COUNCIL OF THE EUROPEAN UNION

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"I" ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions *- Approval of the final compromise text*

1. On 3 July 2012 the Commission transmitted to the Council its Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (hereinafter the "UCITS V").

2. On 29 April 2013, the European Parliament's ECON Committee adopted its report on the Commission's proposal and amendments were adopted in plenary on 3 July 2013. The position at first reading of the European Parliament is still pending.

3. The European Central Bank[1] delivered its opinion on 11 January 2013.

4. The Committee of Permanent Representatives agreed on a general approach on the above mentioned proposal on 2 December 2013[2]. On that basis, the Presidency has conducted negotiations with the European Parliament and the Commission with a view to a first reading agreement.

5. On 25 February 2014, following written exchanges, a provisional agreement was reached which resulted in the final compromise text of the UCITS V as set out in the annex.

6. Against this background the Permanent Representatives Committee (Part 1) is invited to:

   a) approve the final compromise text regarding the UCITS V;

   b) confirm that the Presidency can indicate to the European Parliament that, should the European Parliament adopt its position at first reading as regards the UCITS V as set out in the Annex, subject, if necessary, to revision of that text by the legal linguists of both institutions, the Council would approve the European Parliament's position and the Act shall be adopted in the wording which corresponds to the European Parliament's position.

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[1] Doc. 5943/13
[2] Doc. 17094/13

ANNEX

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission ,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Central Bank ,

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Directive 2009/65/EC of the European Parliament and of the Council should be amended in order to take into account market developments and the experiences of market participants and supervisors gathered so far, in particular to address discrepancies between national provisions in respect of depositaries' duties and liability, remuneration policy and sanctions.

(2) In order to address the potentially detrimental effect of poorly designed remuneration structures on the sound management of risks and control of risk-taking behaviour by individuals, there should be an express obligation for undertakings of collective investment in transferable securities (UCITS) management companies to establish and maintain, for those categories of staff whose professional activities have a material impact on the risk profiles of the UCITS they manage, remuneration policies and practices that are consistent with sound and effective risk management. Those categories of staff should include ***any employee and any other member of staff at fund or sub-fund level who are decision takers, fund managers and persons who take real investment decisions, persons who have the power to exercise influence on such employees or members of staff, including investment advisors and analysts,*** senior management and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and ***decision*** takers. Those rules should also apply to UCITS investment companies that do not designate a management company. ***These policies and practices should apply, in a proportionate manner, to any third party which takes investment decisions that affect the risk profile of the UCITS because of functions which have been delegated in accordance with Article 13.***

(3) ***Provided that UCITS management companies apply all the*** principles governing remuneration policies***, they*** should ***be*** able to apply those policies in different ways according to their size and the size of the UCITS they manage, their internal organisation and the nature, scope and complexity of their activities.

(4) While some actions are to be taken by the management body, it should be ensured that where, according to the national laws, the management company has in place different bodies with specific functions assigned, the requirements directed at the "management body" or "management body in its supervisory function" should also or instead apply to those bodies, such as, for example, the General Meeting.

(5) ***When applying the*** principles regarding sound remuneration policies established in this Directive***, Member States*** should ***take into account*** the principles set out in the Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector***and the work of the Financial Stability Board and G-20 commitments to mitigate risk in the financial services sector***.

(6) Guaranteed variable remuneration should be exceptional because it is not consistent with sound risk management or the pay-for-performance principle and should be limited to the first year.

(7) The principles regarding sound remuneration policies should also apply to payments made by the UCITS itself to management companies

(8) The Commission is invited to analyse which are the common costs and expenses of retail investment products in the Member States and whether further harmonisation of those costs and expenses is needed and submit its findings to the European Parliament and to the Council.

(9) In order to promote supervisory convergence in the assessment of remuneration policies and practices, the European Securities and Markets Authority (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council should ensure the existence of guidelines on sound remuneration policies in the asset management sector. The European Banking Authority (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council should assist ESMA in the elaboration of such guidelines. ***In order to prevent circumvention of the provisions on remuneration, those guidelines should also provide further guidance on the persons to whom remuneration policies and practices apply and on the adaptation of the remuneration principles to the size of the management company and the size of UCITS they manage, their internal organisation and the nature, the scope and the complexity of their activities. ESMA's guidelines on remuneration policies should, where appropriate, be aligned, to the extent possible, with those for funds regulated under Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.***

(10) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, ***to*** general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and custom.

(11) In order to ensure the necessary level of harmonisation of the relevant regulatory requirements in different Member States**,** additional rules should be adopted defining the tasks and duties of depositaries, designating the legal entities that may be appointed as depositaries and clarifying the liability of depositaries in cases UCITS assets are lost in custody or in the case of depositaries' improper performance of their oversight duties. Such improper performance may result in the loss of assets but also in the loss of the value of assets, if, for example, a depositary ***fails to act on*** investments that ***are*** not compliant with fund rules

(12) It is necessary to clarify that a UCITS should appoint a single depositary having general oversight over the UCITS's assets. Requiring that there be a single depositary should ensure that the depositary has a view over all the assets of the UCITS and both fund managers and investors have a single point of reference in the event that problems occur in relation to the safekeeping of the assets or the performance of oversight functions. The safekeeping of assets includes holding assets in custody or, where assets are of such a nature that they cannot be held in custody, verification of the ownership of those assets as well as record-keeping for those assets.

(13) In performing its tasks, a depositary should act honestly, fairly, professionally, independently and in the interest of the UCITS ***and*** of the investors of the UCITS.

(14) In order to ensure a harmonised approach to the performance of depositaries duties in all Member States irrespective of the legal form taken by the UCITS, it is necessary to introduce a uniform list of oversight duties that are incumbent on both a UCITS with a corporate form (an investment company) and a UCITS in a contractual form.

(15) The depositary should be responsible for the proper monitoring of the UCITS' cash flows, and, in particular, for ensuring that investor money and cash belonging to the UCITS is booked correctly on accounts opened in the name of the UCITS, or in the name of the management company acting on behalf of the UCITS, or in the name of the depositary acting on behalf of the UCITS***, at an entity referred to in points (a), (b) and (c) of Article 18(1) of Commission Directive 2006/73/EC***. Therefore detailed provisions should be adopted on cash monitoring so as to ensure effective and consistent levels of investor protection. When ensuring investor money is booked in cash accounts, the depositary should take into account the principles set out in Article 16 of 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 .

