

UCITS V DIRECTIVE

Reference document: Directive 2014/91/EU of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

Link: http://ec.europa.eu/finance/investment/ucits-directive/index_en.htm

EC = European Commission

Introduction

On 3 July 2012, the EC published a legislative package aimed at improving consumer protection in financial services. This package consists of three legislative proposals: a proposal for a key information regulation concerning packaged retail investment products (PRIIPs), a revision of the Insurance Mediation Directive (IMD) and a proposal for a Directive revising the UCITS IV Directive by integrating provisions on depositaries, manager remuneration and sanctions (UCITS V).

Concerning the provisions relating to depositaries in UCITS V, the following is to be noted: except for a few divergences (listed below), this proposal is a word-for-word copy of level 1 of the AIFM Directive. This practically identical reproduction of the alternative funds Directive confirms the EC's wish to harmonize, in a broad and precise way, the functions of depositaries in Europe.

Alignment with the AIFM Directive:

- Appointment of the depositary
- Depositary's duties functions: cash monitoring, custody/recordkeeping, oversight duties
- Delegation rules (see divergences below)
- Liability regime (see divergences below)

Divergence with the AIFM Directive:

- Liability of the depositary for improper performance of its oversight duties in case of loss (or loss of value) if for example the depositary fails to act on investments that are not compliant with fund rules
- Delegation of custody to entities acting as CSDs
- Reuse: Ban of reuse of assets held in custody by the depositary or by any third party to whom custody has been delegated for their own account
- European harmonization of insolvency law effects on assets held in custody: each Member State must ensure that its insolvency law protects assets under custody in the event of bankruptcy of the depositary by whom the assets are in custody or its sub-custodian located in the EU
- Delegation conditions (level 2): the depositary has to ensure that its sub-custodian has taken all necessary steps to ensure that in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among or realisation for the benefit of creditors of the third party
- Liability regime: no contractual transfer of liability to a sub-custodian
- Eligible entities to act as depositary + addition 24 month-period granted to existing managers to appoint a depositary complying with the eligibility's criteria
- Conditions for fulfilling the independence requirement (level 2)
- Information related to the list of our sub-custodians and their delegates

Past steps:

- 13/11/2012: Publication of Sven Giegold draft report (European Parliament)
- 28/08/2014: Publication of UCITS V Directive
- 26/09/2014: ESMA consultation on Level 2 measures
- 28/11/2014: Publication of ESMA technical advice
- 18/12/2016: Publication by the EC of the project of Delegated Regulation
- **18/03/2016: Implementation of UCITS V Directive**
- 24/03/2016: Publication of the Delegated Regulation 2016/438 supplementing directive 2009/65/EC.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1547808575041&uri=CELEX:32016R0438>
- 31/03/2016: ESMA publishes Guidelines on Remuneration under UCITS
- 13/10/2016: UCITS Delegated Regulation entered into application
- 14/10/2016: ESMA published Guidelines on Remuneration under UCITS translated in the languages of Member States
<https://www.esma.europa.eu/press-news/esma-news/esma-issues-guidelines-remuneration-practices-under-ucits-and-aifmd>
- 01/01/2017: Entry into application of the Guidelines on Remuneration. This remuneration policy framework makes provision to ensure sound risk management and in particular imposes transparency with regard to investors.
- 20/07/2017: ESMA published an opinion for the EC related to the best approach according to ESMA for segregation of assets and application to CSDs of delegation rules
https://www.esma.europa.eu/sites/default/files/library/esma34-45-277_opinion_34_on_asset_segregation_and_custody_services.pdf

DELEGATED REGULATIONS RELATED TO ASSET SEGREGATION:

Past steps:

- 29/05/2018: Following ESMA opinion of 20/07/2017, the EC published two draft Delegated Regulations to amend AIFMD and UCITS Level 2 Regulations, both proposals were open for consultation until 26/06/2018.

Those draft regulations main purpose is to eliminate discrepancies related to asset segregation among different Member States. They set out detailed requirements where custody is delegated to a third party.

The following aspects are notably amended:

- Increased record keeping requirements concerning delegation of custody
 - Review of process and agreements with sub-custodians
 - Legal Opinion will be necessary for AIFs, as they are today for UCITS
- 12/07/2018: the EC adopted those Delegated Regulations.
 - 30/10/2018: Publication in the Official Journal of the EU of :
 - Delegated Regulation (EU) 2018/1618 of 12/07/2018 amending AIFMD Delegated Regulation
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1541693600927&uri=CELEX:32018R1618>
 - Delegated Regulation (EU) 2018/1619 of 12/07/2018 amending UCITS Delegated Regulation
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.271.01.0006.01.ENG&toc=OJ:L:2018:271:TOC

Next step: 01/04/2020: Entry into application of those Delegated Regulations

Following the public consultation, the EC deferred the application date of those regulations for 18 months after their date of publication (instead of 6 months as initially envisaged)

INITIATIVE ON CROSS-BORDER FUND DISTRIBUTION amending notably rules for UCITS and AIFs:

- 12/03/2018: As part of the implementation of the Capital Market Union (CMU), the EC published a regulatory initiative on cross-border fund distribution.

In this legislative package, the EC proposes to amend:

- AIFM and UCITS Directives (draft directive)
<http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-92-F1-EN-MAIN-PART-1.PDF>
- and funds Regulations including EuVECA and EuSEF regulations (draft Regulation)
<http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-110-F1-EN-MAIN-PART-1.PDF>

The EC's aim is to reduce regulatory obstacles to cross-border distribution of investment funds, notably by :

- improving transparency with regard to the legal and administrative requirements (notification, marketing material, local support to investors, etc.) requested by the European Union and Member States in this area as well as fees charged by national authorities
- guaranteeing more consistency in the method of calculating these costs
- proposing a harmonized definition of pre-marketing
- specifying the administrative requirements called "facilities" imposed by some national authorities

The EC expects from these measures a simplification of the procedures for distribution of funds as well as a reduction of induced costs, and correlatively an increase in the cross-border distribution of the latter.

- 15/06/2018: the Council published a revised version of the legislations focused mainly in the definition of pre-marketing.

- 18/09/2018 and 02/10/2018: ECON (the Parliament's Economic and Monetary Affairs Committee) published draft reports in which the rapporteur comments that he supports the EC proposals

- 03/12/2018: ECON has voted to adopt ECON draft reports and supports the EC proposals

Next steps:

- Trilogues between the 3 bodies (EC, Council and Parliament) are expected to start. They will lead to the final texts
- The amended directive will be transposed 24 months after its publication
- The amended regulation will enter into application after its publication, except for some provisions (24 months of delay)

