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Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS

Asset Management

Exposure Draft

Initial orientations for discussion on possible adjustments to the UCITS Directive

6. Supervisory cooperation

Important note: This document is a working document of DG MARKET services which is published for discussion purposes only. It presents DG MARKET services preliminary reflections on possible future adjustments to the UCITS Directive. It does not necessarily reflect the views of the European Commission. The Commission retains full autonomy and discretion as regards the content of any subsequent legislative proposal.

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1. Envisaged adjustments

For ease of reference, adjustments in this area are presented in a single document instead of being spread out in the four other relevant chapters (notification, management company passport, mergers, pooling). However, their economic impact, if need be, is discussed in these other chapters.

Introduction

The envisaged adjustments to the UCITS Directive imply a need for an enhanced cooperation framework between authorities. The current framework does not reflect recent progress made in the field of supervisory cooperation, notably following the adoption of the MiFID.

Accordingly, the existing provisions of the UCITS Directive dealing with these issues should be strengthened to:

- (i) ensure equivalence of powers for competent authorities (Section 1 + Annex)
- (ii) develop existing mechanisms relating to exchange of information (Section 2)
- (iii) put in place a mechanism allowing competent authorities of a Member State (within the framework of their powers under the Directive) to carry out on the spot verification of information and investigation on the territory of another Member State, or have them carried out by the competent authorities of another Member State/ third parties. (Section 3)

In addition, it appears necessary (as in the MiFID Directive), and subject to appropriate safeguards, to grant certain rights to the competent authorities of a given Member State in case of a breach of provisions of the Directive do not fall under their responsibilities within their territories by UCITS or management companies situated in other Member States, provided the authorities of such Member State do not act or act in inadequate manner. The exercise of such right should be, in any event, either under the supervision of the Commission or brought before CESR.

Finally, and to take account to possible future developments in the field of supervisory cooperation, it would be useful to provide for the possibility to adopt by way of comitology implementing measures in the fields of exchange of information and on the spot verification/ investigations, as this has been the case in MiFID.

| 1. General powers & cooperation provisions | | | |
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| | Directive 85/611/EEC | Envisaged adjustments | Explanatory comments |
| Powers | <p style="text-align: center;"><u>Article 49</u></p> <p>1. The Member States shall designate the authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.</p> <p>2. The authorities referred to in paragraph 1 must be public authorities or bodies appointed by public authorities.</p> <p>3. The authorities of the State in which a UCITS is situated shall be competent to supervise that UCITS. However, the authorities of the State in which a UCITS markets its units in accordance with Article 44 shall be competent to supervise compliance with Section VIII.</p> <p>4. The authorities concerned must be granted all the powers to carry out their tasks.</p> | <p style="text-align: center;"><u>Article 49</u></p> <p>1. The Member States shall designate the authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof, indicating any division of duties.</p> <p>2. The authorities referred to in paragraph 1 must be public authorities or bodies appointed by public authorities.</p> <p>3. The authorities of the State in which a UCITS is situated shall be competent to supervise that UCITS. However, the authorities of the State in which a UCITS markets its units in accordance with Article 44 shall be competent to supervise compliance with Section VIII <i>the provisions falling outside the field governed by the Directive.</i></p> <p>4. The authorities concerned must be granted all the powers to carry out their tasks.</p> <p style="text-align: center;"><u>Article 49a</u> Powers to be made available to competent authorities Cf Annex</p> <p style="text-align: center;"><u>Article 49b</u> Administrative sanctions Cf Annex</p> | <p>Article 49 should be amended to include new provisions on the powers of competent authorities, administrative sanctions, right of appeal and encouragement of out of court redress mechanisms.</p> <p>Possible adjustments are listed in Annex I. They are to a large extent based on MiFID.</p> <p><u>Nota:</u></p> <p>(i) It has not been deemed necessary to propose to update the provisions on professional secrecy of Articles 50(2) to (11), together with the provisions relating to the duties of the auditors of Article 50a. These provisions appear sufficiently detailed.</p> <p>(ii) provisions on the right of appeal are already covered by Article 51(2) of the Directive</p> <p>(iii) the final sentence of Article 49(3) would be amended to take into account the proposed changes to Article 44 and to the approach to the notification mechanism.</p> <p>(iv) Article 49(4) should be replaced by a more detailed provision on powers (cf new Article 49a)</p> |