(16) In order to prevent fraudulent cash transfers, it should be required that no cash account associated with the funds' transactions be opened without the depositary's knowledge.

(17) Any ***asset*** held in custody for a UCITS should be distinguished from the depositary's own assets, and at all times be identified as belonging to that UCITS; such a requirement should confer an additional layer of protection for investors should the depositary default.

(18) In addition to the existing duty to safe keep assets belonging to a UCITS, assets should be differentiated between those that are capable of being held in custody and those that are not, where a record-keeping and ownership verification requirement applies instead. The group of assets that can be held in custody should be clearly differentiated, since the duty to return lost assets should only apply to that specific category of financial assets.

(19) The assets held in custody by the depositary should not be reused by the depositary or by any third party to whom the custody function has been delegated for their own account. Conditions should apply to the reuse of assets for the account of the UCITS.

(20) It is necessary to define the conditions for the delegation of the depositary's safe-keeping duties to a third party. Delegation and sub-delegation should be objectively justified and subject to strict requirements in relation to the suitability of the third party entrusted with the delegated function, and in relation to the due skill, care and diligence that the depositary should employ to select, appoint and review that third party. For the purpose of achieving uniform market conditions and an equally high level of investor protection, such conditions should be aligned with those applicable under Directive 2011/61/EU***, Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies and Regulation*** (EU) No 1095/***2010.*** Provisions should be adopted to ensure that third parties ***have*** the necessary means to perform their duties and that they segregate UCITS' assets.

(21) ***When a Central Securities Depositary (CSD), as defined in Article 2 (1)(1) of CSDR, or a third-country CSD provides the services of: (i) operating*** a securities settlement system***; as well as at least (ii) initial recording of securities in a book-entry system through initial crediting; or (iii) providing and maintaining securities accounts at the top tier level; as specified in Section A of the Annex to CSDR, the provision of those services by this CSD with respect to the securities of the UCITS that are initially recorded in a book-entry system through initial crediting by this CSD*** should not be considered a delegation of custody functions. ***However, entrusting the custody of securities of the UCITS to a CSD, as defined in Article 2(1)(1) of CSDR, or to a third country CSD should be considered a delegation of custody function.***

(22) A third party to whom the safe-keeping of assets is delegated should be able to maintain an omnibus account, as a common segregated account for multiple UCITS.

(23) Where custody is delegated to a third party, it is also necessary to ensure that the third party is subject to specific requirements on effective prudential regulation and supervision. In addition, in order to ensure that the financial instruments are in the possession of the third party to whom custody was delegated, periodic external audits should be performed.

(24) In order to ensure consistently high levels of investor protection, provisions on conduct and on the management of conflicts of interest should be adopted and they should apply in all situations, including in case of delegation of safe-keeping duties. Those rules should in particular ensure a clear separation of tasks and functions between the depositary, the UCITS and the management company.

(25) In order to ensure a high level of investor protection and to guarantee an appropriate level of prudential regulation and on-going control, it is necessary to establish an exhaustive list of entities that are eligible to act as depositaries***. The entities*** permitted to act as UCITS depositaries ***should be limited to national central banks, credit institutions, and other legal entities authorised under the laws of Member States to carry on depositary activities under this Directive, which are subject to prudential supervision and capital adequacy requirements not less than the requirements calculated depending on the selected approach in accordance with Article 315 or 317 of Regulation (EU) No 575/2013, have own funds not less than the amount of initial capital under Article 28(2) of Directive 2013/36/EU and have their registered office or a branch in the UCITS home Member State***.

(26) It is necessary to specify and clarify the UCITS depositary's liability in case of the loss of a financial instrument that is held in custody. The depositary should be liable, where a financial instrument held in custody has been lost, to return a financial instrument of the identical type or of the corresponding amount to the UCITS. No further discharge of liability in case of loss of assets should be envisaged, except where the depositary is able to prove that the loss is due to an 'external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary'. In this context, a depositary should not be able to rely on internal situations such as a fraudulent act by an employee to discharge itself of liability.

(27) Where the depositary delegates custody tasks and the financial instruments held in custody by a third party are lost, the depositary should be liable. It should also be established that in case of loss of an instrument held in custody, a depositary is bound to return a financial instrument of identical type or the corresponding amount, even if the loss occurred with a sub-custodian. The depositary ***should*** only discharge that liability where it can prove that the loss resulted from an external event beyond its reasonable control and with consequences that were unavoidable despite all reasonable efforts to the contrary. In this context, a depositary should not be able to rely on internal situations such as a fraudulent act by an employee to discharge itself of liability. No discharge of liability either regulatory or contractual should be possible in case of loss of assets by a depository or its sub-custodian.

(28) Every investor in a UCITS fund should be able to invoke claims relating to the liability of its depositary, either directly or indirectly, through the management company. Redress against the depositary should not depend on the legal form that a UCITS fund takes (corporate or contractual form) or the legal nature of the relationship between the depositary, the management company and the unit-holders. ***The right of unit-holders to invoke the depositary liability should not lead to a duplication of redress or to unequal treatment of the unit-holders.***

(29) Without prejudice to the provisions of this Directive a depositary should not be prevented from making arrangements to cover damages and losses to the UCITS or to unit-holders of the UCITS. In particular such arrangements should not constitute a discharge of the depositary's liability, result in a transfer or any change to the depositary's liability and should not impinge the investors' rights including redress rights.

(30) On 12 July 2010 the Commission proposed amendments to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor -compensation schemes ***in order to provide a high level of protection for UCITS investors where a depositary cannot meet its obligations set out in this Directive. The*** proposal of 12 July 2010 ***is supplemented*** by clarifying the obligations and the scope of the liability of the depositary and the sub-custodians of UCITS ***in this Directive.***

(31) The Commission is invited to analyse in which situations the failure of a UCITS depositary or a sub-custodian could lead to losses to UCITS unit holders which are not recoverable under this Directive, to analyse further what kind of measures could be adequate to ensure a high level of investor protection, whatever the chain of intermediation between the investor and the transferable securities affected by the failure, and to submit its findings to the European Parliament and to the Council.

(32) It is necessary to ensure that the same requirements apply to depositaries irrespective of the legal form a UCITS takes. Consistency of requirements should enhance legal certainty, increase investor protection and contribute to creating uniform market conditions. The Commission has not received any notification that the derogation from the general obligation to entrust assets to a depositary has been used by an investment company. Therefore, the requirements of Directive 2009/65/EC regarding the depositary of an investment company should be considered redundant.

