DRAFT DIRECTIVE ON PROTECTED FUNDS

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COUNCIL of [DATE] on protected funds

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 44, Article 52 and Article 95 thereof,

Having regard to the proposal from the Commission,

[Having regard to the opinion of the Committee of Regions,]

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:
(1) ...
(2) ...
(3) ...
(4) ...

Have adopted this Directive

Article 1
Subject matter and scope

This Directive lays down a Community regime applicable to a fund which is -
(a) created for a commercial purpose;
(b) designated in the constitutive document as a protected fund; and
(c) administered by a person qualified as mentioned in Article 7.

Note
This Directive allows the establishment of a fund that is protected or “ringfenced” against the insolvency of the person (the “administrator”) who owns and manages it. Protected funds are intended to be used to further commercial investment and trading, with the aim of encouraging economic growth in the financial sectors of the EU. As Article 1 makes clear, a fund designated a “protected fund” but which is to be used for non-commercial purposes, such as charitable purposes or family succession purposes, would not fall within the scope of the Directive (but might of course be given some effect by the law of a Member State, whether its domestic law or its private international law).
In view of the requirement to state that a “protected fund” is being created (Article 4.2), no pre-Directive relationship will be a protected fund.

A protected fund is different from existing concepts such as the English trust, the Scottish trust, the German Treuhand, the French fiducie, the Luxembourg fiduciary contract, and the Dutch bewind. A protected fund is thus an additional vehicle for the management of assets (other such vehicles including companies, foundations, trusts and agency arrangements). In many instances it will provide a more efficient legal framework than currently exists.

It is possible that, in some Member States, a vehicle which is available for ring-fenced funds could be turned into a protected fund by designating it as such in the constitutive document. In that case the fund in question would be recognised and enforced as such throughout the EU under this Directive, Much more usually, however, the particular requirements for constituting a protected fund will be found to be incompatible with any existing local concept (eg the English trust), although, of course, the local concept may itself be recognised elsewhere, whether under The Hague Trusts Convention (if implemented, as by Italy, The Netherlands, the UK, Luxembourg, Liechtenstein, Malta and Switzerland) or under other private international law rules.

This Directive does not oust any laws of insolvency or succession. Nor does it oust the rules of property law which determine how particular assets are transferred to the administrator of a protected fund. Furthermore, the manner in which a protected fund is taxed is left to each Member State.

*Article 2*

**Definitions**

In this Directive -

“administrator” means the person who owns and administers the assets of a protected fund;

“beneficiary” means a person who is to benefit from a protected fund; “constitutive document” means the document which establishes a protected fund;

“court” means the judicial or other authority indicated by a Member State; “enforcer” means a person appointed to enforce the duties of the administrator;

“funder” means a person who provides assets for a protected fund; “originator” means a person who establishes a protected fund; and “person” means a natural or a legal person.

*Note*

An administrator must be drawn from the list set out in the Annex to this Directive, and in practice will usually be a company or other legal person. Articles 7 and 8 make provision as to the appointment of the administrator and as to its duties once appointed.

Any person can be a beneficiary, except that the administrator cannot be the only beneficiary (Article
13.1. The beneficiaries must be identified in the constitutive document (Article 4.2(a)). “Beneficiary” thus has a technical meeting and does not, for example, include persons who take indirect benefit from the protected fund, such as salaried employees of the administrator.

A constitutive document must contain the information specified in Article 4.2, and in practice is likely to deal with a number of other topics, such as those mentioned in Articles 5 and 6.

At the option of Member States, the court can include non judicial bodies such as regulatory authorities. The principal powers of the court are set out in Article 11.

Articles 5.2(a) and 9 make provision for the appointment of an enforcer.

A funder may provide assets at the outset or subsequently. A protected fund may have more than one funder.

The originator is the person who signs the constitutive document and so, under Article 4, establishes the protected fund, with another person as administrator. He will often also be a funder but he need not be. There can be more than one originator, in which case all must sign the constitutive document.

