

Undertakings for collective investment in transferable securities (UCITS): depositary functions, remuneration policies and sanctions

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The Committee on Economic and Monetary Affairs adopted the report by Sven GIEGOLD (Greens/EFA, DE) on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

The committee recommends that Parliament adopt its position in first reading following the ordinary legislative procedure, and amend the Commission proposal. The amendments are the result of a compromise agreement between Parliament and Council. The main amendments are as follows:

Scope: the remuneration policies and practices shall cover fixed **and variable** components of salaries and discretionary pension benefits.

Bonus cap: the report states that competent authorities must set the appropriate ratios between the fixed and the variable component of the total remuneration and the **variable component must not exceed one time the fixed component of the total remuneration**.

The committee **retained the Commission text where at least 50% of any variable remuneration must consist of units of the UCITS concerned**, or equivalent, unless the management of UCITS accounts for less than 50% of the total portfolio managed by the management company, in which case the minimum of 50% does not apply.

Deferral: a substantial portion, and in any event **at least 25%, of the variable remuneration component, must be deferred over a period which is appropriate** in view of the life cycle and redemption policy of the UCITS concerned and is correctly aligned with the nature of the risks of the UCITS in question.

Disclosure: comprehensive, accurate and timely information about remuneration practices must be disclosed to all stakeholders in a durable medium or by means of a website and a paper copy is delivered free of charge upon request.

Persons to whom new rules apply: the committee states that the remuneration policies shall be extended to any employee or any other member of staff such as, but not limited to, **temporary or contractual staff, at fund or subfund level** who are: (i) fund managers; (ii) other persons who take investment decisions that affect the risk position of the fund; (iii) other persons who have the power to exercise influence on such staff including investment policy advisors and analysts; (iv) senior management, risk takers, personnel in control functions; or (v) any other employee or member of staff such as, but not limited to, temporary or contractual staff receiving total remuneration that falls within the remuneration bracket of senior management and decision takers and whose professional activities have a material impact on the risk profiles of the management companies or of UCITS they manage.

Remuneration committee: a new amendment states that the remuneration committee shall **include employee representatives** and shall ensure that its rules enable shareholders to act in concert. When preparing such decisions, the remuneration committee shall take into account the long-term interest of stakeholders, investors and the public interest.

Furthermore, Members specify that the **remuneration system shall not be primarily controlled by the chief executive officer and the management team**. Members of the management body who perform executive functions shall not determine the remuneration policy. Relevant body members and employees involved in setting the remuneration policy and its implementation shall be **independent** and have expertise in risk management and remuneration.

Align policies with AIFMD: guidelines produced by ESMA on remuneration policies should, where appropriate, be aligned as far as possible with those for funds regulated under the Alternative Investment Fund Managers Directive (AIFMD). Furthermore, ESMA should supervise the adequate enforcement of those guidelines by national authorities. Deficiencies should be addressed promptly with supervisory action in order to safeguard the level playing field across the internal market.

Management company fees: the report includes some changes to the rules on management company fees:

- a variable component shall **vary only in proportion to the size of the fund or to the value of the assets under management**, unless the UCITS is exclusively distributed to professional clients as defined in Directive 2004/39/EC;
- any other variable components have to fulfil the following criteria: (i) they must be calculated on the basis of an adequate benchmark which reproduces as closely as possible the portfolio of the UCITS; (ii) the reference period must be at least one year; (iii) **they must reflect performance in comparison to the benchmark symmetrically** and, accordingly, additional remuneration for out performance of the benchmark must correspond to equally high deductions in the case of underperformance; and (iv) information on the means by which any variable component is calculated must be provided to investors in a concise manner and in non-technical language, both in the prospectus and in the key investor information and that information must demonstrate how the variable component is affected symmetrically by both good and poor performance of the UCITS, how it is calculated and contain realistic examples of absolute amounts accumulated during a one year period.

The Commission shall adopt delegated acts concerning, measures specifying requirements for benchmark portfolios and indices which are sufficiently comparable to the UCITS, holding periods and how the symmetrical effect of good and poor performance shall be determined.

In addition to such pro rata remuneration & other variable remuneration, **only costs directly linked to the maintenance and protection of investments**, should be charged to the fund by the management company.

Lastly, the Commission is invited to **assess which are the common product related costs and expenses in the Member States for retail investment products**. It should launch a consultation exercise and conduct an impact assessment, to be followed by a legislative process if there is a need for further harmonisation.

Depositary rules: the main amendments are as follows:

- the rules have been extended to national central banks and **any other category of institution** that is subject to prudential regulation and ongoing supervision provided that it is subject to capital requirements as well as to prudential and organisational requirements of the same effect as authorized credit institutions and investment firms;
- a new provision states that **the financial instruments held in custody by the depositary should not be reused** by the depositary or by any third party to whom the custody function has been delegated for their own account.

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

Lastly, neither the depositary nor any of its delegates shall carry out activities with regard to the UCITS or the management company on behalf of the UCITS that may create conflicts of interest between the UCITS, the investors in the UCITS, the management company and itself, **unless the depositary has ensured that there is functional and hierarchical separation** of the performance of potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the UCITS.

Sanctions: administrative sanctions must include public warnings, a temporary or permanent ban and **effective, proportionate and dissuasive** administrative pecuniary sanctions (rather than the fixed limits in the Commission proposal.)

With regard to **whistleblowers**, the text states that the competent authorities and ESMA must provide one or more secure communication channels for persons to provide notification of breaches. Member States shall ensure that the identity of the persons making such notifications by way of those channels is known only to the national competent authority.