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# Part B9 – Investment Companies

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# Part B9 - Investment Companies

## Chapter 1

### Preliminary and Interpretation

#### Head 1 Defined terms and expressions

**[Part B2, Head 1(1), 1(2) apply]**

(1) In this Part—

**“the Bank”** means the Central Bank and Financial Services Authority of Ireland;

**“investment company”** means a company to which this Part applies and “company” shall be construed accordingly;

**“property”** means real or personal property of whatever kind (including securities);

**“the UCITS Regulations”** means the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (S.I. No. 211 of 2003) as amended;

**“management company”** means a company designated by an investment company to undertake the management of the investment company;

**“sub-fund”** means a separate portfolio of assets maintained by an investment company in accordance with its articles;

**“umbrella fund”** means an investment company which has one or more sub-funds and which is authorised by the Bank pursuant to Part B9, Head 7 [equivalent of Section 256 of the Companies Act, 1990].

(2) For the purposes of the application by this Part of certain provisions of the UCITS Regulations to investment companies, the said provisions shall be construed as one with the Companies Acts.

#### **Explanatory Note**

*Subheads 1 and 2 are restatements of Section 252 of the Companies Act, 1990, as amended by Section 22 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

*The references to the Central Bank and the UCITS Regulations have been updated.*

*The definition of the Central Bank was removed from Section 252 of the 1990 Act by CBFSAI 2003 and inserted into Section 3 of the 1990 Act. Accordingly it will be necessary to check how Section 3 will be treated under the proposed legislation. Also, under the 1990 Act, the Bank is referred to throughout as “Central Bank” (unlike other Financial Services legislation which uses “the Bank”). The 2005 Act uses the term ‘the Bank’ so references in this part to CBFSAI have been standardised as ‘the Bank’.*

#### Head 2 Interpretation of this Part

- (1) Part B2, including the provisions of Part 1 to 14 of Pillar A, as specified in Part B2, apply to investment companies subject to such amendments thereto or exclusions therefrom as are contained in this Part.
- (2) Part B2, Head 2, shall not apply to an investment company.
- (3) Part B2, Head 2(3), shall not apply to an investment company.

#### **Explanatory Note**

*Part B2 applies generically to this Part unless the provisions are qualified because all investment companies are PLCs. Head 2 of Part B2 applies Pillar A unless individual provisions are similarly qualified in Part B2. Head 2(3) of Part B2 is the “anchor” section of the Societas Europaea. SEs cannot be constituted as investment companies.*

### Head 3      **Adaptation of certain provisions of the UCITS Regulations**

Regulations 14, 31, 63, 74(3), 85(2) to (9), and 98 to 105 of the UCITS Regulations shall apply to an investment company, or in the case of the said Regulation 74(3), such a company other than one to which Head 5 of Part B9 [equivalent of Section 253(2A)(a) of the Companies Act, 1990] applies, as they apply to the bodies to which those Regulations relate subject to the following modifications—

- (a) a reference in those Regulations to a term or expression specified in the second column of the Table to this head at any reference number shall be construed, where the context admits, as a reference to the term or expression specified in the third column of the said Table at that reference number; and
- (b) references to cognate terms or expressions in those Regulations shall be construed accordingly.

Ref. No (1)	Term or expression referred to in UCITS Regulations (2)	Construction of term or expression for purposes of this head (3)
1	"repurchase"	"purchase"
2	"these Regulations"	"Part B11 [Equivalent of Part XIII of the Companies Act, 1990]"
3	"UCITS"	"investment company"
4	"unit"	"share"
5	"unit-holder"	"shareholder"

#### **Explanatory Note**

*Restatement of Section 258 of the Companies Act, 1990. The references to UCITS Regulations in Section 258 of the 1990 Act were references to the 1989 UCITS Regulations, which were replaced by S.I. 211 of 2003, with consequent renumbering of individual Regulations. A table of cross references to these specific UCITS Regulations is contained in Part 2 of Schedule 3 to the European Communities (Undertaking for Collective Investment in Transferable Securities) (Amendment No. 2) Regulations 2003, S.I. 497 of 2003, with which these references have been verified.*

## Chapter 2

### Incorporation & Registration

#### Head 4 Way of forming an investment company

- (1) An investment company may be formed for any lawful purpose by any person subscribing to a constitution and complying with the registration requirements in this Bill.
- (2) A company may be registered as an investment company following -
  - (a) the reregistration as an investment company of a body corporate pursuant to Part B6, Head 2;
  - (b) the reregistration as a investment company of an SE pursuant to Part B6;
  - (c) merger of two or more investment companies pursuant to Part B9, Chapter 10;
  - (d) division of two or more investment companies pursuant to Part B9, Chapter 10;
  - (e) merger of one or more investment companies with one or more bodies corporate registered immediately before such continuance as a body corporate in another EU Member State pursuant to Part B9, Chapter 10.
- (2) The liability of its member or members shall be limited to the amount, if any, unpaid on the shares respectively held by him or them.
- (3) No investment company shall be formed as, or become, an investment company by guarantee and having a share capital.
- (4) An investment company shall not be formed and registered unless it appears to the Registrar that the company, when registered, will carry on an activity in the State.

#### **Explanatory Note**

*This head is a modified version of Part B2, Head 3.*

*The CLRG is working on establishing a provision for forming each type of company. The head for 'Way of forming an investment company' may differ very little from Head 3 of B2, 'Way of forming a PLC.' Part B2, Head 3, shall not apply to an investment company.*

#### Head 5 The form of an investment company's constitution

- (1) Part B2, Head 4, applies.
- (2) The memorandum of association of an investment company shall, in respect of the share capital of the company, state in lieu of the matters specified in Part B2, Head 4(2)(d) [equivalent of Section 6 (4) of the Companies Act, 1963] —
  - (a) that the share capital of the company shall be equal to the value for the time being of the issued share capital of the company;
  - (b) the division of that share capital into a specified number of shares without assigning any par value thereto; and
  - (c) that the issued share capital of the company for the time being shall not be less than a minimum amount nor more than a maximum amount specified in the memorandum,
 

and the form of memorandum provided for in Part B2, Head 4 shall, as may be appropriate, have effect with respect to such company with the necessary modifications.
- (3) This Part applies to a company limited by shares (not being a company to which the UCITS Regulations apply)—
  - (a) the sole object of which is stated in its memorandum to be the collective investment of its funds in property, with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds; and
  - (b) the articles or memorandum of which provide—
    - (i) that the actual value of the paid up share capital of the company shall be at all times equal to the value of the assets of any kind of the company after the deduction of its liabilities, and

- (ii) that the shares of the company shall, at the request of any of the holders thereof, be purchased by the company directly or indirectly out of the company's assets.
- (4) Notwithstanding Subhead (3)(b)(ii), this Part shall also apply to a company to which Subhead (3) otherwise applies, the articles or memorandum of which do not provide that the shares of the company shall, at the request of any holders thereof, be purchased in the manner therein provided, to the extent as may be approved and subject to such conditions as may be applied by the Bank.
- (5) For the purposes of Subhead (3)(b) (ii), action taken by a company to ensure that the stock exchange value of its shares does not deviate from its net asset value by more than a percentage specified in its articles (which deviation shall not be so specified as greater than 5 per cent) shall be regarded as the equivalent of purchase of its shares by the company.
- (6) The constitution of a company shall be regarded as providing for the matters referred to in paragraphs (a) and (b) of Subhead (3) notwithstanding the inclusion in the memorandum or articles with respect thereto of incidental or supplementary provisions.
- (7) A reference to the nominal value of an issued or allotted share in, or of the issued or allotted share capital of, a company limited by shares shall be construed, in the case of an investment company, as a reference to the value of the consideration for which the share or share capital (as the case may be) has been issued or allotted.

### **Explanatory Note**

*Amended restatement of Section 253 of the 1990 Act as amended by Section 54 of the Companies (Amendment) (no. 2) Act, 1999 and Section 80 of the Investment Intermediaries Act, 1995 with appropriate referencing to the heads of Part B2.*

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## **Head 6      Restriction on commencement of business**

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Part B2, Head 7 [equivalent of Section 6 of the Companies (Amendment) Act, 1983 shall not apply to an investment company.

### **Explanatory Note**

*This head is currently disappplied to an investment company by Section 260(3) of the 1990 Act.*

**[Part B2, Heads 8 to 13 apply]**

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## **Head 7      Authorisation by Bank**

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- (1) An investment company shall not carry on business in the State unless it has been authorised to do so by the Bank on the basis of criteria approved by the Minister.
- (2) A person shall not carry on business on behalf of an investment company, insofar as relates to the purchase or sale of the shares of the investment company, unless the investment company has been authorised in the manner referred to in Subhead (1).
- (3) The Bank shall not authorise an investment company to carry on business in the State unless the company has paid up share capital which, in the opinion of the Bank, will be sufficient to enable it to conduct its business effectively and meet its liabilities.
- (4) An application by an investment company for the authorisation referred to in Subhead(1) shall be made in writing to the Bank and contain such information as the Bank may specify for the purpose of determining the application (including such additional information as the Bank may specify in the course of determining the application).
- (5) Where the Bank proposes to grant an authorisation to an investment company under this head and the Bank is satisfied that the company will raise capital by providing facilities for the direct or indirect participation by the public in the profits and income of the company, the Bank shall, in granting the authorisation, designate the company as an investment company which may raise capital in that manner, and "designated company" in this head and Part B9, Head 8 [equivalent of Section 257 of the Companies Act, 1990] shall be construed accordingly.
- (6) In the event that a designated company does not promote the sale of its shares to the public within a period, not greater than six months, which shall be specified in the authorisation under this head, the company shall, on the expiry of the period so specified, be deemed to have ceased to be a designated company.