Article 3

The Protected Fund

1. In a protected fund, assets are owned by an administrator for the benefit of one or more beneficiaries.
2. The assets of a protected fund form a patrimony separate from the private patrimony of the person who is administrator and from the patrimony of any other protected fund held by that person.
3. Accordingly a creditor has no claim against -
   (a) the patrimony of a protected fund in respect of a private debt of its administrator;
   (b) the private patrimony of the administrator in respect of a debt of a protected fund.
4. A protected fund is not affected by the insolvency of its administrator in respect of the administrator's private patrimony or the patrimony of another protected fund.
5. A protected fund includes any -
   (a) fruits of assets of the fund;
   (b) assets substituted for assets of the fund.

Note

Article 3 sets out the essence of a protected fund: the administrator owns the fund assets, but for the benefit of others; the assets are ring-fenced by being held in a separate patrimony; and the fund extends to fruits and to substituted assets. “Asset” is intended to have the widest possible meaning, including, for example, movable and immovable property, claims (receivables), shares in companies, intellectual property rights, and “new” property rights such as emission rights.
By “patrimony” is meant the bundle of assets and liabilities held by a person. And whereas the normal rule is that one person has only one patrimony, the administrator of a protected fund has both a private patrimony and also a second and distinct patrimony containing the assets and liabilities of the protected fund.

An asset passes from the patrimony of the administrator to the patrimony of the protected fund when, in accordance with the normal rules of property law, the asset is acquired by the administrator. In the case of assets (such as land) for which a system of registration exists, it would be open to Member States to require that the owner’s status as administrator is noted on the register.

Following transfer, the protected fund assets are held separately from the private patrimony of the administrator (Article 3.2). As a result, beneficiaries are protected against the administrator’s private creditors (Article 3.3(a)), and against the risk of the administrator’s insolvency, liquidation or merger, or, in the case of natural persons, against the risks of bankruptcy, death or divorce. The separation of patrimony implies that the fund assets are to be kept separate both from the administrator’s private assets and from the assets of any other protected fund managed by the same administrator: see Article 8.3.

It follows from Article 3.3 that debts incurred by the administrator acting as such can be claimed by the creditors out of the patrimony of the protected fund (on which see further Article 10).

As indicated by Article 3.4, an administrator can be insolvent both in its private capacity and in an administrative capacity representing a particular insolvent fund. Member States may need to make insolvency rules for insolvency in an administrative capacity. Such insolvencies would, however, be very uncommon. The administrator’s private insolvency does not, of course, affect the patrimony of the protected fund, while the insolvency of the protected fund patrimony does not affect the administrator’s private patrimony. Similarly, the fund patrimony is unaffected by the winding up, merger or (if a natural person) death of the administrator.

For the purposes of Article 3.5, the determining factor is not the conduct or belief of the administrator but the relationship of the new asset to a previous or existing asset. So for example an asset becomes part of a protected fund whenever it is bought out of the proceeds of sale of a previous asset - even if the administrator was acting in breach of its duties or with the intention of enriching its private patrimony. This is because it is not permitted for the administrator to deny compliance with its core duty, under Article 8.1, to act loyally and honestly in the best interests of the beneficiaries. Obviously, this is an essential protection for beneficiaries. Some examples illustrate the rule:

1. **The administrator sells a fund asset for €2x and uses that €2x to purchase a shareholding for itself.** The shareholding is part of the patrimony of the protected fund. In addition, if its value is now less than €2x, the administrator is liable to restore the shortfall to the fund.

2. **The administrator sells a fund asset for €1x and adds it to €1x of its private money to purchase
land, which it registers in its own name. A half share in the land is part of the patrimony of the protected fund.

Other examples of assets falling within Article 3.5 are insurance moneys received in respect of fund assets, and moneys received as compensation where fund assets have been damaged. Essentially, substituted assets cover everything derived from the protected fund assets and not already included as the fruits thereof.

**Article 4**

**Establishing a protected fund**

1. A protected fund is established by -

   (a) a constitutive document signed by the originator or, if there is more than one originator, by all the originators; and
   (b) acceptance of appointment by the person who is to be the administrator.

2. The constitutive document must contain a statement that a protected fund is being established, and must specify -

   (a) the persons or classes of person who are, or are to become, beneficiaries, and the conditions under which they are to benefit;
   (b) the person who is the administrator; and
   (c) the applicable law, being the law of a Member State.

3. A Member State may make additional requirements in respect of the formal execution of the constitutive document but not otherwise.

