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

2012/0168(COD) - 03/07/2013 - Text adopted by Parliament, partial vote at 1st reading/single reading

The European Parliament adopted amendments to 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 matter has been referred back to the competent committee. The vote has been put back to a later plenary session.

Bonus cap: the amended text states that remuneration policies and practices shall cover fixed and variable components of salaries and discretionary pension benefits. Guaranteed variable remuneration should be **exceptional** because it is not consistent with sound risk management or the pay-for-performance principle and should not be a part of prospective compensation plans.

Parliament **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.

The amended text provides that **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.

Remuneration paid from the fund to management companies should, like the remuneration paid by management companies to their staff, be consistent with sound and effective risk management and with the interests of investors.

In addition to pro rata remuneration, it should be possible for costs and expenses directly linked to the maintenance and safeguarding of investments, such as those for legal action, protection or enforcement of the rights of the unit-holder or for retrieval of or compensation for lost assets, to be charged to the fund by the management company.

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 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 system: the amendments 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.

Remuneration committee: a new amendment states that the remuneration committee, set up, where appropriate, in accordance with ESMA guidelines**,** 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.

Depositary rules: 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.

Furthermore, 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.

The Commission must **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. That analysis should be submitted to the European Parliament and to the Council, together with legislative proposals if necessary.

Management company fees: Parliament rejected amendments made by its competent committee with regard to management company fees.

Role of the European Securities and Markets Authority (ESMA): ESMA shall, in cooperation with the competent authorities, monitor the remuneration policies, and, in the case of a breach may act in accordance with its powers under Regulation (EU) No 1095/2010, in particular by addressing recommendations to the competent authorities to prohibit temporarily, or restrict, the application of particular remuneration policies.

In order to promote supervisory convergence in the assessment of remuneration policies and practices, ESMA should provide further instructions on partial neutralisation of the remuneration principles reconcilable with the risk profile, risk appetite and the strategy of the management company and the UCITS it manages. ESMA's guidelines on remuneration policies should, where appropriate, be aligned, to the extent possible, with those for funds regulated under Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers. Furthermore, ESMA should

supervise the adequate enforcement of those guidelines by competent authorities. Deficiencies should be addressed promptly with supervisory action in order to safeguard the level playing field across the internal market.

Sanctions: administrative sanctions must include public warnings, a temporary or permanent ban and **effective, proportionate and dissuasive** administrative pecuniary sanctions of up to **ten times** the amount of the profits gained or losses avoided because of the breach where those can be determined.

Sanctions must be **effective, proportionate and dissuasive and** take into account **the damage to other persons and, where applicable, the damage to the functioning of markets or the wider economy** insofar as they can be determined.

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 and ESMA.**