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NOTE

From:	Presidency
To:	Coreper / Council
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(UCITS V) - *General approach*

With a view to the Coreper 2 meeting of 4 December 2013, Delegations will find below an updated Presidency compromise on the above mentioned Commission proposal.

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

(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[1],

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

Having regard to the opinion of the European Central Bank[2],

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[3] 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.

[1] OJ C …

[2] OJ C …

[3] OJ L 302, 17.11.2009, p. 32.

(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 at least include senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profile of the management company or of the UCITS they manage. Those rules should also apply to UCITS investment companies that do not designate a management company.

(3) The principles governing remuneration policies should recognise that UCITS management companies are 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.

(3a) 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.

(4) 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[4].

[4] OJ L 120, 15.5.2009, p. 22.

(5) 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[5] 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[6] should assist ESMA in the elaboration of such guidelines.

(6) The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, 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.

(7) 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.

(8) 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.

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[5] OJ L 331, 15.12.2010, p. 84.

[6] OJ L 331, 15.12.2010, p. 12.

(9) 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.

(10) 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.

(11) 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, in accordance with Article 18 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[7].

(12) 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.

(13) 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.

(14) 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.

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[7] OJ L 241, 2.9.2006, p. 26.

(14a) 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.

(15) 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 of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010[8]. Provisions should be adopted to ensure that third parties dispose of the necessary means to perform their duties and that they segregate UCITS' assets.

(16) 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) initial recording of securities in a book-entry system through initial crediting; (ii) providing and maintaining securities accounts at the top tier level; and (iii) operating a securities settlement system, 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.

(17) 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.

[8] OJ L 174, 1.7.2011, p. 1.

(18) 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.

(19) 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.

(20) 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 are limited to 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 and have own funds not less than the amount of initial capital under Article 28(2) of Directive 2013/36/EU.

(21) 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.

(22) 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 shall 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 depositary or its sub-custodian.

(23) 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.

(24) *deleted*

(25) 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 a 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.

(26) 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 sanctions regimes for the breaches of this Directive. A review of existing sanctioning powers and their practical application aimed at promoting convergence of sanctions 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 [9].

(26a) 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.

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

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[9] COM(2010)716 final.

(28) 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. Member States should be able to decide that in relation to natural persons personal data within the meaning of Article 2(a) of Directive 95/46/EC shall not be published.

(28a) 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.

(29) In order to detect potential breaches, competent authorities should be entrusted with the necessary investigatory powers, and should establish effective mechanisms to encourage reporting of breaches.

(30) *deleted*

(31) 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. Moreover, publication of sanctions and measures should respect fundamental rights as laid down in the Charter, and in particular the right to respect for private and family life and the right to protection of personal data.

(32) 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 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.

(33) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[10], 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.

[10] OJ C 369, 17.12.2011, p. 14.

(34) The objectives of the actions to be taken 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. Since only action at the European level can address the identified weaknesses, and therefore such action can be better achieved at Union level, the Union should adopt the necessary 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 that objective.

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

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2009/65/EC is amended as follows:

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

“(s) ‘management body’ means the body with ultimate decision making authority in a management company, 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 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.”

(1) 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 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 of the European Parliament and of the Council [(*)], ESMA shall issue guidelines addressed to competent authorities and/or financial market participants concerning 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 Commission 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 European Banking Authority (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 or 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 its implementation;

(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 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 investment strategy of the UCITS managed by the management company in order to ensure that the assessment process is based on longer term performance 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, the management company or its parent 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 investment strategy 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) ariable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. 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.

3. 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 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.

(*) OJ L 331, 15.12.2010, p. 12.

(**) OJ L 120, 15.5.2009, p. 22."

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

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

(3) 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 [(*)]; and

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

4a. *deleted*

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.

5a. 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 and the reuse is for the benefit of the UCITS and the interest of the unit-holders.

6. 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 the third party located in the EU."

(3a) 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;

(d) the depositary has taken all reasonable steps to ensure that in the event of insolvency of the third pary, 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.

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 time 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) *deleted*

(f) complies with the general obligations and prohibitions set out in paragraphs 2, 5 and 5a 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 and of the circumstances justifying the delegation, prior to their investment;

(ii) the UCITS, 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.

4. 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.

5. For the purposes of paragraphs 1 to 5 of this Article, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council [(**)] 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.

[(*)] OJ L 241, 2.9.2006, p. 26.

[(**)] OJ L 166, 11.6.1998, p. 45."

(4) Article 23 is amended as follows:

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

"2. The depositary shall be:

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

(b) *deleted*

(c) another legal entity, authorized 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;

(i) 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;

(ii) 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;

(iii) 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;

(iv) 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;

(v) 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

(vi) 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: 2 years after a deadline set out in Article 2(1) first subparagraph]."

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

(5) 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 22a.

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

4. Any clause of an 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. The right of unit-holders to invoke liability of the depositary shall not lead to a duplication of redress or to unequal treatment of the unit-holders."

(6) 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.

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."

(7) 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 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 the depositary and rules to ensure the protection of unit-holders in the event of such replacement."

(8) The following Articles 26a and 26b 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 the competent authorities to carry out their duties under this Directive. If the competent authorities of the UCITS and of 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 of the management company.