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| | <p style="text-align: center;"><u>Article 51</u></p> <p>1. [...]</p> <p>2. The Member States shall provide that decisions taken in respect of a UCITS pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts; the same shall apply if no decision is taken within six months of its submission on an authorization application made by a UCITS which includes all the information required under the provisions in force.</p> | <p style="text-align: center;"><u>Article 49c (New)</u> Administrative sanctions</p> <p>Cf Annex</p> <p style="text-align: center;"><u>Article 49d (New)</u> Extra judicial mechanisms</p> <p>Cf Annex</p> <p style="text-align: center;"><u>Article 51</u></p> <p>1. [...]</p> <p>2. The Member States shall provide that decisions taken in respect of a UCITS pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts; the same shall apply if no decision is taken within six months of its submission on an authorization application made by a UCITS which includes all the information required under the provisions in force.</p> <p><i>3. Member States shall provide that one or more of the following bodies, as determined by national law, may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:</i></p> <p><i>(a) public bodies or their representatives;</i></p> <p><i>(b) consumer organisations having a legitimate interest in protecting consumers;</i></p> | <p>The provisions on right to appeal should be completed by the confirmation of the right of certain interested parties such as consumer organisations to apply to the courts to ensure that the provisions of the Directive are implemented. This provision is already provided for in MiFID (Article 52).</p> |
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| | | <i>(c) professional organisations having a legitimate interest in acting to protect their members.</i> | |
| General principles | <p align="center"><u>Article 50</u></p> <p>1. The authorities of the Member States referred to in Article 49 shall collaborate closely in order to carry out their task and must for that purpose alone communicate to each other all information required.</p> | <p align="center"><u>Article 50</u></p> <p>1. <i>Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive or of making use of their powers whether set out in this Directive or in national law.</i></p> <p><i>Member States shall take the necessary administrative and organisational measures to facilitate the assistance provided for in paragraph 1.</i></p> <p><i>Competent authorities may use their powers for the purpose of cooperation, even in cases where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.</i></p> <p>[...]</p> | <p>This general provision on cooperation should be modernized to refer to the powers and the duties of the competent authorities in the context of the Directive. It should be completed by another, also more detailed provision on exchange of information (cf Section 2 and proposed Article 50(1)a below)</p> |
| Management company passport | <p align="center"><u>Article 52a</u></p> <p>1. Where, through the provision of services or by the establishment of branches, a management company operates in one or more host Member States, the competent authorities of all the Member States concerned shall collaborate closely.</p> <p>[...]</p> | <p align="center"><u>Article 52a</u></p> <p>1. Where, through the provision of services or by the establishment of branches, a management company operates in one or more host Member States, the competent authorities of all the Member States concerned shall collaborate closely.</p> <p>[...]</p> | <p>No envisaged changes</p> |

Nota: in the context of the notification procedure, mergers and pooling it should be sufficient to rely on the provisions of Article 49/50.

| 2. Exchange of information | | | |
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| | Directive 85/611/EEC | Envisaged adjustments | Explanatory comments |
| General principles | <p style="text-align: center;"><u>Article 50</u></p> <p>1. The authorities of the Member States referred to in Article 49 shall collaborate closely in order to carry out their task and must for that purpose alone communicate to each other all information required.</p> <p>[...]</p> | <p style="text-align: center;"><u>Article 50</u></p> <p>1 [cooperation/ general provision, cf Section 1 above]</p> <p><i>1a. Competent authorities of Member States shall immediately supply one another with the information required for the purposes of carrying out their duties and within the framework of their powers under the Directive.</i></p> <p>1b [verification/ investigation, cf Section 3 below]</p> <p>[...]</p> <p><i>12. (New). The Commission may adopt, in accordance with the procedure referred to in Article 53b, implementing measures concerning procedures for exchange of information between competent authorities.</i></p> | <p>Article 50(1) should be split between a general cooperation provision (cf section 1 above) and a provision on exchange of information (new paragraph 1a). Provision on exchange of information should be strengthened to insist on the need for speedy exchange of information (cf Article 58(1) MiFID). To avoid possible abuses, it is stated that the competent authorities might require information only within the scope of their powers as provided for under the Directive. Outside the scope of such powers, in certain circumstances and subject to certain safeguards, a competent authority may only act in accordance with the proposed new Article 52(3) and Article 6c(5)a (cf "cross border enforcement" section below)</p> <p>As in MiFID, it would be useful to provide for a faculty to complement these provisions at level 2 via comitology, notably to take account of future developments in the field of supervisory cooperation.</p> |
| Notification | <p style="text-align: center;"><u>Article 52</u></p> <p>[...]</p> <p>3. Any decision to withdraw authorization, or any other serious measure taken against a UCITS, or any suspension of re-purchase or redemption</p> | <p style="text-align: center;"><u>Article 52</u></p> <p>[...]</p> <p>3. Any decision to withdraw authorization, or any other serious measure taken against a UCITS, or any suspension of re-purchase or</p> | <p>No change envisaged.</p> |