(33) While this Directive specifies a minimum set of powers competent authorities should have, these powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to respect private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, for instance, where appropriate prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result.

(34) Existing recordings of telephone conversations and data traffic records from the a UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive, as well as existing telephone and data traffic records from telecommunications operators constitute crucial, and sometimes the only, evidence to detect and prove the existence of breaches of the national law transposing this Directive as well as verify compliance by the UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive with investor protection and other requirements set out in this Directive and its implementing legislation.

Therefore, competent authorities should be able to require existing recordings of telephone conversations, electronic communications and data traffic records held by a UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive. Access to data and telephone records is necessary for the detection and sanctioning of breaches of requirements set out in this Directive or its implementing legislation. In order to introduce a level playing field in the Union in relation to the access to telephone and existing data traffic records held by a telecommunication operator or the existing recordings of telephone conversations and data traffic held by an UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive, competent authorities should in conformity with national law be able to require existing telephone and existing data traffic records held by a telecommunication operator insofar as permitted under national law and existing recordings of telephone conversations as well as data traffic held by an UCITS, management companies, investment companies, depositaries or any other entities regulated by this Directive, in those cases where a reasonable suspicion exists that such records related to the subject-matter of the inspection or investigation may be relevant to prove violations of the requirements set out in this Directive or its implementing legislation. Access to telephone and data traffic records held by a telecommunications operator does not encompass the content of voice communications by telephone.

(35) ***A sound prudential and conduct of business framework for the financial sector should rest on strong supervisory, investigatory and sanctioning regimes. To this end, supervisory authorities should be equipped with sufficient powers to act and should be able to rely on equal, strong and deterrent penalties regimes for the breaches of this Directive. A review of existing sanctioning powers and their practical application aimed at promoting convergence of penalties across the range of supervisory activities has been carried out in*** the Commission Communication of 8 December 2010 on reinforcing sanctioning regimes in the financial services sector***. Competent*** authorities should be empowered to impose pecuniary ***penalties*** which are sufficiently high so as to be ***effective,*** dissuasive and proportionate, so as to offset expected benefits from behaviours which breach requirements.

(36) Even though nothing prevents Member States from laying down rules for administrative sanctions as well as criminal sanctions on the same infringements, Member States should not be required to lay down rules on administrative sanctions for the infringements of this Directive which are subject to national criminal law. In conformity with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they could do so if their national law permits them. However, the maintenance of criminal sanctions instead of administrative sanctions for violations of this Directive should not reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Directive, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.

Member States should be able to decide not to lay down rules for administrative sanctions for breaches which are subject to national criminal law. The option for Member States to impose criminal sanctions instead of or in addition to administrative sanctions should not be used to circumvent the sanction regime in this directive.

(37) In order to ensure a consistent application across Member States, when determining the type of administrative ***penalties*** or measures and the level of administrative pecuniary ***penalties***, Member States should be required to ensure that ***their*** competent authorities take into account all relevant circumstances.

(38) In order to strengthen the dissuasive effect on the public at large and to inform them about breaches of rules which may be detrimental to investors' protection, sanctions should be published, save in certain well-defined circumstances. In order to ensure compliance with the principle of proportionality, sanctions should be published on an anonymous basis where publication would cause a disproportionate damage to the parties involved.

(39) In order to enable ESMA to further strengthen consistency in supervisory outcomes in accordance with Regulation (EU) No 1095/2010, all publicly disclosed sanctions should be simultaneously reported to ESMA, which should also publish an annual report on all sanctions imposed.

(40) ***Competent*** authorities should be entrusted with the necessary investigatory powers, and should establish effective mechanisms to encourage reporting of potential or actual breaches. ***Information on potential and actual breaches should also contribute to the effective performance of ESMA's tasks in accordance with Regulation (EU) 1095/2010. Communication channels for the reporting of those potential and actual breaches should therefore be established also by ESMA. Information on potential and actual breaches communicated to ESMA should only be used for the performance of ESMA's tasks in accordance with Regulation (EU) 1095/2010.***

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(41) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaty on the Functioning of the European Union.

(42) In order to ensure that the objectives of this Directive are attained, the Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union. In particular, the Commission should be empowered to adopt delegated acts to specify the particulars that need to be included in the standard agreement between the depositary and the management company or the investment company, the conditions for performing depositary functions, including the type of financial instruments that should be included in the scope of the depositary's custody duties, the conditions subject to which the depositary may exercise its custody duties over financial instruments registered with a central depositary and the conditions subject to which the depositary should safe keep the financial instruments issued in a nominative form and registered with an issuer or a registrar, the due diligence duties of depositaries, the segregation obligation, the conditions subject to and circumstances in which financial instruments held in custody should be considered as lost, what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. ***The level of investor protection provided by those delegated acts should be at least as high as that provided by delegated acts adopted under Directive 2011/61/EU. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.*** The Commission, when preparing and drawing-up delegated acts, should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

As part of its overall review of the functioning of the UCITS directive, the Commission, taking into account Regulation (EU) No 648/2012 on OTC derivatives [EMIR], shall review counterparty exposure limits applicable to derivatives transactions, taking into account the need to establish appropriate categorisations for such limits so that derivatives with similar risk characteristics are treated the same.

(43) In accordance with the Joint Political Declaration ▌ of Member States and the Commission on explanatory documents▌ ***of 28 September 2011*** Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(44) ***Since the*** objectives of ***this Directive, namely*** to improve investors' confidence in UCITS, by enhancing requirements concerning the duties and the liability of depositaries, the remuneration policies of management companies and investment companies, and by introducing common standards for the sanctions applying to the main breaches of the provisions of this Directive, cannot be sufficiently achieved by Member States acting independently of one another▌ , and ***can*** therefore***, by reason of its scale and effects,*** be better achieved at Union level, the Union ***may*** adopt the ▌ measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve ***those objectives.***

(45) The European Data Protection Supervisor has been consulted in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

(46) Directive 2009/65/EC should therefore be amended accordingly,

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Article 1

Directive 2009/65/EC is amended as follows:

(1) In Article 2(1), the following point is added:

"(s) 'management body' means the body with ultimate decision making authority in a management company, investment company or depositary, comprising the supervisory and the managerial functions, or only the managerial function if the two functions are separated. Where, according to national law, the management company investment company or depositary has in place different bodies with specific functions, the requirements of this Directive directed at the "management body" or the "management body in its supervisory function" shall also or instead apply to those members of other bodies of the management company to whom the applicable national law assigns the respective responsibility."

