

Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company (Text with EEA relevance)

COMMISSION DIRECTIVE 2010/43/EU

of 1 July 2010

implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)<sup>(1)</sup>, and in particular Article 12(3), Article 14(2), Article 23(6), Article 33(6) and Article 51(4) thereof,

Whereas:

- (1) The rules and terminology on the organisational requirements, conflicts of interest and conduct of business should be aligned to the greatest possible extent with the standards introduced in the financial services area 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<sup>(2)</sup> and 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<sup>(3)</sup>. Such alignment, while taking due account of the specificities of the collective portfolio management business, would allow the achievement of equal standards not only between different financial services sectors but also within asset management business more widely, where certain requirements of Directive 2006/73/EC have already been extended by some Member States to UCITS management companies.
- (2) It is appropriate to adopt these rules in the form of a Directive in order to enable the implementing provisions to be adjusted to the specificities of the particular market and legal system in each Member State. A directive will also enable a maximum level of consistency with the regime created by Directive 2006/73/EC.

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- (3) Even though the principles laid down in this Directive have general relevance for all management companies, they are flexible enough to ensure that their application and the supervision of such application by competent authorities is proportionate and takes into account the nature, scale and complexity of a management company's business and the diversity of the companies falling within the scope of application of Directive 2009/65/EC, and the varied nature of the different UCITS that may be managed by a management company.
- (4) As far as allowed by national law, management companies should be able to make arrangements for third parties to carry out some of their activities. The implementing rules should be read accordingly. The management company should in particular perform due diligence in order to determine whether, having regard to the nature of the functions to be carried out by third parties, the undertaking performing those activities can be considered as qualified and capable of undertaking the functions in question. The third party should therefore fulfil all the organisational and conflicts of interest requirements in relation to the activity to be carried out. It also follows that the management company should verify that the third party has taken the appropriate measures in order to comply with the said requirements and should monitor effectively the compliance by the third party with these requirements. Where the delegatee is responsible for applying the rules governing the delegated activities, equivalent organisational and conflict of interests requirements should apply to the activity of monitoring the delegated activities. The management company should be able to take into account in the due diligence process the fact that the third party to whom activities are delegated will often be subject to Directive 2004/39/EC.
- (5) To avoid the application of different standards to management companies and investment companies which have not designated a management company, the latter should be subject to the same rules of conduct and provisions regarding conflicts of interest and risk management as management companies. Therefore, the rules of this Directive on administrative procedures and internal control mechanism should, as a matter of good practice, apply both to management companies and investment companies that have not designated a management company, taking into account the principle of proportionality.
- (6) Directive 2009/65/EC requires management companies to have sound administrative procedures. In order to comply with this requirement management companies should establish a well-documented organisational structure that clearly assigns responsibilities and ensures good flows of information between all parties involved. Management companies should also establish systems to safeguard information and ensure business continuity and which are sufficient to allow them to discharge their obligations in cases where their activities are performed by third parties.
- (7) Management companies should also maintain the necessary resources, in particular, to employ personnel with the right skills, knowledge and experience in order to be able to fulfil their duties.
- (8) With respect to safe data processing procedures and the obligation to reconstruct all transactions involving the UCITS the management company should have arrangements

in place which permit a timely and proper recording of each transaction carried out on behalf of the UCITS.

- (9) Accounting is one of the key areas of UCITS administration. It is therefore of paramount importance that the accounting procedures are further specified in the implementing legislation. This Directive should therefore uphold the principles that all assets and liabilities of a UCITS or of its investment compartments can be directly identified, and that accounts should be separate. In addition, where different share classes exist depending on, for example, the level of management fees, it should be possible to extract directly from the accounting the net asset value of those different classes.
- (10) The clear allocation of the responsibilities of senior management and the supervisory function are central for the implementation of appropriate internal control mechanisms as required by Directive 2009/65/EC. This entails that the senior management should be responsible for the implementation of the general investment policy as referred to in the Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website<sup>(4)</sup>. Senior management should also maintain the responsibility for the investment strategies which are the general indications concerning the strategic asset allocation of the UCITS and the investment techniques which are needed to adequately and effectively implement the investment policy. The clear division of responsibilities should also ensure that adequate control exists so as to ensure the assets of the UCITS are invested according to the fund rules or the instruments of incorporation and the applicable legal provisions and that risk limits of each UCITS are complied with. The allocation of responsibilities should be consistent with the role and responsibilities of the senior management and the supervisory function under applicable national law and corporate governance codes. It is possible that senior management includes several or all members of the board of directors.
- (11) To ensure that a management company has an adequate control mechanism, a permanent compliance function and an internal audit function are necessary. The compliance function should be designed in such a way as to ensure that it may detect any risk of failure by the management company to comply with its obligations under Directive 2009/65/EC. The audit function should aim at verifying and evaluating the different control procedures and administrative arrangements the management company has put in place.
- (12) It is necessary to allow management companies some flexibility in structuring the organisation of their risk management. Where it is not appropriate or proportionate to have a separate risk management function, the management company should nevertheless be able to demonstrate that specific safeguards against conflicts of interest allow for an independent performance of risk management activities.
- (13) Directive 2009/65/EC obliges management companies to put rules in place on personal transactions. In accordance with Directive 2006/73/EC, management companies should prevent their employees who are subject to conflicts of interest or in possession

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of insider information, within the meaning of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)<sup>(5)</sup>, from entering into personal transactions that are the consequence of a misuse of information they have acquired through their professional activity.

- (14) Directive 2009/65/EC requires that management companies ensure that each portfolio transaction involving the UCITS can be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was executed. Therefore, it is necessary to lay down requirements for recording of portfolio transactions and of subscription and redemption orders.
- (15) Directive 2009/65/EC requires UCITS management companies to have appropriate mechanisms in place to ensure fair treatment of UCITS in cases of unavoidable conflicts of interest. Therefore, management companies should make sure that in these cases senior management or other competent internal body of the management company are promptly informed, in order to for them to take any necessary decision to ensure the fair treatment of the UCITS and of its unit-holders.
- (16) Management companies should be requested to adopt, apply and maintain an effective and adequate strategy for the exercise of voting rights attached to the financial instruments held by the UCITS they manage, with a view to ensuring that such rights are exercised to the exclusive benefit of UCITS. Information related to the strategy and its application should be freely available to investors, including via a website. As the case may be, the decision not to exercise voting rights could be considered in certain circumstances as being to the exclusive benefit of the UCITS depending upon its investment strategy. However the possibility for an investment company to vote itself or to give specific voting instructions to its management company should not be excluded.
- (17) The obligation to inform senior management or other competent internal body of the management company in order for them to take necessary decisions should not limit the duty of the management companies and the UCITS to report on situations where the organisational or administrative arrangements for conflicts of interest were not sufficient to ensure, with reasonable confidence, the prevention of the risk of damage, for instance in their periodic reports. Such reporting should explain and give reasons for the decision taken by the management company, even where a decision is taken not to act, taking into account the internal policies and procedures adopted to identify, prevent and manage conflicts of interest.
- (18) Directive 2009/65/EC obliges management companies to act in the best interest of the UCITS they manage and the integrity of the market. Certain behaviour, such as market timing and late trading, may have detrimental effects on unit-holders and may undermine the functioning of the market. Therefore, management companies should have appropriate procedures in place to prevent malpractices. Furthermore, management companies should put in place appropriate procedures to guard against unreasonable charges and activities such as excessive trading, taking into account the UCITS investment objectives and policy.