Article 26b

The Commission shall be empowered to adopt, by means of delegated acts in accordance with Article 112 and subject to the conditions of Articles 112a and 112b, measures 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 22a(2);

(d) the segregation obligation pursuant to point (d) of Article 22a(2);

(e) 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;

(f) 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)."

(9) 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."

(10) Section 3 of Chapter V is deleted.

(11) In Article 69(3) the following second 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 senior management and members of staff of the management company and, where relevant, of the investment company, whose actions have a material impact on the risk profile of the UCITS."

(12) In Article 98(2) point (d) is replaced by the following:

"(d) in conformity with national law, require existing recordings of telephone conversations or electronic communications that are held by UCITS, management companies, investment companies, depositaries or other entities to whom functions mentioned in ANNEX II have been delegated."

Deleted

(13) Article 99 is replaced by the following:

"Article 99

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.

1a. Member States shall ensure that, where the obligations referred to in paragraph 1 apply to UCITS, management companies, investment companies or depositaries in the event of a breach of national provisions transposing this Directive, administrative sanctions or measures may be applied, subject to the conditions laid down in national law, to the members of the management body and to other natural persons who under national law are responsible for the breach.

2. In conformity with national law, Member States shall ensure that in the cases referred to in paragraph 1 the administrative sanctions and other administrative measures shall include at least the following:

(a) a public statement which identifies the person responsible and the nature of the breach. Member States may decide that, in relation to natural persons, such publication shall not contain any personal data within the meaning of Article 2(a) of Directive 95/46/EC;

(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, withdrawal or suspension of the authorisation of the management company or the UCITS in accordance with Articles 5 to 8;

(d) a ban or a temporary 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 companies;

(e) administrative pecuniary sanctions of up to at least twice the amount of the benefit derived from the breach where that benefit can be determined; or:

(i) in respect of a legal person, up to, at least, EUR [5 000 000] or in the Member States whose currency is not the euro, the corresponding value in the national currency on the date of entry into force of this Directive, or, only if specifically provided for in national law, up to 10% of its total annual turnover according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of a 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 [Directive 86/635/EC for banks, Directive 91/674/EC for insurance companies] according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;

(ii) in respect of a natural person, up to, at least, EUR 1 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on the date of entry into force of this Directive.

3. Member States may provide competent authorities, under national law, to have other sanctioning powers in addition to those referred to in paragraph 2 and may provide for higher levels of sanctions than those established in that paragraph.

3a. *deleted*"

(14) The following Articles are inserted:

"Article 99a

deleted

Article 99b

1. Member States shall ensure that the competent authorities publish on their official website at least any administrative sanctions against which there is no appeal and which are imposed for breach of the national provisions transposing this Directive, including information on the type and nature of the breach and the identity of the legal person on whom the sanction is imposed, without undue delay after that person is informed of those sanctions. Member States may decide that, in relation to natural persons, such publication shall not contain any personal data within the meaning of Article 2(a) of Directive 95/46/EC.

   Where Member States permit publication of sanctions against which there is an appeal, competent authorities shall, without undue delay, also publish on their official website information on the appeal status and outcome thereof.

2. *deleted*

   deleted

   Competent authorities shall publish the sanctions on an anonymous basis, in a manner in accordance with national law, in any of the following circumstances:

   (a) where the sanction is imposed on a natural person and, following an obligatory prior assessment, publication of personal data is found to be disproportionate;

   (b) where publication would jeopardise the stability of financial markets or an ongoing criminal investigation;

(c) where publication would cause, insofar as it can be determined, disproportionate damage to the institutions or natural persons involved.

Alternatively, where the circumstances referred to in the first subparagraph are likely to cease within a reasonable period of time, publication under paragraph 1 may be postponed for such a period of time.

3. *deleted*

4. Competent authorities shall ensure that information published in accordance with this Article remains on their official website for a period of, at least, five years. Personal data shall be retained on the official website of the competent authority only for the period necessary in accordance with the applicable data protection rules.

Article 99c

1. Member States shall ensure that when determining the type and level of administrative sanctions, the competent authorities 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, 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. *deleted*

3. In the exercise of their sanctioning powers under circumstances defined in Article 99, competent authorities shall cooperate closely to ensure that the supervisory and investigative powers and administrative sanctions 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 sanctions 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.

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 their employer 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;

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

   deleted

3. Member States shall require employers 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 administrative sanctions and measures imposed by the competent authority in accordance with Article 99. ESMA shall publish this information in an annual report.

2. Where the competent authority has disclosed administrative sanctions or measures to the public, it shall simultaneously report those administrative sanctions or measures to ESMA. Where a published sanction or measure relates to a management company, ESMA shall add a reference to the published sanction 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 the draft implementing technical standards to the Commission by [insert date].

   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.

   deleted

(*) OJ L 281, 23.11.1995, p. 31."

(15) The following Article 104a 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[(*)] shall apply to the processing of personal data carried out by ESMA pursuant to this Directive.

[(*)] OJ L 8, 12.1.2001, p. 1."

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

"2. The power to adopt the delegated acts referred to in Articles 12, 14, 43, 51, 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. 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 after the 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."

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

"1. The delegation of power referred to in Articles 12, 14, 26b, 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."

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

Article 2

1. Member States shall adopt and publish, by … [24 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 Strasbourg,

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;

2.2. A description of any safe-keeping functions delegated by the depositary, any conflicts of interest that may arise from such delegation and a statement that the list of delegates will be made available to investors on request".