(2) In Article 2(1), the following point is added:

(sa) 'financial instruments' means an instrument as specified ion Section C of Annex I to Regulation (EU) No .../2013 of the European Parliament and of the Council of ... [on markets in financial instruments (MIFIR)]

(3) The following Articles 14a and 14b are inserted:

"Article 14a

1. Member States shall require management companies to establish and apply remuneration policies and practices that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS they manage ***and do not impair compliance with the management company's duty to act in the best interest of the UCITS***.

2. The remuneration policies and practices shall ***include fixed and variable components of*** salaries and discretionary pension benefits.

3. The remuneration policies and practices shall apply to those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls within the remuneration bracket of senior management and risk takers whose professional activities have a material impact on the risk profiles of the management companies or of ***the*** UCITS they manage.

4. In accordance with Article 16 of Regulation (EU) No 1095/***2010,*** ESMA shall issue guidelines addressed to competent authorities ***and/or financial market participants concerning the persons referred to in Article 14a(3) and the application of the principles referred to in*** Article 14b. Those guidelines shall take into account the principles on sound remuneration policies set out in Recommendation 2009/384/EC , the size of the management company and the size of UCITS they manage, their internal organisation and the nature, the scope and the complexity of their activities. In the process of development of the guidelines ESMA shall cooperate closely with the EBA in order to ensure consistency with requirements developed for other sectors of financial services, in particular credit institutions and investment firms.

Article 14b

1. When establishing and applying the remuneration policies referred to in Article 14a, management companies shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

   (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS they manage;

   (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the management company and the UCITS it manages ***and*** the investors of such UCITS, and includes measures to avoid conflicts of interest;

(c) the ***remuneration policy is adopted by the*** management body of the management company in its supervisory function, ***and that body*** adopts and ***at least annually*** reviews the general principles of the remuneration policy and is responsible for ***and oversees its implementation. The tasks referred to in the first sentence shall be undertaken only by members of the management body who do not perform any executive functions in the management company concerned and who have expertise in risk management and remuneration.***

(d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;

(e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;

(f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee***, in case such committee exists***;

(g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the performance of the individual and of the business unit or UCITS concerned ***and their risks*** and of the overall results of the management company, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

(h) the assessment of performance is set in a multi-year framework appropriate to the ***holding period recommended to the investors*** of the UCITS managed by the management company in order to ensure that the assessment process is based on longer term performance ***of the UCITS and its investment risks*** and that the actual payment of performance-based components of remuneration is spread over ***the same period***;

(i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;

(j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy on variable remuneration components, including the possibility to pay no variable remuneration component;

(k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;

(l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;

(m) subject to the legal structure of the UCITS and its fund rules or instruments of incorporation, a substantial portion, and in any event at least 50% of any variable remuneration consists of units of the UCITS concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments ***with equally effective incentives as any of the above***, unless the management of UCITS accounts for less than 50% of the total portfolio managed by the management company, in which case the minimum of 50% does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the management company and the UCITS it manages and the investors of such UCITS. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate. This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

(n) a substantial portion, and in any event at least 40 %, of the variable remuneration component, is deferred over a period which is appropriate in view of the ***holding period recommended to the investors*** of the UCITS concerned and is correctly aligned with the nature of the risks of the UCITS in question.

The period referred to in this point shall be at least three ***years***; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount shall be deferred;

(o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the management company as a whole, and justified according to the performance of the business unit, the UCITS and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the management company or of the UCITS concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

(p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the management company and the UCITS it manages.

If the employee leaves the management company before retirement, discretionary pension benefits shall be held by the management company for a period of five years in the form of instruments referred to in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments referred to in point (m), subject to a five year retention period;

(q) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

(r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. In accordance with Article 35 of Regulation (EU) No 1095/2010, ESMA may request from competent authorities information on the remuneration policies referred to in Article 14a.

Cooperating closely with EBA, ESMA shall include in its Guidance on remuneration policies provisions on how different sectoral remuneration principles, such as those in Directive 2011/61/EU and Directive 2013/36/EU, are to be applied where employees or other categories of personnel perform services subject to different sectoral remuneration principles.

3. The principles set out in paragraph 1 shall apply to ***any benefit*** of any type paid by the management ***company, to any amount paid directly by the UCITS itself, including performance fees,*** and to any transfer of units or shares of the UCITS, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that falls into the remuneration bracket of senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk ***profile*** of the UCITS they manage.

4. Management companies that are significant in terms of their size or the size of the UCITS they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee ***set up, where appropriate, in accordance with ESMA guidelines*** shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the management company or the UCITS concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the management company concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the management company concerned.

If employee representation on the management body is provided for by national law the remuneration committee shall include one or more employee representatives. When preparing its decisions, the remuneration committee shall take into account the long-term interest of investors and other stakeholders and the public interest."

(4) In Article 20(1), point (a) is replaced by the following:

"(a) the written contract with the depositary referred to in Article 22(2); "

(5) Article 22 is replaced by the following:

"Article 22

1. An investment company and, for each of the common funds it manages, a management company shall ensure that a single depositary is appointed in accordance with the provisions of this Chapter.

2. The appointment of the depositary shall ***be evidenced by*** written contract.

That contract shall***, inter alia, regulate*** the flow of information deemed necessary to allow the depositary to perform its functions ***for*** the UCITS for which it has been appointed as depositary, as set out in this Directive and in other ***relevant*** laws, regulations and administrative provisions .

3. The depositary shall:

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units of the UCITS are carried out in accordance with the applicable national laws and the fund rules or instruments of incorporation;

(b) ensure that the value of the units of the UCITS is calculated in accordance with the applicable national laws and the fund rules or the instruments of incorporation;

(c) carry out the instructions of the management company or an investment company, unless they conflict with the applicable national laws or the fund rules or the instruments of incorporation;

(d) ensure that in transactions involving the assets of the UCITS any consideration is remitted to the UCITS within the usual time limits;

(e) ensure that the income of the UCITS is applied in accordance with the applicable national laws and the fund rules or the instruments of incorporation.

4. The depositary shall ensure that the cash flows of the UCITS are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units of the UCITS have been received, and that all cash of the UCITS has been booked in cash accounts that meet the following conditions:

(a) they are opened in the name of the UCITS or in the name of the management company acting on behalf of the UCITS, or in the name of the depositary acting on behalf of the UCITS;

(b) they are opened at an entity referred to in points (a), (b) and (c) of Article 18(1) of Commission Directive 2006/73/EC[3] and

[3] ***OJ L 241, 2.9.2006, p. 26.***

(c) they are maintained in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

Where the cash accounts are opened in the name of the depositary acting on behalf of the UCITS, no cash of the entity referred to in point (b) of the first subparagraph and none of the own cash of the depositary shall be booked on such accounts.

