COUNCIL OF THE EUROPEAN UNION

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INFORMATION NOTE

from:	General Secretariat
to:	Permanent Representatives Committee/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 - Outcome of the European Parliament's proceedings (Strasbourg, 1 to 4 July 2013)

INTRODUCTION

The Rapporteur, Mr Sven GIEGOLD (Greens/EFA- DE), presented a report consisting of one amendment (amendment 1) to the proposal for a Directive, on behalf of the Committee on Economic and Monetary Affairs.

The EPP, ALDE and ECR political groups together tabled two further amendments (amendments 2 and 3).

II. DEBATE

The Rapporteur opened the debate and

- thanked the political groups for their support during the vote in the ECON Committee, and also thanked the Commission for putting the proposal on the table. This fifth revision of the Directive on undertakings for collective investment in transferable securities (UCITS) is urgently needed in order to improve the protection of investors and consumers. It covers, in particular, rules for the remuneration of managers of investment funds and harmonises the sanctions across Member States.
- noted that two issues remain open and contentious between the political groups: firstly, the question of transferring the ceiling for remunerations and bonuses from the banking sector to investment funds. The application of the rules for bankers to investment funds is reasonable and coherent. The introduction of a ceiling in order to counter the excessive use of bonuses is fully justified for the whole area of financial services.
- secondly, the issue of the performance fees, meaning a link to the development of the investment fund. The rapporteur does not want to generally ban such an instrument, but wants to influence the way it is applied. He complained that in good years the results are taken into consideration but when the figures are bad, they do not influence the remuneration.
- regrets that the EPP, ALDE and ECR political groups tabled their own amendments which brought the proposed changes into question.

Commissioner Michel BARNIER

- stressed the importance of the proposal and the need to draw the right conclusions from the economic crisis to re-establish consumers' confidence. It is also important to better protect the interests of investors, often consumers who invest their savings, and improve in particular the responsibility of the depositary.
- noted that the responsibility of the fund managers needs to be stricter: the manager must be liable for the sums he keeps in the fund, without the possibility to exclude his liability. Consumers/ investors need to be protected even in cases of insolvency, and the consumer must have the right to sue directly the depositary.

- stressed that the remuneration systems of investment funds need to take into account the long term interests of consumers, the Commission proposes therefore to establish strict rules regarding the structure of the payments and limiting the variable part of the remuneration.
- pointed out that the third element of the Commission proposal is to introduce sanctions for the fund managers. The sanctions need to be in line with other existing rules, such as the CRD IV. Similar rules already exist in the Alternative Investment Fund Managers Directive (AIFMD), which will enter into force in July 2013. As a consequence, professional investors are better protected than normal citizens who put money in the investment fund.

Speaking on behalf of the EPP political group, Mr Thomas MANN (EPP - DE):

- stressed the importance of the UCITS market for small investors and supported the Rapporteur's aim of protecting consumers by way of strict liability on the part of depositaries and fund managers. As regards the issues of rules on remuneration and bonuses, and regarding the performance fees, the EPP group has an approach different from that of the Rapporteur.
- stated that performance fees are justifiable as they balance the interests of small investors and fund managers. According to Mr Mann, there is no need to change the existing system.
- noted that, regarding the remuneration of managers, the application of the same rules as in CRD IV - which would mean that the fixed and variable parts of the remuneration would be in a ration of 1:1 – is not correct. The structure of payments in the banking sector is different from that of the fund managing sector. Therefore it is sufficient to rely upon ESMA's general guidelines.

Speaking on behalf of the S&D political party, Mrs Arlene McCARTHY (S&D - UK):

- emphasised the importance of UCITS funds for investors and consumers across Europe.
- pleaded for sticking to the proposed text as voted by the ECON Committee.
- spoke against performance fees, as these are non-transparent additional costs and vary significantly between funds, making it difficult to compare and understand them. Furthermore, they are an incentive to perform well in the short term even if in the longer term the fund makes a loss.

- regarding a possible cap on bonuses, stressed that the proposed rules would avoid looking only at the short-term perspective, create a level playing field across the financial sector, and would ensure that all remuneration is better aligned with risk.

