transferable securities of the type referred to in Article 50(2)(a);

and analysed in accordance with the most appropriate criteria in the light of the investment policy of the UCITS (e.g. in accordance with economic, geographical or currency criteria) as a percentage of net assets; for each of the above investments the proportion it represents of the total assets of the UCITS.

Statement of changes in the composition of the portfolio during the reference period.

- V. *Statement of the developments concerning the assets of the UCITS during the reference period including the following:*
- income from investments,
  - other income,
  - management charges,
  - depositary's charges,
  - other charges and taxes,
  - net income,

- distributions and income reinvested,
  - changes in capital account,
  - appreciation or depreciation of investments,
  - any other changes affecting the assets and liabilities of the UCITS,
  - transaction costs, which are costs incurred by a UCITS in connection with transactions on its portfolio.
- VI. *A comparative table covering the last three financial years and including, for each financial year, at the end of the financial year:*
- the total net asset value,
  - the net asset value per unit.
- VII. *Details, by category of transaction within the meaning of Article 51 carried out by the UCITS during the reference period, of the resulting amount of commitments.*
-

## ANNEX II

*Functions included in the activity of collective portfolio management:*

- Investment management.
  - Administration:
    - (a) legal and fund management accounting services;
    - (b) customer inquiries;
    - (c) valuation and pricing (including tax returns);
    - (d) regulatory compliance monitoring;
    - (e) maintenance of unit-holder register;
    - (f) distribution of income;
    - (g) unit issues and redemptions;
    - (h) contract settlements (including certificate dispatch);
    - (i) record keeping.
  - Marketing.
-

## ANNEX III

## PART A

**Repealed Directive with list of its successive amendments****(referred to in Article 117)**

Council Directive 85/611/EEC  
(OJ L 375, 31.12.1985, p. 3)

Council Directive 88/220/EEC  
(OJ L 100, 19.4.1988, p. 31)

Directive 95/26/EC of the European Parliament and of the Council  
(OJ L 168, 18.7.1995, p. 7) Article 1, fourth indent, Article 4(7) and Article 5, fifth indent only

Directive 2000/64/EC of the European Parliament and of the Council  
(OJ L 290, 17.11.2000, p. 27) Article 1 only

Directive 2001/107/EC of the European Parliament and of the Council  
(OJ L 41, 13.2.2002, p. 20)

Directive 2001/108/EC of the European Parliament and of the Council  
(OJ L 41, 13.2.2002, p. 35)

Directive 2004/39/EC of the European Parliament and of the Council  
(OJ L 145, 30.4.2004, p. 1) Article 66 only

Directive 2005/1/EC of the European Parliament and of the Council  
(OJ L 79, 24.3.2005, p. 9) Article 9 only

Directive 2008/18/EC of the European Parliament and of the Council  
(OJ L 76, 19.3.2008, p. 42)

## PART B

**List of time limits for transposition into national law and application****(referred to in Article 117)**

Directive	Time limit for transposition	Date of application
85/611/EEC	1 October 1989	—
88/220/EEC	1 October 1989	—
95/26/EC	18 July 1996	—
2000/64/EC	17 November 2002	—
2001/107/EC	13 August 2003	13 February 2004
2001/108/EC	13 August 2003	13 February 2004
2004/39/EC	—	30 April 2006
2005/1/EC	13 May 2005	—



## ANNEX IV

## Correlation table

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Article 1(1)	Article 1(1)
Article 1(2), introductory phrase	Article 1(2), introductory phrase
Article 1(2), first and second indent	Article 1(2)(a) and (b)
—	Article 1(2), second subparagraph
Article 1(3), first subparagraph	Article 1(3), first subparagraph
Article 1(3), second subparagraph	Article 1(3), second subparagraph, point (a)
—	Article 1(3), second subparagraph, point (b)
Article 1(4) to (7)	Article 1(4) to (7)
Article 1(8), introductory phrase	Article 2(1)(n), introductory phrase
Article 1(8), first, second and third indent	Article 2(1)(n), points (i), (ii) and (iii)
Article 1(8), final phrase	Article 2(7)
Article 1(9)	Article 2(1)(o)
Article 1a, introductory phrase	Article 2(1), introductory phrase
Article 1a, point (1)	Article 2(1)(a)
Article 1a, point (2), first part of the phrase	Article 2(1)(b)
Article 1a, point (2), second part of the phrase	Article 2(2)
Article 1a, points (3) to (5)	Article 2(1)(c) to (e)
Article 1a, point (6)	Article 2(1)(f)
Article 1a, point (7), first part of the phrase	Article 2(1)(g)
Article 1a, point (7), second part of the phrase	Article 2(3)
Article 1a, points (8) to (9)	Article 2(1)(h) to (i)
Article 1a, point (10), first subparagraph	Article 2(1)(j)
Article 1a, point (10), second subparagraph	Article 2(5)
Article 1a, point (11)	—
Article 1a, points (12) and (13), first phrase	Article 2(1)(i)(ii)
Article 1a, point (13), second phrase	Article 2(4)(a)
Article 1a, points (14) and (15), first phrase	Article 2(1)(k) and (l)
Article 1a, point (15), second phrase	Article 2(6)
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Article 4(3), first subparagraph	Article 5(4), first subparagraph, points (a) and (b)
—	Article 5(4), second subparagraph
Article 4(3), second subparagraph	Article 5(4), third subparagraph
Article 4(3), third subparagraph	Article 5(4), fourth subparagraph
Article 4(3a)	Article 5(5)
Article 4(4)	Article 5(6)

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Article 5(1) and (2)	Article 6(1) and (2)
Article 5(3), first subparagraph, introductory phrase	Article 6(3), first subparagraph, introductory phrase
Article 5(3), first subparagraph, point (a)	Article 6(3), first subparagraph, point (a)
Article 5(3), first subparagraph, point (b), introductory phrase	Article 6(3), first subparagraph, point (b), introductory phrase
Article 5(3), first subparagraph, point (b), first and second indent	Article 6(3), first subparagraph, point (b)(i) and (ii)
Article 5(3), second subparagraph	Article 6(3), second subparagraph
Article 5(4)	Article 6(4)
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Article 5a(1)(a), introductory phrase	Article 7(1)(a), introductory phrase
Article 5a(1)(a), first indent	Article 7(1)(a)(i)
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Article 5a(1)(a), second indent, points (i), (ii) and (iii)	Article 7(1)(a)(ii), first, second and third indent
Article 5a(1)(a), third and fourth indent	Article 7(1)(a)(iii)
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Article 5a(1)(b) to (d)	Article 7(1)(b) to (d)
Article 5a(2) to (5)	Article 7(2) to (5)
Article 5b	Article 8
Article 5c	Article 9
Article 5d	Article 10
Article 5e	Article 11
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Article 5f(1), second subparagraph, point (a)	Article 12(1), second subparagraph, point (a)
Article 5f(1), second subparagraph, point (b) first sentence	Article 12(1), second subparagraph, point (b)
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Article 5f(2), introductory phrase	Article 12(2), introductory phrase
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—	Article 17(3), third subparagraph
—	Article 17(4) to (5)
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Article 19(1)(d), introductory phrase	Article 50(1)(d), introductory phrase

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Article 22(1), second subparagraph, first and second indent	Article 52(1), second subparagraph, points (a) and (b)
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Article 36(1), first subparagraph, first and second indent	Article 83(1) first subparagraph, points (a) and (b)
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Article 50(6)(b), first, second and third indent	Article 102(5), first subparagraph, points (a), (b) and (c)
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Article 50a(1)(a), introductory phrase	Article 106(1), first subparagraph, introductory phrase
Article 50a(1)(a), first, second and third indent	Article 106(1), first subparagraph, points (a), (b) and (c)
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Article 50a(2)	Article 106(2)
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—	Article 107(3)
Article 52(1)	Article 108(1), first subparagraph
Article 52(2)	Article 108(1), second subparagraph
Article 52(3)	Article 108(2)
—	Article 108(3) to (6)
Article 52a	Article 109(1) and (2)

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Article 52b(3)	Article 110(2)
Article 53a	Article 111
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**DIRECTIVE 2009/111/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 16 September 2009**

**amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management**

**(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,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the European Central Bank <sup>(2)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

- (1) In accordance with the European Council and Ecofin Conclusions and international initiatives such as the Group of Twenty (G-20) summit on 2 April 2009, this Directive represents a first important step to address shortcomings revealed by the financial crisis ahead of further initiatives announced by the Commission and set out in Commission Communication of 4 March 2009 entitled 'Driving European recovery'.
- (2) Article 3 of 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 <sup>(4)</sup> allows Member States to provide for special prudential regimes for credit institutions which are permanently affiliated to a central body since 15 December 1977, provided that those regimes were introduced

into national law by 15 December 1979. Those time limits prevent Member States, especially those which acceded to the European Union since 1980, from introducing or maintaining such special prudential regimes for similarly affiliated credit institutions which were set up on their territories. It is therefore appropriate to remove the time limits set out in Article 3 of that Directive, in order to ensure equal conditions for competition between credit institutions in Member States. The Committee of European Banking Supervisors should provide for guidelines in order to enhance the convergence of supervisory practices in this regard.

- (3) Hybrid capital instruments play an important role in the ongoing capital management of credit institutions. Those instruments allow credit institutions to achieve a diversified capital structure and to access a wide range of financial investors. On 28 October 1998, the Basel Committee on Banking Supervision adopted an agreement on both the eligibility criteria and limits to inclusion of certain types of hybrid capital instruments in original own funds of credit institutions.
- (4) It is therefore important to lay down criteria for those capital instruments to be eligible for original own funds of credit institutions and to align the provisions in Directive 2006/48/EC to that agreement. The amendments to Annex XII to Directive 2006/48/EC result directly from the establishment of those criteria. Original own funds referred to in Article 57(a) of Directive 2006/48/EC should include all instruments that are regarded under national law as equity capital, rank *pari passu* with ordinary shares during liquidation and fully absorb losses on a going-concern basis *pari passu* with ordinary shares. It should be possible for those instruments to include instruments providing preferential rights for dividend payment on a non-cumulative basis, provided that they are included in Article 22 of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions <sup>(5)</sup>, rank *pari passu* with ordinary shares during liquidation and fully absorb losses on a going-concern basis *pari passu* with ordinary shares. Original own funds referred to in Article 57(a) of Directive 2006/48/EC should also include any other instrument under a credit institution's statutory terms taking into account the specific constitution of

<sup>(1)</sup> Opinion of 24 March 2009 (not yet published in the Official Journal).

<sup>(2)</sup> OJ C 93, 22.4.2009, p. 3.

<sup>(3)</sup> Opinion of the European Parliament of 6 May 2009 (not yet published in the Official Journal) and Council Decision of 27 July 2009.

<sup>(4)</sup> OJ L 177, 30.6.2006, p. 1.

