RELAZIONE

Finalità della direttiva

La direttiva 2014/91/UE (di seguito UCITS V) modifica la direttiva 2009/65/CE (UCITS IV) in materia di organismi di investimento collettivo in valori mobiliari (OICVM) per armonizzare le norme nazionali in materia di funzioni e responsabilità dei depositari, di politica retributiva e di sanzioni.

Su queste materie sono emerse, negli ultimi anni, notevoli divergenze delle normative nazionali in ambito UE, in quanto le direttive UCITS, di armonizzazione minima, lasciavano ampio margine per interpretazioni divergenti in merito alla portata delle funzioni del depositario e della sua responsabilità in caso di negligenza. Di conseguenza, nell'UE sono andati sviluppandosi approcci diversi, che hanno posto gli investitori in OICVM di fronte a livelli disomogenei di tutela nei vari paesi.

La direttiva UCITS V si inserisce, inoltre, in un più ampio pacchetto legislativo promosso dalla Commissione europea di revisione della normativa settoriale dell'UE in materia di mercati finanziari, mirante a ridare fiducia ai consumatori, dopo le recenti frodi finanziarie che hanno danneggiato, in particolare, gli investitori al dettaglio (c.d. *retail*).

Al riguardo, l'analisi dei regimi sanzionatori nazionali svolta dalla Commissione assieme alle autorità di vigilanza europee, ha evidenziato una serie di divergenze e di debolezze che possono avere un impatto negativo sulla corretta applicazione della normativa UE, sull'efficacia della vigilanza finanziaria, sulla concorrenza, la stabilità e l'integrità dei mercati finanziari e sulla tutela dei consumatori.

Per potenziare i regimi sanzionatori nel settore dei servizi finanziari, la Commissione ha proposto al Parlamento europeo di fissare norme minime comuni a livello UE su taluni aspetti fondamentali, al fine di promuovere la convergenza e il potenziamento dei regimi sanzionatori nazionali.

In particolare, nella direttiva UCITS V il legislatore europeo ha voluto conseguire un'armonizzazione minima dei regimi sanzionatori imponendo:

- un catalogo minimo di sanzioni e di misure amministrative, tra cui l'armonizzazione del limite inferiore degli importi massimi delle sanzioni amministrative;
- un elenco minimo dei criteri sanzionatori;
- l'obbligo a carico delle autorità competenti e delle società di gestione di istituire meccanismi di segnalazione delle violazioni.

Tale regime sanzionatorio si applica ad una serie di violazioni delle principali disposizioni di tutela degli investitori previste nella direttiva UCITS.

Ambito di applicazione della direttiva

La direttiva si applica agli OICVM. Gli Organismi di investimento collettivo in valori mobiliari sono quegli organismi il cui oggetto esclusivo è l'investimento collettivo dei capitali raccolti presso il pubblico in valori mobiliari o in altre attività finanziarie liquide, il cui funzionamento è soggetto al principio della ripartizione dei rischi, e le cui quote o azioni sono, su richiesta dei detentori, riacquistate o rimborsate, direttamente o indirettamente, a valere sul patrimonio degli organismi stessi.

Gli OICVM possono assumere la forma contrattuale (fondo comune di investimento, gestito da una società di gestione) oppure la forma societaria (società di investimento).

In Italia, gli OICVM, ai sensi dell'art. 1, comma 1, lettera m), del decreto legislativo 24 febbraio 1998, n. 58, recante Testo Unico della Finanza (di seguito TUF), possono assumere la forma di fondo comune di investimento o di Sicav, cioè di società di investimento a capitale variabile.

Termine per l'attuazione delle disposizioni europee

Gli Stati membri devono adottare e pubblicare, entro il 18 marzo 2016, le disposizioni legislative, regolamentari e amministrative necessarie per conformarsi alla direttiva e le applicano a decorrere da tale data.

Ai sensi dell'art. 26-*ter* della direttiva, alla Commissione è conferito il potere di adottare atti delegati per specificare, tra l'altro:

a) gli elementi da includere nel contratto scritto di nomina del depositario;
b) le condizioni per svolgere le funzioni di depositario.

Al riguardo, si fa presente che solo il 17 dicembre u.s. la Commissione ha presentato una proposta di regolamento delegato. Gli Stati membri hanno tempo fino al 29 gennaio 2016 per fare opposizione.