- (7) An investment company which is not a designated company shall not raise capital by providing facilities for the direct or indirect participation by the public in the profits and income of the company.
- (8) A variable capital company incorporated outside the State for the purpose of providing facilities for the participation by the public in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever, shall not sell or purchase shares of the company or make solicitation in respect of such sale or purchase except in accordance with the requirements of the Bank.
- (9) A company incorporated outside the State which, if it were incorporated in the State, would be a company to which this Part applies shall not advertise or market its shares in any way in the State without the approval of the Bank, which approval may be subject to such conditions as the Bank considers appropriate and prudent for the purposes of the orderly and proper regulation of so much of the business of companies of that type as is conducted in the State.
- (2) Conditions imposed under Subhead (1) may be imposed generally, or by reference to particular classes of company or business (including, but not limited to, whether or not an investment company is a designated company), or by reference to any other matter the Bank considers appropriate and prudent for the purposes of the orderly and proper regulation of the business of investment companies.
- (3) The power to impose conditions referred to in Subhead(1) shall include a power to impose such further conditions from time to time as the Bank considers appropriate and prudent for the purposes of the orderly and proper regulation of the business of investment companies.
- (4) Without prejudice to the generality of Subheads (1), (2) and (3), conditions imposed by the Bank on an investment company may make provision for any or all of the following matters—
- (a) the prudential requirements of the investment policies of the company;
  - (b) prospectuses and other information disseminated by the company;
  - (c) the vesting of the assets or specified assets of the company in a person nominated by the Bank with such of the powers or duties of a trustee with regard to the company as are specified by the Bank;
  - (d) such other supervisory and reporting requirements and conditions relating to its business as the Bank considers appropriate and prudent to impose on the company from time to time for the purposes referred to in the aforesaid subhead; and
  - (e) supervisory and reporting requirements and conditions relating to the business of a management company as the Bank considers appropriate or prudent to impose on the management from time to time.

### **Explanatory Note**

*This head is largely a restatement of Section 256 of the Companies Act, 1990, as amended by Section 54 of the Companies (Amendment) (No, 2) Act, 1999 and Section 35 and the Schedule. to CBFSAI Act, 2003. Subhead (8) is being amended to take account of the implementation of the Prospectus Directive, in the context of closed-ended investment companies, and also to streamline the rules for inward marketing of investment companies with those which apply under the Unit Trusts Act, 1990. The wording mirrors, with appropriate modification, the wording of Section 9 of the Unit Trusts Act, 1990.*

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## **Head 8 Powers of Bank**

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- (1) Notwithstanding any other powers which may be available to the Bank under any other enactment, order or regulation, the Bank may impose such conditions for the granting of an authorisation to a company under Part B9, Head 7, [equivalent of Section 256 of the Companies Act, 1990] as it considers appropriate and prudent for the purposes of the orderly and proper regulation of the business of investment companies.

- (5) A company shall comply with any conditions relating to its authorisation or business imposed by the Bank.

### **Explanatory Note**

*Restatement of Section 257 of the Companies Act, 1990, as amended by Section 26 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### **Head 9     Default of investment company or failure in performance of its investments.**

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An authorisation by the Bank under Part B9, Head 7 [equivalent of Section 256 of the Companies Act 1990] of an investment company shall not constitute a warranty by the Bank as to the creditworthiness or financial standing of that company and the Bank shall not be liable by virtue of that authorisation or by reason of its exercise of the functions conferred on it by this Part (or any regulations made under this Part) in relation to investment companies for any default of the company unless the Bank acted in bad faith in exercising such functions.

#### ***Explanatory Note***

*Restatement of Section 259 of the Companies Act, 1990.*

## Chapter 3

### Share Capital

#### Head 10 Authorised share capital

The term 'authorised minimum' as defined in Part B2, Head 1(1) [equivalent of Section 19 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

**Explanatory Note**

*This head is currently disapplied to an investment company by Section 260(3) of the Companies Act, 1990*

#### Head 11 Power to allot and pre-emption rights

Part B2, Head 14 (2) shall not apply to an investment company.

**Explanatory Note**

*Section 20 of Companies (Amendment) Act, 1983 provides for the authority of directors to allot shares to be prescribed by GM or in articles. The authority must state the maximum number of shares which may be allotted and the date on which the authority will expire (not more than 5 years) - Section 20(3). Section 20(4) provides for shareholder approval of renewal of authority where it has expired.*

*Under Sections of the Section 260(3) of the Companies Act, 1990, these provisions are disapplied for the purposes of investment companies. Part B2, Head 14 (2) re-enacts Section 260(3) and therefore has been disapplied by this head.*

**[Part B2, Head 14 (1) applies]**

#### Head 12 Document containing offer to state whether shares will be allotted where issue not fully subscribed

Part B2, Head 106 [equivalent of Section 22 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

**Explanatory Note**

*This head is currently disapplied to an investment company by Section 260(3) of the Companies Act, 1990.*

#### Head 13 Allotment

Part B2, Head 105 [equivalent of Section 53 of the Companies Act, 1963] and Part A3 Head 5 (12) [equivalent of Section 58 of the Companies Act, 1963] shall not apply to an investment company.

**Explanatory Note**

*Restatement. These heads are currently disapplied to an investment company by Section 260(2) of the Companies Act, 1990.*

#### Head 14 Pre-emption rights

Part A3, Head 5 [equivalent of Section, 23-25 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

**Explanatory Note**

*Restatement. These provisions are currently disapplied to an investment company by Section 260(3) of the Companies Act, 1990*

**[Part B2, Heads 17 to 20 apply]**

#### Head 15 Experts' reports on non-cash consideration

Part B2, Heads 21 to 24 [equivalents of Sections 30-33 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

**Explanatory Note**

*Restatement. These provisions are currently disapplied to an investment company by Section 260(3) of the Companies Act, 1990.*

**[Part B2, Heads 25 to 31 apply]**

#### Head 16 Financial assistance

Part B2, Head 33 [equivalent of Sections 60 of the Companies Act, 1963] shall not apply to an investment company.

**Explanatory Note**

*Restatement of Section 260(2) of the Companies Act, 1990.*

**[Part B2, Heads 33 and 34 apply]**

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### Head 17 Disclosure of interests in shares

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Part B2, Head 36 [equivalent of Sections 53 and 64 of the Companies Act, 1990] shall not apply to an interest of a person subsisting by virtue of his holding units in an investment company.

#### **Explanatory Note**

*This refers to Part B2, Head 36, as being the equivalent of Section 53 of the 1990 Act (Disclosure of Director's interest). However, Part B2, Head 36 relates to disclosure of major shareholdings, not specifically by directors.*

*It is not proposed to change the fundamental position relating to major shareholdings in investment companies, although a proposal to clarify the position regarding indirect interests in underlying (investee) companies may be submitted by the IFSC Funds Legislative Sub-group.*

*Head 33(4)(b) of Part A5 amends Section 55 of the 1990 Act by including an interest in a Part XIII Company in the list of interests to be disregarded for the purposes of Section 54 and Sections 56 to 58 of that Act. This is the provision which gives effect to the Review Group's recommendation at 16.8.7. In view of the fact that provisions relating to investment companies are to be contained, to the extent possible, in Part B9, it may be desirable to move sub-paragraph (4)(b)(i) of Head 33 of Part A5 to Part B9, as a separate head.*

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### Head 18 Enforcement Provisions

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Part B2, Head 37, shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Currently disapplied by Section 260(5) of the Companies Act, 1990.*

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### Head 19 Agreement to require interests in a PLC

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Part B2, Head 38 shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Currently disapplied by Section 260(5) of the Companies Act, 1990.*

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### Head 20 Obligations of Disclosure arising under Part B2, Head 39 [equivalent of Section 73 of the Companies Act, 1990]

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Part B2, Head 39 shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 39 of Part B2 is a restatement of Section 74 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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### Head 21 Obligations of Persons acting together to keep each other informed

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Part B2, Head 39 shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 39 of Part B2 is a restatement of Section 75 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(5) of the Companies Act, 1990.*

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### Head 22 Interest in shares by attribution

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Part B2, Head 37 shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 37 of Part B2 is a restatement of Section 76 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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### Head 23 Interest in shares which are to be notified

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Part B2, Head 38, shall not apply to an investment company.

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**Explanatory Note**

*Restatement. Head 38 of Part B2 is a restatement of Section 77 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 24 Register of interests in shares**

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Part B2, Head 40, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 39 of Part B2 is a restatement of Section 80 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 25 Company investigations**

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Part B2, Head 42, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 42 of Part B2 is a restatement of Section 81 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 26 Registration of interest disclosed under Part B2, Head 42 [equivalent of Section 81 of the Companies Act, 1990]**

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Part B2, Head 43, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 43 of Part B2 is a restatement of Section 82 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 27 Company Investigations on requisitions by members**

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Part B2, Head 44, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 44 of Part B2 is a restatement of Section 83 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 28 Company Report to members**

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Part B2, Head 45, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 45 of Part B2 is a restatement of Section 84 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 29 Penalty for failure to provide information**

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Part B2, Head 46, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 46 of Part B2 is a restatement of Section 85 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of Companies Act, 1990.*

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**Head 30 Removal of entries from register**

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Part B2, Head 47, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 47 of Part B2 is a restatement of Section 86 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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**Head 31 Entries, when not to be removed**

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Part B2, Head 48, shall not apply to an investment company.