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| | <p>imposed upon it, must be communicated without delay by the authorities of the Member State in which the UCITS in question is situated to the authorities of the other Member States in which its units are marketed.</p> <p>(Cf also Article 37(3))</p> | <p>redemption imposed upon it, must be communicated without delay by the authorities of the Member State in which the UCITS in question is situated to the authorities of the other Member States in which its units are marketed.</p> | |
| <p>Management company passport</p> | <p style="text-align: center;"><u>Article 52a</u></p> <p>1. Where, through the provision of services or by the establishment of branches, a management company operates in one or more host Member States, the competent authorities of all the Member States concerned shall collaborate closely.</p> <p>They shall supply one another on request with all the information concerning the management and ownership of such management companies that is likely to facilitate their supervision and all information likely to facilitate the monitoring of such companies. In particular, the authorities of the home Member State shall cooperate to ensure that the authorities of the host Member State collect the particulars referred to in Article 6c(2).</p> <p>2. Insofar as it is necessary for the purpose of exercising their powers of supervision, the competent authorities of the home Member State shall be <u>informed</u> by the competent authorities of the host Member State of any measures taken by the host Member State pursuant to Article 6c(6) which involve penalties imposed on a management company or restrictions on a management company's activities.</p> | <p style="text-align: center;"><u>Article 52a</u></p> <p>1. Where, through the provision of services or by the establishment of branches, a management company operates in one or more host Member States, the competent authorities of all the Member States concerned shall collaborate closely.</p> <p>They shall supply one another <i>immediately</i> on request with all the information concerning the management and ownership of such management companies that is likely to facilitate their supervision and all information likely to facilitate the monitoring of such companies. In particular, the authorities of the home Member State shall cooperate to ensure that the authorities of the host Member State collect the particulars referred to in Article 6c(2).</p> <p>2. Insofar as it is necessary for the purpose of exercising their powers of supervision, the competent authorities of the home Member State shall be informed by the competent authorities of the host Member State of any measures taken by the host Member State pursuant to Article 6c(6) which involve penalties imposed on a management company or restrictions on a management company's activities.</p> | <p>Cf comment under Article 50(1)a above</p> |

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| | <u>Article 6c</u> | <u>Article 6c</u> | |
| | <p>[...]</p> <p>9. In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be <u>informed</u> and shall take appropriate measures to prevent the management company concerned from initiating any further transactions within its territory and to safeguard investors' interests. Every two years the Commission shall submit a report on such cases to the Contact Committee set up under Article 53.</p> | <p>[...]</p> <p>9. In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the management company concerned from initiating any further transactions within its territory and to safeguard investors' interests. Every two years the Commission shall submit a report on such cases to the Contact European Securities Committee set up under Article 53 b.</p> | |
| Mergers | Authorization of merger | | |
| | <p>[...]</p> <p>5. The competent authorities of the merging UCITS shall inform the competent authorities of the receiving UCITS if the common draft terms of merger indicate that the receiving UCITS considers that the proposed merger might have a negative impact on its unit-holders and that adequate investor disclosure to its unit-holders is required in accordance with [<i>relevant article on information of unit-holders</i>].</p> | | <p>Otherwise reliance on Article 50(1)a should be sufficient</p> |
| Pooling (Master/ Feeder) | Competent authorities | | |
| | <p>1. In the event that the master UCITS and the feeder UCITS are situated in the same Member State, the competent authorities shall inform the feeder UCITS without delay of any decision or other serious measure taken, of any observation of non-compliance with the conditions of this Section or of any information referred to in Article 50a paragraph 1 with regard to the master UCITS, its depositary or its auditor.</p> <p>2. In the event that the master UCITS and the feeder UCITS are situated in different Member States, the competent authorities of the master UCITS shall communicate without delay the information referred to in paragraph 1 to the feeder UCITS' competent authorities which shall then promptly inform the feeder UCITS.</p> | | <p>There should be a duty on the competent authorities of the master UCITS to give all information to competent authorities of the feeder fund in relation to any serious measure taken against the master UCITS.</p> |