<sup>(5)</sup> OJ L 372, 31.12.1986, p. 1.

- mutuals, cooperative societies and similar institutions and which are deemed equivalent to ordinary shares in terms of their capital qualities in particular as regards loss absorption. Instruments that do not rank *pari passu* with ordinary shares during liquidation or which do not absorb losses on a going-concern basis *pari passu* with ordinary shares should be included in the category of hybrids referred to in Article 57(ca) of Directive 2006/48/EC.
- (5) In order to avoid disruption of markets and to ensure continuity in overall levels of own funds it is appropriate to provide for specific transitional arrangements for the new regime on capital instruments. Once recovery is assured, the quality of original own funds should be further enhanced. In this regard, the Commission should report to the European Parliament and the Council together with any appropriate proposals by 31 December 2011.
- (6) For the purpose of strengthening the crisis management framework of the Community, it is essential that competent authorities coordinate their actions with other competent authorities and, where appropriate, with central banks in an efficient way, including with the aim of mitigating systemic risk. In order to strengthen the efficiency of the prudential supervision of a banking group on a consolidated basis, supervisory activities should be coordinated in a more effective manner. Colleges of Supervisors should therefore be established. The establishment of Colleges of Supervisors should not affect the rights and responsibilities of the competent authorities under Directive 2006/48/EC. Their establishment should be an instrument for stronger cooperation by means of which competent authorities reach agreement on key supervisory tasks. The Colleges of Supervisors should facilitate the handling of ongoing supervision and emergency situations. The consolidating supervisor should, in association with the other members of the college, be able to decide to organise meetings or activities that are not of general interest and should therefore be able to streamline the attendance as appropriate.
- (7) The mandates of competent authorities should take into account, in an appropriate way, the Community dimension. Competent authorities should therefore duly consider the effect of their decisions on the stability of the financial system in all other Member States concerned. Subject to national law, that principle should be understood as a broad objective for promoting financial stability across the European Union and should not legally bind competent authorities to achieve a specific result.
- (8) The competent authorities should be able to participate in colleges established for the supervision of credit institutions having their parent in a third country. The Committee of European Banking Supervisors should, where necessary, provide for guidelines and recommendations in order to enhance the convergence of supervisory practices pursuant to Directive 2006/48/EC. In order to avoid inconsistencies and regulatory arbitrage, which could result from differences in the approaches and rules applied by the various colleges and the application of discretion by Member States, guidelines on the procedures and rules governing colleges should be developed by the Committee of European Banking Supervisors.
- (9) Article 129(3) of Directive 2006/48/EC should not change the allocation of responsibilities between competent supervisory authorities on a consolidated, sub-consolidated and individual basis.
- (10) Information deficits between the home and the host competent authorities may prove detrimental to the financial stability in host Member States. The information rights of host supervisors, in particular in a crisis involving significant branches, should therefore be reinforced. For that purpose, the notion of significant branches should be defined. The competent authorities should transmit information which is essential for the pursuance of the tasks of central banks and of Ministries of Finance with respect to financial crises and systemic risk mitigation.
- (11) The current supervisory arrangements should be subject to further developments. Colleges of Supervisors are a further and important step forward in streamlining European Union's supervisory cooperation and convergence.
- (12) Cooperation between supervisory authorities, dealing with groups and holdings and their subsidiaries and branches, by means of colleges is a phase in a development towards further regulatory convergence and supervisory integration. Trust between supervisors and respect for their respective responsibilities is essential. In the event of a conflict between members of a college linked to those different responsibilities, neutral and independent advice, mediation and conflict-resolving mechanisms at Community level are essential.
- (13) The crisis in international financial markets has demonstrated that it is appropriate to examine further the need for reform of the regulatory and supervisory model of the European Union's financial sector.
- (14) The Commission announced in its Communication of 29 October 2008 entitled 'From financial crisis to recovery: A European framework for action', that it had set up a group of experts, chaired by Mr Jacques de Larosière (the de Larosière Group), to consider the organisation of European financial institutions to ensure prudential soundness, the orderly functioning of markets and stronger European cooperation on financial stability oversight, early warning mechanisms and crisis management, including the management of cross-border and cross-sectoral risks, and also to look at cooperation between the European Union and other major jurisdictions to help safeguard financial stability at the global level.

- (15) In order to achieve the necessary level of supervisory convergence and cooperation at the European Union level, and to underpin the stability of the financial system, further wide-ranging reforms of the regulatory and supervisory model of the European Union's financial sector are highly needed and should be put forward swiftly by the Commission, with due consideration of the conclusions presented by the de Larosière Group on 25 February 2009.
- (16) By 31 December 2009, the Commission should report to the European Parliament and the Council and propose appropriate legislation needed to tackle the shortcomings identified regarding the provisions related to further supervisory integration, taking into account that a stronger role for a European Union level supervisory system should be achieved by 31 December 2011.
- (17) Excessive concentration of exposures to a single client or group of connected clients may result in an unacceptable risk of loss. Such a situation could be considered prejudicial to the solvency of a credit institution. The monitoring and control of the large exposures of a credit institution should therefore be an integral part of its supervision.
- (18) The current large exposures regime dates back to 1992. Therefore, the existing requirements on large exposures set out in Directive 2006/48/EC and in 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 <sup>(1)</sup> should be reviewed.
- (19) Since credit institutions in the internal market are engaged in direct competition, the essential rules for the monitoring and control of the large exposures of credit institutions should be further harmonised. In order to reduce the administrative burden on credit institutions, the number of options for Member States as far as large exposures are concerned should be reduced.
- (20) In determining the existence of a group of connected clients and thus exposures constituting a single risk, it is also important to take into account risks arising from a common source of significant funding provided by the credit institution or investment firm itself, its financial group or its connected parties.
- (21) While it is desirable to base the calculation of the exposure value on that provided for the purposes of minimum own funds requirements, it is appropriate to adopt rules for the monitoring of large exposures without applying risk weightings or degrees of risk. Moreover, the credit risk mitigation techniques applied in the solvency regime were designed with the assumption of a well-diversified credit risk. In the case of large exposures dealing with single name concentration risk, credit risk is not well-diversified. The effects of those techniques should therefore be subject to prudential safeguards. In this context, it is necessary to provide for an effective recovery of credit protection for the purposes of large exposures.
- (22) Since a loss arising from an exposure to a credit institution or an investment firm can be as severe as a loss from any other exposure, such exposures should be treated and reported in the same manner as any other exposures. However, an alternative quantitative limit has been introduced to alleviate the disproportionate impact of such an approach on smaller institutions. In addition, very short-term exposures related to money transmission including the execution of payment services, clearing, settlement and custody services to clients are exempt to facilitate the smooth functioning of financial markets and of the related infrastructure. Those services cover, for example, the execution of cash clearing and settlement and similar activities to facilitate settlement. The related exposures include exposures which might not be foreseeable and are therefore not under the full control of a credit institution, inter alia, balances on inter-bank accounts resulting from client payments, including credited or debited fees and interest, and other payments for client services, as well as collateral given or received.
- (23) The provisions related to external credit assessment institutions (ECAIs) under Directive 2006/48/EC should be consistent with Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies <sup>(2)</sup>. In particular, the Committee of European Banking Supervisors should review its guidelines on the recognition of ECAIs to avoid duplication of work and reduce the burden of the recognition process where an ECAI is registered as a credit rating agency (CRA) at Community level.
- (24) It is important that the misalignment between the interest of firms that 're-package' loans into tradable securities and other financial instruments (originators or sponsors) and firms that invest in these securities or instruments (investors) be removed. It is also important that the interests of the originator or sponsor and the interests of investors be aligned. To achieve this, the originator or sponsor should retain a significant interest in the underlying assets. It is therefore important for the originators or the sponsors to retain exposure to the risk of the loans in question. More generally, securitisation transactions should not be structured in such a way as to avoid the application of the retention requirement, in particular through any fee or premium structure or both. Such retention should be applicable in

<sup>(1)</sup> OJ L 177, 30.6.2006, p. 201.



- all situations where the economic substance of a securitisation according to the definition of Directive 2006/48/EC is applicable, whatever legal structures or instruments are used to obtain this economic substance. In particular where credit risk is transferred by securitisation, investors should make their decisions only after conducting thorough due diligence, for which they need adequate information about the securitisations.
- (25) The measures to address the potential misalignment of those structures need to be consistent and coherent in all relevant financial sector regulation. The Commission should put forward appropriate legislative proposals to ensure such consistency and coherence. There should be no multiple applications of the retention requirement. For any given securitisation it suffices that only one of the originator, the sponsor or the original lender is subject to the requirement. Similarly, where securitisation transactions contain other securitisations as an underlying, the retention requirement should be applied only to the securitisation which is subject to the investment. Purchased receivables should not be subject to the retention requirement if they arise from corporate activity where they are transferred or sold at a discount to finance such activity. Competent authorities should apply the risk weight in relation to non-compliance with due diligence and risk management obligations in relation to securitisation for non-trivial breaches of policies and procedures which are relevant to the analysis of the underlying risks.
- (26) In their Declaration on Strengthening the Financial System of 2 April 2009, the leaders of the G20 requested the Basel Committee for Banking Supervision and authorities to consider due diligence and quantitative retention requirements for securitisation by 2010. In view of those international developments, and in order best to mitigate systemic risks arising from securitisation markets, the Commission should, before the end of 2009 and after consulting the Committee of European Banking Supervisors, decide whether an increase of the retention requirement should be proposed, and whether the methods of calculating the retention requirement deliver the objective of a better alignment of the interests of the originators or sponsors and the investors.
- (27) Due diligence should be used in order properly to assess the risks arising from securitisation exposures for both the trading book and the non-trading book. In addition, due diligence obligations need to be proportionate. Due diligence procedures should contribute to building greater confidence between originators, sponsors and investors. It is therefore desirable that relevant information concerning the due diligence procedures is properly disclosed.
- (28) Member States should ensure that competent authorities have sufficient personnel and resources to comply with their supervisory obligations under Directive 2006/48/EC and that employees involved in the supervision of credit institutions in accordance with that Directive have appropriate knowledge and experience for the duties assigned.
- (29) Annex III to Directive 2006/48/EC should be adapted in order to clarify certain provisions with a view to enhancing the convergence of supervisory practices.
- (30) Recent market developments have highlighted the fact that liquidity risk management is a key determinant of the soundness of credit institutions and their branches. The criteria set out in Annex V and XI to Directive 2006/48/EC should be reinforced in order to align those provisions to the work conducted by the Committee of European Banking Supervisors and the Basel Committee on Banking Supervision.
- (31) The measures necessary for the implementation of Directive 2006/48/EC 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 <sup>(1)</sup>.
- (32) In particular the Commission should be empowered to amend Annex III of Directive 2006/48/EC in order to take account of developments on financial markets or in accounting standards or requirements which take account of Community legislation or with regard to convergence of supervisory practice. Since those measures are of general scope and are designed to amend non-essential elements of Directive 2006/48/EC, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (33) The financial crisis has revealed a need for a better analysis of and response to macro-prudential problems, which lie at the interface between macroeconomic policy and financial system regulation. This will include a need to examine: measures that mitigate the ups and downs of the business cycle, including the need for credit institutions to build counter-cyclical buffers in good times that can be used during a downturn, which may include the possibility of building up additional reserves, 'dynamic provisioning' and the possibility to reduce capital buffers during difficult times, thus ensuring adequate availability of capital over the cycle; the rationale underlying the calculation of capital requirements in Directive 2006/48/EC; supplementary measures to risk-based requirements for credit institutions to help constrain the build-up of leverage in the banking system.