**Explanatory Note**

*Restatement. Head 48 of Part B2 is a restatement of Section 87 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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### Head 32 Inspection of register and reports

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Part B2, Head 49, shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 49 of Part B2 is a restatement of Section 88 of the Companies Act, 1990 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

**[Part B2, Head 50 applies]**

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### Head 33 Restriction on distribution of assets

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Part B2, Head 57, shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 57 of Part B2 is the equivalent of Section 46 of the Companies (Amendment) Act, 1983 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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### Head 34 Relevant accounts

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Part B2, Head 58, shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 58 of Part B2 is the equivalent of Sections 6 and 49 of the Companies (Amendment) Act, 1983 which is currently disapplied from investment companies by Section 260(3) of the Companies Act, 1990.*

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### Head 35 Limitation on reduction by a PLC of its allotted share capital

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Part A3, Head 17, shall not apply to an investment company.

#### **Explanatory Note**

*Restatement. Head 17 of Part A3 is the equivalent of Section 72 of the Companies Act, 1963 which is currently disapplied from investment companies by Section 260(2) of Companies Act, 1990.*

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### Head 36 Power of company to purchase own shares.

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- (1) Subject to Subhead (2), the purchase by an investment company of its own shares shall be on such terms and in such manner as may be provided by its articles.
- (2) An investment company shall not purchase its own shares, for the purposes referred to in Part B9, Head 5 (3) (b) (ii) [equivalent of Section 253(2)(b)(ii) of the Companies Act, 1990], unless they are fully paid, but nothing in this subhead shall prevent a purchase being made in accordance with Part B9, Head 37(3) [equivalent of Section 255(3) of the Companies Act, 1990, as amended by Section 24 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.]
- (3) For the avoidance of doubt, nothing in the Companies Acts shall require an investment company to create any reserve account.
- (4) Part A3, Head 15 [equivalent of Section 60 of the Companies Act, 1963], Head 25 [equivalent of Section 69 of the Companies Act, 1963], Head 26 [equivalent of Section 70 of the Companies Act, 1963], Head 17 [equivalent of Section 72 of the Companies Act, 1963] and Head 36 [equivalent of Section 41 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

#### **Explanatory Note**

*Restatement of Section 254 of the Companies Act, 1990, as amended by Section 23 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

*Subhead (4) – these provisions are currently disapplied by Section 260(2) and (3) of the Companies Act, 1963.*

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### Head 37 Treatment of purchased shares

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- (1) Shares of an investment company which have been purchased by the company shall be cancelled and the amount of the company's issued share capital shall be reduced by the amount of the consideration paid by the company for the purchase of the shares.

(2)

(a) Where a company has purchased or is about to purchase any of its own shares, it shall have the power to issue an equal number of shares in place of those purchased and for the purposes of Section 68 of the Finance Act, 1973, the issue of those replacement shares shall constitute a chargeable transaction if, but only if, the actual value of the shares so issued exceeds the actual value of the shares purchased at the date of their purchase and, where the issue of shares does constitute a chargeable transaction for those purposes, the amount on which stamp duty on the relevant statement relating to that transaction is chargeable under Section 69 of the Finance Act, 1973, shall be the difference between—

(i) the amount on which the duty would be so chargeable if the shares had not been issued in place of shares purchased under this head, and

(ii) the value of the shares purchased at the date of their purchase.

(b) Where new shares are issued before the purchase of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of paragraph (a) unless the old shares are purchased within one month after the issue of the new shares.

(3) Notwithstanding Subhead (1), an umbrella fund may, for the account of any of its sub-funds, and in accordance with conditions imposed by the Bank pursuant to Part B9, Head 8 [equivalent of Section 257 of the Companies Act 1990], acquire by subscription or transfer for consideration, shares of any class or classes, howsoever described, representing other sub-funds of the same umbrella fund provided that the acquisition is for a purpose otherwise than that provided for in Part B9, Head 5 (3) (b) (ii) [equivalent of Section 253(2)(b)(ii) of the Companies Act, 1990].

### **Explanatory Note**

*Restatement of Section 255 of the Companies Act, 1990, as amended by Section 24 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

*Query: For Parliamentary Counsel – does term chargeable transaction need to be defined or definite link to Revenue law? Section 117 Stamp Duties Consolidation Act, 1978.*

## **Head 38 Acquisition of own shares and shares in holding company**

Part A3, Heads 38 to 48 [equivalent of Part XI of the Companies Act, 1990] shall not apply to an investment company.

### **Explanatory Note**

*These provisions are currently disappplied to an investment company by Section 260(5) of the Companies Act, 1990.*

### Chapter 4

#### Distribution by an Investment Company

##### Head 39 Distribution of Profits

Part A3, Heads 49 to 55, shall not apply to an investment company.

##### **Explanatory Note**

*These provisions are currently disapplied to an investment company by Section 260(3) of the Companies Act, 1990.*

##### Head 40 Other distributions of investment companies

- (1) Subject to the following provisions of this head, an investment company may also make a distribution at any time out of its accumulated, realised revenue profits, so far as not previously utilised by distribution or capitalisation, less its accumulated revenue losses (whether realised or unrealised), so far as not previously written off in a reduction or reorganisation of capital duly made—
  - (a) if at that time the amount of its assets is at least equal to one and a half times the aggregate of its liabilities; and
  - (b) if, and to the extent that, the distribution does not reduce that amount to less than one and a half times that aggregate.
- (2) In Subhead (1) “liabilities” includes any provision (within the meaning of Part A6) except to the extent that that provision is taken into account for the purposes of that subhead in calculating the value of any asset of the company in question, and Part B2, Head 57 [equivalent of Section 46(4) of the Companies Act, 1983] shall apply for those purposes as it applies for the purposes of that head.
- (3) In this Part “investment company” means a public limited company which has given notice in writing (which has not been revoked) to the Registrar of its intention to carry on business as an investment company (the “requisite notice”) and has, since the date of that notice complied with the requirements set out in Subhead (4).
  - (4) The requirements referred to in subhead (3) are—
    - (a) that the business of the company consists of investing its funds mainly in securities, with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds;
    - (b) that none of the company’s holdings in companies other than companies which are for the time being investment companies represents more than 15 per cent by value of the investing company’s investment;
    - (c) that distribution of the company’s capital profits is prohibited by its memorandum or articles of association;
    - (d) that the company has not retained, otherwise than in compliance with this Part, in respect of any financial year, more than 15 per cent. of the income it derives from securities.
- (5) An investment company may not make a distribution by virtue of Subhead (1) unless its shares are listed on a recognised stock exchange and, during the period beginning with the first day of the financial year immediately preceding the financial year in which the proposed distribution is to be made or, where the distribution is proposed to be made during the company’s first financial year, the first day of that financial year and ending with the date of the distribution (whether or not any part of those financial years falls before the appointed day), it has not—
  - (a) distributed any of its capital profits; or
  - (b) applied any unrealised profits or any capital profits (realised or unrealised) in paying up debentures or any amounts unpaid on any of its issued shares.
- (6) An investment company may not make a distribution by virtue of Subhead (1) unless the company gave the requisite notice—
  - (a) before the beginning of the appropriate period referred to in Subhead (5); or
  - (b) where that period began before the appointed day, as soon as may be reasonably practicable after the appointed day; or

- (c) where the company was incorporated on or after the appointed day, as soon as may be reasonably practicable after the date of its incorporation.
- (7) A notice by a company to the Registrar under Subhead (3) may be revoked at any time by the company on giving notice to the Registrar that it no longer wishes to be an investment company within the meaning of this head and, on giving such notice, the company shall cease to be such an investment company.
- (8) In determining capital and revenue profits and losses for the purposes of this head an asset, which is not a fixed asset or a current asset, shall be treated as a fixed asset.
- (9) An investment company shall include the expression "investment company" on its letters and order forms.
- (10) Where a company fails to comply with Subhead (9), the company and every officer of the company who is in default shall be guilty of a category three offence
- (11) Proceedings in relation to an offence under this head may be brought and prosecuted by the Registrar.
- (12) For the purposes of paragraph (b) of Subhead (4)—
- (a) "holding" means the shares or securities (whether of one class or more than one class) held in any one company;
- (b) holdings in companies which are members of a group (whether or not including the investing company) and are not excluded from the said paragraph (b) shall be treated as holdings in a single company;
- (c) where the investing company is a member of a group, money owed to it by another member of the group shall be treated as a security of the latter held by the investing company and accordingly as, or as part of, the holding of the investing company in the company owing the money, and for the purposes of this subhead, "group" means a company and all companies which are its subsidiaries within the meaning of Part A1, Head 6(1) [equivalent of Section 155 of the Companies Act, 1963].