| 3. Cross border verification / Investigation | | | |
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| | Directive 85/611/EEC | Envisaged adjustments | Explanatory comments |
| General principles | | <p style="text-align: center;"><u>Article 50</u></p> <p>1 [cooperation/ general provision, cf Section 1 above]</p> <p>1a [exchange of information, cf Section 2 above]</p> <p>1b. The competent authorities of one Member State may request the cooperation of the competent authorities of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation on the latter's territory within the framework of their powers pursuant to this Directive. Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall:</p> <p>(a) carry out the verifications or investigations itself; or</p> <p>(b) allow the requesting authority to carry out the verification or investigation; or</p> <p>(c) allow auditors or experts to carry out the verification or investigation.</p> <p>1c. If the verification/investigation is carried out on the territory of one Member State by the competent authority of such Member State, the competent authority of the other Member State</p> | <p>The UCITS Directive should provide for a general provision on verification and investigations, i.e. the possibility for competent authorities of one Member State (within the framework of their powers), to request a competent authority of another Member State to carry out investigation/ verification, or let them do so (or, alternatively, auditors or experts)</p> <p>To be an effective tool, the cases for refusal to cooperate on such matter should be listed in a limited way.</p> <p>In case of disagreements and as in the Market Abuse Directive, there should be the possibility to rely on the dispute resolution procedures existing within CESR.</p> <p>The suggested text is based on Articles 58 and 59 MiFID and on Article 16 MAD.</p> |

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| | <p><i>may request that members of its own personnel accompany the personnel carrying out the investigation during such investigation. The verification/investigation shall, however, be subject throughout to the overall control of the Member State on whose territory it is conducted.</i></p> <p><i>If the verification/investigation is carried out on the territory of one Member State by the competent authority of another Member State, the competent authority of the Member State on which territory the verification/investigation is carried out may request that members of its own personnel accompany the personnel carrying out the verification/investigation during such verification/investigation.</i></p> <p><i>Id. Competent authorities may refuse to act on a request for cooperation in carrying out an investigation or on-the-spot verification as provided for in Article 50(1)b only where:</i></p> <p><i>(a) such an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public policy of the State addressed;</i></p> <p><i>(b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;</i></p> <p><i>(c) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.</i></p> <p><i>In the case of such a refusal, the competent authority shall notify the requesting competent authority accordingly, providing as detailed</i></p> | |
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| | | <p><i>information as possible.</i></p> <p><i>Without prejudice to the provisions of Article 226 of the Treaty, a competent authority whose</i></p> <p><i>(a) request to exchange information as provided for in Article 52a, or</i></p> <p><i>(b) application to carry out an investigation or a verification as provided for in Article 52b, or</i></p> <p><i>(c) request for authorisation for its officials to accompany those of the other Member State's competent authority,</i></p> <p><i>is not acted upon within a reasonable time or is rejected may bring that non-compliance to the attention of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution.</i></p> <p><i>1e. The Commission may adopt, in accordance with the procedure referred to in Article 53b, implementing measures concerning procedures for on-th- spot verification and investigations.</i></p> | <p>As in MiFID, it would be useful to provide for a faculty to complement these provisions at level 2 via comitology, notably to take account of future developments in the field of supervisory cooperation.</p> |
| <p>Management company passport</p> | <p><u>Article 52b</u></p> <p>1. Each host Member State shall ensure that, where a management company authorised in another Member State carries on business within its territory through a branch, the competent authorities of the management company's home Member State may, after informing the competent authorities of the host Member State,</p> | <p><u>Article 52b</u></p> <p>1. Each host Member State shall ensure that, where a management company authorised in another Member State carries on business within its territory through a branch, the competent authorities of the management company's home Member State may, after informing the competent authorities of the host Member State, themselves</p> | <p>In line with new Article 50(1)(b) to (d). However, no redundancy as it would be still useful to clarify the competence of the management company's home Member State when it comes to branches set up in other Member States. In this case indeed, the Directive grants some powers to the host</p> |