5. The assets of the UCITS shall be entrusted to the depositary for safe-keeping as follows:

(a) for financial instruments that may be held in custody, the depositary shall:

(i) hold in custody all financial instruments that may be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;

(ii) ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the UCITS or the management company acting on behalf of the UCITS, so that they can be clearly identified as belonging to the UCITS in accordance with the applicable law at all times;

(b) for other assets the depositary shall:

(i) verify the ownership of the UCITS or the management company acting on behalf of the UCITS of such assets by assessing whether the UCITS or the management company acting on behalf of the UCITS holds the ownership based on information or documents provided by the UCITS or the management company and, where available, on external evidence;

(ii) maintain a record of those assets for which it is satisfied that the UCITS or the management company acting on behalf of the UCITS holds the ownership and keep that record up-to-date.

6. The depositary shall provide the management company or the investment company, on a regular basis, with a comprehensive inventory of all of the assets of the UCITS.

7. The assets held in custody by the depositary shall not be reused by the depositary or by any third party to whom the custody function has been delegated for their own account. Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

The assets held in custody by the depositary are only allowed to be reused provided that the reuse of the assets is executed for the account of the UCITS, the depositary is carrying out the instructions of the management company on behalf of the UCITS, the reuse is for the benefit of the UCITS and the interest of the unit-holders and the transaction is covered by high quality and liquid collateral received by the UCITS under a title transfer arrangement. The market value of the collateral at all times has to amount to at least the market value of the reused assets plus a premium.

8. Member States shall ensure that in the event of insolvency of the depositary ***and/or any third party located in the EU to whom custody of UCITS assets has been delegated, the*** assets of a UCITS held in custody are unavailable for distribution among or realisation for the benefit of creditors of ***such*** depositary ***and/or such third party***.

(6) The following Article 22a is inserted:

"Article 22a

1. The depositary shall not delegate to third parties its functions as referred to in paragraphs 3 and ***4 of Article 22.***

2. The depositary may delegate to third parties the functions referred to in paragraph 5 ***of Article 22*** only where:

(a) the tasks are not delegated with the intention of avoiding the requirements of this Directive;

(b) the depositary can demonstrate that there is an objective reason for the delegation;

(c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it ***;***

3. The functions referred to in paragraph 5 ***of Article 22*** may be delegated by the depositary only to a third party which at all ***times*** during the performance of the tasks delegated to it:

(a) has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the UCITS or the management company acting on behalf of the UCITS which have been entrusted to it;

(b) for custody tasks referred to in point (a) of ***Article 22(5),*** is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;

(c) for custody tasks referred to in point (a) of ***Article 22(5),*** is subject to an external periodic audit to ensure that the financial instruments are in its possession;

(d) segregates the assets of the clients of the depositary from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;

(e) ***takes all necessary steps to ensure that*** in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among or realisation for the benefit of creditors of the third party;

(f) complies with the general obligations and prohibitions set out in ***paragraphs 2,*** 5 and ***7 of Article 22 and in*** Article 25.

Notwithstanding point (b) of the ***first*** subparagraph***,*** where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in ▌ point ***(b)***, the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, and only where:

(***i***) the investors of the relevant UCITS are duly informed that such delegation is required due to legal constraints in the law of the third country▌ ***,*** of the circumstances justifying the ***delegation and of the risks involved in such*** delegation, prior to their investment;

(*ii*) the ***investment company***, or the management company on behalf of the UCITS, have instructed the depositary to delegate the custody of such financial instruments to such a local entity.

The third party may, in turn, sub-delegate those functions, subject to the same requirements. In such a case, Article 24(2) shall apply mutatis mutandis to the relevant parties.

4. For the purposes of ***this Article***, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council[4] by securities settlement systems as designated for the purposes of Directive 98/26/EC or the provision of similar services by third-country securities settlement systems shall not be considered a delegation of its custody functions.

▌

[4] ***OJ L 166, 11.6.1998, p. 45.***

(7) Article 23 is amended as follows:

(a) ***paragraphs*** 2 ***and 3 are*** replaced by the following:

"2. The depositary shall be:

(***a)*** ***a national central bank;***

(***(***b) a credit institution authorised in accordance with Directive ***2013/36/EU***;

(c) ***another legal entity, authorized by the competent authority under the laws of the Member State to carry on depositary activities under this Directive, which is*** subject to capital adequacy requirements***, not less than the requirements calculated depending on the selected approach*** in accordance with Article ***315 or 317 of Regulation (EU) No 575/2013 and*** shall in any case have own funds not less than the amount of initial capital ***under Article 28(2) of Directive 2013/36/EU. This legal entity shall be subject to prudential regulation, ongoing supervision and satisfy the following minimal requirements:***

(i) the legal entity shall have the infrastructure necessary to keep in custody financial instruments that can be registered in a financial instruments account opened in the depositary's books;

(ii) the legal entity shall establish adequate policies and procedures sufficient to ensure compliance of the entity, including its managers and employees, with its obligations under the provisions of this Directive;

(iii) all members of the management body and senior management of the legal entity, shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience. The management body shall possess adequate collective knowledge, skills and experience to be able to understand the depositary's activities, including the main risks. Each member of the management body and senior management shall act with honesty and integrity;

(iv) the legal entity shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment and effective control and safeguard arrangements for information processing systems;

(v) the legal entity shall maintain and operate effective organizational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest;

(vi) the legal entity shall arrange for records to be kept of all services, activities and transactions undertaken by it, which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive; and

(vii) the legal entity shall take reasonable steps to ensure continuity and regularity in the performance of its depositary functions. To this end the legal entity shall employ appropriate and proportionate systems, resources and procedures including to perform its depositary activities.

Member States shall determine which of these categories of institutions shall be eligible to be depositaries.

3. Investment companies or management companies acting on behalf of the UCITS they manage, that, before [date: transposition deadline set out in Article 2(1) first subparagraph], appointed as a depositary an institution that does not meet the requirements set out in this paragraph, shall appoint a depositary that meets those requirements before [date: ***24 months*** after ***the*** deadline ***for transposition*** set out in Article 2(1) first subparagraph***].***

(b) ***paragraphs*** 4, 5 and 6 are deleted.