**Note**

Article 4 sets out the minimum requirements for creation of a protected fund. Articles 4.1 and 4.2 are both mandatory, so that no protected fund is established if, for example, the constitutive document fails to give the name of the administrator or to specify the applicable law. The word “protected fund” has to be used in the constitutive document in the relevant EU language. A list of translations will be provided in an annex to the Directive.

If desired, a Member State may prescribe further formalities as to execution (Article 4.3) - for example, a requirement to use a notarial deed - but not in respect of other matters. So for example, a Member State could not make it a condition of constitution that the constitutive document is registered in a special register (although there would be no objection to a system of voluntary registration), or that it should include matters other than those listed in Article 4.2. As mentioned in the commentary to Article 3, however, publicity in respect of the administrator’s ownership can be required on an asset-by-asset basis if
there is a public register for such assets.

A protected fund is established even if assets have yet to be transferred to the administrator. Thereafter it continues in existence until terminated under Articles 11.2 or 12. The transfer of assets is governed by the normal rules of property law. Among other things this means that a transfer may be liable to be set aside under laws relating to defrauding creditors or attempts to oust the rights of spouses or heirs.

In Article 4.1(a), the originator means the person who establishes a protected fund (see Article 2). For the purposes of Article 4.1(b), acceptance need not be in writing but can arise by virtue of the administrator’s conduct, eg in accepting transfer of the assets to be held within the fund.

Beneficiaries can include persons who are unascertained or not yet in existence (eg future funders). Article 4.2(a) should be read with Article 1(a) (which provides that a protected fund must have a commercial purpose), and Article 4.2(b) should be read with Article 7 (which limits the categories of person who can act as administrator).

**Article 5**

**Constitutive document: further provisions**

1. The constitutive document may specify -

   (a) a name for the protected fund;
   (b) its duration, in the event that the protected fund is to subsist for a fixed period;
   (c) any assets or classes of asset that are, or are intended to become, Hart of the protected fund;
   (d) any limitations on the administrator’s liabilities;
   (e) any additional duties on the administrator.

2. In addition, the constitutive document may provide for -

   (a) the appointment and duties of an enforcer;
   (b) the method by which subsequent administrators are to be appointed;
   (c) the payment of remuneration to the administrator;
   (d) any cases in which the administrator is to be allowed a conflict of interest;
   (e) any restrictions on the transfer of the rights of beneficiaries;
   (f) the disposal of assets in the event that there are no longer any beneficiaries;
   (g) any other matters that may facilitate the operation of the fund.

3. A limitation on the liability of the administrator is ineffective to the extent that it concerns conduct which is dishonest or grossly negligent.
Note
While a constitutive document need contain only the matters set out in Article 4.2, it is in practice likely to be more wide-ranging. Article 5 lists some of the more important matters to be considered. Further topics for possible inclusion can be found elsewhere, e.g. in Articles 6, 7.6, 7.7, 14.2 and 14.5. Facilitative flexibility is permitted, subject to certain mandatory duties of the administrator which are set out in Article 8. But under Article 5.3, any limitation on the liability of administrators cannot extend to conduct which is dishonest or grossly negligent.

Article 6
Conferral of powers

1. The constitutive document may confer on a person any of the powers listed in Article 6.2, and may specify any conditions or duties which are to govern their exercise.

2. The powers which may be conferred under Article 6.1 are the power to -

   (a) remove the administrator;
   (b) appoint a new administrator;
   (c) designate new beneficiaries or replace existing beneficiaries;
   (d) amend a specified part or parts of the constitutive document;
   (e) stipulate the duration of the protected fund.

Note
Article 6 is intended to allow a broad commercial flexibility for the fund. Of course in many - perhaps in most - cases, none of these powers will be included in the constitutive document; and in a case where one or more is included, a person who chooses to acquire an interest as beneficiary will do so in the knowledge that the power exists.

The conferral of powers under Article 6 can be conditional: for example powers given to the administrator might be expressed as exercisable only after the death or incapacity of the originator or fonder. Equally, it can be made subject to duties, which might restrict or extend the manner in which the Article 6 powers are to be exercised.