Speaking on behalf of the ALDE political group, Mrs Anne E. JENSEN (ALDE - DK):

- supported the position of the EPP political group regarding bonuses and performance fees.
- spoke in favour of a low level of performance fees: consumers need to be well informed about such fees before taking a decision.
- asked for an analysis of the situation and an impact assessment.

Speaking on behalf of the ECR political group, Syed KAMALL (ECR - UK):

- supported the Commission's original aim to align the UCITS Directive to the AIFMD.
- spoke against the proposed ban on bonuses. The industry would find a way to bypass these rules anyway, for example by having variable basic salaries and fixed bonuses. He recommended to tackle the issues, instead of banning them, and to find a way of aligning performance and reward.
- agreed that one should not get a performance fees when one performs badly, but investors and investor managers should be rewarded for good choices.

III. VOTE

When it voted on 3 July 2013, the Parliament adopted the amendments the text of which is annexed to this note. Amendment 1 was partially adopted as regards the parts which were not covered by amendments 2 and 3. Amendments 2 and 3 were approved.

The vote on the legislative resolution was postponed to a later session, thereby not closing the first reading. The matter was then referred back to the Committee on Economic and Monetary Affairs, pursuant to Rule 57(2) of the European Parliament's Rules of Procedure, and in order to start negotiations with the Council.

ANNEX
(3.7.2013)

Coordination of laws, regulations and administrative provisions relating to undertakings for collective securities ***I

Amendments adopted by the European Parliament on 3 July 2013 on the 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 (COM(2012)0350 – C7-0178/2012 – 2012/0168(COD))[1]

(Ordinary legislative procedure: first reading)

[Amendment No 1 unless otherwise stated]

AMENDMENTS BY THE EUROPEAN PARLIAMENT*

to the Commission proposal

DIRECTIVE 2013/.../EU
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,

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

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1 The matter was referred back to the committee responsible for reconsideration pursuant to Rule 57(2), second subparagraph (A7-0125/2013).

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

Having regard to the opinion of the European Central Bank[1],

▌

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Directive 2009/65/EC of the European Parliament and of the Council[2] 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 policy 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.

(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. ***However, UCITS management companies should, in any event, ensure that they apply all those principles simultaneously.***

(4) The principles regarding sound remuneration policies established in this Directive should be consistent with and be complemented by the principles set out in the Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector[3] ***and by the work of the Financial Stability Board and G-20 commitments to mitigate risk in the financial services sector***.

(4a) Guaranteed variable remuneration should be exceptional because it is not consistent with sound risk management or the pay-for-performance principle and should not be a part of prospective compensation plans.

1 OJ C 96, 4.4.2013, p. 18.
2 OJ L 302, 17.11.2009, p. 32.
3 OJ L 120, 15.5.2009, p. 22.

(4b) Remuneration paid from the fund to management companies should, like the remuneration paid by management companies to their staff, be consistent with sound and effective risk management and with the interests of investors.

(4c) In addition to pro rata remuneration, it should be possible for costs and expenses directly linked to the maintenance and safeguarding of investments, such as those for legal action, protection or enforcement of the rights of the unit-holder or for retrieval of or compensation for lost assets, to be charged to the fund by the management company. The Commission should assess which are the common product related costs and expenses in the Member States for retail investment products. The Commission should conduct a consultation exercise and an impact assessment, and should put forward a legislative proposal if there is a need for further harmonisation.

(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[1] 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[2] should assist ESMA in the elaboration of such guidelines. ***Those guidelines should, in particular, provide further instructions on partial neutralisation of the remuneration principles reconcilable with the risk profile, risk appetite and the strategy of the management company and the UCITS it manages. 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[3]. Furthermore, ESMA should supervise the adequate enforcement of those guidelines by competent authorities. Deficiencies should be addressed promptly with supervisory action in order to safeguard the level playing field across the internal market.***

(6) 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.

(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. 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 tolerated investments that were not compliant with fund rules, while exposing the investor to unexpected or anticipated risks. Additional rules should also clarify the conditions under which depositary functions may be delegated.