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| | <p>themselves or through the intermediary of persons they instruct for the purpose, carry out on the- spot verification of the information referred to in Article 52a.</p> <p>2. The competent authorities of the management company's home Member State may also ask the competent authorities of the management company's host Member State to have such verification carried out. Authorities which receive such requests must, within the framework of their powers, act upon them by carrying out the verifications themselves, by allowing the authorities who have requested them to carry them out or by allowing auditors or experts to do so.</p> <p>3. This Article shall not affect the right of the competent authorities of the host Member State, in discharging their responsibilities under this Directive, to carry out on-the-spot verifications of branches established within their territory.</p> | <p>or through the intermediary of persons they instruct for the purpose, carry out on- spot verification of the information referred to in Article 52a. <i>The provisions of Article 50 (1)(b) to (d) shall be applicable.</i></p> <p>2. The competent authorities of the management company's home Member State may also ask the competent authorities of the management company's host Member State to have such verification carried out. Authorities which receive such requests must, within the framework of their powers, act upon them by carrying out the verifications themselves, by allowing the authorities who have requested them to carry them out or by allowing auditors or experts to do so.</p> <p>2. This Article shall not affect the right of the competent authorities of the host Member State, in discharging their responsibilities under this Directive, to carry out on-the-spot verifications of branches established within their territory.</p> | <p>Member State. There is thus a case of joint supervision which consequences when it comes to enforcement should be addressed.</p> <p>However, when it comes to the modalities of such investigations/ verifications, the existing Article 52b(2) would be made redundant by the introduction of Article 50(1)(b) to (d), as it would also deal with the modalities of such investigation/ verification.</p> |
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Nota: in the context of the notification procedure, mergers and pooling it should be sufficient to rely on the provisions of Article 50 (1)(b) to (d).

| 4. Cross-border enforcement | | | |
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| | Directive 85/611/EEC | Envisaged adjustments | Explanatory comments |
| General principles | No specific provisions | No specific provisions | Enforcement provisions should be proposed on a scenario by scenario basis, and not by way of a general provision. |
| Notification | <p style="text-align: center;"><u>Article 52</u></p> <p>1. Only the authorities of the Member State in which a UCITS is situated shall have the power to take action against it if it infringes any law, regulation or administrative provision or any regulation laid down in the fund rules or in the investment company's instruments of incorporation.</p> <p>2. Nevertheless, the authorities of the Member State in which the units of a UCITS are marketed may take action against it if it infringes the provisions referred to in Section VIII.</p> | <p style="text-align: center;"><u>Article 52</u></p> <p>1. Only the authorities of the Member State in which a UCITS is situated shall have the power to take action against it if it infringes any law, regulation or administrative provision or any regulation laid down in the fund rules or in the investment company's instruments of incorporation.</p> <p>2. Nevertheless, the authorities of the Member State in which the units of a UCITS are marketed may take action against it if it infringes <i>the laws, regulations and administrative provisions in force on their territories and falling outside the field governed by the Directive.</i></p> <p>3. <i>In addition, where the competent authorities of the host Member State have clear and demonstrable grounds for believing that a UCITS which units are marketed within their territory is in breach of</i></p> | <p>This amendment results from the suggested adjustments to Section VIII, where the division of powers between the home and the host Member State has been clarified, the UCITS home Member State authorities having responsibility to ensure compliance with the rules falling within the field governed by the Directive and the host Member State authorities having responsibility outside this field.</p> <p>As an exception to the new drafting of paragraph 2 proposed above (and as in the case of the management company passport, cf new Article 6c5a below), competent authorities of Host Member States, as this is</p> |