Article 7
The administrator

1. The administrator must be -

   (a) a legal person having its registered office or an establishment in a Member State; or
   (b) a natural person who is a resident of a Member State, and must in addition belong to one of the categories of person set out in the Annex to this Directive.
2. The first administrator is appointed by the constitutive document.

3. A subsequent administrator may be appointed by -

   (a) a person empowered by the constitutive document so to do; or
   (b) the court on the application of any beneficiary, enforcer, or the administrator.

4. An appointment as administrator takes effect only when the appointment is accepted.

5. An appointment as subsequent administrator has the effect of vesting in the person so appointed the assets and liabilities comprised in the patrimony of the protected fund, but without prejudice to any laws of Member States which require the completion of special formalities for the transfer of certain assets to be effective as against third parties.

6. If the constitutive document does not make provision as respects the remuneration of the administrator, the administrator is entitled to reasonable remuneration.

7. A person may resign as administrator only to the extent permitted by the constitutive document, and such resignation takes effect only when a replacement administrator has accepted appointment.

8. A person may be removed as administrator by -

   (a) a person empowered by the constitutive document so to do; or
   (b) the court on the application of any beneficiary, enforcer or the administrator.

*Note*
Because protected funds will have a significant role in the commercial and financial sector of the EU, only restricted categories of regulated and responsible persons operating within the EU can act as an administrator. Normally there is only one administrator, but it is permissible to have two administrators (but no more): see Article 14.

The office of administrator is central to the protected fund, and the fund is only established when the person designated as administrator accepts appointment (Article 4.1). On the other hand, if the administrator dies or is wound up, the protected fund continues to exist and a replacement administrator will be appointed under Article 7.3.

In terms of Article 6 the constitutive document may confer power - typically on an originator, funder or significant beneficiary - to appoint or to remove administrators. But in any event the court has a power of appointment and removal, on the application of the administrator, a beneficiary or an enforcer (including an enforcer appointed by a State under Article 9.2). See Articles 7.3 and 7.8. *Court can include some other institution indicated by the law of a Member State (Article 2).* Among the grounds on which a court...
might remove an administrator are mental, incapacity and insolvency.

As a professional entity on which the beneficiaries rely, the administrator has no general power to resign, although a power to resign, qualified or unqualified, may be conferred by the constitutive document (Article 7.7). In addition, the administrator could apply to the court under Article 7.8 for its own removal and replacement if there were good reasons for doing so. If the reason is inadequate remuneration, an alternative course of action would be for the administrator to apply to the court, under Articles 7.6 and 11.1(b), for payment of reasonable remuneration.

Article 7.5 provides for universal succession by the new administrator, thus avoiding the need for the individual transfer of assets. But it will still be necessary to comply with any rules as to third party validity (typically registration in a land or other register). This provision is modelled on Article 19.3 of the Merger Directive (the Third Council Directive 78/855).

**Article 8**

**Obligations of the administrator**

1. The administrator must comply with the constitutive document, and must act loyally and honestly in the best interests of the beneficiaries.

2. The administrator must take care of the assets of the protected fund, and maintain accurate accounts.

3. The administrator must keep the assets of the fund separate from the assets of other patrimonies, but the pooling of assets between protected funds is permitted where authorised by the constitutive document.

4. The administrator must avoid a conflict of interest except where authorised by the constitutive document or by the law of the Member State or where acting in the best interests of the beneficiaries.

5. The administrator must act with the standard of care, skill and diligence to be expected of an experienced professional manager of assets; but subject to this duty and to the constitutive document, the administrator may delegate performance of particular duties.

6. Except to the extent that liability is limited by the constitutive document, the administrator must pay to the fund the amount of -

   (a) any loss to the fund resulting from a breach of the administrator’s duties;
   (b) any private profits which the administrator makes, directly or indirectly, from an unlawful conflict of interest.
7. A juridical act of the administrator is not invalid by reason only that it is in breach of the administrator's duties under the protected fund.

8. The duties of the administrator are owed to, and may be enforced by, any beneficiary or enforcer; and in that connection the administrator must provide a beneficiary or enforcer with such information as may reasonably be requested.

Note
Article 8.1 sets out the primary duties of the administrator. Any conduct in breach of these duties is unauthorised and results in liability to make good all losses without excuse. The amount of those losses must appear in the accounts of the fund as money due from the administrator.

