

Basic information	
<b>2012/0168(COD)</b>  COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Undertakings for collective investment in transferable securities (UCITS): depositary functions, remuneration policies and sanctions	
Amending Directive 2009/65/EC <a href="#">2008/0153(COD)</a> See also <a href="#">2017/2013(INI)</a>	
<b>Subject</b>  2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.10 Financial supervision 3.45.01 Company law 3.45.03 Financial management of undertakings, business loans, accounting 7.40.02 Judicial cooperation in civil and commercial matters	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	<b>ECON</b> Economic and Monetary Affairs	GIEGOLD Sven (Verts/ALE)	10/05/2011
		Shadow rapporteur  MANN Thomas (PPE)  MCCARTHY Arlene (S&D)  JENSEN Anne E. (ALDE)  KAMALL Syed (ECR)  CHOUNTIS Nikolaos (GUE/NGL)	
	Committee for opinion	Rapporteur for opinion	Appointed
	<b>JURI</b> Legal Affairs	The committee decided not to give an opinion.	
Council of the European Union	Council configuration	Meetings	Date
	General Affairs	3331	2014-07-23
European Commission	Commission DG	Commissioner	
	Financial Stability, Financial Services and Capital Markets Union	BARNIER Michel	

Key events				
Date	Event	Reference	Summary	
03/07/2012	Legislative proposal published	COM(2012)0350 	Summary	
11/09/2012	Committee referral announced in Parliament, 1st reading			
21/03/2013	Vote in committee, 1st reading			
29/04/2013	Committee report tabled for plenary, 1st reading	A7-0125/2013	Summary	
02/07/2013	Debate in Parliament			
03/07/2013	Decision by Parliament, 1st reading	T7-0309/2013	Summary	
03/07/2013	Results of vote in Parliament			
15/04/2014	Decision by Parliament, 1st reading	T7-0355/2014	Summary	
15/04/2014	Results of vote in Parliament			
23/07/2014	Act adopted by Council after Parliament's 1st reading			
23/07/2014	Final act signed			
23/07/2014	End of procedure in Parliament			
28/08/2014	Final act published in Official Journal			

Technical information	
Procedure reference	2012/0168(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Amendments and repeals	Amending Directive 2009/65/EC <a href="#">2008/0153(COD)</a> See also <a href="#">2017/2013(INI)</a>
Legal basis	Treaty on the Functioning of the EU TFEU 053-p1
Mandatory consultation of other institutions	European Central Bank
Stage reached in procedure	Procedure completed
Committee dossier	ECON/7/10010

Documentation gateway				
European Parliament				
Document type	Committee	Reference	Date	Summary

Committee draft report		PE500.449	09/11/2012	
Amendments tabled in committee		PE502.071	11/01/2013	
Committee report tabled for plenary, 1st reading/single reading		A7-0125/2013	29/04/2013	<a href="#">Summary</a>
Text adopted by Parliament, partial vote at 1st reading /single reading		T7-0309/2013	03/07/2013	<a href="#">Summary</a>
Text adopted by Parliament, 1st reading/single reading		T7-0355/2014	15/04/2014	<a href="#">Summary</a>

#### Council of the EU

Document type	Reference	Date	Summary
Draft final act	00075/2014/LEX	23/07/2014	

#### European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2012)0350 	03/07/2012	<a href="#">Summary</a>
Document attached to the procedure	SWD(2012)0185 	03/07/2012	
Document attached to the procedure	SWD(2012)0186 	03/07/2012	
Commission response to text adopted in plenary	SP(2014)471	09/07/2014	

#### National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	PT_PARLIAMENT	COM(2012)0350	11/10/2012	
Contribution	IT_SENATE	COM(2012)0350	04/12/2012	

#### Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
ECB	European Central Bank: opinion, guideline, report	CON/2013/0004 OJ C 096 04.04.2013, p. 0018	14/01/2013	<a href="#">Summary</a>

Additional information		
Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	
European Commission	EUR-Lex	

## Final act

Corrigendum to final act 32014L0091R(01)  
OJ L 052 27.02.2016, p. 0037

Directive 2014/0091  
OJ L 257 28.08.2014, p. 0186

Summary

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

2012/0168(COD) - 03/07/2012 - Legislative proposal

PURPOSE: to improve investors' confidence in undertakings of collective investment in transferable securities (UCITS).

PROPOSED ACT: Directive of the European Parliament and of the Council.

BACKGROUND: since the UCITS Directive was adopted in 1985, the rules relating to depositaries in the Directive have remained unchanged. These rules consist of a number of generic principles **setting out the duties of depositaries**. The Directive makes reference to national laws in respect of the precise contours of these duties. This leaves considerable scope for diverging interpretations regarding the scope of a depositary's duties and the liability for the negligent performance thereof.

As a result, **different approaches have developed across the European Union**, leading to UCITS investors facing uneven levels of protection in different jurisdictions. The potential consequences of national divergences in the liability standard came to the fore following the Lehman Brothers bankruptcy and the Madoff fraud. **The Madoff case** raised several important issues in relation to UCITS funds particularly regarding the precise conditions under which a depositary acting on behalf of a UCITS fund can delegate safekeeping of assets to a sub-custodian. The Madoff case also raises the issue of conflicts of interest.

The Commission considers it necessary to amend [Directive 2009/65/EC](#) in order to take into account market developments and the experiences of market participants and supervisors gathered so far, in particular to address discrepancies between national provisions in respect of depositaries' duties and liability, remuneration policy and sanctions.

This proposal forms part of a wider **legislative package** dedicated to rebuilding consumer trust in financial markets. The package has two other parts:

- the first is [an extensive overhaul of the Insurance Mediation Directive 2002/92/EC](#) to ensure a high level of protection when buying insurance products;
- the second part is [a proposal for a regulation on key information documents](#) on investment products, aiming at improving transparency in the investment market for retail investors.