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| | | <p><i>the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authorities of the host Member State, they shall refer those findings to the competent authorities of the home Member State.</i></p> <p>4. If, despite the measures taken by the competent authorities of the home Member State or because such measures prove inadequate, or because the home Member State fails to act within a reasonable timeframe, the UCITS persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors, the competent authorities of the host Member State, may either:</p> <p><i>(a) after informing the competent authorities of the home Member State, take all the appropriate measures needed in order to protect investors. This shall include the possibility of preventing offending UCITS from carrying any further marketing of its units within their territories; or</i></p> <p><i>(b) bring the matter to the attention of the Committee of European Securities Regulators, where discussion shall take place in order to reach a rapid and effective solution.</i></p> <p><i>The Commission shall be informed without delay of any measure taken pursuant to paragraph 4a.</i></p> <p>5. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for the</p> | <p>the case for MiFID (Article 62), should be recognized certain rights if the UCITS in is breach of provisions of the Directive which do not fall under the responsibility of the host Member State.</p> <p>The exercise of these rights should be subject to two preconditions:</p> <p>(ii) the home Member State authorities either do not act or provide an inadequate answer to remedy the breach and</p> <p>(iii) the acts of the UCITS are clearly prejudicial to the interests of host Member State investors.</p> <p>In such case (paragraph 4), the host Member State should be given the option either :</p> <p>(i) to take emergency measures to put an end to such situation (of which the Commission shall be informed immediately) or, alternatively,</p> <p>(ii) to bring the matter to CESR for a rapid and effective solution via existing dispute resolution mechanisms (inspired from Article 16(2) MAD).</p> <p>To ensure the effectiveness of the enforcement powers given to the host Member State authority, Member States shall ensure that legal documents necessary for such powers can be served.</p> |
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| | | <i>measures which may be taken by the host Member State pursuant to paragraphs 2 to 4 on UCITS</i> | |
| Management company passport | <p><u>Article 6c</u></p> <p>[...]</p> <p>5. If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the management company persists in breaching the legal or regulatory provisions referred to in paragraph 2 in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, insofar as necessary, to prevent that management company from initiating any further transaction within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for those measures on management companies.</p> | <p><u>Article 6c</u></p> <p>[...]</p> <p>5. If, despite the measures taken by the home Member State or because such measures prove inadequate or are not available in the Member State in question, the management company persists in breaching the legal or regulatory provisions referred to in paragraph 2 in force in the host Member State, the latter may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or to penalise further irregularities and, insofar as necessary, to prevent that management company from initiating any further transaction within its territory. The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for those measures on management companies.</p> <p><i>5a Where the competent authorities of the host Member State have clear and demonstrable grounds for believing that a management company acting within their territory under the freedom to provide services is in breach of the obligations arising from the provisions adopted pursuant to this Directive or that a management company that has a branch within their territory is in breach of the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the host</i></p> | <p>Under the current regime of Article 6c, the competent authorities of the management company host Member State should be recognized certain rights to act in two scenarios.</p> <ol style="list-style-type: none"> 1) If the management company acts through a branch on its territory and if the host Member State authorities are competent, an escalation mechanism involving the competent authorities of the home Member State should be provided for in Article 6c3,4 and 5, with the possibility of emergency powers for the host (6c8) 2) the host Member State authorities should retain a power to act if the management companies are responsible for irregularities which are contrary to measures taken by the host Member State in the “interest of the general good” (6c6), which is equivalent to the rules falling outside the field governed by the Directive of Section VIII. <p>As in MiFID (Article 62(1)) and as in the case of the product passport (cf suggested new Article 52(3) to (4) above), and to further address the concerns linked to split supervision, the competent authorities of the host Member State should be given certain</p> |