<sup>(1)</sup> OJ L 184, 17.7.1999, p. 23.

(34) By 31 December 2009, the Commission should therefore, review Directive 2006/48/EC as a whole to address those issues and present a report to the European Parliament and the Council and any appropriate proposals.

(35) In order to ensure financial stability, the Commission should review and report on measures to enhance transparency of OTC markets, to mitigate the counterparty risks and more generally to reduce the overall risks, such as by clearing of credit default swaps through central counterparties (CCPs). The establishment and development of CCPs in the EU subject to high operational and prudential standards and effective supervision should be encouraged. The Commission should submit its report to the European Parliament and the Council together with any appropriate proposals, taking into account parallel initiatives at the global level as appropriate.

(36) The Commission should review and report on the application of Article 113(4) of Directive 2006/48/EC including whether exemptions should be a matter of national discretion. The Commission should submit that report to the European Parliament and the Council together with any appropriate proposals. The exemptions and options should be abolished where there is no demonstrated need for their maintenance with a view of achieving single set of consistent rules across the Community.

(37) The specific characteristics of microcredit should be taken into account in the risk assessment, and the development of microcredit should be promoted. Furthermore, given the low development of microcredit, the development of adequate rating systems should be promoted, including the development of standard rating systems adapted to the risks of microcredit activities. Member States should endeavour to ensure that the prudential regulation and supervision of micro-credit activities at national level are proportionate.

(38) Since the objectives of this Directive, namely the introduction of rules concerning the taking up and pursuit of the business of credit institutions, and their prudential supervision, cannot be sufficiently achieved by the Member States because it requires the harmonisation of a multitude of different rules existing in the legal systems of the various Member States and can therefore 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 in order to achieve those objectives.

(39) In accordance with point 34 of the Interinstitutional agreement on better law-making <sup>(1)</sup>, 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.

(40) Directives 2006/48/EC, 2006/49/EC and 2007/64/EC <sup>(2)</sup> should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

#### Amendments to Directive 2006/48/EC

Directive 2006/48/EC is hereby amended as follows:

1. Article 3(1) is amended as follows:

(a) in the first subparagraph, the introductory part is replaced by the following:

‘1. One or more credit institutions situated in the same Member State and which are permanently affiliated to a central body which supervises them and which is established in the same Member State, may be exempted from the requirements of Article 7 and Article 11(1) if national law provides that:’;

(b) the second and third subparagraphs are deleted;

2. Article 4 is amended as follows:

(a) point (6) is replaced by the following:

‘(6) “institutions” for the purposes of Sections 2, 3 and 5 of Title V, Chapter 2, means institutions as defined in Article 3(1)(c) of Directive 2006/49/EC;’;

(b) in point (45) point (b) is replaced by the following:

‘(b) two or more natural or legal persons between whom there is no relationship of control as described in point (a) but who are to be regarded as constituting a single risk because they are so interconnected that, if one of them were to experience financial problems, in particular funding or repayment difficulties, the other or all of the others would also be likely to encounter funding or repayment difficulties.’;

<sup>(1)</sup> OJ C 321, 31.12.2003, p. 1.

<sup>(2)</sup> OJ L 319, 5.12.2007, p. 1.

(c) the following point is added:

'(48) "consolidating supervisor" means the competent authority responsible for the exercise of supervision on a consolidated basis of EU parent credit institutions and credit institutions controlled by EU parent financial holding companies.');

3. in Article 40, the following paragraph is added:

'3. The competent authorities in one Member State shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned and, in particular, in emergency situations, based on the information available at the relevant time.;

4. the following Articles are inserted:

*'Article 42a*

1. The competent authorities of a host Member State may make a request to the consolidating supervisor where Article 129(1) applies or to the competent authorities of the home Member State, for a branch of a credit institution to be considered as significant.

That request shall provide reasons for considering the branch to be significant with particular regard to the following:

- (a) whether the market share of the branch of a credit institution in terms of deposit exceeds 2 % in the host Member State;
- (b) the likely impact of a suspension or closure of the operations of the credit institution on market liquidity and the payment and clearing and settlement systems in the host Member State; and
- (c) the size and the importance of the branch in terms of number of clients within the context of the banking or financial system of the host Member State.

The competent authorities of the home and host Member States, and the consolidating supervisor where Article 129(1) applies, shall do everything within their power to reach a joint decision on the designation of a branch as being significant.

If no joint decision is reached within two months of receipt of a request under the first subparagraph, the competent authorities of the host Member State shall take their own decision within a further period of two months on whether the branch is significant. In taking

their decision, the competent authorities of the host Member State shall take into account any views and reservations of the consolidating supervisor or the competent authorities of the home Member State.

The decisions referred to in the third and fourth subparagraph shall be set out in a document containing the fully reasoned decision and transmitted to the competent authorities concerned, and shall be recognised as determinative and applied by the competent authorities in the Member States concerned.

The designation of a branch as being significant shall not affect the rights and responsibilities of the competent authorities under this Directive.

2. The competent authorities of the home Member State shall communicate to the competent authorities of a host Member State where a significant branch is established the information referred to in Article 132(1)(c) and (d) and carry out the tasks referred to in Article 129(1)(c) in cooperation with the competent authorities of the host Member State.

If a competent authority of a home Member State becomes aware of an emergency situation within a credit institution as referred to in Article 130(1), it shall alert as soon as practicable the authorities referred to in the fourth paragraph of Article 49 and in Article 50.

3. Where Article 131a does not apply, the competent authorities supervising a credit institution with significant branches in other Member States shall establish and chair a college of supervisors to facilitate the cooperation under paragraph 2 of this Article and Article 42. The establishment and functioning of the college shall be based on written arrangements determined, after consultation with competent authorities concerned, by the competent authority of the home Member State. The competent authority of the home Member State shall decide which competent authorities participate in a meeting or in an activity of the college.

The decision of the competent authority of the home Member State shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned referred to in Article 40(3) and the obligations referred to in paragraph 2 of this Article.

The competent authority of the home Member State shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The competent authority of the home Member State shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.

*Article 42b*

1. In the exercise of their duties, the competent authorities shall take into account the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive. For that purpose, Member States shall ensure that:

- (a) the competent authorities participate in the activities of the Committee of European Banking Supervisors;
- (b) the competent authorities follow the guidelines, recommendations, standards and other measures agreed by the Committee of European Banking Supervisors and shall state the reasons if they do not do so;
- (c) national mandates conferred on the competent authorities do not inhibit the performance by them of their duties as members of the Committee of European Banking Supervisors or under this Directive.

2. The Committee of European Banking Supervisors shall report to the European Parliament, the Council and the Commission on the progress made towards supervisory convergence every year starting from 1 January 2011.;

5. Article 49 is amended as follows:

(a) in the first paragraph, point (a) is replaced by the following:

‘(a) central banks of the European system of the central banks and other bodies with a similar function in their capacity as monetary authorities when this information is relevant for the exercise of their respective statutory tasks, including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and settlement systems, and the safeguarding of stability of the financial system’;

(b) the following paragraph is added:

‘In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to communicate information to the central banks of the European system of the central banks when this information is relevant for the exercise of their statutory tasks, including the conduct of monetary policy and related liquidity provision, the oversight of payments, clearing and settlement systems, and safeguarding the stability of the financial system.’;

6. in Article 50, the following paragraph is added:

‘In an emergency situation as referred to in Article 130(1), Member States shall allow competent authorities to disclose information which is relevant to the departments referred to in the first paragraph of this Article in all Member States concerned.’;

7. Article 57 is amended as follows:

(a) point (a) is replaced by the following:

‘(a) capital within the meaning of Article 22 of Directive 86/635/EEC, in so far as it has been paid up, plus the related share premium accounts, it fully absorbs losses in going concern situations, and in the event of bankruptcy or liquidation ranks after all other claims;’;

(b) the following point is inserted:

‘(ca) instruments other than those referred to in point (a), which meet the requirements set out in points (a), (c), (d) and (e) of Article 63(2) and in Article 63a;’;

(c) the third paragraph is replaced by the following:

‘For the purposes of point (b), the Member States shall permit inclusion of interim or year-end profits before a formal decision has been taken only if these profits have been verified by persons responsible for the auditing of the accounts and if it is proved to the satisfaction of the competent authorities that the amount thereof has been evaluated in accordance with the principles set out in Directive 86/635/EEC and is net of any foreseeable charge or dividend.’;

8. the first paragraph of Article 61 is replaced by the following:

‘The concept of own funds as defined in Article 57(a) to (h) embodies a maximum number of items and amounts. Member States may decide on the use of those items and on the deduction of items other than those listed in Article 57(i) to (r).’;

9. in Article 63(2), the following subparagraph is added:

‘Instruments referred to in Article 57(ca) shall comply with the requirements set out in points (a), (c), (d) and (e) of this Article.’;

10. the following Article is inserted:

*Article 63a*

1. Instruments referred to in Article 57(ca) shall comply with the requirements set out in paragraphs 2 to 5 of this Article.

2. The instruments shall be undated or have an original maturity of at least 30 years. The instruments may include one or more call options at the sole discretion of the issuer, but they shall not be redeemed before five years after the date of issue. If the provisions governing undated instruments provide for a moderate incentive for the credit institution to redeem as determined by the competent authorities, such incentive shall not occur within 10 years of the date of issue. The provisions governing dated instruments shall not permit an incentive to redeem on a date other than the maturity date.



Dated and undated instruments may be called or redeemed only with the prior consent of the competent authorities. The competent authorities may grant permission provided the request is made at the initiative of the credit institution and either financial or solvency conditions of the credit institution are not unduly affected. The competent authorities may require institutions to replace the instrument by items of the same or better quality referred to in point (a) or (ca) of Article 57.

The competent authorities shall require the suspension of the redemption for dated instruments if the credit institution does not comply with the capital requirements set out in Article 75 and may require such suspension at other times based on the financial and solvency situation of credit institutions.

The competent authority may at any time grant permission for early redemption of dated or undated instruments in the event that there is a change in the applicable tax treatment or regulatory classification of such instruments which was unforeseen at the date of issue.