**Explanatory Note**

*Restatement of Section 47 of the Companies (Amendment) Act, 1983.*

*CRO have confirmed that no such companies are registered with them under Subhead (3).*

**Briefing:**

*General*

*Article 15(4) of the Directive, by way of derogation from the provisions of Art 15(1) to (3) which are given expression in Sections 45 and 46, permits "investment companies with fixed capital" to be treated on a different basis from other public company as far as dividend declarations are concerned. This section takes advantage of this permitted derogation. To all intents and purposes, the investment companies referred to in Article 15 of the Directive are equivalent to investment trust companies as defined in Section 79(7) of the Corporation Tax Act, 1976 and recognised by the Stock Exchange as a special entity. The essential features of an investment company stipulated by the Directive are*

- (i) that the business of the company consists of investing its funds mainly in securities with the aim of spreading investment risks and giving members of the company the benefit of the results of the management of its funds,*
- (ii) that the expression "investment company" is included on its documents,*
- (iii) that it offers its shares for subscription by the public.*

*In formulating the provision it is thought desirable to insert other criteria for such companies which reflect rules contained in the Stock Exchange Yellow Book (Admission of securities to listing). These are :-*

- (i) That no one of the company's holdings in companies other than investment companies represents more than 15 per cent by value of its investments,*
- (ii) That the distribution of capital profits is prohibited by the company's Memorandum or Articles of Association,*
- (iii) That the company does not retain more than 15 per cent of the income it derives from securities,*

- (iv) *That the company has its shares listed on the Stock Exchange (and accordingly, complies with the conditions in Chapter 9 of the Stock Exchange Yellow Book).*

Moreover, it is also being provided that such a company should notify its intention to carry on business as an investment company. There is no investment company which fits that definition at present but there are, however, other forms of investment companies. This section provides that the derogation allowed by the Directive can be applied to either new companies, or existing companies which change their form to meet the criteria set out. The central feature of this section is the option which it gives to such investment companies to distribute their profits either under the rules set out in Sections 45 and 46 or under the separate rules set out in Subsection (1) of this Section. The distribution option in this section reflects a fear which arose during the negotiation of the Directive that the activities of investment companies with a fixed capital could be unduly jeopardised by the general thrust of the restrictions in the Directive on the distribution of profits. Accordingly, the Community decided to introduce special rules with regard to the distribution of dividends of investment companies. The principal reason for this was that it was felt only fair that such companies should be allowed to pass on dividends received to their shareholders, as their essential function is portfolio management, and this might prove impossible if there has been a decline in the value of some of the investment company's holdings. Such a decline might entail that the investment company's net assets were below its paid-up share capital and undistributable reserves for the purposes of Section 46. In addition, the requirements for investor protection were seen to be slightly different in this situation as, primarily, the only liabilities that such companies have is the money borrowed to make investments.

### Subsection (1)

This subsection makes statutory provision for the derogation in respect of the distribution of profits by investment companies provided for in Article 15.4 of the Second Directive.

Being public limited companies and this retirement is specified in Subsection(3)— investment companies are, of course, subject to the provisions of Section 46. Accordingly, by virtue of Sections 45 and 46 taken together, an investment company may make a distribution at any time out of its accumulated realised revenue and capital profits so far as not previously utilised by distribution or capitalisation less its accumulated realised revenue and capital losses so far as not written off in a reduction or reorganisation of capital provided that at that time the amount of its net assets is not less than the aggregate of its called up share capital and its undistributable reserves; and to the extent that the distribution does not reduce the amount of its assets to less than that aggregate. The option available to investment companies under this subsection is that they may also, i.e. as an alternative, make a distribution at any time from accumulated realised revenue profits so far as not previously utilised by distribution or capitalisation, less accumulated revenue losses (whether realised or unrealised) insofar as not previously written off in a reduction or reorganisation of capital duly made:-

- (a) *if at that time the amount of assets is at least equal to 1½ times the aggregate of liabilities; and*
- (b) *if, and to the extent that, the distribution does not reduce that amount to less than 1½ times that aggregate.*

The central feature of this approach is that regard is only had to revenue gains and losses. Moreover, in determining the company's financial margin of safety, for purposes of this provision regard is had to liabilities and not share capital and undistributable reserves.

It should be noted, finally, that the arrangement in this subsection is more restrictive in some senses than the general distribution provisions for public limited companies under sections 45 and 46. This is so because:

- Under this subsection only net realised revenue profits are distributable and,

- *The asset ratio requires that assets must be maintained at or above 1½ times liabilities (whereas for public limited companies generally under Section 46 net assets must be maintained at a level equal to the aggregate of called-up share capital and undistributable reserves). This section takes account of the nature of the activities of investment companies.*

*It is recognised that the provisions in this section are as stringent but since there are no public investment companies as defined in existence no particular entity is affected. If such public companies were to develop it is only proper having regard to the nature of their activities that the distribution derogation be applied with some stringency.*

### *Subsection (2)*

*This subsection defines “liabilities” for the purposes of calculating the ratio set out in Subsection (1). The definition of liabilities includes any “provision” within the meaning of the Sixth Schedule but excludes the amount of any provision taken into account in the calculation of the value of an asset. This is to avoid doubt by catering for differences in approach in balance sheets where, for example, one company might list its assets at cost and show a corresponding entry for depreciation under a liability heading, while another company would list its assets in the balance sheet at their net book value. The inclusion of uncalled share capital as an asset for the purposes of the calculation in Subsection (1) is prohibited by the application of Subsection (4) of Section 46 to this section.*

### *Subsection (3)*

*This subsection defines “investment company” as a public limited company which has given the requisite notice in writing (which has not been revoked) to the registrar of its intention to carry on business as an investment company and has since the date of that notice complied with the requirements set out in Subsection (4) following. An investment company must fulfil certain requirements to have its status recognised as such for the purposes of this section. In brief, these relate to:*

- (i) the nature of its business,*
- (ii) the spread of its holdings,*
- (iii) prohibition of the distribution of capital profits,*

*(iv) retention of income from securities,*

*(v) listing of the company on the stock exchange,*

*(vi) the use of the expression “investment company” on its letters and order forms.*

*[The briefing material on Subsections (4), (5) and (9) of this section expands further on the rationale for the above requirements.] This subsection also defines the “requisite notice” for the purposes of Subsection (6).*

## Chapter 5 Uncertificated Securities

***[Chapter applies as per PLC – Heads 60 to 61 of Part B2 apply]***

## Chapter 6

# Corporate Governance

*[Part B2, Heads 63 to 68 apply]*

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### **Head 41    Inspection of register of members**

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Part A4, Head 38 [equivalent of Section 119 of the Companies Act, 1963] shall not apply to an investment company.

***Explanatory Note***

Section 119 is currently disapplied by Section 260 (2) of the Companies Act, 1990.

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### **Head 42    Audit Committees**

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Part A4 Head 34 [equivalent of Section 205B of the Companies Act, 1990] shall not apply to an investment company.

## Chapter 7

### Duties of Directors and Other Officers

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#### **Head 43   Obligation to convene extraordinary general meeting in event of serious loss of capital**

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Part B2, Head 67 [equivalent of Section 40 of the Companies (Amendment) Act, 1983] shall not apply to an investment company.

***Explanatory Note***

*Section 40 of the Companies Act, 1983 is expressly disappplied to an investment company by Section 260(3) of the Companies Act, 1990 – no requirement for an investment company to convene an EGM in event of serious loss of capital.*

***[Part B2, Heads 68 and 69, apply]***

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#### **Head 44   Directors' Compliance Statement**

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Part A5, Head 7 shall not apply to an investment company.

***Explanatory Note***

*Part A5, Head 7 is an amended re-enactment of Section 205E of the Companies Act, 1990 as inserted by Section 45 of the Companies (Auditing and Accounting) Act, 2003. The effect of disapplying Part A5, Head 7 under this head is that directors of an investment company are not required to make a directors' compliance statement.*

# Chapter 8

## Accounts, Audits and Annual Return

### Head 45 Annual Return

Part A6, Head 52 [equivalent of Section 125 of Companies Act, 1963] shall not apply to an investment company.

#### **Explanatory Note**

*Restatement: Section 119 is currently disappplied by Section 260(2) of the Companies Act, 1990.*

### Head 46 Information to be included in directors' report regarding acquisition by company of own shares.

Part A6, Head 40 [equivalent of Section 14 of the Companies (Amendment) Act, 1986] shall not apply to an investment company.

#### **Explanatory Note**

*Section 14 is currently disappplied by Section 260(4) of the Companies Act, 1990.*

### Head 47 Application of Part A6, Head 12 [equivalent of Section 148 of the Companies Act, 1963]

(1) Notwithstanding Part A6 Head 12(3) [equivalent of Section 148(2) of the Companies Act, 1963 (inserted by the European Communities (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005 (S.I. No. 116 of 2005))] an investment company may, in respect of its individual accounts, opt to prepare those accounts in accordance with both of the following, namely—

- (a) an alternative body of accounting standards; and
- (b) Part A6 Head 14 [equivalent of Section 149 of the 1963 Act], as if the references in that Head A14 to international financial reporting standards were references to that alternative body of accounting standards.