La proposta di regolamento prevede che esso entri in vigore il ventesimo giorno seguente alla data di pubblicazione nella G.U.U.E e che esso si applichi sei mesi dopo l'entrata in vigore. Solo all'esito della procedura di adozione dell'atto comunitario anzidetto, che integra la direttiva per quanto riguarda gli obblighi del depositario, sarà possibile conoscere il termine esatto entro il quale i gestori e i depositari italiani dovranno adeguare i contratti già in essere alle nuove disposizioni regolamentari europee.

Procedure per l'attuazione della direttiva

La delega legislativa è contenuta nell'art. 1, comma 1, della legge 9 luglio 2015, n. 114, (legge di delegazione europea 2014), pubblicata nella G.U. n. 176 del 31 luglio 2015, ed entrata in vigore il 15 agosto 2015.

Il termine di scadenza della delega è fissato al 18 gennaio 2016, come previsto dall'articolo 31 della legge 24 dicembre 2012, n. 234, che continua ad applicarsi nell'originaria formulazione relativamente alle deleghe contenute nelle leggi di delegazione europee entrate in vigore in epoca antecedente alle modifiche apportate dall'articolo 29 della legge 29 luglio 2015, n. 115.

I principi e i criteri direttivi specifici per l'esercizio della delega sono contenuti nell'art. 10 della legge 114/2015 e prevedono di:

"a) apportare al testo unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24 febbraio 1998, n. 58, le modifiche e le integrazioni necessarie al corretto e integrale recepimento della direttiva 2014/91/UE;

b) prevedere, ove opportuno, il ricorso alla disciplina secondaria adottata dalla CONSOB e dalla Banca d'Italia secondo le rispettive competenze e in ogni caso nell'ambito di quanto previsto dalla direttiva 2009/65/CE del Parlamento europeo e del Consiglio, del 13 luglio 2009, come modificata dalla direttiva 2014/91/UE;

c) apportare le opportune modifiche e integrazioni alle disposizioni in materia di sanzioni contenute nel testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, al fine di attribuire alla Banca d'Italia e alla CONSOB, nell'ambito delle rispettive competenze, il potere di imporre le sanzioni e le altre misure amministrative per le violazioni delle disposizioni della direttiva 2014/91/UE con i criteri e i massimi edittali ivi previsti;

d) provvedere affinché siano posti in atto i dispositivi e le procedure per la segnalazione di violazioni di cui all'articolo 99-quinquies della direttiva 2009/65/CE, introdotto dalla direttiva 2014/91/UE, tenendo anche conto dei profili di riservatezza e di protezione dei soggetti coinvolti;

e) adottare, in conformità alle definizioni, alla disciplina della direttiva 2014/91/UE e ai principi e criteri direttivi previsti dal presente comma, le occorrenti modificazioni alla normativa vigente, anche di derivazione europea, per i settori interessati dalla direttiva da attuare, al fine di realizzare il migliore coordinamento con le altre disposizioni vigenti, assicurando un appropriato grado di protezione dell'investitore, di tutela della stabilità finanziaria e dell'integrità dei mercati finanziari.

2. Dall'attuazione del presente articolo non devono derivare nuovi o maggiori oneri a carico della finanza pubblica."

Nel rispetto dei criteri di delega, lo schema di decreto legislativo contiene un articolo con le modifiche da introdurre nel TUF e una clausola di invarianza finanziaria.

Gli interventi da apportare al TUF in tema di disciplina del depositario sono minimali in quanto la materia è stata completamente rivisitata, alla luce dei nuovi orientamenti UE, in sede di attuazione della direttiva 2011/61/UE - direttiva AIFMD sui gestori di fondi di investimento alternativi, recepita con il D. lgs. 4 marzo 2014, n. 44. In tale sede, nella Parte II del TUF sulla disciplina degli intermediari è stato riscritto completamente il Titolo III, tra cui gli artt. 47, 48 e 49, disciplinanti l'incarico, i compiti e le responsabilità del depositario.