- (19) Management companies should also act in the best interest of the UCITS when directly executing orders to deal on behalf of the UCITS they manage or by transmitting them to third parties. When executing orders on behalf of the UCITS, management companies should take all reasonable steps to obtain the best possible result for the UCITS on a consistent basis, taking into account price, costs, speed, likelihood of execution and settlement, size and nature of the order or any other consideration relevant to the execution of the order.
- (20) In order to ensure that management companies act with due skill, care and diligence in the best interests of the UCITS they manage as required by 2009/65/EC Directive, it is necessary to lay down rules on order handling.
- (21) Certain fees, commissions or non-monetary benefits which may be paid to or by a management company should not be permitted as they could have an impact on the observance of the requirements laid down in 2009/65/EC Directive that the management company should act honestly, fairly and professionally in accordance with the best interests of the UCITS. Therefore, it is necessary to set out clear rules specifying where the payments of fees, commissions and non-monetary benefits are not considered a violation of those principles.
- (22) The cross-border activities of the management company create new challenges for the relationship between the management company and the UCITS' depositary. To ensure the necessary legal certainty, the main elements of the agreement between the UCITS' depositary and the management company, where that management company is established in a Member State other than the UCITS' home Member State, should be specified in this Directive. Given the need to ensure that this agreement properly serves its purpose it is necessary to provide for conflict of law rules which derogate from Articles 3 and 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>(6)</sup> in such a way that the applicable law to this agreement should be the law of the UCITS' home Member State.
- (23) Directive 2009/65/EC contains an obligation to specify the criteria for assessing the adequacy of a management company's risk management process. Such criteria focus on the establishment of an adequate and documented risk management policy to be employed by management companies. This policy should enable the management companies to assess the risks of the positions taken within the portfolios they manage and the contributions of these individual risks to the overall risk profile of the portfolio. The organisation of the risk management policy should be adequate and proportionate to the nature, scale and complexity of the management company's activities and of the UCITS it manages.
- (24) The periodical assessment, monitoring and review of the risk management policy by management companies are also a criterion to assess the adequacy of the risk management process. This criterion also includes the review of the effectiveness of measures taken to address any deficiencies in the performance of the risk management process.

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- (25) As an essential element in the criteria for assessing the adequacy of risk management processes, proportionate and effective risk measurement techniques should be adopted by management companies in order to measure at any time the risks which the UCITS they manage are or might be exposed to. These requirements are based on common practices agreed by competent authorities of Member States. They include both quantitative measures, as regards quantifiable risks, and qualitative methods. Electronic data processing systems and tools used for the computation of quantitative measures should be integrated with one another or with the front-office and accounting applications. Risk measurement techniques should allow for an adequate measurement of risks in periods of increased market turbulence and be reviewed whenever necessary in the interest of unit-holders. They should also allow adequate assessment of the concentration and interaction of relevant risks at the portfolio level.
- (26) It is the objective of a functioning risk management system that the investment limits set by Directive 2009/65/EC such as limits on global exposure and exposure to counterparty risk are respected by the management companies. Therefore criteria should be laid down as to how the global exposure should be calculated and how counterparty risk should be calculated.
- (27) It is necessary in laying down such criteria that this Directive clarifies how the global exposure can be calculated, including by using the commitment approach, the value at risk approach or advanced risk measurement methodologies. It should also lay down the main elements of the methodology according to which the management company should calculate the counterparty risk. In applying those rules, account should be taken of the conditions under which those methodologies are used, including the principles to be applied to such collateral arrangements to reduce the UCITS' exposure to counterparty risk as well as the use of the hedging and netting arrangements, as developed by competent authorities working within the Committee of European Securities Regulators.
- (28) According to Directive 2009/65/EC, management companies are obliged to employ a process for the accurate and independent assessment of the value of over-the-counter (OTC) derivatives. This Directive therefore lays down detailed rules for that process in accordance with Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions<sup>(7)</sup>. As a matter of good practice, management companies should apply those requirements to instruments which expose UCITS to valuation risks equivalent to those raised by OTC derivatives, such as those relating to product illiquidity and/or the complexity of the pay-off structure. Accordingly, management companies should adopt arrangements and procedures consistent with the requirements set out in Article 44 for the valuation of less liquid or complex transferable securities and money market instruments which require the use of model-based valuation methods.
- (29) Directive 2009/65/EC obliges a management company to provide the relevant competent authorities with information with regard to the types of derivative

instruments in which a UCITS has been invested, the underlying risks posed, applicable quantitative limits and methods chosen for estimating the risks associated with such transactions. The content and the procedure to be followed by a management company when discharging this obligation should be specified.

- (30) The Committee of European Securities Regulators, established by Commission Decision 2009/77/EC<sup>(8)</sup> has been consulted for technical advice.
- (31) The measures provided for in this Directive are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SUBJECT-MATTER, SCOPE AND DEFINITIONS

#### *Article 1*

#### **Subject matter**

This Directive lays down rules implementing Directive 2009/65/EC:

1. specifying the procedures and arrangements as referred to under point (a) of the second subparagraph of Article 12(1), and the structures and organisational requirements to minimise conflicts of interests as referred to under point (b) of the second subparagraph of Article 12(1);
2. establishing criteria for acting honestly and fairly and with due skill, care and diligence in the best interests of the UCITS and the criteria for determining the types of conflict of interests, specifying the principles required to ensure that the resources are employed effectively, defining the steps that should be taken to identify, prevent, manage or disclose conflicts of interests referred to in Article 14(1) and (2);
3. concerning the particulars that need to be included in the agreements between the depository and management company in accordance with Articles 23(5) and 33(5); and
4. concerning the risk management process referred to in Article 51(1), in particular criteria for assessing the adequacy of the risk management process employed by the management company and the risk management policy and processes and the arrangements, processes and techniques for risk measurement and management relating to such criteria.

#### *Article 2*

#### **Scope**

1 This Directive shall apply to management companies pursuing the activity of management of an undertaking for collective investment in transferable securities (UCITS) as referred to in Article 6(2) of Directive 2009/65/EC.

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Chapter V of this Directive shall also apply to depositaries carrying out their functions according to the provisions of Chapter IV and Section 3 of Chapter V of Directive 2009/65/EC.

2 The provisions of this Chapter, Article 12 of Chapter II and Chapters III, IV and VI shall apply *mutatis mutandis* to investment companies that have not designated a management company authorised pursuant to Directive 2009/65/EC.

In those cases ‘management company’ shall be understood as ‘investment company’.

### Article 3

#### Definitions

For the purposes of this Directive, the following definitions shall apply in addition to the definitions set out in Directive 2009/65/EC:

1. ‘client’ means any natural or legal person, or any other undertaking including a UCITS, to whom a management company provides a service of collective portfolio management or services pursuant to Article 6(3) of Directive 2009/65/EC;
2. ‘unit-holder’ means any natural or legal person holding one or more units in a UCITS;
3. ‘relevant person’ in relation to a management company, means any of the following:
  - (a) a director, partner or equivalent, or manager of the management company;
  - (b) an employee of the management company, as well as any other natural person whose services are placed at the disposal and under the control of the management company and who is involved in the provision by the management company of collective portfolio management;
  - (c) a natural person who is directly involved in the provision of services to the management company under a delegation arrangement to third parties for the purpose of the provision by the management company of collective portfolio management;
4. ‘senior management’ means the person or persons who effectively conduct the business of a management company in accordance with Article 7(1)(b) of Directive 2009/65/EC;
5. ‘board of directors’ means the board of directors of the management company;
6. ‘supervisory function’ means the relevant persons or body or bodies responsible for the supervision of its senior management and for the assessment and periodical review of the adequacy and effectiveness of the risk management process and of the policies, arrangements and procedures put in place to comply with the obligations under Directive 2009/65/EC;
7. ‘counterparty risk’ means the risk of loss for the UCITS resulting from the fact that the counterparty to a transaction may default on its obligations prior to the final settlement of the transaction’s cash flow;
8. ‘liquidity risk’ means the risk that a position in the UCITS portfolio cannot be sold, liquidated or closed at limited cost in an adequately short time frame and that the ability of the UCITS to comply at any time with Article 84(1) of Directive 2009/65/EC is thereby compromised;



9. 'market risk' means the risk of loss for the UCITS resulting from fluctuation in the market value of positions in the UCITS' portfolio attributable to changes in market variables, such as interest rates, foreign exchange rates, equity and commodity prices or an issuer's credit worthiness;
10. 'operational risk' means the risk of loss for the UCITS resulting from inadequate internal processes and failures in relation to people and systems of the management company or from external events, and includes legal and documentation risk and risk resulting from the trading, settlement and valuation procedures operated on behalf of the UCITS.