(2) In the application of Subheads (4), (5) and (6) of Part A6 Head 12 [equivalent of Section 148 of the 1963 Act] to an investment company which has opted under Subhead (1) to prepare its accounts in accordance with an alternative body of accounting standards; and

- (a) the reference in that subhead (4) to international financial reporting standards shall be read as a reference to that alternative body of accounting standards, and
- (b) there shall be substituted for 'IFRS', in each place where it occurs in those Subheads (4), (5) and (6), 'ABAS' (which shall be read as referring to that alternative body of accounting standards).

(3) For the purposes of this head, accounts shall not be regarded as having been prepared in accordance with an alternative body of accounting standards unless the accounts concerned would, were they to have been prepared by a company or undertaking registered in the relevant jurisdiction, be regarded as having been prepared in accordance with those standards.

(4) In this head—

'alternative body of accounting standards' means standards that accounts of companies or undertakings must comply with that are laid down by such body or bodies having authority to lay down standards of that kind in—

- (a) United States of America;
- (b) Canada;
- (c) Japan; or
- (d) any other prescribed state or territory, as may be prescribed;

'relevant jurisdiction' means the state or territory in which the alternative body of accounting standards concerned have effect.

- (5) Before making regulations for the purposes of Subhead (4), the Minister—
- (a) shall consult with the Bank; and
  - (b) may consult with any other persons whom the Minister considers should be consulted.
- (6) If particular regulations for the purposes of Subhead (4) are proposed to be made at a time subsequent to [the commencement of Part 2 of the Companies (Auditing and Accounting) Act, 2003], then, before making those regulations, the Minister shall also consult with the Irish Auditing and Accounting Supervisory Authority.

**Explanatory Note**

*Restatement of Section 28 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

## **Chapter 9**

### Debentures & Charges

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*[Part B2, Heads 84 and 85 apply]*

## **Chapter 10**

### Reorganisations

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*[Part B2, Heads 86 and 87 apply]*

## **Chapter 11**

### Strike-off and Restoration

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*[Part B2, Heads 88 and 89 apply].*

## Chapter 12

### Winding-up

#### Head 48 Company may be required to contribute to related debts of a related company.

Part A11, Head 38 [equivalent of Section 140 of the Companies Act, 1990] (whether as regards a case in which the investment company is being wound up or a case in which it is a related company (within the meaning of that head) shall not apply to an investment company.

##### **Explanatory Note**

*Restatement. This provision is currently disapplied to an investment company by Section 260(5) of the Companies Act, 1990.*

#### Head 49 Circumstances in which company may be wound up by the court.

- (1) Part A11, Head 10 [equivalent of Section 213 of the Companies Act, 1963] will be amended by the addition of the following paragraph after paragraph (e) of that head:

If the court is of opinion that it is just and equitable that the company, being an investment company within the meaning of this Part [the equivalent of Part XIII of the Companies Act, 1990] or the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (S.I. No.78 of 1989) should be wound up and the following conditions are complied with –

- (i) in the case of an investment company within the meaning of this Part [the equivalent of Part XIII of the Companies Act, 1990] –
- (l) the petition for such winding-up has been presented by the trustee of the company, that is to say, the person nominated by the Bank under Head 8(4)(c) of this Part [the equivalent of Section 257(4)(c) of the Companies Act, 1990] in respect of that company,

- (ll) the said trustee has notified the investment company of its intention to resign as such trustee and six or more months have elapsed since the giving of that notification without a trustee having been appointed to replace it,

- (lll) the court, in considering the said petition, has regard to –

- (A) any conditions imposed under Head 8 of this Part [the equivalent of Section 257 of the Companies Act, 1990] in relation to the resignation from office of such a trustee and the replacement of it by another trustee, and
- (B) whether a winding-up would best serve the interests of shareholders in the company;

and

- (IV) the petition for such winding-up has been served on the company (if any) discharging, in relation to the first-mentioned company, functions of a company referred to in conditions imposed under Head 8 of this Part [the equivalent of Section 257 of the Companies Act, 1990] as a “management company”;

and

- (ii) in the case of an investment company within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989, such conditions as the Minister may prescribe by regulations.”

##### **Explanatory Note**

*This is a slightly amended re-enactment of paragraph (fa) of Section 213 of the Companies Act, 1963 as inserted by Section 93(b) of the Company Law Enforcement Act, 2001.*

*As Part A11 only applies to private companies, paragraph (fa) was excluded from the amended re-enactment of Section 213 re-enacted under Head 10 of Part A11. The purpose of this head, therefore, is to restore paragraph (fa) and maintain the effect of Section 213 as it applies to investment companies.*

### **Head 50 Restoration by the court**

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The reference to “20 years” in Part A12, Head 10 (1) shall, in respect of the dissolution of an investment company or of a company to which the UCITS Regulations apply, be replaced by a reference to “2 years”.

#### **Explanatory Note**

*This amendment is designed to improve the efficiency of the procedure for the dissolution of investment companies, both UCITS and non-UCITS. It is expected that the amended provision will facilitate the dissolution of investment companies by way of voluntary strike-off rather than by a members' voluntary winding-up, which should mean that the revocation of authorisation of an investment company can be completed by the Financial Regulator in a shorter period of time than would be the case if a liquidator was appointed.*

## Chapter 13

### Compliance, Investigation and Enforcement

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#### Head 51 Offences

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Where a company contravenes—

- (a) any of the provisions of this Part; or
- (b) any regulations made in relation thereto (whether under this Part or under any other enactment); or
- (c) any condition in relation to its authorisation or business imposed by the Bank under Part B9, Head 8 [equivalent of Section 257 of the Companies Act, 1990],

the company and every officer thereof who is in default shall be guilty of an offence .

**Explanatory Note**

*Restatement of Section 262 of the Companies Act, 1990.*

## Chapter 14

### Regulatory and Advisory Bodies

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#### **Head 52 Power to make supplementary necessary regulations.**

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The Minister may make such regulations as he considers necessary for the purposes of giving full effect to the provisions of this Part.

***Explanatory Note***

*Restatement of Section 261 of the Companies Act, 1990.*

## Chapter 15

### Market Abuse

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*[Part B2, Heads 90 to 95 apply]*

## Chapter 16

### Public Offers of Securities

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#### **Head 53 Disapplication of Chapter 13 of Part B2 to certain types of investment company**

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Part B2, Heads 96 to 112 shall not apply to the issue of securities in an investment company to which Part 9, Head 5(b)(ii) [equivalent of Section 253(2)(b)(ii) of the 1990 Act] applies.

#### **Explanatory Note**

*The provisions relating to the offer of securities to the public provided for under Chapter 13 of Part B2 only apply to 'close-ended funds'. This head exempts open-ended non-UCITS investment companies from those provisions. [Query UCITS]*

## Chapter 17

Transparency Requirements  
Regarding Issuers of Securities  
Admitted to Trading on Certain  
Markets

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### **Head 54 Disapplication of Chapter 14 of Part B2 to certain types of investment company**

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Part B2, Heads 113-117 shall not apply to the issue of securities in an investment company to which Part B9, Head 5(3)(b)(ii) [equivalent of Section 253(2)(b)(ii) of the 1990 Act applies.

#### **Explanatory Note**

*The provisions relating to the transparency obligations imposed upon publicly quoted companies provided for under Chapter 14 of Part B2 only apply to 'close-ended funds'. This head exempts open-ended non-UCITS investment companies from those provisions. [Query UCITS]*

# Chapter 18

## Umbrella Funds and Sub-Funds

### Head 55 Segregated liability of investment company sub-funds

- (1) Notwithstanding any statutory provision or rule of law to the contrary, but subject to Subhead (2), any liability incurred on behalf of or attributable to any sub-fund of an umbrella fund shall be discharged solely out of the assets of that sub-fund, and no umbrella fund nor any director, receiver, examiner, liquidator, provisional liquidator or other person shall apply, nor be obliged to apply, the assets of any such subfund in satisfaction of any liability incurred on behalf of or attributable to any other sub-fund of the same umbrella fund, whether such liability was incurred before, on or after the date this head commences.
- (2) Subhead (1) shall not apply to an umbrella fund which was authorised and commenced trading prior to the date this head commences unless -
- (a) the members of the umbrella fund shall have resolved by special resolution that the provisions of Subhead (1) should apply to that umbrella fund; and
  - (b) the special resolution has taken effect in accordance with Subhead (4).
- (3) For the purposes of Subhead (2), an umbrella fund shall be deemed to have commenced to trade prior to the date this head commences if—
- (a) shares, other than the subscriber shares issued for the purposes of incorporation of the umbrella fund, were issued in any sub-fund of that umbrella fund prior to that commencement date and one or more of those shares remains in issue on that commencement date; or
  - (b) the umbrella fund, or any person acting on its behalf, entered into an agreement with a third party prior to that commencement date, which remains in force on that commencement date and pursuant to which the assets of any sub-fund may be applied in satisfaction of any liability incurred on behalf of or attributable to any other sub-fund of the same umbrella fund.
- (4) If—
- (a) no application to the court is made pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990], a special resolution passed pursuant to Subhead(2) shall take effect on the date on which such resolution is passed or the 31st day following the date of service of notice on creditors issued pursuant to Subhead (5)(b), whichever is the later; or
  - (b) an application is or applications are made to the court pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990], a special resolution pursuant to Subhead (2) shall not take effect until—
    - (i) in the event that all applications made are withdrawn, the day on which such resolution is passed or the day next following the withdrawal of the last outstanding application, whichever is the later, subject to this day being no earlier than the 31st day following the date of service of notice on creditors, and
    - (ii) in the event that all applications made are not withdrawn, whichever of the following is the later, that is to say, the later of the day on which such resolution is passed, and:
      - (l) where an order is granted by the court pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990] or on appeal pursuant to section Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990], the date specified in that order or, if no such date is specified, the day next following the date on which the period for which the order is specified to remain in force expires or, as appropriate, following the day on which it otherwise ceases to be in force, or

(II) where no appeal against any decision of the court is lodged pursuant to Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990], the day next following the date on which the time period for such an appeal in relation to the last such determination of the court shall have elapsed, or

(III) where an appeal is lodged against any decision of the court pursuant to Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990], the day next following the date on which the last outstanding such appeal is disposed of or withdrawn, unless a court has otherwise ordered under Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990] or Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990].

