

Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC) (repealed)

[<sup>F1</sup>SECTION III

**Obligations regarding management companies**

Title A

**Conditions for taking up business**

*Article 5*

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

2 No management company may engage in activities other than the management of UCITS authorised according to this Directive except 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 which cannot be marketed in other Member States under this Directive.

The activity of management of unit trusts/common funds and of investment companies includes, for the purpose of this Directive, the functions mentioned in Annex II which are not exhaustive.

3 By way of derogation from paragraph 2, Member States may authorise management companies to provide, in addition to the management of unit trusts/common funds and of investment companies, 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 Section B of the Annex to the ISD,
- b as non-core services:
  - investment advice concerning one or more of the instruments listed in Section B of the Annex to the ISD,
  - safekeeping and administration in relation to units of collective investment undertakings.

Management companies may in no case be authorised under this Directive to provide only the services mentioned in this paragraph or to provide non-core services without being authorised for the service referred to in point (a).

[<sup>F24</sup> Articles 2(2), 12, 13 and 19 of [<sup>X1</sup>Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments]<sup>(1)</sup>, shall apply to the provision of the services referred to in paragraph 3 of this Article by management companies.]

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#### Editorial Information

- X1** Substituted by [Corrigendum to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC \(Official Journal of the European Union L 145 of 30 April 2004\).](#)

#### Textual Amendments

- F2** Substituted by [Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.](#)

#### Article 5a

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:

- a the management company has an initial capital of at least EUR 125 000:
  - When the value of the portfolios of the management company, exceeds EUR 250 000 000, the management company shall be required to provide an additional amount of own funds. This additional amount of own funds shall be equal to 0,02 % of the amount by which the value of the portfolios of the management company exceeds EUR 250 000 000. The required total of the initial capital and the additional amount shall not, however, exceed EUR 10 000 000.
  - For the purpose of this paragraph, the following portfolios shall be deemed to be the portfolios of the management company:
    - (i) unit trusts/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;
    - (ii) investment companies for which the management company is the designated management company;
    - (iii) 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.
  - Irrespective of the amount of these requirements, the own funds of the management company shall never be less than the amount prescribed in Annex IV of Directive 93/6/EEC.
  - Member States may authorise management companies not to provide up to 50 % of the additional amount of own funds referred to in the first indent if they benefit from a guarantee of the same amount given by a credit institution or an insurance undertaking. The credit institution or insurance undertaking must have its registered office in a Member State, or in a non-Member State provided that it is subject to prudential rules considered by the competent authorities as equivalent to those laid down in Community law.

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- No later than 13 February 2005, the Commission shall present a report to the European Parliament and the Council on the application of this capital requirement, accompanied where appropriate by proposals for its revision;
- 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. To that end, the names of these persons and of every person succeeding them in office must be communicated forthwith to the competent authorities. The conduct of a management company's business must be decided by at least two persons meeting such conditions;
- c the application for authorisation is accompanied by a programme of activity setting out, *inter alia*, the organisational structure of the management company;
- d both its head office and its registered office are located in the same Member State.

2 Moreover where close links exist between the management company and other natural or legal persons, the competent authorities shall grant authorisation only if those 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 non-member 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 An applicant 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.

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 93/6/EEC if its authorisation also covers the discretionary portfolio management service referred to in Article 5(3)(a) of this Directive;
- e has seriously and/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 5b*

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

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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 aforementioned shareholders or members.

2 In the case of branches of management companies that have registered offices outside the European Union and are starting or carrying on 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 on the authorisation of any management company which is:

- 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 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.

## Title B

### Relations with third countries

#### Article 5c

1 Relations with third countries shall be regulated in accordance with the relevant rules laid down in Article 7 of the ISD.

For the purpose of this Directive, the expressions ‘firm/investment firm’ and ‘investment firms’ contained in Article 7 of the ISD shall be construed respectively as ‘management company’ and ‘management companies’; the expression ‘providing investment services’ in Article 7(2) of the ISD shall be construed as ‘providing services’.

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

## Title C

### Operating conditions

#### Article 5d

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 5 and Article 5a(1) and (2) of this Directive. The own funds of a management company may not fall below the level specified in Article 5a(1)(a). If they do, however, the competent authorities may, where the circumstances justify it, allow such firms a limited period in which to rectify their situations or cease their activities.