The term 'board of directors' defined in point 5 of the first paragraph shall not comprise the supervisory board where management companies have a dual structure composed of a board of directors and a supervisory board.

## CHAPTER II

### ADMINISTRATIVE PROCEDURES AND CONTROL MECHANISM

#### (Article 12(1)(a) and Article 14(1)(c) of Directive 2009/65/EC)

### SECTION 1

#### General principles

##### *Article 4*

#### General requirements on procedures and organisation

1 Member States shall require management companies to comply with the following requirements:

- a to establish, implement and maintain decision-making procedures and an organisational structure which clearly and in a documented manner specifies reporting lines and allocates functions and responsibilities;
- b to ensure that their relevant persons are aware of the procedures which must be followed for the proper discharge of their responsibilities;
- c to establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the management company;
- d to establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the management company as well as effective information flows with any third party involved;
- e to maintain adequate and orderly records of their business and internal organisation.

Member States shall ensure that management companies take into account the nature, scale and complexity of the business of the management company, and the nature and range of services and activities undertaken in the course of that business.

2 Member States shall require management companies to establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.

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3 Member States shall require management companies to establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their services and activities.

4 Member States shall require management companies to establish, implement and maintain accounting policies and procedures that enable them, at the request of the competent authority, to deliver in a timely manner to the competent authority financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.

5 Member States shall require management companies to monitor and, on a regular basis, evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements established in accordance with paragraphs 1 to 4, and to take appropriate measures to address any deficiencies.

#### *Article 5*

### **Resources**

1 Member States shall require management companies to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.

2 Member States shall ensure that management companies retain the necessary resources and expertise so as to effectively monitor the activities carried out by third parties on the basis of an arrangement with the management company, especially with regard to the management of the risk associated with those arrangements.

3 Member States shall require management companies to ensure that the performance of multiple functions by relevant persons does not and is not likely to prevent those relevant persons from discharging any particular function soundly, honestly, and professionally.

4 Member States shall ensure that for the purposes laid down in paragraphs 1, 2 and 3, management companies take into account the nature, scale and complexity of the business of the management company, and the nature and range of services and activities undertaken in the course of that business.

## SECTION 2

### **Administrative and accounting procedures**

#### *Article 6*

### **Complaints handling**

1 Member States shall require management companies to establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from investors.

2 Member States shall require management companies to ensure that each complaint and the measures taken for its resolution are recorded.

3 Investors shall be able to file complaints free of charge. The information regarding procedures referred to in paragraph 1 shall be made available to investors free of charge.

#### *Article 7*

### **Electronic data processing**

1 Member States shall require management companies to make appropriate arrangements for suitable electronic systems so as to permit a timely and proper recording of each portfolio transaction or subscription or redemption order in order to be able to comply with Articles 14 and 15.

2 Member States shall require management companies to ensure a high level of security during the electronic data processing as well as integrity and confidentiality of the recorded information, as appropriate.

#### *Article 8*

### **Accounting procedures**

1 Member States shall require management companies to ensure the employment of accounting policies and procedures as referred to in Article 4(4) so as to ensure the protection of unit-holders.

UCITS accounting shall be kept in such a way that all assets and liabilities of the UCITS can be directly identified at all time.

If a UCITS has different investment compartments, separate accounts shall be maintained for those investment compartments.

2 Member States shall require management companies to have accounting policies and procedures established, implemented and maintained, in accordance with the accounting rules of the UCITS' home Member States, so as to ensure that the calculation of the net asset value of each UCITS is accurately effected, on the basis of the accounting, and that subscription and redemption orders can be properly executed at that net asset value.

3 Member States shall require management companies to establish appropriate procedures to ensure the proper and accurate valuation of the assets and liabilities of the UCITS, as consistent with the applicable rules referred to in Article 85 of Directive 2009/65/EC.

## SECTION 3

### **Internal control mechanisms**

#### *Article 9*

### **Control by senior management and supervisory function**

1 Member States shall require management companies, when allocating functions internally, to ensure that senior management and, where appropriate, the supervisory function, are responsible for the management company's compliance with its obligations under Directive 2009/65/EC.

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- 2 The management company shall ensure that its senior management:
- a is responsible for the implementation of the general investment policy for each managed UCITS, as defined, where relevant, in the prospectus, the fund rules or the instruments of incorporation of the investment company;
  - b oversees the approval of investment strategies for each managed UCITS;
  - c is responsible for ensuring that the management company has a permanent and effective compliance function, as referred to in Article 10, even if this function is performed by a third party;
  - d ensures and verifies on a periodic basis that the general investment policy, the investment strategies and the risk limits of each managed UCITS are properly and effectively implemented and complied with, even if the risk management function is performed by third parties;
  - e approves and reviews on a periodic basis the adequacy of the internal procedures for undertaking investment decisions for each managed UCITS, so as to ensure that such decisions are consistent with the approved investment strategies;
  - f approves and reviews on a periodic basis the risk management policy and arrangements, processes and techniques for implementing that policy, as referred to in Article 38, including the risk limit system for each managed UCITS.
- 3 The management company shall also ensure that its senior management and, where appropriate, its supervisory function shall:
- a assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations in Directive 2009/65/EC;
  - b take appropriate measures to address any deficiencies.
- 4 Member States shall require management companies to ensure that their senior management receives on a frequent basis, and at least annually, written reports on matters of compliance, internal audit and risk management indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies.
- 5 Member States shall require management companies to ensure that their senior management receives on a regular basis reports on the implementation of investment strategies and of the internal procedures for taking investment decisions referred to in points (b) to (e) of the paragraph 2.
- 6 Member States shall require management companies to ensure that the supervisory function, if any, receives on a regular basis written reports on the matters referred to in paragraph 4.

### *Article 10*

#### **Permanent compliance function**

1 Member States shall ensure that management companies establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the management company to comply with its obligations under Directive 2009/65/EC, as well as the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the competent authorities to exercise their powers effectively under that Directive.

Member States shall ensure that management companies take into account the nature, scale and complexity of the business of the company, and the nature and range of services and activities undertaken in the course of that business.

2 Member States shall require management companies to establish and maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:

- a to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures, policies and procedures put in place in accordance with paragraph 1, and the actions taken to address any deficiencies in the management company's compliance with its obligations;
- b to advise and assist the relevant persons responsible for carrying out services and activities to comply with the management company's obligations under Directive 2009/65/EC.

