

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

2012/0168(COD) - 15/04/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 607 votes to 28 with 34 abstentions, a legislative resolution 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 had been referred back to the competent committee during the plenary session of 3 July 2013.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary were the result of a compromise between Parliament and Council. They amend the Commission proposal as follows:

Remuneration policy: Parliament and council retained this part of the commission proposal whereby **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.

A recital stated that **guaranteed variable remuneration** should be exceptional because it was not consistent with sound risk management or the pay-for-performance principle and should be limited to the first year.

Parliament specified that the remuneration policy must be **adopted by the management body of the management company** in its supervisory function. That body must adopt and at least annually review the general principles of the remuneration policy and be responsible for and oversee its implementation.

The amended text stated that the assessment of performance must be set in a **multi-year framework appropriate to the holding period recommended to the investors of the UCITS** managed by the management company in order to ensure that the assessment process is based on longer term performance of the UCITS and its investment risks and that the actual payment of performance-based components of remuneration is spread over the same period.

When preparing its decisions, the **remuneration committee** shall take into account the long-term interest of investors and other stakeholders and the public interest.

Categories of staff concerned: a recital noted that remuneration policies and practices should concern: (i) any employee and any other member of staff at fund or sub-fund level who are decision takers, fund managers and persons who take real investment decisions, (ii) persons who have the power to exercise influence on such employees or members of staff, including investment advisors and analysts, (iii) senior management (iv) any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and decision takers.

Depositories: the amended text stated that the depositary should provide the management company or the investment company, on a regular basis, with a **comprehensive inventory** of all of the assets of the UCITS. No company shall act as both management company and depositary. In carrying out their

respective functions, the investment company and the depositary shall act **honestly, fairly, professionally, independently and solely** in the interest of the investors of the UCITS.

The entities permitted to act as UCITS depositaries should be limited to:

- national central banks,
- credit institutions, and
- **other legal entities authorised** under the laws of Member States to carry on depositary activities under this Directive, which are subject to prudential supervision and capital adequacy requirements, have own funds not less than the amount of initial capital under Directive 2013/36/EU and have their registered office or a branch in the UCITS home Member State.

A new clause stated that the assets 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. The assets held in custody by the depositary are only allowed to be reused subject to certain conditions.

The Commission was invited to analyse in which situations the failure of a UCITS depositary or a sub-custodian could lead to losses to UCITS unit holders which were not recoverable under the Directive, to analyse further what kind of measures could be adequate to ensure a high level of investor protection, whatever the chain of intermediation between the investor and the transferable securities affected by the failure, and to submit its findings to the European Parliament and to the Council.

Role of ESMA: in order to promote supervisory convergence in the assessment of remuneration policies and practices, the European Supervisory Authority (European Securities and Markets Authority) (ESMA), should ensure the existence of **guidelines** on sound remuneration policies in the asset management sector.

Detecting the existence of breaches of the law: to this end, competent authorities should be able to require existing **recordings of telephone conversations**, electronic communications and data traffic records held by a UCITS, management companies, investment companies, depositaries or any other entities regulated by the Directive.

Sanctions: the administrative penalties and other administrative measures that may be applied include at least the following:

- a **public statement** which identifies the person responsible and the nature of the breach.
- **an order** requiring the person responsible to cease the conduct and to desist from a repetition of that conduct;
- in the case of a management company or a UCITS, **suspension or withdrawal** of the authorisation of the management company or the UCITS;
- a temporary or, for repeated serious breaches, a **permanent ban** against a member of the management company's or investment company's management body;
- in case of a **legal person**, maximum administrative pecuniary sanctions of at least EUR 5 000 000 or 10 % of the total annual turnover of the legal ;
- in case of a **natural person**, maximum administrative pecuniary sanctions of at least EUR 5 000 000,
- or, maximum administrative pecuniary sanctions of at least twice the amount of the benefit derived from the infringement.

In order to enable ESMA to further strengthen consistency in supervisory outcomes, all **publicly disclosed sanctions** should be simultaneously reported to ESMA, which should also publish an annual report on all sanctions imposed.

Competent authorities should be entrusted with the necessary **investigatory powers**, and should establish effective mechanisms to encourage reporting of potential or actual breaches.

Communication channels for the **reporting of those potential and actual breaches** should be established also by ESMA. Information on potential and actual breaches communicated to ESMA should only be used for the performance of ESMA's tasks.