Per quanto riguarda le politiche e le prassi retributive, previste dall'articolo 14-*bis* della direttiva UCITS, si segnala che la disciplina è speculare a quella stabilita dalla direttiva AIFMD già recepita. La materia è ampiamente disciplinata in Italia dalla normativa secondaria emanata dalla Banca d'Italia e dalla Consob, nel regolamento congiunto in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio, emanato ai sensi dell'art. 6, comma 2-bis, lettera a), del TUF. Non appare necessario, pertanto, prevedere modifiche alla normativa primaria, essendo sufficiente l'intervento in normativa secondaria per assicurare che le regole si applichino anche agli OICVM. A normativa vigente tali regole già si applicano ai gestori in relazione ai FIA - fondi di investimento alternativi

(cfr. Parte 5, Titolo III e Allegato 2 del regolamento congiunto), occorre estendere l'ambito di applicazione anche agli OICVM.

In merito al regime sanzionatorio, si fa presente che, in occasione del recepimento della direttiva 2013/36/UE (CRD IV) sull'accesso all'attività degli enti creditizi e la vigilanza prudenziale sugli enti creditizi e le imprese di investimento, con il decreto legislativo 12 maggio 2015, n. 72, in virtù della delega conferita dal legislatore, è stato riorganizzato in maniera organica il sistema sanzionatorio italiano in materia finanziaria contenuto nel Testo Unico Bancario (TUB) e nel TUF, evitando che gli stessi soggetti, o violazioni tra loro omogenee, fossero assoggettati a regimi e procedure diverse a seconda dell'autorità (Banca d'Italia o Consob) competente ad irrogare la sanzione.

La direttiva UCITS V impone agli Stati membri di prevedere sanzioni o altre misure amministrative da irrogare a società e persone per le violazioni delle disposizioni nazionali di recepimento della direttiva. Le sanzioni possono essere penali o amministrative.

La direttiva prevede un elenco minimo armonizzato di sanzioni e misure amministrative applicabili, tra cui il c.d. *temporary* o *permanent ban*, cioè l'interdizione temporanea o (in caso di violazioni gravi reiterate) permanente dall'esercizio di funzioni di gestione, a carico del/dei responsabili delle violazioni. In caso di persone giuridiche, le sanzioni amministrative pecuniarie massime non possono essere inferiori a 5.000.000 di euro o al 10% del fatturato annuale totale.

Gran parte dei principi e dei criteri in materia di sanzioni previste dalla direttiva UCITS V sono contenuti anche nella direttiva 2014/65/UE (c.d. MiFID II), relativa ai mercati degli strumenti finanziari, per l'attuazione della quale è previsto apposito criterio di delega nella legge di delegazione europea 2014 (art. 9). A livello europeo, infatti, si sta cercando di allineare per quanto possibile il regime sanzionatorio contenuto nelle direttive CRD, MiFID, UCITS, AIFMD, Market Abuse e Trasparency, che disciplinano a vario titolo il settore dei servizi finanziari. La revisione di tali direttive procede in modo parallelo.

Per adeguare l'apparato sanzionatorio a carico dei gestori di OICVM alle nuove fattispecie disciplinate dalla direttiva UCITS V occorre apportare alcune modifiche al TUF. Per i motivi sopra illustrati, lo scopo di tali modifiche è, in un'ottica più ampia, l'adeguamento alla normativa europea di settore e quindi anche al regime sanzionatorio contenuto nella direttiva MiFID II, in corso di recepimento (la delega per MiFID II scade il 3 maggio 2016).

Si segnala, pertanto, un'esigenza di coordinamento, mediante un unico intervento normativo, della disciplina sanzionatoria contenuta nel TUF in attuazione delle direttive UCITS V (2014/91/UE) e MiFID II (2014/65/UE), per le motivazioni di seguito illustrate.

Alcuni articoli del TUF stabiliscono sanzioni amministrative per violazione di norme vigenti adottate in attuazione delle direttive UE in materia di gestione collettiva del risparmio (anche ai sensi delle direttiva UCITS IV) e prestazione di servizi di investimento (ai sensi della direttiva MiFID). All'interno del medesimo articolo è attualmente stabilito ad esempio che la medesima sanzione amministrativa si applica

agli esponenti aziendali per violazione sia delle regole sulla gestione collettiva che di quelle su altri servizi di investimento.

