

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

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OPINION OF THE EUROPEAN CENTRAL BANK (ECB).

On 19 September 2012, the European Central Bank (ECB) received a request from the European Parliament for an opinion on a 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 ECB **broadly welcomes the proposed directive**. However, it makes the following observations:

- **Reuse of assets by a UCITS depositary** : the ECB considers that the proposed directive should explicitly prohibit a UCITS depositary or any party to whom the custody of a UCITS fund has been delegated from reusing the assets under its management for its own account.
- **Delegation** : the proposed directive allows a depositary's safekeeping duties to be delegated to a sub-custodian under certain conditions. In this respect, the ECB considers that protection of retail investors requires more stringent rules for UCITS depositaries than for depositaries appointed by alternative investment funds managers. In particular, the delegation by a UCITS depositary to a sub-custodian located outside the European Union should be subject in all cases to appropriate safeguards, such as minimum capital requirements and effective supervision in the country concerned.
- **Eligibility to act as a UCITS custodian** : the ECB supports the introduction of eligibility conditions according to which only credit institutions and investment firms may act as UCITS depositaries. Moreover, it should be further assessed whether the proposed regime for capital requirements for credit institutions and investment firms provides for adequate safeguards in relation to the exercise of the UCITS depositary functions.
- **Liability** : the ECB considers that the 'external events beyond reasonable control' which trigger the possibility for a depositary to discharge liability by contract should be specified in the Commission delegated acts in a detailed manner.