3 In order to enable the compliance function referred to in paragraph 2 to discharge its responsibilities properly and independently, management companies shall ensure that the following conditions are satisfied:

- a the compliance function must have the necessary authority, resources, expertise and access to all relevant information;
- b a compliance officer must be appointed and must be responsible for the compliance function and for any reporting on a frequent basis, and at least annually, to the senior management on matters of compliance, indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies;
- c the relevant persons involved in the compliance function must not be involved in the performance of services or activities they monitor;
- d the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so.

However, a management company shall not be required to comply with point (c) or point (d) of the first subparagraph where it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of its services and activities, that requirement is not proportionate and that its compliance function continues to be effective.

### *Article 11*

#### **Permanent internal audit function**

1 Member States shall require management companies, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of collective portfolio management activities undertaken in the course of that business, to establish and maintain an internal audit function which is separate and independent from the other functions and activities of the management company.

2 The internal audit function referred to in paragraph 1 shall have the following responsibilities:

- a to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the management company's systems, internal control mechanisms and arrangements;
- b to issue recommendations based on the result of work carried out in accordance with point (a);
- c to verify compliance with the recommendations referred to in point (b);
- d to report in relation to internal audit matters in accordance with Article 9(4).

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## Article 12

### Permanent risk management function

1 Member States shall require management companies to establish and maintain a permanent risk management function.

2 The permanent risk management function referred to in paragraph 1 shall be hierarchically and functionally independent from operating units.

However, Member States may allow management companies to derogate from that obligation where the derogation is appropriate and proportionate in view of the nature, scale and complexity of the management company's business and of the UCITS it manages.

A management company shall be able to demonstrate that appropriate safeguards against conflicts of interest have been adopted so as to allow an independent performance of risk management activities and that its risk management process satisfies the requirements of Article 51 of Directive 2009/65/EC.

3 The permanent risk management function shall:

- a implement the risk management policy and procedures;
- b ensure compliance with the UCITS risk limit system, including statutory limits concerning global exposure and counterparty risk in accordance with Articles 41, 42 and 43;
- c provide advice to the board of directors as regards the identification of the risk profile of each managed UCITS;
- d provide regular reports to the board of directors and, where it exists, the supervisory function, on:
  - (i) the consistency between the current levels of risk incurred by each managed UCITS and the risk profile agreed for that UCITS;
  - (ii) the compliance of each managed UCITS with relevant risk limit systems;
  - (iii) the adequacy and effectiveness of the risk management process, indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies;
- e provide regular reports to the senior management outlining the current level of risk incurred by each managed UCITS and any actual or foreseeable breaches to their limits, so as to ensure that prompt and appropriate action can be taken;
- f review and support, where appropriate, the arrangements and procedures for the valuation of OTC derivatives as referred to in Article 44.

4 The permanent risk management function shall have the necessary authority and access to all relevant information necessary to fulfil the tasks set out in paragraph 3.

### Article 13

#### Personal transactions

1 Member States shall require management companies to establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 1(1) of Directive 2003/6/EC or to other confidential information relating to UCITS or transactions with or for UCITS by virtue of an activity carried out by him on behalf of the management company:

- a entering into a personal transaction which fulfils at least one of the following criteria:
  - (i) that person is prohibited from entering into that personal transaction within the meaning of Directive 2003/6/EC;
  - (ii) it involves the misuse or improper disclosure of confidential information;
  - (iii) it conflicts or is likely to conflict with an obligation of the management company under Directive 2009/65/EC or under Directive 2004/39/EC;
- b advising or procuring, other than in the proper course of his employment or contract for services, any other person to enter into a transaction in financial instruments which, if a personal transaction of the relevant person, would be covered by point (a) of this paragraph or by points (a) or (b) of Article 25(2) of Directive 2006/73/EC, or would otherwise constitute a misuse of information relating to pending orders;
- c disclosing, other than in the normal course of his employment or contract for services and without prejudice to Article 3(a) of Directive 2003/6/EC, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:
  - (i) to enter into a transaction in financial instruments which, where a personal transaction of the relevant person would be covered by point (a) of this paragraph or by points (a) or (b) of Article 25(2) of Directive 2006/73/EC, or would otherwise constitute a misuse of information relating to pending orders;
  - (ii) to advise or procure another person to enter into such a transaction.

2 The arrangements required under paragraph 1 shall in particular be designed to ensure that:

- a each relevant person covered by paragraph 1 is aware of the restrictions on personal transactions, and of the measures established by the management company in connection with personal transactions and disclosure, in accordance with paragraph 1;
- b the management company is informed promptly of any personal transaction entered into by a relevant person, either by notification of that transaction or by other procedures enabling the management company to identify such transactions;
- c a record is kept of the personal transaction notified to the management company or identified by it, including any authorisation or prohibition in connection with such a transaction.

For the purposes of point (b) of the first subparagraph, where certain activities are performed by third parties, the management company shall ensure that the entity performing the activity maintains a record of personal transactions entered into by any

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relevant person and provides that information to the management company promptly on request.

- 3 Paragraphs 1 and 2 shall not apply to the following kinds of personal transactions:
- a personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
  - b personal transactions in UCITS or units in collective undertakings that are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.
- 4 For the purposes of paragraphs 1, 2 and 3 of this Article, ‘personal transaction’ shall have the same meaning as in Article 11 of Directive 2006/73/EC.

#### *Article 14*

### **Recording of portfolio transactions**

- 1 Member States shall require management companies to ensure, for each portfolio transaction relating to UCITS, that a record of information which is sufficient to reconstruct the details of the order and the executed transaction is produced without delay.
- 2 The record referred to in paragraph 1 shall include:
- a the name or other designation of the UCITS and of the person acting on account of the UCITS;
  - b the details necessary to identify the instrument in question;
  - c the quantity;
  - d the type of the order or transaction;
  - e the price;
  - f for orders, the date and exact time of the transmission of the order and name or other designation of the person to whom the order was transmitted, or for transactions, the date and exact time of the decision to deal and execution of the transaction;
  - g the name of the person transmitting the order or executing the transaction;
  - h where applicable, the reasons for the revocation of an order;
  - i for executed transactions, the counterparty and execution venue identification.

For the purposes of point (i) of the first subparagraph, an ‘execution venue’ shall mean a regulated market as referred to under Article 4(1)(14) of Directive 2004/39/EC, a multilateral trading facility as referred to in Article 4(1)(15) of that Directive, a systematic internaliser as referred to in Article 4(1)(7) of that Directive, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.



## Article 15

### Recording of subscription and redemption orders

1 Member States shall require management companies to take all reasonable steps to ensure that the received UCITS subscription and redemption orders are centralised and recorded immediately after receipt of any such order.

2 That record shall include information on the following:

- a the relevant UCITS;
- b the person giving or transmitting the order;
- c the person receiving the order;
- d the date and time of the order;
- e the terms and means of payment;
- f the type of the order;
- g the date of execution of the order;
- h the number of units subscribed or redeemed;
- i the subscription or redemption price for each unit;
- j the total subscription or redemption value of the units;
- k the gross value of the order including charges for subscription or net amount after charges for redemption.

## Article 16

### Recordkeeping requirements

1 Member States shall require management companies to ensure the retention of the records referred to in Articles 14 and 15 for a period of at least 5 years.

However, competent authorities may, in exceptional circumstances, require management companies to retain any or all of those records for a longer period, determined by the nature of the instrument or portfolio transaction, where it is necessary to enable the authority to exercise its supervisory functions under Directive 2009/65/EC.

2 Following the termination of the authorisation of a management company, Member States or competent authorities may require the management company to retain records referred to in paragraph 1 for the outstanding term of the 5-year period.

Where the management company transfers its responsibilities in relation to the UCITS to another management company, Member States or competent authorities may require that arrangements are made that such records for the past 5 years are accessible to that company.