Le nuove direttive UCITS V e MiFID II prevedono in maniera pressoché speculare l'introduzione di tipologie di sanzioni (dichiarazione pubblica, interdizione, sanzione pecuniaria etc.), massimali, criteri di imputazione e di determinazione della sanzione. Per recepire le disposizioni delle direttive anzidette è necessario intervenire sugli articoli del TUF che già prevedono le medesime sanzioni per violazioni di entrambe le discipline (gestione collettiva e servizi di investimento).

Per mantenere la coerenza della disciplina sanzionatoria del TUF ed evitare soluzioni disomogenee e non coordinate, si è ritenuto opportuno modificare gli articoli del TUF senza limitare la novella alle sole fattispecie ricadenti sotto le disciplina della gestione collettiva, in considerazione del fatto che il Legislatore nella legge di delegazione europea ha previsto la delega al Governo per attuare entrambe le direttive ed assicurare il coordinamento tra gli interventi di recepimento della disciplina UE in tema di sanzioni.

Più nello specifico si segnala che:

Per alcuni articoli la modifica sostanziale introdotta dalle direttive UCITS V e MiFID II è l'innalzamento del limite minimo della sanzione massima. Si tratta in particolare dei seguenti articoli del TUF:

188 (Abuso di denominazione) – modificati i massimali;

189 (Partecipazioni al capitale) – modificati massimali;

Esistono fattispecie sanzionatorie già previste nel TUF per le quali è necessario estendere l'applicazione della sanzione anche ai casi di violazione delle disposizioni contenute nelle direttive UCITS V e MiFID II o nei regolamenti delegati della Commissione integrativi delle direttive medesime o nelle disposizioni attuative nazionali. Si tratta in particolare dei seguenti articoli del TUF:

190 (Altre sanzioni amministrative pecuniarie in tema di disciplina degli intermediari, dei mercati e della gestione accentrata di strumenti finanziari) – modificati massimali e introdotti nuovi casi di violazione;

190-bis (Responsabilità degli esponenti aziendali e del personale per le violazioni in tema di disciplina degli intermediari, dei mercati e della gestione accentrata di strumenti finanziari) – inserita la fattispecie dell'interdizione permanente dall'esercizio di funzioni di gestione prevista dalle direttive UCITS V e MiFID II;

191 (Offerta al pubblico di sottoscrizione e di vendita) – modificati massimali e introdotti nuovi casi di violazione;

194-quater (Ordine di porre termine alle violazioni) - introdotti nuovi casi di violazione;

Inoltre, è' stata inserita con l'art. 194-septies, una nuova sanzione amministrativa, alternativa alle sanzioni amministrative pecuniarie attualmente previste dal TUF: la dichiarazione pubblica, avente a oggetto la violazione commessa e il soggetto

responsabile. La dichiarazione pubblica è prevista sia dalla direttiva UCITS V sia dalla direttiva MiFID II.

Infine sono state apportate modifiche alle procedure sanzionatorie applicate da Banca d'Italia e Consob nonché agli obblighi di cooperazione in capo alle suddette Autorità di vigilanza e, in particolare, ai seguenti articoli del TUF:

4 (Collaborazione tra autorità e segreto d'ufficio);

194-bis (Criteri per la determinazione delle sanzioni);

195-bis (Pubblicazione delle sanzioni);

195-ter (Comunicazione all'ABE sulle sanzioni applicate).

Lo schema di decreto legislativo è stato elaborato previo confronto a livello tecnico con gli uffici di Banca d'Italia e Consob che hanno collaborato con il Ministero dell'economia e delle finanze nell'ambito del negoziato europeo per l'approvazione della direttiva.

Considerata l'esiguità del tempo disponibile tra l'adozione della proposta di atto delegato da parte della Commissione (17 dicembre u.s.) e il termine per l'esercizio della delega legislativa (18 gennaio 2016) nonché il numero contenuto di modifiche alla normativa primaria necessarie all'attuazione della stessa, è stata ritenuta sufficiente, ai fini della consultazione con gli operatori, l'attività svolta durante il negoziato in ambito UE sulla proposta di direttiva presentata dalla Commissione europea e il confronto più recente mediante le associazioni di categoria.