IMPACT ASSESSMENT: the impact assessment focused on five issues. Its main conclusions are as follows:

1. **Eligibility to act as a depositary:** both credit institutions and regulated investment firms provide sufficient guarantees in terms of prudential regulation, capital requirements and effective supervision to act as UCITS depositaries. Other institutions (such as law firms, notaries) are not deemed to provide these guarantees and would have, if they wished to act as UCITS depositaries, to transform themselves into regulated investment firms. As most UCITS depositaries are already credit institutions or regulated investment firms, the impact of the chosen option would thus only concern a small minority of unlicensed service providers.
2. **Delegation of custody:** the delegation of custody should be governed by rules on diligence in selecting an appointing a sub-custodian, and on the ongoing monitoring of the activities of the sub-custodian.
3. **Liability:** a 'strict liability' standard obliging depositaries to return instruments lost in custody irrespective of fault or negligence is both conducive to ensuring a high level of investor protection and to achieving a uniform standard across the EU.
4. **Remuneration:** the proposal envisages introducing a requirement for the UCITS management company to implement remuneration policy that is consistent with sound risk management of the UCITS fund and complies with minimum remuneration principles.
5. **Sanctions:** the policy choice is to achieve minimum harmonisation of the sanctions regime. This regime would apply to a catalogue of breaches of main investor protection safeguards in the UCITS Directive.

LEGAL BASIS: Article 53(1) of the Treaty on the Functioning of the European Union.

CONTENT: the proposal aims to amend Directive 2009/65/EC on UCITS as regards depositary functions, remuneration policies and sanctions. The main points of the proposal are as follows:

**Rules on depositaries' duties:** in relation to the depositary's core safekeeping and oversight duties, the draft proposes to amend the UCITS Directive in the following manner:

- **appointment of a single depositary** for each UCITS fund in order to ensure that one fund cannot have several depositaries. The appointment of a depositary shall be evidenced by written contract;
- **making uniform a list of oversight duties of depositaries** of UCITS established in a contractual form and UCITS established in a corporate form. These duties involve: (i) verifying compliance with applicable rules when UCITS shares are sold, issued, re-purchased, redeemed and cancelled; (ii) verifying that any consideration is remitted to it within the usual time limits; (iii) verifying that the investment company's income is applied in accordance with its instruments of incorporation, ensuring that the value of units in a UCITS is calculated in accordance with the applicable national law and the fund rules; (iv) and carrying out instructions of the management or investment company;
- detailed provisions on **cash monitoring** in order to equip the depositary with a view over all the assets of the UCITS, cash included. The proposal also ensures that no cash account associated with the funds' transactions shall be opened without the depositary's knowledge. The aim is to avoid the possibility of fraudulent cash transfers. This paragraph also introduces a segregation requirement, so that any financial instruments on the depositary's book held for a UCITS can be distinguished from the depositary's own assets and can at all times be identified as belonging to that UCITS;
- introduction of a distinction between (a) **custodial duties** relating to financial instruments that can be held in custody by the depositary and (b) **verification** of the ownership duties relating to the remaining types of assets;
- introduction of a series of customary provisions on **professional conduct**, the avoidance of and the management of conflicts of interest.

**Rules on delegation:**

- the proposal defines the conditions in which the depositary's safekeeping duties can be delegated to a sub-custodian (the conditions upon which a UCITS depositary may entrust its safekeeping duties to a third party are aligned with those applicable under the Alternative Investment Fund Management Directive).

**Rules on eligibility to act as a UCITS custodian:**

- introduction of an exhaustive list of entities that are eligible to act as depositaries. The policy choice is to only allow credit institutions and investment firms to act as UCITS depositaries.

**Rules on liability:**

- clarification of the UCITS depositary's liability in case of the loss of a financial instrument that is held in custody. Where a financial instrument held in custody is lost, the UCITS depositary shall be under the obligation to return a financial instrument of the identical type or of the corresponding amount to the UCITS. **No further discharge of liability** in case of loss of assets is envisaged, except where the depositary can prove that the loss is due to an 'external event beyond its reasonable control';
- the depositary's liability is not affected by the fact that it has entrusted to a third party all or some of its custody tasks. As a result, the depositary is obliged to return instruments held in custody that are lost, **even if the loss was incurred by the sub-custodian**.

**Redress:**

- alignment of the rights of investors in both corporate and contractual UCITS so that they are able to invoke claims relating to the liabilities of depositaries, either directly or indirectly (through the management company), depending on the legal nature of the relationship between the depositary, the management company and the unit-holders.

**Remuneration:**

- the proposal reflects current policy on remuneration of senior management, risk takers and those who exercise control functions. These principles should also apply to those that manage a UCITS fund, be it managed in the form of an investment company or in the form of a management company.

**Access to telephone and data records:**

- competent authorities will be able to require existing telephone and existing data traffic records held by a telecommunication operator or by a UCITS, a management company, an investment company or a depositary, where a reasonable suspicion exists that such records related to the subject-matter of the inspection may be relevant to prove a breach of the provisions of the UCITS Directive.

**Sanctions and measures:**

- a common approach to the main breaches of the UCITS Directive. The proposal sets out a list of the main breaches. It also lays down the administrative sanctions and measures that the competent authorities should be empowered to apply in case of the main breaches.

**BUDGETARY IMPLICATIONS:** the proposal has no implications for the EU budget.

**DELEGATED ACTS:** the proposal contains provisions empowering the Commission to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the EU.

# 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 to 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.

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

2012/0168(COD) - 29/04/2013 - Committee report tabled for plenary, 1st reading/single reading

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.

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

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.

## 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.

**Depository 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**.

## **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.