3 The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the competent authority, and in such a form and manner that the following conditions are met:

- a the competent authority must be able to access them readily and to reconstitute each key stage of the processing of each portfolio transaction;
- b it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;

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- c it must not be possible for the records to be otherwise manipulated or altered.

## CHAPTER III

### CONFLICT OF INTERESTS

#### (Article 12(1)(b) and Article 14(1)(d) and (2)(c) of Directive 2009/65/EC)

#### *Article 17*

#### **Criteria for the identification of conflicts of interest**

1 Member States shall ensure that, for the purposes of identifying the types of conflict of interest that arise in the course of providing services and activities and whose existence may damage the interests of a UCITS, management companies take into account, by way of minimum criteria, the question of whether the management company or a relevant person, or a person directly or indirectly linked by way of control to the management company, is in any of the following situations, whether as a result of providing collective portfolio management activities or otherwise:

- a the management company or that person is likely to make a financial gain, or avoid a financial loss, at the expense of the UCITS;
- b the management company or that person has an interest in the outcome of a service or an activity provided to the UCITS or another client or of a transaction carried out on behalf of the UCITS or another client, which is distinct from the UCITS interest in that outcome;
- c the management company or that person has a financial or other incentive to favour the interest of another client or group of clients over the interests of the UCITS;
- d the management company or that person carries on the same activities for the UCITS and for another client or clients which are not UCITS;
- e the management company or that person receives or will receive from a person other than the UCITS an inducement in relation to collective portfolio management activities provided to the UCITS, in the form of monies, goods or services, other than the standard commission or fee for that service.

2 Member States shall require management companies, when identifying the types of conflict of interests, to take into account:

- a the interests of the management company, including those deriving from its belonging to a group or from the performance of services and activities, the interests of the clients and the duty of the management company towards the UCITS;
- b the interests of two or more managed UCITS.

#### *Article 18*

#### **Conflicts of interest policy**

1 Member States shall require management companies to establish, implement and maintain an effective conflicts of interest policy. That policy shall be set out in writing and shall be appropriate to the size and organisation of the management company and the nature, scale and complexity of its business.

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Where the management company is a member of a group, the policy shall also take into account any circumstances of which the company is or should be aware which may give rise to a conflict of interest resulting from the structure and business activities of other members of the group.

2 The conflicts of interest policy established in accordance with paragraph 1 shall include the following:

- a the identification of, with reference to the collective portfolio management activities carried out by or on behalf of the management company, the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of the UCITS or one or more other clients;
- b procedures to be followed and measures to be adopted in order to manage such conflicts.

### *Article 19*

#### **Independence in conflicts management**

1 Member States shall ensure that the procedures and measures provided for in Article 18(2)(b) are designed to ensure that relevant persons engaged in different business activities involving a conflict of interest carry on those activities at a level of independence appropriate to the size and activities of the management company and of the group to which it belongs and to the materiality of the risk of damage to the interests of clients.

2 The procedures to be followed and measures to be adopted in accordance with Article 18(2)(b) shall include the following where necessary and appropriate for the management company to ensure the requisite degree of independence:

- a effective procedures to prevent or control the exchange of information between relevant persons engaged in collective portfolio management activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of one or more clients;
- b the separate supervision of relevant persons whose principal functions involve carrying out collective portfolio management activities on behalf of, or providing services to, clients or to investors whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the management company;
- c the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;
- d measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out collective portfolio management activities;
- e measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate collective portfolio management activities where such involvement may impair the proper management of conflicts of interest.

Where the adoption or the practice of one or more of those measures and procedures does not ensure the requisite degree of independence, Member States shall require management companies to adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.

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## Article 20

### Management of activities giving rise to detrimental conflict of interest

1 Member States shall require management companies to keep and regularly update a record of the types of collective portfolio management activities undertaken by or on behalf of the management company in which a conflict of interest entailing a material risk of damage to the interests of one or more UCITS or other clients has arisen or, in the case of an ongoing collective portfolio management activity, may arise.

2 Member States shall require that, where the organisational or administrative arrangements made by the management company for the management of conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of UCITS or of its unit-holders will be prevented, the senior management or other competent internal body of the management company is promptly informed in order for them to take any necessary decision to ensure that in any case the management company acts in the best interests of the UCITS and of its unit-holders.

3 The management company shall report situations referred to in paragraph 2 to investors by any appropriate durable medium and give reasons for its decision.

## Article 21

### Strategies for the exercise of voting rights

1 Member States shall require management companies to develop adequate and effective strategies for determining when and how voting rights attached to instruments held in the managed portfolios are to be exercised, to the exclusive benefit of the UCITS concerned.

2 The strategy referred to in paragraph 1 shall determine measures and procedures for:

- a monitoring relevant corporate events;
- b ensuring that the exercise of voting rights is in accordance with the investment objectives and policy of the relevant UCITS;
- c preventing or managing any conflicts of interest arising from the exercise of voting rights.

3 A summary description of the strategies referred to in paragraph 1 shall be made available to investors.

Details of the actions taken on the basis of those strategies shall be made available to the unit-holders free of charge and on their request.

## CHAPTER IV

### RULES OF CONDUCT

#### (Article 14(1)(a), (b) and (2)(a), (b) of Directive 2009/65/EC)

#### SECTION 1

#### General principles

##### *Article 22*

#### **Duty to act in the best interests of UCITS and their unit-holders**

1 Member States shall require management companies to ensure that unit-holders of managed UCITS are treated fairly.

Management companies shall refrain from placing the interests of any group of unit-holders above the interests of any other group of unit-holders.

2 Member States shall require management companies to apply appropriate policies and procedures for preventing malpractices that might reasonably be expected to affect the stability and integrity of the market.

3 Without prejudice to requirements under national law, Member States shall require management companies to ensure that fair, correct and transparent pricing models and valuation systems are used for the UCITS they manage, in order to comply with the duty to act in the best interests of the unit-holders. Management companies must be able to demonstrate that the UCITS portfolios have been accurately valued.

4 Member States shall require management companies to act in such a way as to prevent undue costs being charged to the UCITS and its unit-holders.

##### *Article 23*

#### **Due diligence requirements**

1 Member States shall require management companies to ensure a high level of diligence in the selection and ongoing monitoring of investments, in the best interests of UCITS and the integrity of the market.

2 Member States shall require management companies to ensure they have adequate knowledge and understanding of the assets in which the UCITS are invested.

3 Member States shall require management companies to establish written policies and procedures on due diligence and implement effective arrangements for ensuring that investment decisions on behalf of the UCITS are carried out in compliance with the objectives, investment strategy and risk limits of the UCITS.

4 Member States shall require management companies when implementing their risk management policy, and where it is appropriate after taking into account the nature of a foreseen investment, to formulate forecasts and perform analyses concerning the investment's contribution to the UCITS portfolio composition, liquidity and risk and reward profile before

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carrying out the investment. The analyses must only be carried out on the basis of reliable and up-to-date information, both in quantitative and qualitative terms.

Management companies shall exercise due skill, care and diligence when entering into, managing or terminating any arrangements with third parties in relation to the performance of risk management activities. Before entering into such arrangements, management companies shall take the necessary steps in order to verify that the third party has the ability and capacity to perform the risk management activities reliably, professionally and effectively. The management company shall establish methods for the on-going assessment of the standard of performance of the third party.