(5) Any notice of a meeting to consider a special resolution of the type referred to in Subhead (2) shall be—

- (a) accompanied by audited accounts for the umbrella fund which include a statement of the assets and liabilities of each sub-fund of the umbrella fund and which are prepared as at a date which is not more than four months before the date on which the notice convening the meeting is served (hereafter referred to in this head and Part B9, Head 56 [equivalent of Section 256B of the Companies Act, 1990] as 'statement of assets and liabilities');
- (b) given to all creditors of the umbrella fund accompanied by a copy of the statement of assets and liabilities, in accordance with the provisions of Part B9, Head 56 [equivalent of Section 256B of the Companies Act, 1990]; and
- (c) delivered to the Registrar, accompanied by the statement of assets and liabilities, no later than the third day after the date on which the notice is first sent to members of the umbrella fund.

### **Explanatory Note**

*Equivalent of Section 256A of the Companies Act, 1990, as inserted by Section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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## **Head 56 Notice to creditors of special resolution under Part B9, Head 55 [Equivalent of s 256A of Companies Act 1990]**

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- (1) The requirement in Part B9, Head 55 [equivalent of Section 256A of the Companies Act, 1990] to give all creditors of the umbrella fund notice of a meeting to consider a special resolution shall be met if—
  - (a) a notice in writing, accompanied by the statement of assets and liabilities, is sent to each relevant creditor of a subfund; and
  - (b) a notice is published in at least one national newspaper, stating that the umbrella fund intends to avail of in Part B9, Head 55(1) [equivalent of Section 256A(1) of the Companies Act, 1990] and that an application may be made in accordance with Head 57 Part B9, [equivalent of Section 256C of the Companies Act, 1990], for an order pursuant to that head.
- (2) For the purpose of this head, a relevant creditor of a sub-fund is any creditor for whom provision was made, in accordance with the articles of association, in the net asset value of the sub-fund calculated—
  - (a) in the case of a sub-fund in respect of which the net asset value is not calculated on a daily basis, as at the last valuation point for that sub-fund prior to the date of service of the notice pursuant to in Part B9, Head 55(5)(b) [equivalent of Section 256A(5)(b) of the Companies Act, 1990]; and
  - (b) in the case of a sub-fund in respect of which the net asset value is calculated on a daily basis, as at the second last valuation point for that sub-fund.

### **Explanatory Note**

*Equivalent of Section 256B of the Companies Act, 1990 as inserted by Section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

### **Head 57 Application to court opposing special resolution under Part B9, Head 55 [equivalent of Section 256A of the Companies Act, 1990]**

- (1) An application may be made to the court in accordance with this head for an order preventing any resolution passed or proposed to be passed pursuant to Part B9, Head 55(2) [equivalent of section 256A(2) of the Companies Act, 1990] from taking effect in relation to any umbrella fund to which that head applies.
- (2) An order under this head may be granted only if the court considers that it would be just and equitable to do so.
- (3) Each order granted pursuant to this head shall specify the period in respect of which the order shall remain in force and, without prejudice to the powers of the court to specify such period, may specify that the order shall cease to be in force on the date on which the applicant ceases to be a creditor of the umbrella fund or the date on which the applicant consents to the application of Part B9, Head 56(1) [Equivalent of section 256A(1) of Companies Act 1990] to that umbrella fund, whichever is the later.
- (4) An application under this head may only be made by a relevant creditor or relevant creditors constituting not less than 1 per cent in number of the creditors of any sub-fund, or whose debts account for not less than 1 per cent in value of the debts owed by any sub-fund, in each case as provided for in the net asset value of that sub-fund referred to in Part B9, Head 56 [equivalent of Section 256B of the Companies Act, 1990].
- (5) Any application pursuant to this head must be made by a relevant creditor within 28 days after the date of service of the notice referred to in Part B9, Head 55 (5)(b) [equivalent of Section 256A(5)(b) of the Companies Act, 1990], and may be made on behalf of the creditors entitled to make the application by one or more of their number as they may appoint in writing for such purpose.

- (6) Notice of an application to the court for the purposes of this head shall be sent by the relevant creditor or relevant creditors to the umbrella fund and to the Bank within two days after the date on which the application is made, and the umbrella fund and the Bank shall each be entitled to make representations to the court before an order is made.
- (7) In considering whether it is just and equitable to make an order pursuant to this head, the court shall have regard to the following matters -
  - (a) the terms of any agreement or arrangement between the creditor or creditors and the umbrella fund or its delegates;
  - (b) the course of dealings between the creditor or creditors and the umbrella fund or its delegates;
  - (c) the conduct of the umbrella fund or its delegates towards the creditor or creditors;
  - (d) the extent to which the umbrella fund or its delegates represented to the creditor or creditors that it would have recourse to the assets of any other subfund to discharge the liabilities owed to the creditor or creditors;
  - (e) the extent to which it was reasonable for the relevant creditor or relevant creditors to expect to have recourse to the assets of any other sub-fund; and
  - (f) any other matters which the court shall deem relevant.

### **Explanatory Note**

*Restatement of Section 256C of the Companies Act, 1990 as inserted by Section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### **Head 58 Appeal from court order under Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990]**

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- (1) Any creditor who has made an application pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990], or the umbrella fund in respect of which the application is made, may appeal to the Supreme Court against any decision of the court in respect of that application.
- (2) Notice of any such appeal must be lodged within five days after the date on which the order is perfected by the court.
- (3) Notice of any appeal lodged by the umbrella fund shall be sent to the Central Bank and to the relevant creditor or relevant creditors who made the application pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990] within two days after the date on which the appeal is made.
- (4) Notice of any appeal by the party which made the application pursuant to Part B9, Head 57 [equivalent of Section 256C of the Companies Act, 1990] shall be sent to the Central Bank and to the umbrella fund within two days after the date on which the appeal is made.

#### **Explanatory Note**

*Restatement of Section 256D of the Companies Act, 1990, as inserted by Section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### **Head 59 Requirements to be complied with by, and other matters respecting, an umbrella fund to which Part B9, Head 55 [equivalent of Section 256A of the Companies Act, 1990] applies**

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- (1) Every umbrella fund to which Part B9, Head 55 [equivalent of Section 256A of the Companies Act, 1990] applies shall be required to include the words 'An umbrella fund with segregated liability between sub-funds' in all its letterheads and in any agreement entered into in writing with a third party, and shall be obliged to disclose that it is a segregated liability umbrella fund to any third party with which it enters into an oral contract.
- (2) There shall be implied in every contract, agreement, arrangement or transaction entered into by an umbrella fund to which Part B9, Head 55 [equivalent of Section 256A of the Companies Act, 1990] applies the following terms, that—
  - (a) the party or parties contracting with the umbrella fund shall not seek, whether in any proceedings or by any other means whatsoever or wheresoever, to have recourse to any assets of any subfund of the umbrella fund in the discharge of all or any part of a liability which was not incurred on behalf of that sub-fund;
  - (b) if any party contracting with the umbrella fund shall succeed by any means whatsoever or wheresoever in having recourse to any assets of any sub-fund of the umbrella fund in the discharge of all or any part of a liability which was not incurred on behalf of that sub-fund, that party shall be liable to the umbrella fund to pay a sum equal to the value of the benefit thereby obtained by; and