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1 OJ L 331, 15.12.2010, p. 84.
2 OJ L 331, 15.12.2010, p. 12.
3 ***OJ L 174, 1.7.2011, p. 1.***

(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.

(9) In performing its tasks, a depositary should act honestly, fairly, professionally, independently and in the interest of the UCITS or 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. 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[1].

(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 financial instrument 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.

(14a) The financial instruments 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.

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

(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*,* Regulation (EC) No 1060/2009 *of the European Parliament and of the Council of 16 September 2009 on credit rating agencies*[1] 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.

(16) Entrusting the custody of assets to the operator of a securities settlement system as provided for in Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[2] or entrusting the provision of similar services to third-country securities settlement systems should not be considered a delegation of custody functions.

(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.

(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, such that only credit institutions and investment firms are permitted to act as UCITS depositaries. In order to allow other entities that may have previously been eligible to act as depositaries for UCITS funds to convert themselves into eligible entities, transitional provisions should be provided for those entities.

(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.

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1 OJ L 302, 17.11.2009, p. 1.

2 OJ L 166, 11.6.1998, p. 45.

(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 *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.

(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.

(24) 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[1]. It is essential that that the proposal of 12 July 2010 be complemented by clarifying the obligations and the scope of the liability of the depositary and the sub-custodians of UCITS with a view to provide a high level of protection for UCITS investors where a depositary cannot meet its obligations set out in this Directive.

(24a) In the light of the provisions laid down in this Directive determining the scope of the functions and liabilities of depositaries, the Commission should analyse in which situations the failure of a UCITS depositary or a sub-custodian could lead to losses to UCITS unit holders, whether through the loss of net asset value of their units or other causes, which are not recoverable under those provisions and which, therefore, could require an extension of existing investor-compensation schemes to cover insurance or some kind of compensation which covers the custodian against the failure of a sub-custodian. The analysis should further investigate how to ensure that, in such situations, protection of investors or transparency is equivalent, whatever the chain of intermediation between the investor and the transferable securities affected by the failure. That analysis should be submitted to the European Parliament and to the Council, together with legislative proposals if necessary.

(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 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.

[1] OJ L 84, 26.3.1997, p. 22.

(26) In line with the Commission Communication of 8 December 2010 on reinforcing sanctioning regimes in the financial services sector, competent authorities should be empowered to impose pecuniary sanctions which are sufficiently high so as to be ***effective,*** dissuasive and proportionate, so as to offset expected benefits from behaviours which breach requirements.

(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 pecuniary sanctions, Member States should be required to ensure that *their* competent authorities take into account all relevant circumstances.

(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.

(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 potential or actual breaches.

(30) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal offences and sanctions.

(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.

(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 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.

(33) In accordance with the Joint Political Declaration ▌ of Member States and the Commission on explanatory documents *of 28 September 2011*[1], 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.

(34) *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*.

(34a) 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.

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

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2009/65/EC is amended as follows:

(1) The following Articles ▌ 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.

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

[1] *OJ C 369, 17.12.2011, p. 14.*

3. The remuneration policies and practices shall apply to those categories of staff, including ***employees and other members of staff such as, but not limited to, temporary or contractual staff,*** at fund or subfund level who are:

   (a) fund managers

   (b) persons other than fund managers, who take investment decisions that affect the risk position of the fund;

   (c) persons other than fund managers, who have the power to exercise influence on staff, including investment policy advisors and analysts;

   (d) senior management, risk takers, ***personnel in control functions; or***

   (e) any other employee or member of staff such as, but not limited to, temporary or contractual staff receiving total remuneration that falls within the remuneration bracket of senior management and ***decision*** takers and whose professional activities have a material impact on the risk profiles of the management companies or of UCITS they manage.