Article 8.3 follows from the proposition that the assets of a protected fund form a patrimony separate from the private patrimony of the administrator and from the patrimony of any other protected fund held by the administrator (see Article 3.2). Normally, assets of a protected fund will be completely segregated from the assets of other patrimonies; but a constitutive document may provide for assets of different protected funds to be pooled for investment purposes, and this is unobjectionable provided there are accurate accounts which identify the separate fractional shares of the pool which belong to different patrimonies.

Article 8.5 must be read with Article 5.3, which places restrictions on the limitation of liability. The administrator will often be a professional investor of assets but, if not, it should delegate investment to a well-chosen and properly monitored professional investor. Article 8.5 makes clear that this is permitted. In turn, a professional investor-manager will be able to delegate to a foreign investor-manager the investment-management of a portfolio of foreign investments.

Article 8.6(a) covets losses incurred both in respect of (i) acts which were unauthorised and (ii) acts which, although authorised, were performed in a manner which breached some other duty, most notably that due under Article 8.5. Where a loss results from unauthorised acts (i.e., case (i)), such loss is remedied in the manner most favourable to beneficiaries, by way of a substitutive performance of the administrator's core duty to act loyally and honestly in the best interests of beneficiaries.

Example: the administrator makes an unauthorised sale of a fund asset for €Zx in order to buy for €2x an unauthorised asset for the fund or for itself

Naturally, the replacement asset is treated as an asset of the protected fund: see Article 3.5. If, however, such asset is only worth €1x when matters come to light, the administrator is personally liable to restore to the fund what the fund has lost. If the sold asset would now cost more than €2x to re-purchase (and so be restored to the fund as a proper performance of the duty to have retained the asset in the first place), the measure of this loss will be that cost less the €1x which represents the value of the replacement asset. But if re-purchase would cost less than €2x, the administrator is liable for the difference be-
tween the €2x proceeds of the unauthorised sale (that should have been held in a deposit account until invested in some authorised asset on behalf of the fund) and the €lx value of the replacement asset.

Article 8.6(b) concerns, not losses to the fund, but profits made by the administrator in breach of Article 8.4.

Even where an administrator acts in breach of the constitutive document or of its other duties, such an act is not in excess of the administrator's own capacity, both as a person and as owner of the fund assets. Consequently, the act itself is legally effective: see Article 8.7. Of course, that is not the end of the matter. The administrator will be liable to the beneficiaries out of its private patrimony for any loss which results.

If the unauthorised act is a contract, the administrator will be similarly liable to the third party with whom the contract was made: see Article 10.2(a). And if the unauthorised act involved the transfer of a fund asset, the laws of the Member States may provide further remedies against the transferee - for example on the ground of fraud or (if the transfer was gratuitous) unjustified enrichment. Beneficiaries are further protected by the fact that any money or other asset received on an unauthorised sale becomes part of the fund patrimony pursuant to Article 3.5.

As Article 8.8 makes clear, the duties of the administrator may be enforced by any beneficiary or by an enforcer appointed under Article 9. The administrator must provide a beneficiary or enforcer with such information as may reasonably be requested and may need to make documents or databases available for inspection. The remedies available are a matter for the laws of the Member State but are likely to include preventive orders, orders to augment the protected fund to make good any loss resulting from the administrator's conduct, and, in appropriate cases, orders for performance of specific duties.

Article 9

Enforcers

1. The constitutive document may appoint any person other than the administrator as an enforcer in respect of the duties owed by the administrator under the protected fund.

2. In addition, a Member State may appoint a person as an enforcer for all protected funds or for protected funds of a particular type.

Note

Article 9 allows an enforcer to be appointed either by the constitutive document or by a Member State. Of course it is not necessary to have an enforcer, because beneficiaries already have the power to enforce the administrator's duties (see Article 8.8), but sometimes it is desirable for an originator or (under (or the lawyer of such a person) to have enforcement rights as well.

Article 9.2 gives the option of restricting the enforcer to protected funds of a particular type. For example, Member States may choose to have a statutory regulator to oversee those protected funds which are
publicly marketed to investors, while leaving experienced investors involved in the wholesale (as opposed to retail) financial sector to look after their own interests.