(8) Article 24 is replaced by the following:

"Article 24

1. Member States shall ensure that the depositary shall be liable to the UCITS and to the unit holders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 22(5) has been delegated.

In case of a loss of a financial instrument held in custody, Member States shall ensure that the depositary shall return a financial instrument of identical type or the corresponding amount to the UCITS or the management company acting on behalf of the UCITS without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

Member States shall ensure that the depositary shall also be liable to the UCITS and to the investors of the UCITS, for all other losses suffered ***by them*** as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.

2. The liability of the depositary shall not be affected by any delegation referred to in Article 22***a***.

3. The liability of the depositary referred to in paragraph 1 shall not be excluded or limited by agreement.

4. Any agreement that contravenes the provision of paragraph 3 shall be void.

5. Unit holders in the UCITS may invoke the liability of the depositary directly or indirectly through the management company ***or the investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders."***

(9) In Article 25, paragraph 1 is replaced by the following:

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

(10) In Article 25, paragraph 2 is replaced by the following:

"2. In carrying out their respective functions, the management company and the depositary shall act honestly, fairly, professionally, independently and ***solely*** in the interest of the UCITS and ***the investors of the UCITS. In carrying out their respective functions, the investment company and the depositary shall act honestly, fairly, professionally, independently and solely in the interest of*** the investors of the UCITS.

A depositary shall not carry out activities with regard to the UCITS or the management company on behalf of the UCITS that may create conflicts of interest between the UCITS, the investors in the UCITS, the management company and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the UCITS."

(11) Article 26 is replaced by the following:

"Article 26

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

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

(12) The following Articles are inserted:

"Article 26a

The depositary shall make available to its competent authorities, on request, all information which it has obtained while performing its duties and that may be necessary for ***its competent authorities or for the competent authorities of the UCITS or the UCITS management company.***

If the competent authorities of the UCITS or the management company are different from those of the depositary, the competent authorities of the depositary shall share the information received without delay with the competent authorities of the UCITS and the management company.

Article 26b

1. The Commission shall be empowered to adopt delegated acts in accordance with Article 112 specifying:

   (a) the particulars that need to be included in the written contract referred to in Article 22(2);

   (b) the conditions for performing the depositary functions pursuant to Articles 22(3), (4) and (5), including:

      (i) the type of financial instruments to be included in the scope of the custody duties of the depositary in accordance with point (a) of Article 22(5);

(ii) the conditions subject to which the depositary is able to exercise its custody duties over financial instruments registered with a central depositary;

(iii) the conditions subject to which the depositary is to safekeep the financial instruments issued in a nominative form and registered with an issuer or a registrar, in accordance with point (b) of Article 22(5);

(c) the due diligence duties of depositaries pursuant to point (c) of Article 22***a***(***2***);

(d) the segregation obligation pursuant to point (d) of ***Article 22a(3);***

(e) the steps to be taken by the third party pursuant to point (e) of Article 22***a***(***3***);

(f) the conditions subject to which and circumstances in which financial instruments held in custody are to be considered as lost for the purpose of Article 24;

(g) what is to be understood by external events beyond reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary pursuant to Article 24(1***).***

(h) the conditions for fulfilling the independence requirement referred to in Article 25(2)."

(13) In Article 30, the first paragraph is replaced by the following:

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

(14) Section 3 of Chapter V is deleted.

(***15***) In Article 69(***1***) the following ***third*** subparagraph is added:

"The prospectus shall include either:

(i) The details of the up to date remuneration policy, including but not limited to a description of how remuneration and benefits are calculated, the identities of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, in case such committee exists; or

(ii) a summary of the remuneration policy and a statement that the details of the up to date remuneration policy, including but not limited to a description of how remuneration and benefits are calculated, the identities of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, in case such committee exists, are available by means of a website (including a reference to that website) and that a paper copy will be made available free of charge upon request.

(16) In Article 69(3) the following subparagraph is added:

"The annual report shall also contain:

(a) the total amount of remuneration for the financial year, split into fixed and variable remuneration paid by the management company and by the investment company to its staff, and the number of beneficiaries, and where relevant, ***any amount*** paid ***directly*** by the UCITS ***itself, including performance fee***;

(b) the aggregate amount of remuneration broken down by ***categories of employees or other members of staff as referred to in Article 14a(3);***

(c) a description of how the remuneration and benefits have been calculated;

(d) outcomes of the reviews referred to in point (c) and (d) of Article 14b(1) including any irregularities that occurred;

(e) material changes to the adopted remuneration policy.

(17) in Article 78(3), point (a) is replaced by the following:

"(a) identification of the UCITS and of the competent authority of the UCITS;"

(18) in Article 78(4), the following second subparagraph is added:

"Key investor information shall also include a statement that the details of the up to date remuneration policy, including but not limited to a description of how remuneration and benefits are calculated, the identities of persons responsible for awarding the remuneration and benefits including the composition of the remuneration committee, in case such committee exists, are available by means of a website (including a reference to that website) and that a paper copy will be made available free of charge upon request."

(19) ***In*** Article 98 ▌***(***2) point (d) is replaced by the following:

'(d) require

(i) ***in so far as permitted by national law,*** existing ***data traffic records held by a telecommunication operator, where there is a reasonable suspicion of a breach and where such records may be relevant to an investigation into violations of this Directive or Regulation (EU) No …/… [UCITS];***

(ii) ***existing recordings of telephone conversations or electronic communications or other data traffic records held by*** UCITS, management companies, investment companies***, depositaries or any other entities regulated by this Directive;***

▌

(20) Article 99 is replaced by the following:

▌

1. ***Without prejudice to the supervisory powers of*** competent authorities ***referred to in Article 98 and the right of Member States to provide for and impose criminal sanctions, Member States shall lay down rules on*** administrative sanctions and ***other administrative measures to be imposed on companies and persons in respect of breaches of*** national provisions ***transposing*** this Directive ***and shall take all measures necessary to ensure that they are implemented***.

Where Member States decide not to lay down rules for administrative sanctions for breaches which are subject to national criminal law, they shall communicate to the Commission the relevant criminal law provisions. The administrative sanctions and other administrative measures shall be effective, proportionate and dissuasive.

2. Where Member States have chosen, in accordance with the first paragraph, to lay down criminal sanctions for the breaches of the provisions referred to in that paragraph, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible violations of this Directive [UCITS] and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Directive.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

By [18 months after the entry into force of this Directive] Member States shall notify the laws, regulations and administrative provisions applying this Article, including any relevant criminal law provisions, to the Commission and ESMA. Member States shall notify the Commission and ESMA without undue delay of any subsequent amendments thereto.