Al riguardo, si segnala che le novità in materia di depositario e politiche retributive sono coincidenti con quelle già introdotte recependo la direttiva sui gestori di fondi alternativi (AIFMD) nel 2014, sulle quali gli operatori del mercato sono stati più volte consultati durante le varie fasi negoziali, anche mediante incontri organizzati presso il Ministero dell'economia e delle finanze, ai quali hanno partecipato, oltre a rappresentanti dell'industria, anche le autorità di vigilanza.

Le norme sono state redatte nel rispetto del principio di invarianza della spesa.

Si illustra, di seguito, il contenuto delle norme introdotte nello schema di decreto legislativo.

Art. 1 : *Modifiche al decreto legislativo 24 febbraio 1998, n. 58.*

La lettera a) modifica l'art. 4 del TUF, sulla collaborazione tra autorità e segreto d'ufficio, in attuazione delle direttive UCITS e MiFID che prevedono, nel caso in cui gli Stati membri decidano di stabilire sanzioni penali da irrogare a società e persone per le violazioni delle disposizioni nazionali adottate in attuazione della direttiva (o dei regolamenti delegati), l'adozione di misure adeguate per far sì che le autorità competenti dispongano di tutti i poteri necessari per stabilire contatti con le autorità giudiziarie nella loro giurisdizione al fine di ricevere informazioni specifiche relative alle indagini o ai procedimenti penali avviati per possibili violazioni della direttiva (o dei regolamenti delegati); nonché fornire le stesse informazioni alle altre autorità

competenti e all'ESMA, per soddisfare gli obblighi di cooperazione. L'ESMA mantiene una banca dati centrale delle sanzioni che le sono comunicate, ai soli fini dello scambio di informazioni tra autorità competenti. (cfr. art. 99 direttiva 2009/65/CE e art. 79 direttiva 2011/61/UE).

La nuova norma introdotta nel TUF per consentire alla Banca d'Italia e alla Consob l'acquisizione di informazioni sulle sanzioni penali applicate e sui procedimenti penali avviati, indica nel dettaglio le fattispecie sanzionatorie previste dal TUF per cui si ritiene necessario lo scambio di informazioni ai fini della cooperazione con le altre autorità di vigilanza e con l'ESMA. Le direttive UCITS e MiFID, infatti, non specificano per quali tipologie di violazioni sanzionate penalmente è necessario lo scambio di informazioni con le autorità giudiziarie, essendo l'ambito della disciplina penale rimesso alla legislazione degli Stati membri. Alcuni Stati membri potrebbero avere previsto sanzioni amministrative per le stesse fattispecie. Le direttive in questione parlano genericamente di scambio di informazioni per qualsiasi violazione della direttiva (o del regolamento delegato) e delle disposizioni nazionali di attuazione.

Il nuovo articolo 99-*bis* della direttiva 2009/65/CE fornisce un catalogo minimo di fattispecie sanzionate, che tuttavia non è esaustivo delle violazioni che possono essere oggetto di sanzione amministrativa e/o penale.

Un esempio è rappresentato dall'ostacolo all'attività di vigilanza, disciplinato nel nostro ordinamento sia dall'articolo 2638 c.c., sia dall'art. 170-*bis* del TUF per tutti i casi non previsti dal codice civile, che non rientra nell'elenco delle violazioni che devono essere necessariamente sanzionate (in via amministrativa o penale) ai sensi della direttiva UCITS V, ma è citato espressamente, tra le violazioni da sanzionare, dall'articolo 70, paragrafo 5, della direttiva MiFID II.

Si è cercato, pertanto, di individuare quelle violazioni delle disposizioni nazionali di attuazione delle direttive UCITS e MiFID nel settore degli intermediari finanziari e dei mercati, che nel nostro ordinamento hanno rilievo penale e prevedere per queste lo scambio di informazioni tra autorità di vigilanza di settore e Ministero della Giustizia o Autorità giudiziaria.

Nello specifico, si tratta delle sanzioni penali applicate e delle indagini e dei procedimenti penali in corso relativi ai reati di cui all'articolo 2638 c.c. (Ostacolo all'esercizio delle funzioni delle autorità pubbliche di vigilanza) e agli articoli 166 (Abusivismo), 167 (Gestione infedele), 168 (Confusione di patrimoni), 169 (Partecipazioni al capitale), 170-*bis* (Ostacolo alle funzioni di vigilanza della Banca d'Italia e della Consob) e 173-*bis* (Falso in prospetto) del TUF.