**Article 10**

**Obligations to third parties**

1. The creditor in an obligation incurred by the administrator acting in accordance with its duties under the protected fund has a claim against -

   (a) the patrimony of the protected fund; and

   (b) the private patrimony of the administrator if, at the time when the obligation was incurred, the administrator did not disclose that it was acting as administrator.

2. The creditor in an obligation incurred by the administrator acting in breach of its duties under the protected fund has a claim against -

   (a) the private patrimony of the administrator; and

   (b) the patrimony of the protected fund if, at the time when the obligation was incurred, the administrator disclosed that it was acting as administrator;

   but there is no claim against the patrimony of the protected fund if the creditor knew or ought to have known without inquiry that the obligation was incurred in breach of the administrator's duties.

3. There is a right of relief from -

   (a) the patrimony of the protected fund in respect of performance exacted under Article 10.1(b);

   (b) the private patrimony of the administrator in respect of performance exacted under Article 10.2(b).

**Note**

Article 10 applies to contracts and other obligations incurred by an administrator, and allocates liability to one or both of the patrimony of the protected fund and the private patrimony of the administrator. In a case where both patrimonies are liable, a creditor is unrestricted in his choice of which to pursue.

Moneys due under an authorised obligation are normally claimed only from the patrimony of the protected fund. Where, under Article 10.1(b), it is claimed from the administrator's private patrimony, the administrator can be reimbursed from the fund patrimony (Article 10.3(a)).

Moneys due under an unauthorised obligation are normally claimed only from the private patrimony of the administrator. Where, under Article 10.2(b), it is claimed from the patrimony of the protected fund,
the beneficiaries or enforcer can ensure that the amount paid is reimbursed from the private patrimony (Article 10.3(b)).

Under the proviso to Article 10.2(b), a creditor cannot claim out of the fund moneys due under an unauthorised obligation if he “knew or ought to have known without inquiry” that the obligation was unauthorised. Thus, in the absence of actual knowledge of the administrator’s breach of its duties, or of special circumstances that would make such a breach obvious to an honest reasonable person, a creditor can claim moneys out of the fund. Following from Article 10 (coupled with Article 8.7), the general rule is that third parties can deal safely with administrators and have no need to examine the constitutive document.

**Article 11**

**Special court powers**

1. The court may on application -
   
   (a) direct the administrator as to the scope and the proper exercise of its duties;
   (b) make such other order as is available under the law applicable to the protected fund;
   (c) amend the constitutive document where expedient to do so, provided that no amendment may be made to the prejudice of a beneficiary except with the consent of that beneficiary.

2. Where assets remain in a protected fund but -
   
   (a) there are no beneficiaries and no persons (whether or not in existence) who can become beneficiaries; and
   (b) no provision is made in the constitutive document for the further disposal of the assets;

   the court may, on application, order that the assets be transferred to the funders in proportion to their original contribution and declare that, on completion of the transfer, the fund is terminated.

3. An application to the court -
   
   (a) under Article 11.1 may be made by the administrator, an enforcer, or a beneficiary;
   (b) under Article 11.2 may be made by the administrator, an enforcer, or a funder.

*Note*

Article 11 sets out certain special powers of the court. Court includes any other authority indicated by a Member State (Article 2).

Due to the potential duration of protected funds, it is important that the administrator can seek assistance from the court as to the scope of its duties and as to the proper construction of the constitutive document.
The necessary power is conferred by Article 11.1(a). This allows an administrator to obtain an authoritative ruling in advance on the validity of major acts, such as the sale of a controlling shareholding for €10 million, the compromise of a legal action for €20 million, or the payment of a foreign tax bill for €5 million.

Where proceedings are brought in a jurisdiction other than that of the applicable law, Article 11.1(b) allows the court to provide any remedial order available under the applicable law even if not ordinarily available in that jurisdiction.

After a number of years it may become expedient to amend the constitutive document so as to facilitate the best use of the assets of the fund, Article 11.1(c) confers a power of amendment on the court. Amendment (including varying, adding or deleting provisions) will normally occur only in respect of administrative, rather than distributive, provisions, and in any event no amendment can be made so as to prejudice a beneficiary without his consent. Article 11.1(c) supplements any power to amend conferred on a person by the constitutive document under Article 6.2(d).