4. In accordance with Article 16 of Regulation (EU) No 1095/2010 ▌, ESMA shall issue guidelines addressed to competent authorities which comply with 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 management body of the management company, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for ***and oversees*** its implementation***. The remuneration system shall not be primarily controlled by the chief executive officer and the management team. Relevant body members and employees involved in setting the remuneration policy and its implementation shall be independent and shall have expertise in risk management and remuneration. Details of those remuneration policies and the basis on which they have been decided shall be included in the Key Investor Information Document, including demonstrating adherence to the principles set out in Article 14a***; **[Am. 2 - part 1]**

(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;

(da) comprehensive, accurate and timely information about remuneration practices is disclosed to all stakeholders in a durable medium or by means of a website and a paper copy is delivered free of charge upon request;

(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;

(g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of the ***risk-adjusted*** performance of the individual and of the business unit or UCITS concerned and of the ***risk-adjusted*** 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 life-cycle 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 a period which takes account of the redemption policy of the UCITS it manages***, the long-term performance of the UCITS*** and their investment risks; **[Am. 2 - part 2]**

(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;

(ja) the variable remuneration component is subject to the conditions set out in point (o), which provides that the variable remuneration shall 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. 'Malus' and 'clawback' mean malus and clawback as defined in ESMA Guidelines 2013/201; **[Am. 2 - part 3]**

(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, 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 ***25 %***, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy 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 to five years unless the life cycle of the UCITS concerned is shorter; 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.

1a. ESMA shall, in cooperation with the competent authorities, monitor the remuneration policies referred to in Article 14a. In the case of a breach of Article 14a and of this Article, ESMA may act in accordance with its powers under Article 17 of Regulation (EU) No 1095/2010, in particular by addressing recommendations to the competent authorities to prohibit temporarily, or restrict, the application of particular remuneration policies.

1b. The [UCITS/management company/remuneration committee] shall provide the investors with information in a durable medium on an annual basis setting out the remuneration policy of the UCITS for staff within the scope of Article 14a and describing how the remuneration has been calculated.

1c. Notwithstanding paragraph 1, Member States shall ensure that the competent authority may require the [UCITS/management company/remuneration committee] to explain in writing how any variable remuneration package is consistent with its obligation to adopt a remuneration policy that:

(a) promotes sound and effective risk management;

(b) does not encourage risk taking that is inconsistent with the rules or instruments of incorporation of the UCITS that they manage and/or the risk profile of each such UCITS.

Cooperating closely with EBA, ESMA shall include in its Guidance on remuneration policies 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. **[Am. 3]**

2. The principles set out in paragraph 1 shall apply to remuneration of any type paid by the management companies 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 ***the*** risk profile or the risk profiles of the UCITS that 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 ***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. ***The remuneration committee shall include employee representatives and shall ensure that its rules enable shareholders to act in concert. When preparing its decisions, the remuneration committee shall take into account the long-term interest of stakeholders, investors and the public interest***."

(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 take the form of a written contract.

That contract shall comprise rules establishing the flow of information deemed necessary to allow the depositary to perform its functions in respect of the UCITS for which it has been appointed as depositary, as set out in this Directive and in other laws, regulations and administrative provisions which are relevant for depositaries in the UCITS home Member State.

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.

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 ***as defined in Regulation (EU) No .../2013 of the European Parliament and of the Council of ... [on markets in financial instruments (MIFIR)]*** 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 depositary shall provide the management company, on a regular basis, with a comprehensive inventory of all of the assets held in the name of the UCITS.

5b. The financial instruments 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.

For the purposes of this Article, reuse means any use of financial instruments delivered in one transaction in order to collateralise another transaction including, but not limited to, transferring, pledging, selling and lending.

6. Member States shall ensure that in the event of insolvency of the depositary ***or of any regulated entity which holds in custody financial instruments belonging to a UCITS, financial instruments*** of a UCITS held ▌in custody are unavailable for distribution among or realisation for the benefit of creditors of the depositary ***or of the regulated entity***.

7. The depositary shall not delegate to third parties its functions as referred to in paragraphs 3 and 4.

The depositary may delegate to third parties the functions referred to in paragraph 5 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.

The functions referred to in paragraph 5 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 paragraph 5, is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned;

(c) for custody tasks referred to in ▌paragraph 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) makes adequate arrangements based on ESMA guidelines so 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 paragraph 5 of this Article and in Article 25.

