

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)

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.