3. The provisions governing the instrument shall allow the credit institution to cancel, when necessary, the payment of interest or dividends for an unlimited period of time, on a non-cumulative basis.

However, the credit institution shall cancel such payments if it does not comply with the capital requirements set out in Article 75.

The competent authorities may require the cancellation of such payments based on the financial and solvency situation of the credit institution. Any such cancellation shall not prejudice the right of the credit institution to substitute the payment of interest or dividend by a payment in the form of an instrument referred to in Article 57(a), provided that any such mechanism allows the credit institution to preserve financial resources. Such substitution may be subject to specific conditions established by the competent authorities.

4. The provisions governing the instrument shall provide for principal, unpaid interest or dividend to be such as to absorb losses and to not hinder the recapitalisation of the credit institution through appropriate mechanisms, as elaborated by the Committee of European Banking Supervisors under paragraph 6.

5. In the event of the bankruptcy or liquidation of the credit institution, the instruments shall rank after the items referred to in Article 63(2).

6. The Committee of European Banking Supervisors shall elaborate guidelines for the convergence of supervisory practices with regard to the instruments referred to in paragraph 1 of this Article and in Article 57(a) and shall monitor their application. By 31 December 2011, the Commission shall review the application of this Article and shall report to the European Parliament and the Council together with any appropriate proposals to ensure the quality of own funds.;

11. in Article 65(1), point (a) is replaced by the following:

- '(a) any minority interests within the meaning of Article 21 of Directive 83/349/EEC, where the global integration method is used. Any instruments referred to in Article 57(ca), which give rise to minority interests shall meet the requirements under points (a), (c), (d) and (e) of Article 63(2) and Articles 63a and 66;'

12. Article 66 is amended as follows:

- (a) paragraphs 1 and 2 are replaced by the following:

'1. The items referred to in Article 57(d) to (h) shall be subject to the following limits:

- (a) the total of the items referred to in Article 57(d) to (h) must not exceed a maximum of 100 % of the items in points (a) to (ca) minus (i), (j) and (k) of that Article; and
- (b) the total of the items referred to in Article 57(g) to (h) must not exceed a maximum of 50 % of the items in points (a) to (ca) minus (i), (j) and (k) of that Article.

1a. Notwithstanding paragraph 1 of this Article, the total of the items in Article 57(ca) shall be subject to the following limits:

- (a) instruments that must be converted during emergency situations and may be converted at the initiative of the competent authority, at any time, based on the financial and solvency situation of the issuer into items referred to in Article 57(a) within a pre-determined range must in total not exceed a maximum of 50 % of the items in points (a) to (ca) minus (i), (j) and (k) of that article;
- (b) within the limit referred to in point (a) of this paragraph, all other instruments must not exceed a maximum of 35 % of the items in points (a) to (ca) minus (i), (j) and (k) of Article 57;
- (c) within the limits referred to in points (a) and (b) of this paragraph, dated instruments and instruments with provisions that provide for an incentive for the credit institution to redeem must not exceed a maximum of 15 % of the items in points (a) to (ca) minus (i), (j) and (k) of Article 57;
- (d) the amount of items exceeding the limits set out in points (a), (b) and (c) must be subject to the limit set out in paragraph 1 of this Article.



2. The total of the items referred to in Article 57(l) to (r) shall be deducted half from the total of the items referred to in points (a) to (ca) minus (i), (j) and (k) of that Article, and half from the total of the items referred to in points (d) to (h) of that Article, after application of the limits laid down in paragraph 1 of this Article. To the extent that half of the total of the items (l) to (r) of Article 57 exceeds the total of the items (d) to (h) of that Article, the excess shall be deducted from the total of the items (a) to (ca) minus (i), (j) and (k) of that Article. Items referred to in Article 57(r) shall not be deducted if they have been included in the calculation of risk-weighted exposure amounts for the purposes of Article 75 as referred to in Annex IX, Part 4.;

(b) paragraph 4 is replaced by the following:

‘4. The competent authorities may authorise credit institutions to exceed the limits laid down in paragraphs 1 and 1a temporarily during emergency situations.’;

13. the subtitle of Title V, Chapter 2, Section 2, Subsection 2 ‘Calculation of requirements’ is replaced by ‘Calculation and reporting requirements’;

14. in Article 74(2) the following subparagraph is inserted after the first subparagraph:

‘For the communication of those calculations by credit institutions, competent authorities shall apply, from 31 December 2012, uniform formats, frequencies and dates of reporting. To facilitate this, the Committee of European Banking Supervisors shall elaborate guidelines to introduce, within the Community, a uniform reporting format before 1 January 2012. The reporting formats shall be proportionate to the nature, scale and complexity of the credit institutions’ activities.’;

15. Article 81(2) is replaced by the following:

‘2. The competent authorities shall recognise an ECAI as eligible for the purpose of Article 80 only if they are satisfied that its assessment methodology complies with the requirements of objectivity, independence, ongoing review and transparency, and that the resulting credit assessments meet the requirements of credibility and transparency. For those purposes, the competent authorities shall take into account the technical criteria set out in Annex VI, Part 2. Where an ECAI is registered as a credit rating agency in accordance with Regulation (EC) No 1060/2009 of 16 September 2009 of the European Parliament and of the Council on credit rating agencies (\*), the competent authorities shall consider the requirements of objectivity, independence, ongoing review and transparency with respect to its assessment methodology to be satisfied.

(\*) OJ L 302, 17.11.2009, p. 1’;

16. Article 87 is amended as follows:

(a) paragraph 11 is replaced by the following:

‘11. Where exposures in the form of a collective investment undertaking (CIU) meet the criteria set out in Annex VI, Part 1, points 77 and 78 and the credit institution is aware of all or parts of the underlying exposures of the CIU, the credit institution shall look through to those underlying exposures in order to calculate risk-weighted exposure amounts and expected loss amounts in accordance with the methods set out in this Subsection. Paragraph 12 shall apply to the part of the underlying exposures of the CIU the credit institution is not aware of or could not reasonably be aware of. In particular, paragraph 12 shall apply where it would be unduly burdensome for the credit institution to look through the underlying exposures in order to calculate risk-weighted exposure amounts and expected loss amounts in accordance with methods set out in this Subsection.

Where the credit institution does not meet the conditions for using the methods set out in this Subsection for all or parts of the underlying exposures of the CIU, risk weighted exposure amounts and expected loss amounts shall be calculated in accordance with the following approaches:

(a) for exposures belonging to the exposure class referred to in Article 86(1)(e), the approach set out in Annex VII, Part 1, points 19 to 21.

(b) for all other underlying exposures, the approach set out in Articles 78 to 83, subject to the following modifications:

(i) for exposures subject to a specific risk weight for unrated exposures or subject to the credit quality step yielding the highest risk weight for a given exposure class, the risk weight must be multiplied by a factor of two but must not be higher than 1 250 %;

(ii) for all other exposures, the risk weight must be multiplied by a factor of 1,1 and must be subject to a minimum of 5 %.

Where, for the purposes of point (a), the credit institution is unable to differentiate between private equity, exchange-traded and other equity exposures, it shall treat the exposures concerned as other equity exposures. Without prejudice to Article 154(6), where those exposures, taken together with the credit institution’s direct exposures in that exposure class, are not material within the meaning of

Article 89(2), Article 89(1) may be applied subject to the approval of the competent authorities.;

- (b) in paragraph 12, the second subparagraph is replaced by the following:

‘Alternatively to the method described in the first subparagraph, credit institutions may calculate themselves or may rely on a third party to calculate and report the average risk weighted exposure amounts based on the CIU’s underlying exposures in accordance with the approaches referred to in points (a) and (b) of paragraph 11, provided that the correctness of the calculation and the report is adequately ensured.’;

17. in Article 89(1)(d), the introductory part is replaced by the following:

‘(d) exposures to central governments of the Member States and their regional governments, local authorities and administrative bodies provided that.’;

18. Article 97(2) is replaced by the following:

‘2. The competent authorities shall recognise an ECAI as eligible for the purpose of paragraph 1 of this Article only if they are satisfied as to its compliance with the requirements laid down in Article 81, taking into account the technical criteria set out in Annex VI, Part 2, and that it has a demonstrated ability in the area of securitisation, which may be evidenced by a strong market acceptance. Where an ECAI is registered as a credit rating agency in accordance with Regulation (EC) No 1060/2009, the competent authorities shall consider the requirements of objectivity, independence, ongoing review and transparency with respect to its assessment methodology to be satisfied.’;

19. Article 106 is amended as follows:

- (a) paragraph 2 is replaced by the following:

‘2. Exposures shall not include any of the following:

- (a) in the case of foreign exchange transactions, exposures incurred in the ordinary course of settlement during the two working days following payment;
- (b) in the case of transactions for the purchase or sale of securities, exposures incurred in the ordinary course of settlement during five working days following payment or delivery of the securities, whichever the earlier;
- (c) in the case of the provision of money transmission including the execution of payment services, clearing and settlement in any currency and correspondent banking or financial instruments clearing,

settlement and custody services to clients, delayed receipts in funding and other exposures arising from client activity which do not last longer than the following business day; or

- (d) in the case of the provision of money transmission including the execution of payment services, clearing and settlement in any currency and correspondent banking, intra-day exposures to institutions providing those services.

The Committee of European Banking Supervisors shall provide for guidelines in order to enhance the convergence of supervisory practises in applying the exemptions in points (c) and (d).;

- (b) the following paragraph is added:

‘3. In order to determine the existence of a group of connected clients, in respect of exposures referred to in points (m), (o) and (p) of Article 79(1), where there is an exposure to underlying assets, a credit institution shall assess the scheme, its underlying exposures, or both. For that purpose, a credit institution shall evaluate the economic substance and the risks inherent in the structure of the transaction.’;

20. Article 107 is replaced by the following:

‘Article 107

For the purposes of calculating the value of exposures in accordance with this Section, the term “credit institution” also means any private or public undertaking, including its branches, which meets the definition of “credit institution” and has been authorised in a third country.’;

21. Article 110 is replaced by the following:

‘Article 110

1. A credit institution shall report the following information about every large exposure to the competent authorities, including large exposures exempted from the application of Article 111(1):

- (a) the identification of the client or the group of connected clients to which a credit institution has a large exposure;
- (b) the exposure value before taking into account the effect of the credit risk mitigation, when applicable;
- (c) where used, the type of funded or unfunded credit protection;
- (d) the exposure value after taking into account the effect of the credit risk mitigation calculated for the purpose of Article 111(1).

If a credit institution is subject to Articles 84 to 89, its 20 largest exposures on a consolidated basis, excluding those exempted from the application of Article 111(1), shall be made available to the competent authorities.

2. Member States shall provide that reporting is to be carried out at least twice a year. The competent authorities shall apply, from 31 December 2012, uniform formats, frequencies and dates of reporting. To facilitate this, the Committee of European Banking Supervisors shall elaborate guidelines to introduce, within the Community, a uniform reporting format before 1 January 2012. The reporting formats shall be proportionate to the nature, scale and complexity of the credit institutions' activities.