As part of its overall review of the functioning of the UCITS Directive, the Commission shall review, not later than 3 years after entry into force of Directive [...], the application of the administrative and criminal sanctions, and in particular the need to further harmonise the administrative sanctions set out for the breach of the requirements set out in this Directive.

3. A competent authority may refuse to act on a request for information or a request to cooperate with an investigation only in the following exceptional circumstances, namely where:

(a) communication of relevant information might adversely affect the security of the Member State addressed, in particular the fight against terrorism and other serious crimes;

(b) complying with the request is likely adversely to affect its own investigation, enforcement activities or, where applicable, a criminal investigation;

(c) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or

(d) a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

4. Member States shall ensure that where obligations apply to UCITS, management companies, investment companies or depositaries, in ***the event*** of a breach ***of national provisions transposing this Directive, administrative penalties*** or measures may be applied***, in accordance with the national law,*** to the members of the management body and to other ***natural persons*** who under national law are responsible for the breach.

***5. In conformity with national law, Member States shall ensure that, in all cases referred to in paragraph 1, the administrative penalties and other administrative measures that may be applied include at least the following*:**

(a) a public statement which identifies the person responsible and the nature of the breach.

(b) an order requiring the person responsible to cease the conduct and to desist from a repetition of that conduct;

(c) in the case of a management company or a UCITS, suspension of the authorisation of the management company or the UCITS;

(d) in the case of a management company or a UCITS, withdrawal of the authorisation of the management company or the UCITS;

(e) a temporary or, for repeated serious breaches, a permanent ban against a member of the management company's or investment company's management body or any other natural person who is held responsible, from exercising management functions in those or in other such companies;

(f) in case of a legal person, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or in the Member States where the euro is not the official currency, the corresponding value in the national currency on the date of entry into force of this Directive or 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts according to Directive 83/349/EC, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant Accounting Directives according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

(g) in case of a natural person, maximum administrative pecuniary sanctions of at least EUR 5 000 000, or in the Member States where the euro is not the official currency, the corresponding value in the national currency on the date of entry into force of this Directive;

(h) or, maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts in (e) and (f).

6. ***Member States may empower competent authorities, under national law, to impose additional types of penalties in addition to those referred to in Article 99a(2) or to impose penalties exceeding the amounts referred to in points (e), (f) and (g) of Article 99a(2).***

(21) The following ***articles*** are inserted:

"Article 99a

1. ***Member States shall ensure that their laws, regulations or administrative provisions transposing this Directive provide for penalties, in particular when:***

(a) the activities of UCITS are pursued without obtaining authorisation in breach of Article 5;

(b) the business of a management company is carried on without obtaining prior authorisation in breach of Article 6;

(c) the business of an investment company is carried on without obtaining prior authorisation in breach of Article 27;

(d) a qualifying holding in a management company is acquired, directly or indirectly, or such a qualifying holding in a management company is further increased so that the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the management company would become its subsidiary (hereinafter referred to as the proposed acquisition), without notifying in writing the competent authorities of the management company in which the acquirer is seeking to acquire or increase a qualifying holding in breach of Article 11(1);

(e) a qualifying holding in a management company is disposed of, directly or indirectly, or reduced so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the management company would cease to be a subsidiary, without notifying in writing the competent authorities, in breach of Article 11(1);

(f) a management company has obtained an authorisation through false statements or any other irregular means in breach of Article 7(5)(b);

(g) an investment company has obtained an authorisation through false statements or any other irregular means in breach of Article 29(4)(b);

(h) a management company, on becoming aware of any acquisition or disposal of holdings in their capital that cause holdings to exceed or fall below one of the thresholds referred to in Article 11(10) of Directive 2004/39/EC, fails to inform the competent authorities of those acquisitions or disposals in breach of Article 11(1);

(i) a management company fails to, at least once a year, inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings in breach of Article 11(1);

(j) a management company fails to comply with procedures and arrangements imposed in accordance with the national provisions implementing Article 12(1)(a);

(k) a management company fails to comply with structural and organisational requirements imposed in accordance with the national provisions implementing Article 12(1)(b);

(l) an investment company fails to comply with procedures and arrangements imposed in accordance with the national provisions implementing Article 31;

(m) a management company or an investment company fails to comply with requirements related to delegation of its functions to third parties imposed in accordance with the national provisions implementing Articles 13 and 30;

(n) a management company or an investment company fails to comply with rules of conduct imposed in accordance with the national provisions implementing Articles 14 and 30;

(o) a depositary fails to perform its tasks in accordance with national provisions implementing paragraphs (3) to (7) of Article 22;

(p) an investment company and, for each of the common fund it manages, a management company repeatedly fails to comply with obligations concerning the investment policies of UCITS set out by national provisions implementing Chapter VII;

(q) a management company or an investment company fails to employ a risk management process and a process for accurate and independent assessment of the value of OTC derivatives as set out in national provisions implementing Article 51(1);

(r) an investment company and, for each of the common fund it manages, a management company repeatedly fails to comply with obligations concerning information to be provided to investors imposed in accordance with the national provisions implementing Articles 68 to 82;

(s) a management company or an investment company marketing units of UCITS it manages in a Member State other than the UCITS home Member State fails to comply with the notification requirement set out in Article 93(1).

Article 99b

1. Member States shall provide that competent authorities publish any decision, against which there is no appeal, imposing an administrative sanction or measure for breaches of the national provisions transposing this Directive on their official websites without undue delay after the person sanctioned has been informed of that decision. The publication shall include at least information on the type and nature of the breach and the identity of the persons responsible. This obligation does not apply to decisions imposing measures that are of an investigatory nature.

However, where the publication of the identity of the legal persons or of the personal data of the natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an on-going investigation, Member States shall ensure that competent authorities shall either:

(a) delay the publication of the decision to impose the sanction or measure until the moment where the reasons for non-publication cease to exist;

(b) publish the decision to impose the sanction or measure on an anonymous basis in a manner which is in conformity with national law, if such anonymous publication ensures an effective protection of the personal data concerned;

(c) not publish the decision to impose a sanction or measure at all in the event that the options set out in (a) and (b) above are considered insufficient to ensure:

(i) that the stability of financial markets would not be put in jeopardy;

(ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

Competent authorities shall inform ESMA of all administrative sanctions imposed but not published in accordance with paragraph 1(c) including any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of sanctions communicated to it solely for the purposes of exchanging information between competent authorities. That database shall be accessible to competent authorities only and it shall be updated on the basis of the information provided by the competent authorities.