- (c) if any party contracting with the umbrella fund shall succeed in seizing or attaching by any means, or otherwise levying execution against, any assets of a sub-fund of an umbrella fund in respect of a liability which was not incurred on behalf of that subfund, that party shall hold those assets or the direct or indirect proceeds of the sale of such assets on trust for the umbrella fund and shall keep those assets or proceeds separate and identifiable as such trust property.
- (3) All sums recovered by an umbrella fund as a result of any such trust as is described in Subhead (2)(c) shall be credited against any concurrent liability pursuant to the implied term set out in Subhead (2)(b).
- (4) Any asset or sum recovered by an umbrella fund pursuant to the implied term set out in Subhead (2)(b) or (c) or by any other means whatsoever or wheresoever in the events referred to in those paragraphs shall, after the deduction or payment of any costs of recovery, be applied so as to compensate the sub-fund affected.
- (5) In the event that assets attributable to a sub-fund to which Head 55 of this Part [equivalent of Section 256A of the Companies Act, 1990] applies are taken in execution of a liability not attributable to that sub-fund, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to that sub-fund affected, the directors of the umbrella fund, with the consent of the custodian, shall certify or cause to be certified, the value of the assets lost to the sub-fund affected and transfer or pay from the assets of the sub-fund or sub-funds to which the liability was attributable, in priority to all other claims against such sub-fund or sub-funds, assets or sums sufficient to restore to the sub-fund affected, the value of the assets or sums lost to it.
- (6) Without prejudice to the other provisions of Part B9, Heads 55 [equivalent of Section 256A of the Companies Act, 1990] to Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990] and this head, a sub-fund of an umbrella fund is not a legal person separate from that umbrella fund, but an umbrella fund may sue and be sued in respect of a particular subfund and may exercise the same rights of set-off, if any, as between its sub-funds as apply at law in respect of companies and the property of a subfund is subject to orders of the court as it would have been if the sub-fund were a separate legal person.
- (7) Nothing in Part B9, Heads 55 [equivalent of Section 256A of the Companies Act, 1990] to Part B9, Head 58 [equivalent of Section 256D of the Companies Act, 1990] and this head shall prevent the application of any enactment or rule of law which would require the application of the assets of any sub-fund in discharge of some or all of the liabilities of any other subfund on the grounds of fraud or misrepresentation and, in particular, by reason of the application of—
- (a) Part A11, Head 43 [equivalent of Section 286 of the Companies Act, 1963]; and
- (b) Part A8, Head 16 [equivalent of Section 139 of the Companies Act, 1990].
- (8) A sub-fund may be wound up in accordance with the provisions of Part A11, Head 10 (e) and Part A11, Head 20 [equivalent of Section 213(e) and Section 251(1)(c) of the Companies Act, 1963] as if the sub-fund were a separate company, provided always that the appointment of the liquidator or any provisional liquidator and the powers, rights, duties and responsibilities of the liquidator or any provisional liquidator shall be confined to the subfund or sub-funds which is or are being wound up.
- (9) For the purposes of Subhead (8), all references made in Part A11, Head 10 (e) and Part A11, Head 20 [equivalent of Sections 213(e) and 251(1)(c) of the Companies Bill 1963] and all relevant provisions of this Act relating to the winding up of a company pursuant to Part A11, Head 10 (e) and Part A11, Head 20 [equivalent of Sections 213(e) and 251(1)(c) of the Companies Act, 1963] to one of the following words shall be construed as follows—
- (a) 'company' shall be read as referring to the sub-fund or sub-funds which is or are being wound up;
- (b) a 'member' or 'members' shall be read as referring to the holders of the shares in that sub-fund or sub-funds; and
- (c) 'creditors' shall be read as referring to the creditors of that sub-fund or subfunds.”.

### **Explanatory Note**

*Restatement of Section 256E of the Companies Act, 1990, as inserted by Section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

### Head 60 Netting Arrangements

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The Netting of Financial Contracts Act, 1995 is amended, in Section 1, by the substitution of the text in the table to this head, for the definition of “party”.

“‘Party’ means a person constituting one of the parties to an agreement and, in every context, includes, and shall be deemed always to have included, in respect of any agreement-

- (a) any number of legal or natural persons sharing a single, identical interest in the agreement where there is no differentiation in the rights and obligations of each such person therein; and
- (b) the participants in-
  - (i) a common contractual fund authorised pursuant to the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 or the UCITS Regulations, and
  - (ii) a sub-fund of a common contractual fund referred to in paragraph (i),whether or not a party described in (i) or (ii) is acting through a manager or other agent.

#### **Explanatory Note**

*An extension of netting legislation is proposed in Head 57, to encompass netting agreements to which CCFs are party and clarify the position regarding certain other netting agreements with a view to facilitating the participation of CCFs and certain other structures in the financial markets on an equivalent basis with other collective investment undertaking structures.*

# Chapter 19

## Common Contractual Funds

### Head 61 Interpretation of this Chapter

- (1) In this Chapter, unless the context otherwise requires “common contractual fund” means a collective investment undertaking, being an unincorporated body established by a management company, under which the participants by contractual arrangement participate and share in the property of the collective investment undertaking as co-owners, provided—
- (a) it is expressly stated in its deed of constitution to be established pursuant to this Bill;
  - (b) it holds an authorisation issued in accordance with this Bill; and
  - (c) it is not established pursuant to Council Directive No. 85/611/EEC of 20 December 1985 as amended from time to time.

“**deed of constitution**” or “**deed**” means the deed under which the common contractual fund is constituted, and references to the deed of constitution of a common contractual fund shall be construed accordingly;

“**sub-fund**” means a separate portfolio of assets maintained by a common contractual fund in accordance with its deed of constitution;

“**unit-holder**” means the holder of one or more units of a common contractual fund and references to a unit-holder in such a common contractual fund shall be construed accordingly;

“**units**” means instruments granting an entitlement to share in the investments and relevant income of a common contractual fund;

“**umbrella fund**” means a common contractual fund which is divided into a number of sub-funds.

- (2) Any reference in this Chapter to a management company of a common contractual fund or to a custodian of such a common contractual fund shall be construed as a reference to the person in whom are vested the powers of management relating to property of the fund for the time being or, as the case may be, to the person in whom such property is entrusted for safe-keeping.
- (3) Any reference in this Chapter to an authorisation, in relation to a common contractual fund, standing revoked under this Bill shall be construed as a reference to an authorisation standing revoked under Regulation 102 of the UCITS Regulations as applied by Head 73 of this Part.
- (4) For the purposes of the application by Head 73 of this Part of certain provisions of the UCITS Regulations to common contractual funds, the said provisions shall be construed as one with this Chapter.

#### **Explanatory Note**

*A re-enactment of Section 6 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

### Head 62 Non-application of this Part to certain undertakings

- (1) The provisions of this Chapter shall not apply to an undertaking for collective investment in transferable securities (within the meaning of the UCITS Regulations) that is authorised—
  - (a) under the UCITS Regulations; or
  - (b) by a competent authority in another Member State of the European Union in accordance with Council Directive No. 85/611/EEC of 20 December 1985, as amended from time to time.
- (2) A common contractual fund shall not be subject to the provisions respecting—
  - (a) a partnership under the Partnership Act 1890, the Limited Partnerships Act 1907 or the Investment Limited Partnerships Act, 1994, or
  - (b) a unit trust scheme under the Unit Trusts Act, 1990.

### **Explanatory Note**

*A re-enactment of Section 7 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### **Head 63 Authorisation of non-UCITS common contractual funds**

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- (1) The Bank shall authorise a common contractual fund if, but only if—
  - (a) the Bank is satisfied that—
    - (i) the competence of the management company and custodian in respect of matters of the kind with which they would be concerned in relation to a common contractual fund, and
    - (ii) their probity, are such as to render them suitable to act as management company and custodian respectively, under the common contractual fund;
  - (b) the management company of the common contractual fund—
    - (i) is a body corporate that has its registered office and head office in the State, and
    - (ii) has, in the opinion of the Bank, sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities;
  - (c) the custodian of the common contractual fund—
    - (i) either has its registered office in the State or has established a place of business in the State if its registered office is in another Member State,
    - (ii) has, in the opinion of the Bank, sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities, and
    - (iii) can satisfy the Bank that it has the appropriate expertise and experience to perform its functions under this Chapter;

- (d) the Bank is satisfied that the common contractual fund is organised such that the effective control over the affairs of the management company and of the custodian of the common contractual fund will be exercised independently of one another;
- (e) the Bank has approved the deed of constitution and the deed of constitution contains a covenant providing that the common contractual fund will be carried on in compliance with the provisions of this Bill;
- (f) a copy of the deed of constitution is deposited with the Bank; and
- (g) the name of the common contractual fund is not, in the opinion of the Bank, undesirable.

- (2) An application for authorisation of a common contractual fund shall be made in writing jointly by the proposed management company and custodian of the proposed common contractual fund and shall contain such information as the Bank may specify for the purpose of determining the application (including such additional information as the Bank may specify in the course of determining the application).
- (3) The authorisation of a common contractual fund by the Bank shall not constitute a warranty by the Bank as to the performance of the common contractual fund and the Bank shall not be liable for the performance or default of the common contractual fund.

### **Explanatory Note**

*A re-enactment of Section 8 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### **Head 64 Public information and reporting on authorisation of common contractual funds**

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- (1) The Bank shall establish and maintain a register of common contractual funds.
- (2) The Bank shall ensure that the register is kept at a specified office of the Bank and is made available for inspection by members of the public during the ordinary business hours of that office.