3. Member States shall require credit institutions to analyse, to the extent possible, their exposures to collateral issuers, providers of unfunded credit protection and underlying assets pursuant to Article 106(3) for possible concentrations and where appropriate take action and report any significant findings to their competent authority.;

22. Article 111 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. A credit institution shall not incur an exposure, after taking into account the effect of the credit risk mitigation in accordance with Articles 112 to 117, to a client or group of connected clients the value of which exceeds 25 % of its own funds.

Where that client is an institution or where a group of connected clients includes one or more institutions, that value shall not exceed 25 % of the credit institution's own funds or EUR 150 million, whichever the higher, provided that the sum of exposure values, after taking into account the effect of the credit risk mitigation in accordance with Articles 112 to 117, to all connected clients that are not institutions does not exceed 25 % of the credit institution's own funds.

Where the amount of EUR 150 million is higher than 25 % of the credit institution's own funds, the value of the exposure, after taking into account the effect of credit risk mitigation in accordance with Articles 112 to 117, shall not exceed a reasonable limit in terms of the credit institution's own funds. That limit shall be determined by credit institutions, consistently with the policies and procedures referred to in Annex V, point 7, to address and control concentration risk, and shall not be higher than 100 % of the credit institution's own funds.

Member States may set a lower limit than EUR 150 million and shall inform the Commission.;

(b) paragraphs 2 and 3 are deleted;

(c) paragraph 4 is replaced by the following:

'4. A credit institution shall at all times comply with the relevant limit laid down in paragraph 1. If, in an exceptional case, exposures exceed this limit, the value of the exposure shall be reported without delay to the competent authorities which may, where the circumstances warrant it, allow the credit institution a limited period of time in which to comply with the limit.

Where the amount of EUR 150 million referred to in paragraph 1 is applicable, the competent authorities may allow on a case-by-case basis the 100 % limit in terms of the credit institution's own funds to be exceeded.;

23. Article 112 is amended as follows:

(a) paragraph 2 is replaced by the following:

'2. Subject to paragraph 3 of this Article, where, under Articles 113 to 117, the recognition of funded or unfunded credit protection is permitted, this shall be subject to compliance with the eligibility requirements and other minimum requirements, set out in Articles 90 to 93.;

(b) the following paragraph is added:

'4. For the purpose of this Section, a credit institution shall not take into account the collateral referred to in Annex VIII, Part 1, points 20 to 22, unless permitted under Article 115.;

24. Article 113 is amended as follows:

(a) paragraphs 1 and 2 are deleted;

(b) paragraph 3 is amended as follows:

(i) the introductory part is replaced by the following:

'3. The following exposures shall be exempted from the application of Article 111(1).;

(ii) points (e) and (f) are replaced by the following:

'(e) asset items constituting claims on regional governments or local authorities of Member States where those claims would be assigned a 0 % risk weight under Articles 78 to 83 and other exposures to or guaranteed by those regional governments or local authorities, claims on which would be assigned a 0 % risk weight under Articles 78 to 83;

- (f) exposures to counterparties referred to in paragraph 7 or paragraph 8 of Article 80 if they would be assigned a 0 % risk weight under Articles 78 to 83; exposures that do not meet those criteria, whether or not exempted from Article 111(1), shall be treated as exposures to a third party.;
- (iii) point (i) is replaced by the following:
- ‘(i) exposures arising from undrawn credit facilities that are classified as low-risk off-balance sheet items in Annex II and provided that an agreement has been concluded with the client or group of connected clients under which the facility may be drawn only if it has been ascertained that it will not cause the limit applicable under Article 111(1) to be exceeded.;
- (iv) points (j) to (t) are deleted;
- (v) the third, fourth and fifth subparagraphs are deleted;
- (c) the following paragraph is added:
- ‘4. Member States may fully or partially exempt the following exposures from the application of Article 111(1):
- (a) covered bonds falling within the terms of Annex VI, Part 1, points 68, 69 and 70;
- (b) asset items constituting claims on regional governments or local authorities of Member States where those claims would be assigned a 20 % risk weight under Articles 78 to 83 and other exposures to or guaranteed by those regional governments or local authorities, claims on which would be assigned a 20 % risk weight under Articles 78 to 83;
- (c) notwithstanding paragraph 3(f) of this Article, exposures, including participations or other kinds of holdings, incurred by a credit institution to its parent undertaking, to other subsidiaries of that parent undertaking or to its own subsidiaries, in so far as those undertakings are covered by the supervision on a consolidated basis to which the credit institution itself is subject, in accordance with this Directive or with equivalent standards in force in a third country; exposures that do not meet these criteria, whether or not exempted from Article 111(1), shall be treated as exposures to a third party;
- (d) asset items constituting claims on and other exposures, including participations or other kinds of holdings, to regional or central credit institutions with which the credit institution is associated in a network in accordance with legal or statutory provisions and which are responsible, under those provisions, for cash-clearing operations within the network;
- (e) asset items constituting claims on and other exposures to credit institutions incurred by credit institutions operating on a non-competitive basis, providing loans under legislative programmes or their statutes, to promote specified sectors of the economy under some form of government oversight and restrictions on the use of the loans, provided that the respective exposures arise from such loans that are passed on to the beneficiaries via other credit institutions;
- (f) asset items constituting claims on and other exposures to institutions, provided that those exposures do not constitute such institutions’ own funds, do not last longer than the following business day and are not denominated in a major trading currency;
- (g) asset items constituting claims on central banks in the form of required minimum reserves held at those central banks which are denominated in their national currencies;
- (h) asset items constituting claims on central governments in the form of statutory liquidity requirements held in government securities which are denominated and funded in their national currencies provided that, at the discretion of the competent authority, the credit assessment of those central governments assigned by a nominated ECAI is investment grade;
- (i) 50 % of medium/low risk off-balance-sheet documentary credits and of medium/low risk off-balance sheet undrawn credit facilities referred to in Annex II, and subject to the competent authorities’ agreement, 80 % of guarantees other than loan guarantees which have a legal or regulatory basis and are given for their members by mutual guarantee schemes possessing the status of credit institutions;
- (j) legally required guarantees used when a mortgage loan financed by issuing mortgage bonds is paid to the mortgage borrower before the final registration of the mortgage in the land register, provided the guarantee is not used as reducing the risk in calculating the risk weighted assets.;
25. Article 114 is amended as follows:
- (a) paragraph 1 is replaced by the following:
- ‘1. Subject to paragraph 3 of this Article, for the purposes of calculating the value of exposures for the purposes of Article 111(1) a credit institution may use the “fully adjusted exposure value” as calculated under Articles 90 to 93, taking into account the credit risk mitigation, volatility adjustments, and any maturity mismatch (E\*);’



(b) paragraph 2 is amended as follows:

(i) the first subparagraph is replaced by the following:

‘Subject to paragraph 3 of this Article, a credit institution permitted to use own estimates of LGDs and conversion factors for an exposure class under Articles 84 to 89 shall be permitted, where it is able to the satisfaction of the competent authorities to estimate the effects of financial collateral on their exposures separately from other LGD-relevant aspects, to recognise such effects in calculating the value of exposures for the purposes of Article 111(1).’;

(ii) the fourth subparagraph is replaced by the following:

‘Credit institutions permitted to use own estimates of LGDs and conversion factors for an exposure class under Articles 84 to 89 which do not calculate the value of their exposures using the method referred to in the first subparagraph of this paragraph may use the Financial Collateral Comprehensive Method or the approach set out in Article 117(1)(b) for calculating the value of exposures.’;

(c) paragraph 3 is amended as follows:

(i) the first subparagraph is replaced by the following:

‘A credit institution that makes use of the Financial Collateral Comprehensive Method or is permitted to use the method described in paragraph 2 of this Article in calculating the value of exposures for the purposes of Article 111(1), shall conduct periodic stress tests of their credit-risk concentrations, including in relation to the realisable value of any collateral taken.’;

(ii) the fourth subparagraph is replaced by the following:

‘In the event that such a stress test indicates a lower realisable value of collateral taken than would be permitted to be taken into account while making use of the Financial Collateral Comprehensive Method or the method described in paragraph 2 of this Article as appropriate, the value of collateral permitted to be recognised in calculating the value of exposures for the purposes of Article 111(1) shall be reduced accordingly.’;

(iii) in the fifth subparagraph, point (b) is replaced by the following:

‘(b) policies and procedures in the event that a stress test indicates a lower realisable value of collateral than taken into account while making use of the Financial Collateral Comprehensive Method or the method described in paragraph 2; and’;

(d) paragraph 4 is deleted;

26. Article 115 is replaced by the following:

‘Article 115

1. For the purpose of this Section, a credit institution may reduce the exposure value by up to 50 % of the value of the residential property concerned, if either of the following conditions is met:

- (a) the exposure is secured, by mortgages on residential property or by shares in Finnish residential housing companies, operating in accordance with the Finnish Housing Company Act of 1991 or subsequent equivalent legislation;
- (b) the exposure relates to a leasing transaction under which the lessor retains full ownership of the residential property leased for as long as the lessee has not exercised his option to purchase.

The value of the property shall be calculated, to the satisfaction of the competent authorities, on the basis of prudent valuation standards laid down by law, regulation or administrative provisions. Valuation shall be carried out at least once every three years for residential property.

The requirements in Annex VIII, Part 2, point 8, and in Annex VIII Part 3, points 62 to 65 shall apply for the purpose of this paragraph.

“Residential property” shall mean a residence to be occupied or let by the owner.

2. For the purpose of this Section, a credit institution may reduce the exposure value by up to 50 % of the value of the commercial property concerned only if the competent authorities concerned in the Member State where the commercial property is situated allow the following exposures to receive a 50 % risk weight in accordance with Articles 78 to 83:

- (a) exposures secured by mortgages on offices or other commercial premises, or by shares in Finnish housing companies, operating in accordance with the Finnish Housing Company Act of 1991 or subsequent equivalent legislation, in respect of offices or other commercial premises; or
- (b) exposures related to property leasing transactions concerning offices or other commercial premises.

The value of the property shall be calculated, to the satisfaction of the competent authorities, on the basis of prudent valuation standards laid down by law, regulation or administrative provisions.

Commercial property shall be fully constructed, leased and produce appropriate rental income.’;



27. Article 116 is deleted;

28. Article 117 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. Where an exposure to a client is guaranteed by a third party, or secured by collateral issued by a third party, a credit institution may:

- (a) treat the portion of the exposure which is guaranteed as having been incurred to the guarantor rather than to the client provided that the unsecured exposure to the guarantor would be assigned an equal or lower risk weight than a risk weight of the unsecured exposure to the client under Articles 78 to 83;
- (b) treat the portion of the exposure collateralised by the market value of recognised collateral as having been incurred to the third party rather than to the client, if the exposure is secured by collateral and provided that the collateralised portion of the exposure would be assigned an equal or lower risk weight than a risk weight of the unsecured exposure to the client under Articles 78 to 83.