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2 The prudential supervision of a management company shall be the responsibility of the competent authorities of the 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 give responsibility to the authorities of the host country.

#### *Article 5e*

1 Qualifying holdings in management companies shall be subject to the same rules as those laid down in Article 9 of the ISD.

2 For the purpose of this Directive, the expressions 'firm/investment firm' and 'investment firms' contained in Article 9 of the ISD shall be construed respectively as 'management company' and 'management companies'.

#### *Article 5f*

1 Each home Member State shall draw up prudential rules which management companies, 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 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 own funds and ensuring, *inter alia*, that each transaction involving the fund 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 unit trusts/common funds or of the investment companies 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 one of its clients and another, between one of its clients and a UCITS or between two UCITS. Nevertheless, where a branch is set up, the organisational arrangements may not conflict with the rules of conduct laid down by the host Member State to cover conflicts of interest.

2 Each management company the authorisation of which also covers the discretionary portfolio management service mentioned in Article 5(3)(a):

- shall not be permitted to invest all or a part of the investor's portfolio in units of unit trusts/common funds or of investment companies it manages, unless it receives prior general approval from the client,
- shall be subject with regard to the services referred to in Article 5(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>(2)</sup>.

#### *Article 5g*

1 If Member States permit 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 the following preconditions have to be complied with:

- a the competent authority must be informed in an appropriate manner;

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- b the mandate shall not prevent the effectiveness of supervision over the management company, and in particular it 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 may only be given 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 shall 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 shall 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 shall not prevent the persons who conduct the business of the management company to give at any time further instructions to the undertaking to which functions are delegated and to withdraw 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 list the functions which the management company has been permitted to delegate.

2 In no case shall the management company's and the depositary's liability be affected by the fact that the management company delegated any functions to third parties, nor shall the management company delegate its functions to the extent that it becomes a letter box entity.

#### *Article 5h*

Each Member State shall draw up rules of conduct which management companies authorised in that Member State shall observe at all times. Such rules must implement at least the principles set out in the following indents. These 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.

## Title D

### **The right of establishment and the freedom to provide services**

#### *Article 6*

1 Member States shall ensure that a management company, authorised in accordance with this Directive by the competent authorities of another Member State, may carry on 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.

2 Member States may 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.

#### *Article 6a*

1 In addition to meeting the conditions imposed in Articles 5 and 5a, any management company wishing to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State.

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 5(2) and (3) envisaged and the organisational structure of the branch;
- c the address in the host Member State from which documents may be obtained;
- d the names of those responsible for the management of the branch.

3 Unless the competent authorities of the 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 three months of receiving all the information referred to in paragraph 2, communicate that information to the competent authorities of the 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 home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the host Member State, they shall give reasons for their refusal to the management company concerned within two months of receiving all the information. That refusal or failure to reply shall be subject to the right to apply to the courts in the home Member State.

4 Before the branch of a management company starts business, the competent authorities of the host Member State shall, within two months of receiving the information referred to in paragraph 2, prepare for the supervision of the management company and, if necessary, indicate the conditions, including the rules mentioned in Articles 44 and 45 in force in the host Member State and the rules of conduct to be respected in the case of provision of the portfolio management service mentioned in Article 5(3) and of investment advisory services and custody, under which, in the interest of the general good, that business must be carried on in the host Member State.

5 On receipt of a communication from the competent authorities of the host Member State or on the expiry of the period provided for in paragraph 4 without receipt of any

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communication from those authorities, the branch may be established and start business. From that moment the management company may also begin distributing the units of the unit trusts/common funds and of the investment companies subject to this Directive which it manages, unless the competent authorities of the host Member State establish, in a reasoned decision taken before the expiry of that period of two months — to be communicated to the competent authorities of the home Member State — that the arrangements made for the marketing of the units do not comply with the provisions referred to in Article 44(1) and Article 45.

6 In the event of change of any particulars communicated in accordance with paragraphs 2(b), (c) or (d), a management company shall give written notice of that change to the competent authorities of the home and host Member States at least one month before implementing the change so that the competent authorities of the home Member State may take a decision on the change under paragraph 3 and the competent authorities of the host Member State may do so under paragraph 4.