## SECTION 2

### Handling of subscription and redemption orders

#### Article 24

#### Reporting obligations in respect of execution of subscription and redemption orders

1 Member States shall ensure that where management companies have carried out a subscription or redemption order from a unit-holder, they must notify the unit-holder, by means of a durable medium, confirming execution of the order as soon as possible, and no later than the first business day following execution or, where the confirmation is received by the management company from a third party, no later than the first business day following receipt of the confirmation from the third party.

However, the first subparagraph shall not apply where the notice would contain the same information as a confirmation that is to be promptly dispatched to the unit-holder by another person.

2 The notice referred to in paragraph 1 shall, where applicable, include the following information:

- a the management company identification;
- b the name or other designation of the unit-holder;
- c the date and time of receipt of the order and method of payment;
- d the date of execution;
- e the UCITS identification;
- f the nature of the order (subscription or redemption);
- g the number of units involved;
- h the unit value at which the units were subscribed or redeemed;
- i the reference value date;
- j the gross value of the order including charges for subscription or net amount after charges for redemptions;
- k a total sum of the commissions and expenses charged and, where the investor so requests, an itemised breakdown.

3 Where orders for a unit-holder which are executed periodically, management companies shall either take the action specified in paragraph 1 or provide the unit-holder, at least once every 6 months, with the information listed in paragraph 2 in respect of those transactions.

4 Management companies shall supply the unit-holder, upon request, with information about the status of his order.

### SECTION 3

#### **Best execution**

##### *Article 25*

#### **Execution of decisions to deal on behalf of the managed UCITS**

1 Member States shall require management companies to act in the best interests of the UCITS they manage when executing decisions to deal on behalf of the managed UCITS in the context of the management of their portfolios.

2 For the purposes of paragraph 1, Member States shall ensure that management companies take all reasonable steps to obtain the best possible result for the UCITS, taking into account price, costs, speed, likelihood of execution and settlement, order size and nature, or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to the following criteria:

- a the objectives, investment policy and risks specific to the UCITS, as indicated in the prospectus or as the case may be in the fund rules or articles of association of the UCITS;
- b the characteristics of the order;
- c the characteristics of the financial instruments that are the subject of that order;
- d the characteristics of the execution venues to which that order can be directed.

3 Member States shall require management companies to establish and implement effective arrangements for complying with the obligation referred to in paragraph 2. In particular, management companies shall establish and implement a policy to allow them to obtain, for UCITS orders, the best possible result in accordance with paragraph 2.

Management companies shall obtain the prior consent of the investment company on the execution policy. The management company shall make available appropriate information to unit-holders on the policy established in accordance with this Article and on any material changes to their policy.

4 Management companies shall monitor on a regular basis the effectiveness of their arrangements and policy for the execution of orders in order to identify and, where appropriate, correct any deficiencies.

In addition, management companies shall review the execution policy on an annual basis. A review shall also be carried out whenever a material change occurs that affects the management company's ability to continue to obtain the best possible result for the managed UCITS.

5 Management companies shall be able to demonstrate that they have executed orders on behalf of the UCITS in accordance with the management company's execution policy.

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## Article 26

### Placing orders to deal on behalf of UCITS with other entities for execution

1 Member States shall require management companies to act in the best interests of the UCITS they manage when placing orders to deal on behalf of the managed UCITS with other entities for execution, in the context of the management of their portfolios.

2 Member States shall ensure that management companies take all reasonable steps to obtain the best possible result for the UCITS taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to Article 25(2).

For those purposes, management companies shall establish and implement a policy to enable them to comply with the obligation referred to in the first subparagraph. The policy shall identify, in respect of each class of instruments, the entities with which the orders may be placed. The management company shall only enter into arrangements for execution where such arrangements are consistent with obligations laid down in this Article. Management companies shall make available to unit-holders appropriate information on the policy established in accordance with this paragraph and on any material changes to this policy.

3 Management companies shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 2 and, in particular, the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

In addition, management companies shall review the policy on an annual basis. Such a review shall also be carried out whenever a material change occurs that affects the management company's ability to continue to obtain the best possible result for the managed UCITS.

4 Management companies shall be able to demonstrate that they have placed orders on behalf of the UCITS in accordance with the policy established in accordance with paragraph 2.

## SECTION 4

### Handling of orders

## Article 27

### General principles

1 Member States shall require management companies to establish and implement procedures and arrangements which provide for the prompt, fair and expeditious execution of portfolio transactions on behalf of the UCITS.

The procedures and arrangements implemented by management companies shall satisfy the following conditions:

- a ensure that orders executed on behalf of UCITS are promptly and accurately recorded and allocated;



- b execute otherwise comparable UCITS orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the UCITS require otherwise.

Financial instruments or sums of money, received in settlement of the executed orders shall be promptly and correctly delivered to the account of the appropriate UCITS.

- 2 A management company shall not misuse information relating to pending UCITS orders, and shall take all reasonable steps to prevent the misuse of such information by any of its relevant persons.

### *Article 28*

#### **Aggregation and allocation of trading orders**

- 1 Member States shall not permit management companies to carry out a UCITS order in aggregate with an order of another UCITS or another client or with an order on their own account, unless the following conditions are met:

- a it must be unlikely that the aggregation of orders will work overall to the disadvantage of any UCITS or clients whose order is to be aggregated;
- b an order allocation policy must be established and implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders, including how the volume and price of orders determines allocations and the treatment of partial executions.

- 2 Member States shall ensure that where a management company aggregates a UCITS order with one or more orders of other UCITS or clients and the aggregated order is partially executed, it allocates the related trades in accordance with its order allocation policy.

- 3 Member States shall ensure that management companies which have aggregated transactions for own account with one or more UCITS or other clients' orders do not allocate the related trades in a way that is detrimental to the UCITS or another client.

- 4 Member States shall require that, where a management company aggregates an order of a UCITS or another client with a transaction for own account and the aggregated order is partially executed, it allocates the related trades to the UCITS or other client in priority over those for own account.

However, if the management company is able to demonstrate to the UCITS or its other client on reasonable grounds that it would not have been able to carry out the order on such advantageous terms without aggregation, or at all, it may allocate the transaction for own account proportionally, in accordance with the policy as referred to in paragraph 1(b).

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## SECTION 5

### Inducements

#### Article 29

#### **Safeguarding the best interests of UCITS**

1 Member States shall ensure that management companies are not regarded as acting honestly, fairly and professionally in accordance with the best interests of the UCITS if, in relation to the activities of investment management and administration to the UCITS, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:

- a a fee, commission or non-monetary benefit paid or provided to or by the UCITS or a person on behalf of the UCITS;
- b a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the following conditions are satisfied:
  - (i) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the UCITS in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;
  - (ii) the payment of the fee or commission, or the provision of the non-monetary benefit must be designed to enhance the quality of the relevant service and not impair compliance with the management company's duty to act in the best interests of the UCITS;
- c proper fees which enable or are necessary for the provision of the relevant service, including custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the management company's duties to act honestly, fairly and professionally in accordance with the best interests of the UCITS.

2 Member States shall permit a management company, for the purposes of paragraph 1(b)(i), to disclose the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form, provided that the management company undertakes to disclose further details at the request of the unit-holder and provided that it honours that undertaking.

