

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

2012/0168(COD) - 23/07/2014 - Final act

PURPOSE: to improve investors' confidence in undertakings of collective investment in transferable securities (UCITS) through strengthening requirements on depositary functions, remuneration policies and sanctions for serious breaches.

LEGISLATIVE ACT: Directive 2014/91/EU 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.

CONTENT: the Directive amends Directive 2009/65/EC regarding undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

Depositary functions: the Directive introduces specific provisions on the **depositary's safekeeping and oversight duties**, and defining the conditions in which safekeeping duties can be delegated to a sub-custodian.

Under the previous rules before the enactment of this Directive, all assets of a UCITS fund had to be entrusted to a depositary. The depositary was liable for losses suffered as a result of a failure to perform its duties, though the precise contours of those duties were defined by the laws of the Member States. As a result, different approaches had developed across the EU.

The new Directive therefore **sets out a list of entities that are eligible to act as UCITS depositaries**. Such an entity must be:

- a national central bank;
- a credit institution
- another legal entity, authorised by the competent authority under the law of the Member State to carry out depositary activities under this Directive, which is subject to capital adequacy requirements and which has 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.

The new Directive **clarifies the depositary's liability in the event of the loss of a financial instrument held in custody**. In such a case, the depositary will be liable, where a financial instrument held in custody has been lost, to return a financial instrument of an identical type or the corresponding amount to the UCITS. No discharge of liability in the case of loss of assets should be envisaged, except where the depositary is able to prove that the loss is due to an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

The Directive states that no company shall act as both management company and depositary. In performing its tasks, a depositary should act **honestly, fairly, professionally, independently** and in the interest of the UCITS and of the investors of the UCITS.

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.

Remuneration policy: the directive introduces a requirement for the UCITS management company to implement policy that is consistent with sound risk management and complies with minimum principles. Remuneration policy must, in particular:

- include fixed and variable components of salaries and discretionary pension benefits; **guaranteed variable remuneration is exceptional**, occurs only in the context of hiring new staff and is limited to the first year of engagement;
- apply to those **categories of staff**, including senior management, risk takers, control functions and any employee receiving total remuneration that falls within the remuneration bracket of senior management;
- be in line with the **business strategy**, objectives, values and interests of the management company and the UCITS that it manages and of the investors in such UCITS, and includes measures to avoid conflicts of interest;
- **be adopted by the management body** of the management company in its supervisory function and be overseen by it;
- at least annually, be subject to central and independent **internal review**.

The Directive provides that **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.

Furthermore, at least **40 %**, of the **variable remuneration component**, must be deferred over an appropriate period in view of the holding period recommended to the investors of the UCITS concerned and be correctly aligned with the nature of the risks of the UCITS in question.

Sanctions: the Directive lays down the administrative sanctions and measures that the authorities should be empowered do apply.

- Administrative sanctions for legal persons are set to **10 % of total annual turnover or up to at least EUR 5 million**, for natural persons up to at least EUR 5 million, or in both cases up to at least twice the amount of the benefit derived from the infringement, if this benefit can be determined.
- Competent authorities will 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.
- Competent authorities will have the investigative powers necessary to put in place effective and reliable mechanisms to **encourage the reporting of potential or actual infringements**. Information on infringements communicated to ESMA should be used only for the performance of ESMA's tasks.

- Save in certain well-defined circumstances, **sanctions should be published** in order to strengthen their dissuasive effect on the public at large and to inform them about infringements that may be detrimental to investor protection. In order to ensure compliance with the principle of proportionality, sanctions should be published on an anonymous basis where publication would cause a disproportionate damage to the parties involved.

ENTRY INTO FORCE: 17.9.2014.

TRANSPOSITION: 18.3.2016.

APPLICATION: from 18.3.2016.

DELEGATED ACTS: the Commission may adopt delegated acts to ensure that the objectives of the Directive are achieved. Power to adopt such acts is conferred on the Commission for a period of **four years from 4 January 2011**, 21 July 2011, 20 June 2013 and 17 September 2014, depending on the provisions. The European Parliament or the Council may formulate objections to a delegated act within a period of **three months** of notification of that act (that period may be extended by three months). If Parliament or Council raise objections, the delegated act will not enter into force.