To deal with the exceptional case where assets remain in the fund but there are no beneficiaries, no possibility of persons becoming beneficiaries and no provision for this eventuality in the constitutive document, Article 11.2 provides for return of the assets to the funders in proportion to their funding. Court proceedings are necessary as it is likely that there will be uncertainties to be resolved in tracing fencers and, if dead, their successors, and in ascertaining appropriate proportions. The court then declares the protected fund to be terminated, rather than leaving this to the act of the administrator under Article 12.

**Article 12**

**Termination**

1. Where there are no assets in a protected fund, and no prospect of future assets, the administrator can bring the protected fund to an end by signing a declaration of termination.

2. Where a protected fund is to subsist for a fixed period, the administrator must, as soon as that period expires -

   (a) distribute the fund’s assets in accordance with the constitutive document; and
   (b) bring the fund to an end by signing a declaration of termination.

3. The administrator must send a copy of the declaration of termination to -

   (a) such of the remaining beneficiaries as are traceable; and
   (b) any enforcer.
Note
In the ordinary course of events, the termination of a protected fund (which, of course, is not a legal person) is achieved by the administrator alone without the delay and expense of legal proceedings. Article 12.1 sets out the procedure. Normally, the reason for an absence of assets is that the assets have all been distributed in accordance with the constitutive document, although in theory it is possible that no assets were put into the fund in the first place. On the other hand, a fund does not come to an end merely because it has no assets - a state of affairs which may turn out to be temporary. The additional step of a declaration of termination is always required.

The court’s intervention is needed only where assets remain in the fund but there are no beneficiaries, no possibility of persons becoming beneficiaries and no provision for this eventuality in the constitutive document (Article 11.2). Application to the court for guidance under Article 11.1(a) is always possible if any issues arise affecting termination, eg as to whether a power to specify a shorter duration (Article 6.2(e)) has been duly exercised.

A declaration of termination is competent only if there are no assets or prospects of assets. So if the administrator was mistaken on this point, and further assets turn up, the declaration would be void, and the fund consequently still in existence.

Article 11.2 applies to fixed-term protected funds (see Article 5.1(b)) and makes clear that, once the term expires, any remaining assets must be distributed at once.

Any remaining beneficiary and any enforcer must be informed about the declaration of termination (Article 12.3), but even if this is not done the termination still takes effect.

Once a fund has terminated it cannot be revived, and a funder who wants to transfer further assets must establish a new fund.

Article 13
Shared positions

1. The administrator can also be a fonder and beneficiary, but not an originator or the sole beneficiary.

2. Any other person can, at the same time, be an originator, fonder, and beneficiary.

3. Where the administrator is a beneficiary, it cannot exercise its rights as such beneficiary for as long as and to the extent that it has liabilities outstanding under Article 8.6.

Note
An originator will often be the sole fonder or one of the funders. There is no reason why he should not also be a beneficiary. However, as Article 13.1 makes clear, he cannot also be administrator - in recognition of
the fact that the originator and administrator may need to negotiate the terms of the constitutive docu-
ment. Nonetheless, the technical requirement to have an originator for the creation of a protected fund
will be satisfied where the originator is a company which is a subsidiary company of the administrator or
is otherwise closely associated with the administrator. A funder can be the administrator.

An administrator will often be one of the beneficiaries, as in the case of a syndicated loan where the
loaned moneys have been provided by the administrator and several other beneficiaries who are content
to leave it to the administrator to look after their interests, after agreeing the terms of the constitutive
document. While, however, an administrator cannot be sole beneficiary (Article 13.1), it may be the sole
known beneficiary if the other beneficiaries are not yet ascertained.

Article 14
Joint administrators

1. There can be two persons acting as joint administrators, in which case the modifications set out in
this Article apply.

2. Unless the constitutive document otherwise provides, the powers of the administrator must be
exercised jointly and may not be delegated by one joint administrator to the other; but one joint
administrator may act alone in order to -

(a) resign as administrator;
(b) appoint or remove a person as administrator, if so authorised in the constitutive document;
(c) obtain reimbursement of money due; or
(d) make an application to the court.

3. The appointment of a subsequent joint administrator vests the assets and liabilities comprised in the
patrimony of the protected fund in both joint administrators.