In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is foreseen that within that period the reasons for anonymous publication shall cease to exist.

Where the decision to impose a sanction or measure is subject to an appeal before the relevant judicial or other authorities, competent authorities shall also publish, immediately, on their official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.

Competent authorities shall ensure that any publication in accordance with this Article shall remain on their official website for a period of at least five years after its publication. Personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.

Article 99c

1. Member States shall ensure that when determining the type of administrative ***penalties*** or measures and the level of administrative pecuniary ***penalties***, the competent authorities ***ensure that they are effective, proportionate and dissuasive and*** take into account all relevant circumstances, including***, where appropriate***:

   (a) the gravity and the duration of the breach;

   (b) the degree of responsibility of the ***person*** responsible ▌***;***

   (c) the financial strength of the ***person*** responsible ▌, as indicated***, for example,*** by the total turnover of the ▌ legal person ***responsible*** or the annual income of the ▌ natural person ***responsible***;

   (d) the importance of ***the*** profits gained or losses avoided by the ***person*** responsible ▌***,the damage to other persons and, where applicable, the damage to the functioning of markets or the wider economy*** insofar as they can be determined;

(e) the level of cooperation of the ***person*** responsible ▌ with the competent authority;

(f) previous breaches by the ***person responsible;***

(g) measures taken after the breach by the person responsible to prevent the repetition of the breach.

2. In the exercise of their powers to impose penalties under Article 99, competent authorities shall cooperate closely to ensure that the supervisory and investigative powers and administrative penalties produce the desired results of this Directive. They shall also coordinate their actions in order to avoid possible duplication and overlap when applying supervisory and investigative powers and administrative penalties and measures to cross border cases in accordance with Article 101.

Article 99d

1. Member States shall establish effective ***and reliable*** mechanisms to encourage reporting of ***potential or actual*** breaches of national provisions ***transposing*** this Directive to competent authorities***, including secure communication channels for reporting of such breaches***.

2. The mechanisms referred to in paragraph 1 shall include at least:

   (a) specific procedures for the receipt of reports on breaches and their follow-up;

   (b) appropriate protection for employees of investment companies **,** management companies ***and depositaries*** who report breaches committed within ***these entities, against retaliation, discrimination or other types of unfair treatment at a minimum***;

(c) protection of personal data concerning both the person who reports the breaches and the natural person who is allegedly responsible for a breach, in ***accordance*** with ▌ Directive 95/46/EC▌ ***;***

(d) clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports a breach, unless disclosure is required by national law in the context of further investigations or subsequent judicial proceedings.

3. ESMA shall provide one or more secure communication channels for the reporting of breaches of the national provisions transposing this Directive. ESMA shall ensure that those communication channels comply with the provisions in letters (a) to (ca) of paragraph 2 of Article 99d.

4. Member States shall ensure that the reporting by employees of investment companies, management companies and depositaries referred to in Article 99d(1) and Article 99d(2a) shall not be considered as a breach of any restriction on disclosure of information imposed by contract or by any law, regulation or administrative provision, and shall not involve the person making that notification in liability of any kind relating to such notification.

5. Member States shall require ***management companies, investment companies and depositaries*** to have in place appropriate procedures for their employees to report breaches internally through a specific***, independent and autonomous*** channel.

Article 99e

1. ***Competent authorities*** shall provide ESMA annually with aggregated information regarding all ***penalties and other*** measures imposed in accordance with Article 99. ESMA shall publish this information in an annual report.

2. Where the competent authority has ***disclosed administrative penalties or measures to the public***, it shall ***simultaneously*** report ***those administrative penalties or*** measures to ESMA. Where a published ***penalty or*** measure relates to a management company, ESMA shall add a reference to the published ***penalty or*** measure in the list of management companies published under Article 6(1).

3. ESMA shall develop draft implementing technical standards ***to determine*** the procedures and forms for submitting information as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by ...[12 months after entry into force]

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

(22) The following Article is inserted:

"Article 104a

1. Member State shall apply Directive 95/46/EC to the processing of personal data carried out in the Member State pursuant to this Directive.

2. Regulation *(*EC*)* No 45/2001 of the European Parliament and of the Council ***of 18 December 2000 on the protection of individuals with regard*** to the processing of personal data ***by the Community institutions and bodies and on the free movement of such data[5] shall apply to the processing of personal data*** carried out by ESMA pursuant to this Directive.

▌

(23) In Article 112, paragraph 2 is replaced by the following:

"2. The power to adopt the ***delegated acts is conferred on the Commission subject to the conditions laid down in this Article.***

The power to adopt delegated acts referred to in Articles 12, 14, 43, ▌60, 61, 62, 64, 75, 78, 81, 95 and 111 shall be conferred on the Commission for a period of four years from 4 January 2011.

[5] ***OJ L 8, 12.1.2001, p. 1.***

The power to adopt delegated acts referred to in Article 51 shall be conferred on the Commission for a period of four years from 20 June 2013.

The power to adopt the delegated acts referred to in Article 50a shall be conferred on the Commission for a period of four years from 21 July 2011. The power to adopt the delegated acts referred to in Article 26b shall be conferred on the Commission for a period of four years from [***entry into force of this Directive***]. The Commission shall draw up a report in respect of delegated powers not later than six months before the end of the four-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes them in accordance with Article 112a."

(24) In Article 112a, paragraph 1 is replaced by the following:

"1. The delegation of power referred to in Articles 12, 14, ***22, 24,*** 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, 95 and 111 may be revoked at any time by the European Parliament or by the Council."

(25) Annex I is amended as set out in the Annex to this Directive

Article 2

1. Member States shall adopt and publish, by [***18 months after the entry into force of this Directive***] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply the laws, regulations and administrative provisions referred to in paragraph 1 from […]. 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 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at ,

For the European Parliament For the Council

The President The President

ANNEX

In Annex I, point 2 of the Schedule A is replaced by the following;

"2. Information concerning the depositary:

2.1. The identity of the depositary of the UCITS and a description of its duties ***and of conflicts of interest that may arise***;

2.2. A description of any safe-keeping functions delegated by the depositary, the ***list of delegates and sub-delegates*** and any conflicts of interest that may arise from such delegation***;***

2.3. A statement that up to date information regarding points 2.1 and 2.2 will be made available to investors on request."