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 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[(1)], 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;

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.

(**1**) OJ L 157, 9.6.2006, p. 87.