4. Except where the other joint administrator has already resigned, or resigns at the same time, the
resignation of a joint administrator takes effect immediately.

5. Unless the constitutive document otherwise provides, each joint administrator is liable in respect of
any breach of duty by the other administrator, but without prejudice to a right of relief against that
administrator.

Note
It is possible to have two (but not more than two) administrators. But as administrators must be members
of a restricted and regulated class of persons (Article 7) it will be unusual for beneficiaries to need the
protection of a second administrator. A system of joint administrators might be attractive to lawyers and
accountants who wish to hold clients’ money in a protected fund.

Article 14 makes modifications to the rest of the Directive in order to accommodate joint administrators. As a general rule, both administrators must act together (Article 14.2), and each is individually liable for the duties incumbent on the administrator and so will wish to monitor the other’s conduct (Article 14.5). But there may be special reasons why the originator wishes each administrator to have separate functions, with full autonomy to act alone, and appropriate provision can be made in the constitutive document.

Article 14.3 makes a necessary adjustment to the normal rule set out in Article 7.5. So if A and B are joint administrators, and B resigns to be replaced by C, the assets and liabilities of the fund pass to A and C jointly.

Article 14.4 marks out an exception to Article 7.7 (which provides that a resignation does not take effect until a new administrator has been appointed).

**Article 15**

**jurisdiction**

1. For the purposes of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a protected fund is regarded as a trust and an enforcer as a beneficiary.

2. A protected fund has the same domicile as its administrator.

**Note**

When applying Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, “settlor” should read “fonder” and “trustee” should read “administrator”, while Article 5(6) of the Regulation also applies to enforcers.

**Article 16**

**Mutual Recognition**

Each Member State shall recognise a protected fund created under the law of any other Member State.

**Article 17**

**Review**

1. Following the implementation of this Directive, the Commission shall examine the functioning of the protected fund. It should seek to analyse and detail the difficulties that are [possible problems].
2. Not later than [date] the Commission shall report to the European Parliament and the Council on the problems facing [... ], and shall submit, where appropriate, proposals to amend and/or further harmonise the protected fund.

Article 18
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [date]. They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 19
Entry into force

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

Article 20
Addressees

This Directive is addressed to the Member States.

Done at Brussels, [date].

For the European Parliament
The President
[name]

For the Council
The President
[name]

No remarks.
Annex

Categories of person who can be appointed as administrator

The administrator must belong to one of the following categories:

1. a public authority (excluding publicly guaranteed undertakings) including: (i) public sector bodies of Member States charged with or intervening in the management of assets, and (ii) public sector bodies of Member States authorised to hold accounts or assets for customers;
2. a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in Article 1(19) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (1), the International Monetary Fund and the European Investment Bank;
3. a financial institution subject to prudential supervision including:
   (a) a credit institution as defined in Article 1(1) of Directive 2000/12/EC, including the institutions listed in Article 2(3) of that Directive;
   (b) an investment firm as defined in Article 1(2) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (1);
   (c) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;
   (d) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (2) and a life assurance undertaking as defined in Article 1(a) of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance (3);
   (e) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (4); and
4. a central counterparty, settlement agent or clearing house, as defined respectively in Article 2(c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive, and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points 3 (a) to (d);
5. public notaries, lawyers admitted to the bar, accountants and bailiffs.
Note
These are illustrative categories only. Categories 1-4 are taken from the Financial Collateral Directive. The precise competition of the list would necessarily be a matter for further discussion and consultation.

Endnotes:

1 In Article la(2) a management company is defined as any company, the regular business of which is the management of UCITS (= undertakings for collective investment in transferable securities) in the form of unit trusts/common funds and/or of investment companies (collective portfolio management of UCITS); this includes the functions mentioned in Annex II. The functions included in the activity of collective portfolio management mentioned in Annex II are: (1) Investment management; (2) Administration: (a) legal and fund management accounting services; (b) customer inquiries; (c) valuation and pricing (including tax returns); (d) regulatory compliance monitoring; (e) maintenance of unit-hold register; (f) distribution of income; (g) unit issues and redemptions; (h) contract settlements (including certificate dispatch); and (i) record keeping; and (3) Marketing.