The approach referred to in point (b) of the first subparagraph shall not be used by a credit institution where there is a mismatch between the maturity of the exposure and the maturity of the protection.

For the purpose of this Section, a credit institution may use both the Financial Collateral Comprehensive Method and the treatment provided for in point (b) of the first subparagraph only where it is permitted to use both the Financial Collateral Comprehensive Method and the Financial Collateral Simple Method for the purposes of Article 75(a).;

(b) in paragraph 2, the introductory part is replaced by the following:

‘2. Where a credit institution applies paragraph 1(a).;’

29. Article 119 is deleted;

30. the following Section is added in Chapter 2:

‘Section 7

### **Exposures to transferred credit risk**

*Article 122a*

1. A credit institution, other than when acting as an originator, a sponsor or original lender, shall be exposed to the credit risk of a securitisation position in its trading book or non-trading book only if the originator, sponsor or original lender has explicitly disclosed to the credit institution that it will retain, on an ongoing basis, a material net economic interest which, in any event, shall not be less than 5 %.

For the purpose of this Article, “retention of net economic interest” means:

- (a) retention of no less than 5 % of the nominal value of each of the tranches sold or transferred to the investors;
- (b) in the case of securitisations of revolving exposures, retention of the originator’s interest of no less than 5 % of the nominal value of the securitised exposures;
- (c) retention of randomly selected exposures, equivalent to no less than 5 % of the nominal amount of the securitised exposures, where such exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is no less than 100 at origination; or
- (d) retention of the first loss tranche and, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention equals in total no less than 5 % of the nominal value of the securitised exposures.

Net economic interest is measured at the origination and shall be maintained on an ongoing basis. It shall not be subject to any credit risk mitigation or any short positions or any other hedge. The net economic interest shall be determined by the notional value for off-balance sheet items.

For the purpose of this Article, “ongoing basis” means that retained positions, interest or exposures are not hedged or sold.

There shall be no multiple applications of the retention requirements for any given securitisation.

2. Where an EU parent credit institution or an EU financial holding company, or one of its subsidiaries, as an originator or a sponsor, securitises exposures from several credit institutions, investment firms or other financial institutions which are included in the scope of supervision on a consolidated basis, the requirement referred to in paragraph 1 may be satisfied on the basis of the consolidated situation of the related EU parent credit institution or EU financial holding company. This paragraph shall apply only where credit institutions, investment firms or financial institutions which created the securitised exposures have committed themselves to adhere to the requirements set out in paragraph 6 and deliver, in a timely manner, to the originator or sponsor and to the EU parent credit institution or an EU financial holding company the information needed to satisfy the requirements referred to in paragraph 7.

3. Paragraph 1 shall not apply where the securitised exposures are claims or contingent claims on or fully, unconditionally and irrevocably guaranteed by:

- (a) central governments or central banks;
- (b) regional governments, local authorities and public sector entities of Member States;
- (c) institutions to which a 50 % risk weight or less is assigned under Articles 78 to 83; or
- (d) multilateral development banks.

Paragraph 1 shall not apply to:

- (a) transactions based on a clear, transparent and accessible index, where the underlying reference entities are identical to those that make up an index of entities that is widely traded, or are other tradable securities other than securitisation positions; or
- (b) syndicated loans, purchased receivables or credit default swaps where these instruments are not used to package and/or hedge a securitisation that is covered by paragraph 1.

4. Before investing, and as appropriate thereafter, credit institutions, shall be able to demonstrate to the competent authorities for each of their individual securitisation positions, that they have a comprehensive and thorough understanding of and have implemented formal policies and procedures appropriate to their trading book and non-trading book and commensurate with the risk profile of their investments in securitised positions for analysing and recording:

- (a) information disclosed under paragraph 1, by originators or sponsors to specify the net economic interest that they maintain, on an ongoing basis, in the securitisation;
- (b) the risk characteristics of the individual securitisation position;
- (c) the risk characteristics of the exposures underlying the securitisation position;
- (d) the reputation and loss experience in earlier securitisations of the originators or sponsors in the relevant exposure classes underlying the securitisation position;
- (e) the statements and disclosures made by the originators or sponsors, or their agents or advisors, about their due diligence on the securitised exposures and, where applicable, on the quality of the collateral supporting the securitised exposures;

(f) where applicable, the methodologies and concepts on which the valuation of collateral supporting the securitised exposures is based and the policies adopted by the originator or sponsor to ensure the independence of the valuer; and

(g) all the structural features of the securitisation that can materially impact the performance of the credit institution's securitisation position.

Credit institutions shall regularly perform their own stress tests appropriate to their securitisation positions. To this end, credit institutions may rely on financial models developed by an ECAI provided that credit institutions can demonstrate, when requested, that they took due care prior to investing to validate the relevant assumptions in and structuring of the models and to understand methodology, assumptions and results.

5. Credit institutions, other than when acting as originators or sponsors or original lenders, shall establish formal procedures appropriate to their trading book and non-trading book and commensurate with the risk profile of their investments in securitised positions to monitor on an ongoing basis and in a timely manner performance information on the exposures underlying their securitisation positions. Where relevant, this shall include the exposure type, the percentage of loans more than 30, 60 and 90 days past due, default rates, prepayment rates, loans in foreclosure, collateral type and occupancy, and frequency distribution of credit scores or other measures of credit worthiness across underlying exposures, industry and geographical diversification, frequency distribution of loan to value ratios with band widths that facilitate adequate sensitivity analysis. Where the underlying exposures are themselves securitisation positions, credit institutions shall have the information set out in this subparagraph not only on the underlying securitisation tranches, such as the issuer name and credit quality, but also on the characteristics and performance of the pools underlying those securitisation tranches.

Credit institutions shall have a thorough understanding of all structural features of a securitisation transaction that would materially impact the performance of their exposures to the transaction such as the contractual waterfall and waterfall related triggers, credit enhancements, liquidity enhancements, market value triggers, and deal-specific definition of default.

Where the requirements in paragraphs 4, 7 and in this paragraph are not met in any material respect by reason of the negligence or omission of the credit institution, Member States shall ensure that the competent authorities impose a proportionate additional risk weight of no less than 250 % of the risk weight (capped at 1 250 %) which would, but for this paragraph, apply to the relevant securitisation positions under Annex IX, Part 4, and shall progressively increase the risk weight with each subsequent infringement of the due diligence provisions. The competent authorities shall take into account the exemptions for certain securitisations provided in paragraph 3 by reducing the risk weight it would otherwise impose under this Article in respect of a securitisation to which paragraph 3 applies.

6. Sponsor and originator credit institutions shall apply the same sound and well-defined criteria for credit-granting in accordance with the requirements of Annex V, point 3 to exposures to be securitised as they apply to exposures to be held on their book. To this end the same processes for approving and, where relevant, amending, renewing and re-financing credits shall be applied by the originator and sponsor credit institutions. Credit institutions shall also apply the same standards of analysis to participations or underwritings in securitisation issues purchased from third parties whether such participations or underwritings are to be held on their trading or non-trading book.

Where the requirements referred to in the first subparagraph of this paragraph are not met, Article 95(1) shall not be applied by an originator credit institution and that originator credit institution shall not be allowed to exclude the securitised exposures from the calculation of its capital requirements under this Directive.

7. Sponsor and originator credit institutions shall disclose to investors the level of their commitment under paragraph 1 to maintain a net economic interest in the securitisation. Sponsor and originator credit institutions shall ensure that prospective investors have readily available access to all materially relevant data on the credit quality and performance of the individual underlying exposures, cash flows and collateral supporting a securitisation exposure as well as such information that is necessary to conduct comprehensive and well informed stress tests on the cash flows and collateral values supporting the underlying exposures. For that purpose, materially relevant data shall be determined as at the date of the securitisation and where appropriate due to the nature of the securitisation thereafter.

8. Paragraphs 1 to 7 shall apply to new securitisations issued on or after 1 January 2011. Paragraphs 1 to 7 shall, after 31 December 2014, apply to existing securitisations where new underlying exposures are added or substituted after that date. Competent authorities may decide to suspend temporarily the requirements referred to in paragraphs 1 and 2 during periods of general market liquidity stress.

9. Competent authorities shall disclose the following information:

- (a) by 31 December 2010, the general criteria and methodologies adopted to review the compliance with paragraphs 1 to 7;
- (b) without prejudice to the provisions laid down in Chapter 1, Section 2, a summary description of the outcome of the supervisory review and description of the measures imposed in cases of non-compliance with paragraphs 1 to 7 identified on an annual basis from 31 December 2011.

The requirement set out in this paragraph is subject to the second subparagraph of Article 144.

10. The Committee of European Banking Supervisors shall report annually to the Commission about the compliance by competent authorities with this Article. The Committee of European Banking Supervisors shall elaborate guidelines for the convergence of supervisory practices with regard to this Article, including the measures taken in case of breach of the due diligence and risk management obligations.;

31. Article 129 is amended as follows:

- (a) in paragraph 1 point (b) is replaced by the following:
  - (b) planning and coordination of supervisory activities in going-concern situations, including in relation to the activities referred to in Articles 123, 124, 136, in Chapter 5 and in Annex V, in cooperation with the competent authorities involved;
  - (c) planning and coordination of supervisory activities in cooperation with the competent authorities involved, and if necessary with central banks, in preparation for and during emergency situations, including adverse developments in credit institutions or in financial markets using, where possible, existing defined channels of communication for facilitating crisis management.

The planning and coordination of supervisory activities referred to in point (c) includes exceptional measures referred to in Article 132(3)(b), the preparation of joint assessments, the implementation of contingency plans and communication to the public.;

- (b) the following paragraph is added:

‘3. The consolidating supervisor and the competent authorities responsible for the supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company in a Member State shall do everything within their power to reach a joint decision on the application of Articles 123 and 124 to determine the adequacy of the consolidated level of own funds held by the group with respect to its financial situation and risk profile and the required level of own funds for the application of Article 136(2) to each entity within the banking group and on a consolidated basis.

The joint decision shall be reached within four months after submission by the consolidating supervisor of a report containing the risk assessment of the group in accordance with Articles 123 and 124 to the other relevant competent authorities. The joint decision shall also duly consider the risk assessment of subsidiaries performed by relevant competent authorities in accordance with Articles 123 and 124.

The joint decision shall be set out in a document containing the fully reasoned decision which shall be provided to the EU parent credit institution by the consolidating supervisor. In the event of disagreement, the consolidating supervisor shall at the request of any of the other competent authorities concerned consult the Committee of European Banking Supervisors. The consolidating supervisor may consult the Committee of European Banking Supervisors on its own initiative.