## CHAPTER V

### **PARTICULARS OF THE STANDARD AGREEMENT BETWEEN A DEPOSITARY AND A MANAGEMENT COMPANY**

#### **(Article 23(5) and Article 33(5) of Directive 2009/65/EC)**

##### *Article 30*

#### **Elements related to the procedures to be followed by the parties to the agreement**

Member States shall require the depositary and the management company, referred to in this Chapter as the ‘parties to the agreement’, to include in the written agreement referred to in either Articles 23(5) or Article 33(5) of Directive 2009/65/EC at least the following particulars related to the services provided by and procedures to be followed by the parties to the agreement:

- (a) a description of the procedures, including those related to the safe-keeping, to be adopted for each type of asset of the UCITS entrusted to the depositary;
- (b) a description of the procedures to be followed where the management company envisages a modification of the fund rules or prospectus of the UCITS, and identifying when the depositary should be informed, or where a prior agreement from the depositary is needed to proceed with the modification;
- (c) a description of the means and procedures by which the depositary will transmit to the management company all relevant information that the management company needs to perform its duties including a description of the means and procedures related to the exercise of any rights attached to financial instruments, and the means and procedures applied in order to allow the management company and the UCITS to have timely and accurate access to information relating to the accounts of the UCITS;
- (d) a description of the means and procedures by which the depositary will have access to all relevant information it needs to perform its duties;
- (e) a description of the procedures by which the depositary has the ability to enquire into the conduct of the management company and to assess the quality of information transmitted, including by way of on-site visits;
- (f) a description of the procedures by which the management company can review the performance of the depositary in respect of the depositary’s contractual obligations.

##### *Article 31*

#### **Elements related to the exchange of information and to obligations on confidentiality and money-laundering**

1 Member States shall require parties to the agreement referred to in either Article 23(5) or Article 33(5) of Directive 2009/65/EC to include at least the following elements related to the exchange of information and obligations on confidentiality and money laundering in that agreement:

- a a list of all the information that needs to be exchanged between the UCITS, its management company and the depositary related to the subscription, redemption, issue, cancellation and repurchase of units of the UCITS;

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- b the confidentiality obligations applicable to the parties to the agreement;
- c information on the tasks and responsibilities of the parties to the agreement in respect of obligations relating to the prevention of money laundering and the financing of terrorism, where applicable.

2 The obligations referred to in paragraph 1(b) shall be drawn up so as not to impair the ability of either the competent authorities of a management company's home Member State or the competent authorities of the UCITS home Member State in gaining access to relevant documents and information.

#### *Article 32*

##### **Elements related to the appointment of third parties**

Where the depositary or the management company envisage appointing third parties to carry out their respective duties, Member States shall require both parties to the agreement referred to either in Article 23(5) or Article 33(5) of Directive 2009/65/EC to include at least the following particulars in that agreement:

- (a) an undertaking by both parties to the agreement to provide details, on a regular basis, of any third parties appointed by the depositary or the management company to carry out their respective duties;
- (b) an undertaking that, upon request by one of the parties, the other party will provide information on the criteria used for selecting the third party and the steps taken to monitor the activities carried out by the selected third party;
- (c) a statement that a depositary's liability as referred to in Article 24 or Article 34 of Directive 2009/65/EC 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.

#### *Article 33*

##### **Elements related to potential amendments and the termination of the agreement**

Member States shall require the parties to the agreement referred to in either Article 23(5) or Article 33(5) of Directive 2009/65/EC to include at least the following particulars related to amendments and the termination of the agreement in that agreement:

- (a) the period of validity of the agreement;
- (b) the conditions under which the agreement may be amended or terminated;
- (c) the conditions which are necessary to facilitate transition to another depositary and, in case of such transition the procedure by which the depositary shall send all relevant information to the other depositary.

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#### *Article 34*

##### **Applicable law**

Member States shall require the parties to the agreement referred to either in Articles 23(5) or Article 33(5) of Directive 2009/65/EC to specify that the law of the UCITS' home Member State applies to that agreement.

#### *Article 35*

##### **Electronic transmission of information**

In cases where the parties to the agreement referred to in either Article 23(5) or Article 33(5) of Directive 2009/65/EC agree to the use of electronic transmission for part or all of information that flows between them, Member States shall require that such agreement contains provisions ensuring that a record is kept of such information.

#### *Article 36*

##### **Scope of the agreement**

Member States may allow that the agreement referred to in either Article 23(5) or Article 33(5) of Directive 2009/65/EC cover more than one UCITS managed by the management company. In such case, the agreement shall list the UCITS covered.

#### *Article 37*

##### **Service level agreement**

Member States shall allow parties to the agreement to either include details of means and procedures referred to in Article 30(c) and (d) in the agreement referred to in either Article 23(5) or Article 33(5) of Directive 2009/65/EC or in a separate written agreement.

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## CHAPTER VI

### RISK MANAGEMENT

#### (Article 51(1) of Directive 2009/65/EC)

##### SECTION 1

#### Risk management policy and risk measurement

##### *Article 38*

#### **Risk management policy**

1 Member States shall require management companies to establish, implement and maintain an adequate and documented risk management policy which identifies the risks the UCITS they manage are or might be exposed to.

The risk management policy shall comprise such procedures as are necessary to enable the management company to assess for each UCITS it manages the exposure of that UCITS to market, liquidity and counterparty risks, and the exposure of the UCITS to all other risks, including operational risks, which may be material for each UCITS it manages.

Member States shall require management companies to address at least the following elements in the risk management policy:

- a the techniques, tools and arrangements that enable them to comply with the obligations set out in Articles 40 and 41;
- b the allocation of responsibilities within the management company pertaining to risk management.

2 Member States shall require management companies to ensure that the risk management policy referred to in paragraph 1 states the terms, contents and frequency of reporting of the risk management function referred to in Article 12 to the board of directors and to senior management and, where appropriate, to the supervisory function.

3 For the purposes of paragraphs 1 and 2, Member States shall ensure that management companies take into account the nature, scale and complexity of their business and of the UCITS they manage.

##### *Article 39*

#### **Assessment, monitoring and review of risk management policy**

1 Member States shall require management companies to assess, monitor and periodically review:

- a the adequacy and effectiveness of the risk management policy and of the arrangements, processes and techniques referred to in Articles 40 and 41;
- b the level of compliance by the management company with the risk management policy and with arrangements, processes and techniques referred to in Articles 40 and 41;
- c the adequacy and effectiveness of measures taken to address any deficiencies in the performance of the risk management process.

2 Member States shall require management companies to notify to competent authorities of their home Member State any material changes to the risk management process.

3 Member States shall ensure that requirements laid down in paragraph 1 are subject to review by the competent authorities of the management company's home Member State on an on-going basis and accordingly when granting authorisation.

## SECTION 2

### **Risk management processes, Counterparty risk exposure and issuer concentration**

#### *Article 40*

#### **Measurement and management of risk**

1 Member States shall require management companies to adopt adequate and effective arrangements, processes and techniques in order to:

- a measure and manage at any time the risks which the UCITS they manage are or might be exposed to;
- b ensure compliance with limits concerning global exposure and counterparty risk, in accordance with Articles 41 and 43.

Those arrangements, processes and techniques shall be proportionate to the nature, scale and complexity of the business of the management companies and of the UCITS they manage and be consistent with the UCITS risk profile.

2 For the purposes of paragraph 1, Member States shall require management companies to take the following actions for each UCITS they manage:

- a put in place such risk measurement arrangements, processes and techniques as are necessary to ensure that the risks of taken positions and their contribution to the overall risk profile are accurately measured on the basis of sound and reliable data and that the risk measurement arrangements, processes and techniques are adequately documented;
- b conduct, where appropriate, periodic back-tests in order to review the validity of risk measurement arrangements which include model-based forecasts and estimates;
- c conduct, where appropriate, periodic stress tests and scenario analyses to address risks arising from potential changes in market conditions that might adversely impact the UCITS;
- d establish, implement and maintain a documented system of internal limits concerning the measures used to manage and control the relevant risks for each UCITS taking into account all risks which may be material to the UCITS as referred to in Article 38 and ensuring consistency with the UCITS risk-profile;
- e ensure that the current level of risk complies with the risk limit system as set out in point (d) for each UCITS;
- f establish, implement and maintain adequate procedures that, in the event of actual or anticipated breaches to the risk limit system of the UCITS, result in timely remedial actions in the best interests of unit-holders.