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| | | <p><i>Member State, they shall refer those findings to the competent authorities of the home Member State.</i></p> <p><i>5b If, despite the measures taken by the competent authorities of the home Member State or because such measures prove inadequate, or because the home Member State fails to act within a reasonable timeframe, the management company persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors, the competent authorities of the host Member State, after informing the competent authorities of the home Member State may either:</i></p> <p><i>(a) take all the appropriate measures needed in order to protect investors and others for whom services are provided. This shall include the possibility of preventing offending management companies from initiating any further transactions within their territory, or</i></p> <p><i>(b) bring the matter to the attention of the Committee of European Securities Regulators, where discussion shall take place in order to reach a rapid and effective solution.</i></p> <p><i>The Commission shall be informed without delay of any measure taken pursuant to paragraph 5a.</i></p> <p><i>5c The Member States shall ensure that within their territories it is possible to serve the legal documents necessary for the measures which may be taken by the host</i></p> | <p>rights if a management company acting on its territory violates the provisions of the Directive which fall under the competence of the home Member State, whether under the freedom to provide services or the freedom of establishment (Cf new Article 6c5a). These provisions are identical to those detailed under the product passport (cf new paragraphs 3 to 5 under Article 52 above)</p> <p>Finally, the provisions on service of legal documents should be set out in a new Article 6c5c</p> |
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| | <p>6. The foregoing provisions shall not affect the powers of host Member States to take appropriate measures to prevent or to penalize irregularities committed within their territories which are contrary to legal or regulatory provisions adopted in the interest of the general good. This shall include the possibility of preventing offending management companies from initiating any further transactions within their territories.</p> <p>7. Any measure adopted pursuant to paragraphs 4, 5 or 6 involving penalties or restrictions on the activities of a management company must be properly justified and communicated to the management company concerned. Every such measure shall be subject to the right to apply to the courts in the Member State which adopted it.</p> <p>8. Before following the procedure laid down in paragraphs 3, 4 or 5 the competent authorities of the host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided. The Commission and the competent authorities of the other Member States concerned must be informed of such measures at the earliest opportunity.</p> <p>After consulting the competent authorities of the Member States concerned, the Commission may decide that the Member State in question must amend or abolish those measures.</p> | <p><i>Member State pursuant to paragraphs 5 and 6(i) on management companies.</i></p> <p>6. The foregoing provisions shall not affect the powers of host Member States to take appropriate measures to prevent or to penalize irregularities committed within their territories which are contrary to legal or regulatory provisions adopted in the interest of the general good. This shall include the possibility of preventing offending management companies from initiating any further transactions within their territories.</p> <p>7. Any measure adopted pursuant to paragraphs 4, 5 or 5b involving penalties or restrictions on the activities of a management company must be properly justified and communicated to the management company concerned. Every such measure shall be subject to the right to apply to the courts in the Member State which adopted it.</p> <p>8. Before following the procedure laid down in paragraphs 3, 4 or 5 the competent authorities of the host Member State may, in emergencies, take any precautionary measures necessary to protect the interests of investors and others for whom services are provided. The Commission and the competent authorities of the other Member States concerned must be informed of such measures at the earliest opportunity.</p> <p>After consulting the competent authorities of the Member States concerned, the Commission may decide that the Member State in question must amend or abolish those</p> | <p>No changes envisaged.</p> <p>No change envisaged</p> |
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| | <p>9. In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the management company concerned from initiating any further transactions within its territory and to safeguard investors' interests. Every two years the Commission shall submit a report on such cases to the Contact Committee set up under Article 53.</p> | <p>measures.</p> <p>9. In the event of the withdrawal of authorisation, the competent authorities of the host Member State shall be informed and shall take appropriate measures to prevent the management company concerned from initiating any further transactions within its territory and to safeguard investors' interests. Every two years the Commission shall submit a report on such cases to the <i>European Securities</i> Committee set up under Article <i>53b</i>.</p> | |
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Nota: in the context of mergers and pooling, no specific enforcement procedure seems justified.

2. Annex

Envisaged adjustments to the provisions on powers of competent authorities

Article 49a (New)

(based on Art 50 MiFID)

Powers to be made available to competent authorities

1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions. Within the limits provided for in their national legal frameworks they shall exercise such powers:

- (a) directly; or
- (b) in collaboration with other authorities; or
- (c) under their responsibility by delegation to entities to which tasks have been delegated; or
- (d) by application to the competent judicial authorities.

2. The powers referred to in paragraph 1 shall be exercised in conformity with national law and shall include, at least, the rights to:

- (a) have access to any document in any form whatsoever and to receive a copy of it;
- (b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections;
- (d) require existing telephone and existing data traffic records;
- (e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;
- (f) request the freezing and/or the sequestration of assets;
- (g) request temporary prohibition of professional activity;
- (h) require authorised investment companies, management companies and depositaries to provide information;
- (i) adopt any type of measure to ensure that investment companies, management companies or depositaries continue to comply with legal requirements;

- (j) require the suspension of the repurchase or redemption of units in the interest of the unit holders or of the public;
- (k) withdraw the authorization granted to a UCITS, a management company or a depositary,
- (l) refer matters for criminal prosecution;
- (m) allow auditors or experts to carry out verifications or investigations.

Article 49b (New)
(based on Art 51 MiFID)

Administrative sanctions

1. Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.
2. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by [Article 49a].
3. Member States shall provide that the competent authority may disclose to the public any measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

Article 49b (New)
(on the basis of Art 53MiFID)

Extra judicial mechanism

1. Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate.
2. Member States shall ensure that those bodies are not prevented by legal or regulatory provisions from cooperating effectively in the resolution of cross-border disputes.

3. Questions

1. Do the proposed amendments represent the most effective basis for achieving the stated objective (strengthening supervisory cooperation) in relation to each of the four adjustments under review (notification, management company passport, mergers, pooling)?
2. How could the proposed amendments be improved and what alternative approaches could/should be envisaged? Which provisions are not adapted to realisation of the stated objective?
3. Are some proposals redundant, being already in place as a consequence of other Directives, such as on powers (MiFID in particular)?