In the absence of such a joint decision between the competent authorities within four months, a decision on the application of Articles 123 and 124 and Article 136(2) shall be taken on a consolidated basis by the consolidating supervisor after duly considering the risk assessment of subsidiaries performed by relevant competent authorities.

The decision on the application of Articles 123 and 124 and Article 136(2) shall be taken by the respective competent authorities responsible for supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company on an individual or sub-consolidated basis after duly considering the views and reservations expressed by the consolidating supervisor.

The decisions shall be set out in a document containing the fully reasoned decisions and shall take into account the risk assessment, views and reservations of the other competent authorities expressed during the four-month period. The document shall be provided by the consolidating supervisor to all competent authorities concerned and to the EU parent credit institution.

Where the Committee of European Banking Supervisors has been consulted, all competent authorities shall consider such advice, and explain any significant deviation therefrom.

The joint decision referred to in the first subparagraph and the decisions taken by the competent authorities in the absence of a joint decision shall be recognised as determinative and shall be applied by the competent authorities in the Member State concerned.

The joint decision referred to in the first subparagraph and any decision taken in the absence of a joint decision in accordance with the fourth and fifth subparagraphs, shall be updated on an annual basis or, in exceptional circumstances, where a competent authority responsible for the supervision of subsidiaries of an EU parent credit institution or, an EU parent financial holding company makes a written and fully reasoned request to the consolidating supervisor to update the decision on the application of Article 136(2). In the latter case, the update may be addressed on a bilateral basis between the consolidating supervisor and the competent authority making the request.

The Committee of European Banking Supervisors shall elaborate guidelines for the convergence of supervisory practices with regard to the joint decision process referred to in this paragraph and with regard to the application of Articles 123, 124 and 136(2) with a view to facilitating joint decisions.;

32. in Article 130, paragraph 1 is replaced by the following:

'1. Where an emergency situation, including adverse developments in financial markets, arises, which potentially jeopardises the market liquidity and the stability of the financial system in any of the Member States where entities of a group have been authorised or where significant branches as referred to in Article 42a are established, the consolidating supervisor shall, subject to Chapter 1, Section 2, alert as soon as is practicable, the authorities referred to in the fourth subparagraph of Article 49 and in Article 50, and shall communicate all information that is essential for the pursuance of their tasks. Those obligations shall apply to all competent authorities under Articles 125 and 126 and to the competent authority identified under Article 129(1).

If the authority referred to in the fourth paragraph of Article 49 becomes aware of a situation described in the first subparagraph of this paragraph, it shall alert as soon as is practicable the competent authorities referred to in Articles 125 and 126.

Where possible, the competent authority and the authority referred to in the fourth paragraph of Article 49 shall use existing defined channels of communication.;

33. the following Article is inserted:

*'Article 131a*

1. The consolidating supervisor shall establish colleges of supervisors to facilitate the exercise of the tasks referred to in Article 129 and Article 130(1) and subject to the confidentiality requirements of paragraph 2 of this Article and compatibility with Community law, ensure appropriate coordination and cooperation with relevant third-country competent authorities where appropriate.

Colleges of supervisors shall provide a framework for the consolidating supervisor and the other competent authorities concerned to carry out the following tasks:

- (a) exchanging information;
- (b) agreeing on voluntary entrustment of tasks and voluntary delegation of responsibilities where appropriate;
- (c) determining supervisory examination programmes based on a risk assessment of the group in accordance with Article 124;
- (d) increasing the efficiency of supervision by removing unnecessary duplication of supervisory requirements, including in relation to the information requests referred to in Article 130(2) and Article 132(2);



- (e) consistently applying the prudential requirements under this Directive across all entities within a banking group without prejudice to the options and discretions available in Community legislation;
- (f) applying Article 129(1)(c) taking into account the work of other forums that may be established in this area.

The competent authorities participating in the colleges of supervisors shall cooperate closely. The confidentiality requirements under Chapter 1, Section 2 shall not prevent competent authorities from exchanging confidential information within colleges of supervisors. The establishment and functioning of colleges of supervisors shall not affect the rights and responsibilities of the competent authorities under this Directive.

2. The establishment and functioning of the colleges shall be based on written arrangements referred to in Article 131, determined after consultation with competent authorities concerned by the consolidating supervisor.

The Committee of European Banking Supervisors shall elaborate guidelines for the operational functioning of colleges, including in relation to Article 42a(3).

The competent authorities responsible for the supervision of subsidiaries of an EU parent credit institution or an EU parent financial holding company and the competent authorities of a host country where significant branches as referred to in Article 42a are established, central banks as appropriate, and third countries' competent authorities where appropriate and subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements under Chapter 1 Section 2, may participate in colleges of supervisors.

The consolidating supervisor shall chair the meetings of the college and shall decide which competent authorities participate in a meeting or in an activity of the college. The consolidating supervisor shall keep all members of the college fully informed, in advance, of the organisation of such meetings, the main issues to be discussed and the activities to be considered. The consolidating supervisor shall also keep all the members of the college fully informed, in a timely manner, of the actions taken in those meetings or the measures carried out.

The decision of the consolidating supervisor shall take account of the relevance of the supervisory activity to be planned or coordinated for those authorities, in particular the potential impact on the stability of the financial system in the Member States concerned referred to in Article 40(3) and the obligations referred to in Article 42a(2).

The consolidating supervisor, subject to the confidentiality requirements under Chapter 1, Section 2, shall inform the Committee of European Banking Supervisors of the activities of the college of supervisors, including in emergency situations, and communicate to that Committee all information that is of particular relevance for the purposes of supervisory convergence.;

34. Article 132 is amended as follows:

- (a) in paragraph 1(d), the reference to Article 136 is replaced by the reference to Article 136(1);
- (b) in paragraph 3(b), the reference to Article 136 is replaced by the reference to Article 136(1);

35. Article 150 is amended as follows:

- (a) in paragraph 1, points (k) and (l) are replaced by the following:
  - '(k) the list and classification of off-balance sheet items in Annexes II and IV;
  - (l) adjustment of the provisions in Annexes III and V to XII in order to take account of developments on financial markets (in particular new financial products) or in accounting standards or requirements which take account of Community legislation, or with regard to convergence of supervisory practice.;
- (b) in paragraph 2, point (c) is replaced by the following:
  - '(c) clarification of exemptions provided for in Article 113.;

36. in Article 153, the third paragraph is replaced by the following:

'In the calculation of risk weighted exposure amounts for the purposes of Annex VI, Part 1, point 4, until 31 December 2015 the same risk weight shall be assigned in relation to exposures to Member States' central governments or central banks denominated and funded in the domestic currency of any Member State as would be applied to such exposures denominated and funded in their domestic currency.;

37. in Article 154, the following paragraphs are added:

'8. Credit institutions which do not comply by 31 December 2010 with the limits set out in Article 66(1a) shall develop strategies and processes on the necessary measures to resolve this situation before the dates set out in paragraph 9 of this Article.

Those measures shall be reviewed under Article 124.



9. Instruments that by 31 December 2010, according to national law were deemed equivalent to the items referred to in points (a), (b) and (c) of Article 57 but do not fall within Article 57(a) or do not comply with the criteria set out in Article 63a, shall be deemed to fall within Article 57(ca) until 31 December 2040, subject to the following limitations:

- (a) up to 20 % of the sum of Article 57(a) to (ca), less the sum of points (i), (j) and (k) of Article 57 between 10 and 20 years after 31 December 2010;
- (b) up to 10 % of the sum of Article 57(a) to (ca), less the sum of points (i), (j) and (k) of Article 57 between 20 and 30 years after 31 December 2010.

The Committee of European Banking Supervisors shall monitor, until 31 December 2010, the issuance of those instruments.

10. For the purpose of Section 5, assets items constituting claims on and other exposures to institutions incurred prior to 31 December 2009 shall continue to be subject to the same treatment as applied in accordance with Article 115(2) and Article 116 as they stood prior to 7 December 2009, however not longer than until 31 December 2012.

11. Until 31 December 2012, the time period referred to in Article 129(3) shall be six months.;

38. Article 156 is replaced by the following:

*'Article 156*

The Commission, in cooperation with Member States, and taking into account the contribution of the European Central Bank, shall periodically monitor whether this Directive taken as a whole, together with Directive 2006/49/EC, has significant effects on the economic cycle and, in the light of that examination, shall consider whether any remedial measures are justified.

Based on that analysis and taking into account the contribution of the European Central Bank, the Commission shall draw up a biennial report and submit it to the European Parliament and to the Council, together with any appropriate proposals. Contributions from credit taking and credit lending parties shall be adequately acknowledged when the report is drawn up.

By 31 December 2009, the Commission shall review this Directive as a whole to address the need for better analysis of and response to macro-prudential problems, including the examination of:

- (a) measures that mitigate the ups and downs of the business cycle, including the need for credit institutions to build counter-cyclical buffers in good times that can be used during a downturn;
- (b) the rationale underlying the calculation of capital requirements in this Directive; and

- (c) supplementary measures to risk-based requirements for credit institutions, to help constrain the build-up of leverage in the banking system.

The Commission shall submit a report on the above issues to the European Parliament and to the Council with any appropriate proposals.

The Commission shall, as soon as possible and in any event by 31 December 2009 present to the European Parliament and the Council a report on the need for further reform of the supervisory system, including relevant Articles of this Directive, and, in accordance with the applicable procedure under the Treaty, any appropriate legislative proposal.

By 1 January 2011, the Commission shall review the progress made by the Committee of European Banking Supervisors towards uniform formats, frequencies and dates of reporting referred to in Article 74(2). In light of that review, the Commission shall report to the European Parliament and the Council.

By 31 December 2011, the Commission shall review and report on the application of this Directive with particular attention to all aspects of Articles 68 to 73, 80(7), 80(8) and its application to microcredit finance and shall submit this report to the European Parliament and the Council together with any appropriate proposals.

By 31 December 2011 the Commission shall review and report on the application of Article 113(4) including whether exemptions should be a matter of national discretion and shall submit this report to the European Parliament and the Council together with any appropriate proposals. With respect to the potential elimination of the national discretion under Article 113(4)(c) and its potential application at the EU level, the review shall in particular take into account the efficiency of group's risk management while ensuring that sufficient safeguards are in place to ensure financial stability in all Member States in which an entity of a group is incorporated.

By 31 December 2009 the Commission shall review and report on measures to enhance transparency of OTC markets, including the credit default swap markets, such as by clearing through central counterparties, and shall submit this report to the European Parliament and the Council together with any appropriate proposals.

By 31 December 2009 the Commission shall report on the expected impact of Article 122a, and shall submit that report to the European Parliament and the Council, together with any appropriate proposal. The Commission shall draw up its report after consulting the Committee of European Banking Supervisors. The report shall consider, in particular, whether

the minimum retention requirement under Article 122a(1) delivers the objective of better alignment between the interests of originators or sponsors and investors and strengthens financial stability, and whether an increase of the minimum level of retention would be appropriate taking into account international developments.