7 In the event of a change in the particulars communicated in accordance with the first subparagraph of paragraph 3, the authorities of the home Member State shall inform the authorities of the host Member State accordingly.

#### *Article 6b*

1 Any management company wishing to carry on business 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 its home Member State:

- a the Member State within the territory of which the management company intends to operate;
- b a programme of operations stating the activities and services referred to in Article 5(2) and (3) envisaged.

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

They shall also communicate details of any applicable compensation scheme intended to protect investors.

3 The management company may then start business in the host Member State notwithstanding the provisions of Article 46.

When appropriate, the competent authorities of the host Member State shall, on receipt of the information referred to in paragraph 1, indicate to the management company the conditions, including the rules of conduct to be respected in the case of provision of the portfolio management service mentioned in Article 5(3) and of investment advisory services and custody, with which, in the interest of the general good, the management company must comply in the host Member State.

4 Should the content of the information communicated in accordance with paragraph 1(b) be amended, the management company shall give notice of the amendment in writing to the competent authorities of the home Member State and of the host Member State before implementing the change, so that the competent authorities of the host Member State may, if necessary, inform the company of any change or addition to be made to the information communicated under paragraph 3.

5 A management company shall also be subject to the notification procedure laid down in this Article in cases where it entrusts a third party with the marketing of the units in a host Member State.



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### Article 6c

1 Host Member States may, for statistical purposes, require all management companies with branches within their territories to report periodically on their activities in those host Member States to the competent authorities of those host Member States.

2 In discharging their responsibilities under this Directive, host Member States may require branches of management companies to provide the same particulars as national management companies for that purpose.

Host Member States may require management companies, carrying on business within their territories under the freedom to provide services, to provide the information necessary for the monitoring of their compliance with the standards set by the host Member State that apply to them, although those requirements may not be more stringent than those which the same Member State imposes on established management companies for the monitoring of their compliance with the same standards.

3 Where the competent authorities of a host Member State ascertain that a management company that has a branch or provides services within its territory is in breach of the legal or regulatory provisions adopted in that State pursuant to those provisions of this Directive which confer powers on the host Member State's competent authorities, those authorities shall require the management company concerned to put an end to its irregular situation.

4 If the management company concerned fails to take the necessary steps, the competent authorities of the host Member State shall inform the competent authorities of the home Member State accordingly. The latter shall, at the earliest opportunity, take all appropriate measures to ensure that the management company concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authorities of the host Member State.

5 If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the management company persists in breaching the legal or regulatory provisions referred to in paragraph 2 in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, insofar as necessary, to prevent that management company from initiating any further transaction within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for those measures on management companies.

6 The foregoing provisions shall not affect the powers of host Member States to take appropriate measures to prevent or to penalise irregularities committed within their territories which are contrary to legal or regulatory provisions adopted in the interest of the general good. This shall include the possibility of preventing offending management companies from initiating any further transactions within their territories.

7 Any measure adopted pursuant to paragraphs 4, 5 or 6 involving penalties or restrictions on the activities of a management company must 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.

8 Before following the procedure laid down in paragraphs 3, 4 or 5 the competent authorities of the 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 must be informed of such measures at the earliest opportunity.

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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.

9 In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the management company concerned from initiating any further transactions within its territory and to safeguard investors' interests. Every two years the Commission shall submit a report on such cases to the Contact Committee set up under Article 53.

10 The Member States shall inform the Commission of the number and type of cases in which there have been refusals pursuant to Article 6a or measures have been taken in accordance with paragraph 5. Every two years the Commission shall submit a report on such cases to the Contact Committee set up under Article 53.]

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**Textual Amendments**

- F1** Substituted by [Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities \(UCITS\) with a view to regulating management companies and simplified prospectuses.](#)

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- (1) [<sup>F1</sup> [<sup>F2</sup> [<sup>X1</sup> OJ L 145, 30.4.2004, p. 1.]]]
- (2) OJ L 84, 26.3.1997, p. 22.]

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#### **Editorial Information**

- X1** Substituted by Corrigendum to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (Official Journal of the European Union L 145 of 30 April 2004).

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- F2** Substituted by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.