- (3) If the register is kept in a form that is not immediately legible, the Bank shall make available a version of it that is in legible form.
- (4) A person who, during the ordinary business hours of the Bank, attends the office at which the Bank keeps the register is entitled—
- (a) to inspect the register without charge, and
  - (b) on payment of a fee (if any) prescribed under Section 33K of the Central Bank Act, 1942, for the purposes of this subhead, to obtain a copy of any entry in the register.
- (5) The Bank shall, within 21 days after the date of the authorisation by it under Head 63 of this Part of a common contractual fund, publish a notice to that effect in *Iris Oifigiúil*.
- (6) The Bank shall publish from time to time, but not less frequently than once a year, in such manner as it thinks fit, the names of all common contractual funds which have been authorised by it under Head 63 of this Part and whose authorisation has not been revoked under this Chapter.
- (7) The Bank shall include in its annual report to the Minister for Finance a report on the performance of its functions under this Chapter.
- (8) The Bank shall give to the Minister, a copy of the report on the performance of its functions under this Chapter referred to in Subhead (7).
- (2) The power to impose conditions referred to in Subhead (1) shall include power to impose such conditions from time to time in respect of the manner in which the business of a common contractual fund authorised under Head 63 of this Part shall be operated as the Bank considers appropriate.
- (3) Conditions imposed under this head may be imposed generally or on a particular common contractual fund, or by reference to a particular class or classes of common contractual fund, or by reference to any other matter the Bank considers appropriate and prudent for the purposes referred to in Subhead (1).
- (4) Without prejudice to the generality of Subheads (1), (2) and (3), conditions imposed by the Bank on a common contractual fund may make provision for any or all of the following matters—
- (a) the prudential requirements of the investment policies of the common contractual fund;
  - (b) borrowing policies of the common contractual fund;
  - (c) prospectuses and other information disseminated in relation to the common contractual fund;
  - (d) the safe-keeping of the assets of the common contractual fund;
  - (e) such other supervisory and reporting requirements and conditions relating to its business as the Bank considers appropriate and prudent.
- (5) The Bank may amend or revoke a condition imposed by it under this head.
- (6) The management company and custodian of a common contractual fund shall comply with any conditions imposed by the Bank in relation to that common contractual fund.

### **Explanatory Note**

*A re-enactment of Section 9 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

## **Head 65 Powers of Bank**

- (1) Notwithstanding any other powers which may be available to the Bank under any other enactment, the Bank may impose such conditions for the authorisation of a common contractual fund under Head 63 of this Part as it considers appropriate and prudent for the purposes of the orderly and proper regulation of the business of common contractual funds.

### **Explanatory Note**

*A re-enactment of Section 10 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### Head 66 Refusal of authorisation

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- (1) Where the Bank decides to refuse authorisation of a common contractual fund, it shall notify the management company and the custodian of the common contractual fund of its decision and of the reasons therefor.
- (2) The management company may apply to the Court for a review of the decision in accordance with Regulation 105 of the UCITS Regulations (as applied by Head 73 of this Part).
- (3) The management company shall have the same right to apply to the Court as in Subhead (2) if a decision on authorisation under Head 63 of this Part has not been taken by the Bank within 6 months of the submission of an application for authorisation which includes the information (other than any additional information sought by the Bank) specified by the Bank under Head 63 (2) of this Part.

#### **Explanatory Note**

*A re-enactment of Section 11 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### Head 67 Alteration in deed of constitution of, or change in name of, common contractual fund

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- (1) No alteration in the deed of constitution of a common contractual fund or change in the name of such a common contractual fund shall be made without the approval of the Bank and—
  - (a) any person who makes such an alteration or change without such approval shall be guilty of a category three offence; and
  - (b) any such alteration made without the approval of the Bank is void.
- (2) Within 21 days after the making of an alteration in the deed of constitution of a common contractual fund or a change in the name of a common contractual fund, the management company of the common contractual fund shall deposit with the Bank a copy of the deed of constitution as so altered or containing the alterations or (as the case may be) particulars of the change in name.

- (3) Where the management company of a common contractual fund fails to comply with Subhead (2), it shall be guilty of a category three offence.

#### **Explanatory Note**

*A re-enactment of Section 12 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### Head 68 Replacement of management company or custodian

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- (1) The deed of constitution shall specify the conditions for the replacement of the management company or custodian of the common contractual fund with another management company or custodian and shall contain provisions to ensure the protection of unit-holders in the event of any such replacement.
- (2) Neither the management company nor the custodian may be replaced without the approval of the Bank.

#### **Explanatory Note**

*A re-enactment of Section 13 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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### Head 69 Obligation on management companies under common contractual funds to purchase units

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- (1) Subject to Regulation 63 of the UCITS Regulations, as applied by Head 73 of this Part, whenever the unit-holder in a common contractual fund, or the unit-holder in a common contractual fund the authorisation of which stands revoked under this Chapter, so requests, the management company of the common contractual fund shall, in accordance with the provisions of the deed of constitution of the fund and any relevant conditions imposed by the Bank, redeem out of the assets of the common contractual fund such number of the units of the common contractual fund held by the unit-holder as that person may specify at the price for the time being at which the management company redeems units of the common contractual fund.

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- (2) Subhead (1) shall not apply to the extent the Bank may specify in a condition imposed by it under Head 65 of this Part.
  - (3) A management company which contravenes Subhead (1) shall be guilty of a category two offence.

**Explanatory Note**

*A re-enactment of Section 14 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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## **Head 70 Prohibition of certain transactions and making of certain profits by management companies, etc**

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- (1) Neither a management company of a common contractual fund (the “corporate body”) nor a subsidiary or a holding company of that corporate body or a subsidiary of the holding company of that corporate body or a director or person engaged in the management of such corporate body or company shall carry out transactions for it, him or herself, or make a profit for it, him or herself from transactions, in any assets held under the scheme save in accordance with the deed of constitution and any conditions imposed by the Bank.
- (2) A person who contravenes this head shall be guilty of a category two offence.

**Explanatory Note**

*A re-enactment of Section 15 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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## **Head 71 Assets of common contractual funds**

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- (1) The assets of a common contractual fund shall belong exclusively to the common contractual fund and the assets shall be entrusted to a custodian for safe-keeping in accordance with conditions imposed by the Bank under Head 65 of this Part.
- (2) Where a common contractual fund is established as an umbrella fund, the assets shall belong exclusively to the relevant subfund and shall not be used to discharge directly or indirectly the liabilities of, or claims against, any other sub-fund and shall not be available for any such purpose.

- (3) The liabilities of a unit-holder, as such a holder, shall be limited to the amount agreed to be contributed by him or her for the subscription of units.
- (4) The provisions of the deed of constitution shall be binding on the unit-holder and all persons claiming through the unit-holder as if such persons had been party to the deed.

**Explanatory Note**

*A re-enactment of Section 16 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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## **Head 72 Liability of custodians of common contractual funds**

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- (1) The custodian shall exercise due care and diligence in the discharge of its duties and shall be liable to the unit-holders and management company for any loss arising from the negligence, fraud, bad faith, wilful default or recklessness in the performance of those duties.
- (2) Unit-holders may enforce this liability either directly or indirectly through the management company.

**Explanatory Note**

*A re-enactment of Section 17 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

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## **Head 73 Application of certain provisions of UCITS Regulations**

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- (1) Regulations 63, 77 to 85 and 98 to 105 of the UCITS Regulations shall apply to a common contractual fund as they apply to the bodies to which those Regulations relate subject to the following modifications and any other necessary modifications—
  - (a) a reference in those Regulations to a term or expression specified in the second column of the Table to this head at any reference number shall be construed, where the context admits, as a reference to the term or expression specified in the third column of the said Table at that reference number; and
  - (b) references to cognate terms or expressions in those Regulations shall be construed accordingly;

- (c) references to “the articles” and “the Directive” in those Regulations shall be disregarded;
- (d) the words “and the other information provided for in Schedule 2 to these Regulations” in Regulation 79 and the first sentence of Regulation 80 of those Regulations shall be disregarded and Regulation 80 shall have effect as if there were inserted the words “in the half-yearly report” after the words “the figures”;
- (e) paragraph (4)(d) of Regulation 102 shall be disregarded;
- (f) references to “simplified prospectus” in Regulations 82 and 83 shall be disregarded.
- (2) In Subhead (1), “common contractual fund” includes a common contractual fund, the authorisation of which stands revoked under Regulation 102 of the UCITS Regulations as applied and adapted by thishead.

### **Explanatory Note**

*A re-enactment of Section 19 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

## **Head 75 Offences under provisions of this Chapter**

- (1) A person who contravenes any provision of this Chapter and for which contravention no offence is created by any other provision of this Chapter shall be guilty of a category three offence.
- (2) Summary proceedings in relation to an offence under this Chapter may be brought and prosecuted by the Bank.
- (3) Notwithstanding Section 10 (4) of the Petty Sessions (Ireland) Act, 1851, summary proceedings for an offence under this Chapter may be instituted within 3 years from the date of the offence.

<b>Ref. No.</b>	<b>Term or expression referred to in UCITS Regulations</b>	<b>Construction of term or expression for purposes of this section</b>
<b>(1)</b>	<b>(2)</b>	<b>(3)</b>
1.	“Regulation 14”	“Head 66 of Part B9 of the Companies Consolidation Act 2007”
2.	“Regulation 59”	“Head 69 of Part B9 of the Companies Consolidation Act 2007”
3.	“these Regulations”	“Chapter 19 of Part B9 of the Companies Consolidation Act 2007”
4.	“repurchase”	“purchase”
5.	“UCITS”	“common contractual fund”
6.	“section 8 of the Unit Trusts Act 1990”	“Head 68 of Part B9 of the Companies Consolidation Act 2007”

### **Explanatory Note**

*A re-enactment of Section 18 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

## **Head 74 Offences in relation to certain bodies**

Where an offence under this Chapter is committed by a body corporate and is proved to have been so committed with the consent or approval of, or to have been facilitated by any wilful neglect on the part of any person being a director, manager, secretary, member of any committee of management or other controlling authority of such body or official of such body, that person shall also be guilty of an offence of the same category.

### **Explanatory Note**

*Subhead (1) re-enacts Section 20 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*

*Subheads (2) and (3) re-enact Sections 21 (3) and (4) of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.*