3 Member States shall ensure that management companies employ an appropriate liquidity risk management process in order to ensure that each UCITS they manage is able to comply at any time with Article 84(1) of Directive 2009/65/EC.

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Where appropriate, management companies shall conduct stress tests which enable assessment of the liquidity risk of the UCITS under exceptional circumstances.

4 Member States shall require management companies to ensure that for each UCITS they manage the liquidity profile of the investments of the UCITS is appropriate to the redemption policy laid down in the fund rules or the instruments of incorporation or the prospectus.

#### *Article 41*

### **Calculation of global exposure**

1 Member States shall require management companies to calculate the global exposure of a managed UCITS as referred to in Article 51(3) of Directive 2009/65/EC as either of the following:

- a the incremental exposure and leverage generated by the managed UCITS through the use of financial derivative instruments including embedded derivatives pursuant to the fourth subparagraph of Article 51(3) of Directive 2009/65/EC, which may not exceed the total of the UCITS net asset value;
- b the market risk of the UCITS portfolio.

2 Member States shall require management companies to calculate the UCITS global exposure on at least a daily basis.

3 Member States may allow management companies to calculate global exposure by using the commitment approach, the value at risk approach or other advanced risk measurement methodologies as may be appropriate. For the purposes of this provision, 'value at risk' shall mean a measure of the maximum expected loss at a given confidence level over a specific time period.

Member States shall require management companies to ensure that the method selected to measure global exposure is appropriate, taking into account the investment strategy pursued by the UCITS and the types and complexities of the financial derivative instruments used, and the proportion of the UCITS portfolio which comprises financial derivative instruments.

4 Where a UCITS in accordance with Article 51(2) of Directive 2009/65/EC employs techniques and instruments including repurchase agreements or securities lending transactions in order to generate additional leverage or exposure to market risk, Member States shall require management companies to take these transactions into consideration when calculating global exposure.

#### *Article 42*

### **Commitment approach**

1 Where the commitment approach is used for the calculation of global exposure, Member States shall require management companies to apply this approach to all financial derivative instrument positions including embedded derivatives as referred to in the fourth subparagraph of Article 51(3) of Directive 2009/65/EC, whether used as part of the UCITS general investment policy, for purposes of risk reduction or for the purposes of efficient portfolio management as referred to in Article 51(2) of that Directive.



2 Where the commitment approach is used for the calculation of global exposure, Member States shall require management companies to convert each financial derivative instrument position into the market value of an equivalent position in the underlying asset of that derivative (standard commitment approach).

Member States may allow management companies to apply other calculation methods which are equivalent to the standard commitment approach.

3 Member States may allow a management company to take account of netting and hedging arrangements when calculating global exposure, where these arrangements do not disregard obvious and material risks and result in a clear reduction in risk exposure.

4 Where the use of financial derivative instruments does not generate incremental exposure for the UCITS, the underlying exposure need not be included in the commitment calculation.

5 Where the commitment approach is used, temporary borrowing arrangements entered into on behalf of the UCITS in accordance with Article 83 of Directive 2009/65/EC need not be included in the global exposure calculation.

### *Article 43*

#### **Counterparty risk and issuer concentration**

1 Member States shall require management companies to ensure that counterparty risk arising from an over-the-counter (OTC) financial derivative instrument is subject to the limits set out in Article 52 of Directive 2009/65/EC.

2 When calculating the UCITS exposure to a counterparty in accordance with the limits as referred to in Article 52(1) of Directive 2009/65/EC, management companies shall use the positive mark-to-market value of the OTC derivative contract with that counterparty.

Management companies may net the derivative positions of a UCITS with the same counterparty, provided that they are able to legally enforce netting agreements with the counterparty on behalf of the UCITS. Netting shall only be permissible with respect to OTC derivative instruments with the same counterparty and not in relation to any other exposures the UCITS may have with that same counterparty.

3 Member States may allow management companies to reduce the UCITS exposure to a counterparty of an OTC derivative transaction through the receipt of collateral. Collateral received shall be sufficiently liquid so that it can be sold quickly at a price that is close to its pre-sale valuation.

4 Member States shall require management companies to take collateral into account in calculating exposure to counterparty risk as referred to in Article 52(1) of Directive 2009/65/EC when the management company passes collateral to OTC counterparty on behalf of the UCITS. Collateral passed may be taken into account on a net basis only if the management company is able to legally enforce netting arrangements with this counterparty on behalf of the UCITS.

5 Member States shall require management companies to calculate issuer concentration limits as referred to in Article 52 of Directive 2009/65/EC on the basis of the underlying exposure created through the use of financial derivative instruments pursuant to the commitment approach.

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6 With respect to the exposure arising from OTC derivatives transactions as referred to in Article 52(2) of Directive 2009/65/EC, Member States shall require management companies to include in the calculation any exposure to OTC derivative counterparty risk.

### SECTION 3

#### **Procedures for the valuation of the OTC derivatives**

##### *Article 44*

#### **Procedures for the assessment of the value of OTC derivatives**

1 Member States shall require management companies to verify that UCITS exposures to OTC derivatives are assigned fair values that do not rely only on market quotations by the counterparties of the OTC transactions and which fulfil the criteria set out in Article 8(4) of Directive 2007/16/EC.

2 For the purposes of paragraph 1, management companies shall establish, implement and maintain arrangements and procedures which ensure appropriate, transparent and fair valuation of UCITS exposures to OTC derivatives.

Member States shall require management companies to ensure that the fair value of OTC derivatives is subject to adequate, accurate and independent assessment.

The valuation arrangements and procedures shall be adequate and proportionate to the nature and complexity of the OTC derivatives concerned.

Management companies shall comply with the requirements set out in Article 5(2) and in the second subparagraph of Article 23(4) when arrangements and procedures concerning the valuation of OTC derivatives involve the performance of certain activities by third parties.

3 For the purposes of paragraphs 1 and 2, the risk management function shall be appointed with specific duties and responsibilities.

4 The valuation arrangements and procedures referred to in paragraph 2 shall be adequately documented.

### SECTION 4

#### **Transmission of information on derivative instruments**

##### *Article 45*

#### **Reports on derivative instruments**

1 Member States shall require management companies to deliver to the competent authorities of their home Member State, at least on an annual basis, reports containing information which reflects a true and fair view of the types of derivative instruments used for each managed UCITS, the underlying risks, the quantitative limits and the methods which are chosen to estimate the risks associated with the derivative transactions.

2 Member States shall ensure that the competent authorities of the management company's home Member State review the regularity and completeness of information referred to in paragraph 1 and that they have an opportunity to intervene where appropriate.

## CHAPTER VII

### FINAL PROVISIONS

#### *Article 46*

##### **Transposition**

1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2011 at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, 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 47*

##### **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 48*

##### **Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 1 July 2010.

*For the Commission*

*The President*

José Manuel BARROSO

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- (1) OJ L 302, 17.11.2009, p. 32.
- (2) OJ L 145, 30.4.2004, p. 1.
- (3) OJ L 241, 2.9.2006, p. 26.
- (4) See page 1 of this Official Journal.
- (5) OJ L 96, 12.4.2003, p. 16.
- (6) OJ L 177, 4.7.2008, p. 6.
- (7) OJ L 79, 20.3.2007, p. 11.
- (8) OJ L 25, 29.1.2009, p. 18.