For the purposes of point (e), ESMA shall issue guidelines addressed to competent authorities, in accordance with Article 16 of Regulation (EU) No 1095/2010, concerning adequate arrangements in the event of insolvency of the third party.

Notwithstanding point (b) of the ***third*** 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 ***points (a) to (f) of the third subparagraph***, 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 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.

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.

For the purposes of ***this paragraph,*** the provision of services *by securities settlement systems* as *designated* by 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) 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 2006/48/EC;

(b) an investment firm, subject to capital adequacy requirements in accordance with Article 20 ▌ of Directive 2006/49/EC including capital requirements for operational risks*,* authorised in accordance with Directive 2004/39/EC*,* and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms shall in any case have own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC;

(ba) national central banks and any other category of institution that is subject to prudential regulation and ongoing supervision provided that it is subject to capital requirements as well as to prudential and organisational requirements of the same effect as entities under points (a) and (b).

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: 1 year after a deadline set out in Article 2(1) first subparagraph.

3. Member States shall determine which of the categories of institutions referred to in paragraph 2(ba) is eligible to be depositaries.";

(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 ▌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 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(7).

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.

5a. Nothing in this Article shall preclude a depositary from making arrangements for the purposes of meeting its liabilities under paragraph 1, provided that such arrangements do not limit or reduce those liabilities or result in a delay in the fulfilment of the depositary's obligations.";

(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 in the interest of the UCITS and the investors of the UCITS.

Neither the depositary ***nor any of its delegates*** shall ▌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 ***ensured that there is functional and hierarchical separation of the performance*** of 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 *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."

(8) 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 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 ***in relation to this Directive*** 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 second subparagraph of Article 22(7);

(d) the segregation obligation pursuant to point (d) of third subparagraph of Article 22(7);

(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 *the first subparagraph of* Article 24(1).

(fa) the conditions for fulfilling the independence requirement.";

(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 ▌ 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, the carried interest paid by the UCITS;

(b) the aggregate amount of remuneration broken down by ***categories of employees or other members of staff as referred to in Article 14a(3)*** of the ***financial group, the*** management company and, where relevant, of the investment company, whose actions have a material impact on the risk profile of the UCITS."

(11a) in Article 78(3), point (a) is replaced by the following:

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

(12) Article 98 is amended as follows:

(a) In paragraph 2, point (d) is replaced by the following:

"(d) require existing telephone records, and traffic data as defined in Article 2 *second paragraph point* (b) of Directive 2002/58/EC of the European Parliament and of the Council *12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector**, that are held by UCITS, management companies, investment companies or depositories, where a serious suspicion exists that such records related to the subject-matter of the inspection may be relevant to prove a breach by the UCITS, management companies, investment companies or depositories of their obligations under this Directive; these records shall however not concern the content of the communication to which they relate."

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* *OJ L 302, 17.11.2009, p. 32.*

(b) The following paragraph ▌ is added:

"3. If a request for records of telephone or data traffic referred to in point (d) of paragraph 2 requires authorisation from a judicial authority according to national rules such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure."

(13) Article 99 is replaced by the following:

"Article 99

1. ***Without prejudice to the supervisory powers of competent authorities under Article 98 and without prejudice to the right for*** Member States ***to*** provide ***for and impose criminal penalties, Member States shall lay down rules on*** administrative ***penalties*** and ***other*** measures where the national provisions adopted in the implementation of this Directive have not been complied with, and shall ensure that those measures are applied. The sanctions and measures shall be effective, proportionate and dissuasive.

2. Member States shall ensure that where obligations apply to UCITS, management companies, investment companies or depositaries, in case of a breach, sanctions or measures may be applied to the members of the management body, and to any other individuals who under national law are responsible for the breach.

3. Competent authorities shall be given all investigatory powers that are necessary for the exercise of their functions. In the exercise of their powers, competent authorities shall cooperate closely to ensure that sanctions or measures produce the desired results and coordinate their action when dealing with cross border cases."

(14) The following articles ▌ are inserted:

"Article 99a

1. ***Member States*** shall ***ensure that their laws, regulations or administrative provisions provide for penalties in respect of***:

(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).