By 1 January 2012, the Commission shall report to the European Parliament and the Council on the application and effectiveness of Article 122a in the light of international market developments.;

39. Annex III is amended as follows:

(a) in Part 1, point 5, the following sentence is added:

'Under the method set out in Part 6 of this Annex (IMM), all netting sets with a single counterparty may be treated as single netting set if negative simulated market values of the individual netting sets are set to 0 in the estimation of expected exposure (EE).';

(b) in Part 2, point 3 is replaced by the following:

'3. When a credit institution purchases credit derivative protection against a non-trading book exposure, or against a CCR exposure, it may compute its capital requirement for the hedged asset in accordance with Annex VIII, Part 3, points 83 to 92, or subject to the approval of the competent authorities, in accordance with Annex VII, Part 1, point 4 or Annex VII, Part 4, points 96 to 104.

In those cases, and where the option in the second sentence of point 11 in Annex II of Directive 2006/49/EC is not applied, the exposure value for CCR for those credit derivatives is set to zero.

However, an institution may choose consistently to include for the purposes of calculating capital requirements for counterparty credit risk all credit derivatives not included in the trading book and purchased as protection against a non-trading book exposure or against a CCR exposure where the credit protection is recognised under this Directive.;

(c) in Part 5, point 15 is replaced by the following:

'15. There is one hedging set for each issuer of a reference debt instrument that underlies a credit default swap. "Nth to default" basket credit default swaps shall be treated as follows:

(a) the size of a risk position in a reference debt instrument in a basket underlying an "nth to default" credit default swap is the effective notional value of the reference debt instrument, multiplied by the modified duration of

the "nth to default" derivative with respect to a change in the credit spread of the reference debt instrument;

(b) there is one hedging set for each reference debt instrument in a basket underlying a given "nth to default" credit default swap; risk positions from different "nth to default" credit default swaps shall not be included in the same hedging set;

(c) the CCR multiplier applicable to each hedging set created for one of the reference debt instruments of an "nth to default" derivative is 0,3 % for reference debt instruments that have a credit assessment from a recognised ECAI equivalent to credit quality step 1 to 3 and 0,6 % for other debt instruments.;

40. Annex V is amended as follows:

(a) point 8 is replaced by the following:

'8. The risks arising from securitisation transactions in relation to which the credit institutions are investor, originator or sponsor, including reputational risks (such as arise in relation to complex structures or products) shall be evaluated and addressed through appropriate policies and procedures, to ensure in particular that the economic substance of the transaction is fully reflected in the risk assessment and management decisions.;

(b) point 14 is replaced by the following:

'14. Robust strategies, policies, processes and systems shall exist for the identification, measurement, management and monitoring of liquidity risk over an appropriate set of time horizons, including intraday, so as to ensure that credit institutions maintain adequate levels of liquidity buffers. Those strategies, policies, processes and systems shall be tailored to business lines, currencies and entities and shall include adequate allocation mechanisms of liquidity costs, benefits and risks.;

(c) the following point is inserted:

'14a. The strategies, policies, processes and systems referred to in point 14 shall be proportionate to the complexity, risk profile, scope of operation of the credit institution and risk tolerance set by the management body and reflect the credit institution's importance in each Member State, in which it carries on business. Credit institutions shall communicate risk tolerance to all relevant business lines.;

(d) point 15 is replaced by the following:

- ‘15. Credit institutions shall develop methodologies for the identification, measurement, management and monitoring of funding positions. Those methodologies shall include the current and projected material cash-flows in and arising from assets, liabilities, off-balance-sheet items, including contingent liabilities and the possible impact of reputational risk.
16. Credit institutions shall distinguish between pledged and unencumbered assets that are available at all times, in particular during emergency situations. They shall also take into account the legal entity in which assets reside, the country where assets are legally recorded either in a register or in an account as well as their eligibility and shall monitor how assets can be mobilised in a timely manner.
17. Credit institutions shall also have regard to existing legal, regulatory and operational limitations to potential transfers of liquidity and unencumbered assets amongst entities, both within and outside the EEA.
18. A credit institution shall consider different liquidity risk mitigation tools, including a system of limits and liquidity buffers in order to be able to withstand a range of different stress events and an adequately diversified funding structure and access to funding sources. Those arrangements shall be reviewed regularly.
19. Alternative scenarios on liquidity positions and on risk mitigants shall be considered and the assumptions underlying decisions concerning the funding position shall be reviewed regularly. For these purposes, alternative scenarios shall address, in particular, off-balance sheet items and other contingent liabilities, including those of SSPEs or other special purpose entities, in relation to which the credit institution acts as sponsor or provides material liquidity support.
20. Credit institutions shall consider the potential impact of institution-specific, market-wide and combined alternative scenarios. Different time horizons and varying degrees of stressed conditions shall be considered.
21. Credit institutions shall adjust their strategies, internal policies and limits on liquidity risk and develop effective contingency plans, taking into account the outcome of the alternative scenarios referred to in point 19.
22. In order to deal with liquidity crises, credit institutions shall have in place contingency plans setting out adequate strategies and proper implementation measures in order to address possible liquidity

shortfalls. Those plans shall be regularly tested, updated on the basis of the outcome of the alternative scenarios set out in point 19, be reported to and approved by senior management, so that internal policies and processes can be adjusted accordingly.’;

41. in Annex IX, Part 3, Section 2, the following point is added:

- ‘7a. Competent authorities shall, furthermore, take the necessary measures to ensure that, with regard to credit assessments relating to structured finance instruments, the ECAI is committed to make available publicly the explanation how the performance of pool assets affects its credit assessments.’;

42. Annex XI is amended as follows:

(a) in point 1, point (e) is replaced by the following:

- ‘(e) the exposure to, measurement and management of liquidity risk by the credit institutions, including the development of alternative scenario analyses, the management of risk mitigants (in particular the level, composition and quality of liquidity buffers) and effective contingency plans;’;

(b) the following point is inserted:

- ‘1a. For the purposes of point 1(e), the competent authorities shall regularly carry out a comprehensive assessment of the overall liquidity risk management by credit institutions and promote the development of sound internal methodologies. While conducting those reviews, the competent authorities shall have regard to the role played by credit institutions in the financial markets. The competent authorities in one Member State shall duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned.’;

43. in point 3 of Part 2 of Annex XII, points (a) and (b) are replaced by the following:

- ‘(a) summary information on the terms and conditions of the main features of all own-funds items and components thereof, including instruments referred to in Article 57(ca), instruments the provisions of which provide an incentive for the credit institution to redeem them, and instruments subject to Article 154(8) and (9);
- (b) the amount of the original own funds, with separate disclosure of all positive items and deductions; the overall amount of instruments referred to in Article 57(ca) and instruments the provisions of which provide an incentive for the credit institution to redeem them, shall also be disclosed separately; those disclosures shall each specify instruments subject to Article 154(8) and (9).’;

## Article 2

**Amendments to Directive 2006/49/EC**

Directive 2006/49/EC is hereby amended as follows:

1. in Article 12, the first paragraph is replaced by the following:

“Original own funds” means the sum of points (a) to (ca), less the sum of points (i), (j) and (k) of Article 57 of Directive 2006/48/EC;”

2. Article 28 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. Institutions, except investment firms that fulfil the criteria set out in paragraph 2 or 3 of Article 20 of this Directive, shall monitor and control their large exposures in accordance with Articles 106 to 118 of Directive 2006/48/EC;’

- (b) paragraph 3 is deleted;

3. in Article 30, paragraph 4 is replaced by the following:

‘4. By derogation from paragraph 3 competent authorities may allow assets constituting claims and other exposures on recognised third country investment firms and recognised clearing houses and exchanges to be subject to the same treatment as laid down in Article 111(1) of Directive 2006/48/EC and in Article 106(2)(c) of that Directive respectively.’;

4. Article 31 is amended as follows:

- (a) in the first paragraph, points (a) and (b) is replaced by the following:

‘(a) the exposure on the non-trading book to the client or group of clients in question does not exceed the limit laid down in Article 111(1) of Directive 2006/48/EC, this limit being calculated with reference to own funds as specified in that Directive, so that the excess arises entirely on the trading book;

(b) the institution meets an additional capital requirement on the excess in respect of the limit laid down in Article 111(1) of Directive 2006/48/EC, that additional capital requirement being calculated in accordance with Annex VI to this Directive;’;

- (b) in the first paragraph, point (e) is replaced by the following:

‘(e) institutions shall report to the competent authorities every three months all cases where the limit laid down in Article 111(1) of Directive 2006/48/EC has been exceeded during the preceding three months.’;

- (c) the second paragraph is replaced by the following:

‘In relation to point (e), in each case in which the limit has been exceeded, the amount of the excess and the name of the client concerned shall be reported.’;

5. in Article 32(1), the first subparagraph is replaced by the following:

‘1. The competent authorities shall establish procedures to prevent institutions from deliberately avoiding the additional capital requirements that they would otherwise incur, on exposures exceeding the limit laid down in Article 111(1) of Directive 2006/48/EC once those exposures have been maintained for more than 10 days, by means of temporarily transferring the exposures in question to another company, whether within the same group or not, and/or by undertaking artificial transactions to close out the exposure during the 10-day period and create a new exposure.’;

6. in Article 35, the following paragraph is added:

‘6. Investment firms shall be covered by the uniform formats, frequencies and dates of reporting referred to in Article 74(2) of Directive 2006/48/EC.’;

7. in Article 38, the following paragraph is added:

‘3. Article 42a of Directive 2006/48/EC, with the exception of point (a) of its paragraph 1, shall apply mutatis mutandis to the supervision of investment firms unless the investment firms fulfil the criteria set out in Article 20(2), 20(3) or 46(1) of this Directive.’;

8. in Article 45(1), the date ‘31 December 2010’ is replaced by ‘31 December 2014’;

9. in Article 47, the date ‘31 December 2009’ is replaced by ‘31 December 2010’ and the reference to points 4 and 8 of Annex V of the Directive 93/6/EEC is replaced by reference to points 4 and 8 of Annex VIII;

10. in Article 48(1), the date ‘31 December 2010’ is replaced by ‘31 December 2014’.

## Article 3

**Amendment to Directive 2007/64/EC**

Article 1(1)(a) of Directive 2007/64/EC is replaced by the following:

- ‘(a) credit institutions within the meaning of Article 4(1)(a) of Directive 2006/48/EC, including branches within the meaning of Article 4(3) of that Directive located in the Community of credit institutions having their head offices inside or, in accordance with Article 38 of that Directive, outside the Community.’;

*Article 4***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 October 2010.

They shall apply those measures from 31 December 2010.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 5***Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 6***Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 16 September 2009.

*For the European Parliament*  
*The President*  
J. BUZEK

*For the Council*  
*The President*  
C. MALMSTRÖM

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