Qualora si ritenesse preferibile limitare lo scambio di informazioni sulle condotte penalmente rilevanti solo a quelle rientranti nell'elenco minimo di cui al citato art. 99-*bis* della direttiva UCITS, escludendo la fattispecie di ostacolo all'attività di vigilanza, si creerebbe un disallineamento con la direttiva MiFID II, che invece le sanziona espressamente. Ciò comporterebbe una nuova modifica dell'articolo 4, comma 13-*bis* del TUF in sede di recepimento della direttiva MiFID II, cioè a distanza di pochi mesi dall'entrata in vigore del decreto legislativo in esame.

La **lettera b)** modifica l'articolo 48 del TUF, sui compiti del depositario, per allineare la disciplina del depositario di OICVM italiani al quadro normativo europeo.

In particolare, l'articolo 22, paragrafo 3, lettera b), della direttiva prevede, tra l'altro, che il depositario:

"assicura che il valore delle quote dell'OICVM sia calcolato conformemente al diritto nazionale applicabile e al regolamento o all'atto costitutivo del fondo".

Tra i compiti propri del depositario non rientra, pertanto, il calcolo del valore delle parti dell'OICVM, bensì la verifica della correttezza di tale calcolo. Tale previsione, già contenuta nell'articolo 22 della direttiva, risulta ulteriormente specificata e rafforzata dall'articolo 5 della proposta di regolamento delegato della Commissione, che integra la direttiva per quanto riguarda gli obblighi dei depositari.[1]

Il gestore può, tuttavia, delegare a soggetti terzi e quindi anche al depositario, il calcolo del valore delle parti dell'OICVM, ferma restando la responsabilità del gestore circa il calcolo del valore della quota e la pubblicazione del relativo valore.

Qualora il gestore deleghi al depositario tale funzione, il depositario, nel quale si sommano i due ruoli (calcolo del valore e verifica della sua correttezza) deve adottare misure organizzative e di gestione dei conflitti di interesse conformi alle disposizioni adottate dalla Banca d'Italia e dalla Consob, ai sensi dell'art. 6, comma 2-*bis* del TUF.

Infatti, il nuovo articolo 25, paragrafo 2, della direttiva UCITS prevede, analogamente a quanto stabilito dalla direttiva AIFMD nel caso di FIA, che:

"Un depositario non svolge attività in relazione all'OICVM o alla società di gestione per conto dell'OICVM che possano creare conflitti di interesse tra l'OICVM, gli investitori dell'OICVM, la società di gestione e lo stesso depositario, a meno che non abbia separato, sotto il profilo funzionale e gerarchico, l'esercizio delle sue funzioni di depositario dalle altre sue funzioni potenzialmente confliggenti, e i potenziali conflitti di interesse non siano adeguatamente identificati, gestiti, monitorati e comunicati agli investitori dell'OICVM."

Tenendo conto anche delle osservazioni espresse dall'industria (ABI e Assogestioni), si è ritenuto opportuno esplicitare in normativa primaria, nel nuovo comma 3-*bis* dell'art. 48 TUF, che il depositario può svolgere per conto del gestore altre attività rispetto a quelle tipiche del depositario, anche in regime di esternalizzazione, purché vi sia separazione organizzativa e gerarchica di tali attività e siano adeguatamente identificati e gestiti i conflitti di interesse che ne derivano, secondo la normativa vigente (il

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[1] *Articolo 5*

Funzioni relative alla valutazione delle quote

1. Il depositario è considerato assolvere gli obblighi imposti dall'articolo 22, paragrafo 3, lettera b), della direttiva 2009/65/CE se introduce procedure per:

(a) verificare su base continuativa che siano predisposte e applicate procedure adeguate e uniformi per la valutazione del patrimonio dell'OICVM in conformità al diritto nazionale applicabile, secondo quanto previsto dall'articolo 85 della direttiva 2009/65/CE, e al regolamento o all'atto costitutivo dell'OICVM;

(b) assicurare che le politiche e procedure di valutazione siano effettivamente attuate e riesaminate a cadenza periodica.