2. Member States shall ensure that in all cases referred to in paragraph 1, the administrative sanctions and measures that may be applied include at least the following:

(a) a public ***warning or*** statement which indicates the natural or legal person and the nature of the breach;

(b) issuing an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;

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

(d) imposing a temporary ***or permanent*** ban against any member of the management company's or the investment company's management body or any other natural person, who is held responsible, to exercise functions in those ***or in other*** companies;

(e) in case of a legal person, imposing ***effective, proportionate and dissuasive*** administrative pecuniary sanctions ▌;

(f) in case of a natural person, imposing ***effective, proportionate and dissuasive*** administrative pecuniary sanctions ▌;

(g) imposing administrative pecuniary sanctions of up to ***ten times*** the amount of the profits gained or losses avoided because of the breach where those can be determined.

Article 99b

Member States shall ensure that the competent authorities publish any sanction or measure imposed for breach of the national provisions adopted *for* the *transposition* of this Directive without undue delay, including information on the type and nature of the breach and the identity of persons responsible for it, unless such publication would seriously jeopardise the stability of financial markets. Where publication would cause a disproportionate damage to the parties involved, competent authorities shall publish the sanction or measure imposed on an anonymous basis.

Article 99c

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

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

(b) the degree of responsibility of the responsible natural or legal person;

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

(d) the importance of profits gained or losses avoided by the responsible natural or legal person, ***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 responsible natural or legal person with the competent authority;

(f) previous breaches by the responsible natural or legal person.

2. ESMA shall issue guidelines addressed to competent authorities in accordance with Article 16 of Regulation (EU) No 1093/2010 on types of administrative measures and sanctions and level of administrative pecuniary sanctions.

Article 99d

1. Member States shall ensure that competent authorities establish effective mechanisms to encourage reporting of breaches of the national provisions *transposing* this Directive to competent authorities ***and that the competent authorities provide one or more secure communication channels for persons to provide notification of such breaches. Member States shall ensure that the identity of the persons making such notifications by way of those channels is known only to the competent authority.***

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 and management companies who report breaches committed within the company;

   (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 compliance with the principles laid down in Directive 95/46/EC of the European Parliament and of the Council *of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data**.

2a. ESMA shall provide one or more secure communication channels for the notification of breaches of the national provisions transposing this Directive. Member States shall ensure that the identity of the persons making such notification by way of those channels is known only to ESMA.

2b. The notification in good faith to ESMA or to the competent authority of a breach of the national provisions transposing this Directive pursuant to paragraph 2a shall not constitute 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.

3. Member states shall require institutions to have in place appropriate procedures for their employees to report breaches internally through a specific channel.

Article 99e

1. Member States shall provide ESMA annually with aggregated information regarding all measures or sanctions imposed in accordance with Article 99. ESMA shall publish this information in an annual report.

2. Where the competent authority has published a measure or sanction, it shall also report the measures or sanctions to ESMA. Where a published measure or sanction relates to a management company, ESMA shall add a reference to the published measure or sanction in the list of management companies published under Article 6(1).

3. ESMA shall develop draft implementing technical standards concerning 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 ...

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**.**

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* *OJ L 281, 23.11.1995, p. 31.****";***

▌

(15) 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** shall apply to the processing of personal data carried out by ESMA pursuant to this Directive.

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* *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 *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, 51, 60, 61, 62, 64, 75, 78, 81, ***90***, 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 *Articles 22 and 24* shall be conferred on the Commission for a period of four years from […]. 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, ***22, 24***, 43, 50a, 51, 60, 61, 62, 64, 75, 78, 81, ***90,*** 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 […] 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.

Where the documents accompanying notification of transposition measures by the Member States are not sufficient to assess fully the compliance of those measures with certain provisions of this Directive, the Commission may, upon a request by ESMA in view to carrying out its tasks under Regulation (EU) No 1095/2010, or on its own initiative, require Member States to provide more detailed information regarding the transposition of this Directive and implementation of those measures.

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;

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

Information on all entities involved in providing custody of the fund's assets, together with conflicts of interest that may arise, is available on request from the depositary."