2. Il depositario effettua le verifiche di cui al paragrafo 1 con una frequenza corrispondente alla frequenza prevista per la politica di valutazione dell'OICVM definita nel diritto nazionale adottato in conformità all'articolo 85 della direttiva 2009/65/CE e nel regolamento o atto costitutivo dell'OICVM.

3. Il depositario che ritiene che il valore delle quote dell'OICVM non sia stato calcolato a norma del diritto applicabile oppure del regolamento o atto costitutivo dell'OICVM ne informa la società di gestione o la società di investimento e si accerta che siano adottate tempestivamente misure correttive nel miglior interesse degli investitori dell'OICVM.

potenziale conflitto di interesse è rappresentato dal fatto che il depositario potrebbe trovarsi nella condizione di valutare le attività del fondo, calcolare il valore delle quote del fondo e dover, al contempo, verificare la correttezza di tale calcolo).

La lettera c) inserisce, nella sezione del TUF sull'offerta al pubblico di quote o azioni di Oicr aperti, il nuovo articolo 98-*sexies*, che estende la disciplina sugli obblighi di segnalazione delle violazioni, già prevista dagli articoli 8-*bis* e 8-*ter* del TUF, anche all'offerta al pubblico di quote o azioni di OICVM.

Le lettere d) ed e), di analogo contenuto, modificano gli importi della sanzione amministrativa pecuniaria applicata alle società o agli enti, per le violazioni degli obblighi previsti dagli artt. 188 e 189 del TUF.

La direttiva UCITS V, nel modificare l'articolo 99, paragrafo 6, della direttiva 2009/65/CE, ha fissato sanzioni amministrative pecuniarie massime pari almeno a 5 milioni di euro per le persone fisiche, e pari almeno a 5 milioni di euro o al 10% del fatturato annuale totale per le persone giuridiche. Ai sensi del paragrafo 7, gli Stati membri possono irrogare sanzioni pecuniarie di importo superiore.

La direttiva MiFID II, all'articolo 70, paragrafo 6, prevede per le persone fisiche, ammende amministrative fino a 5 milioni di euro e, per le persone giuridiche, ammende amministrative massime di almeno a 5 milioni di euro o fino al 10 % del fatturato complessivo annuo della persona giuridica. Ai sensi del paragrafo 7, gli Stati membri possono imporre ammende che superano tali importi.

Per le persone fisiche il massimale fino a 5 milioni di euro è già presente nel TUF, per le persone giuridiche occorre adeguarlo in conformità a quanto previsto dalle due direttive.

La lettera f) apporta alcune modifiche all'art. 190 del TUF per:

a) modificare il massimale della sanzione amministrativa pecuniaria, come previsto dalle direttive UCITS V e MiFID II;

b) espungere dall'elenco delle fattispecie sanzionate i casi di inosservanza delle disposizioni dell'art. 32-*quater* del TUF sulla riserva di attività, in quanto per l'esercizio abusivo dell'attività di gestione collettiva del risparmio è già prevista la sanzione penale ai sensi dell'art. 166, comma 1;

c) aggiungere al comma 2-*bis* la lettera b-bis), per poter sanzionare gestori e depositari di FIA per le violazioni delle disposizioni contenute nel regolamento delegato della Commissione di attuazione della direttiva AIFMD. In assenza di tale riferimento normativo espresso, la violazione del suddetto regolamento europeo – direttamente applicabile per quanto riguarda la disciplina sostanziale – potrebbe essere ritenuta non sanzionabile in Italia. Si rammenta che il regolamento delegato UE attuativo della direttiva UCITS V è in corso di adozione. Il riferimento a tale regolamento delegato potrà essere inserito solo a seguito della formale adozione dell'atto comunitario.

La lettera g) modifica l'art. 190-*bis* del TUF, sulla responsabilità degli esponenti aziendali e del personale, inserendo il comma 3-*bis*, per recepire quanto richiesto dalle

direttive UCITS V e MiFID II in tema di interdizione permanente (*permanent ban*). La disposizione in merito all'interdizione temporanea è già presente nel comma 3 dell'articolo anzidetto.

In particolare, l'art. 99, paragrafo 6, lettera d), della direttiva UCITS V, prevede: "l'interdizione temporanea o permanente, in caso di violazioni gravi reiterate, a carico di un membro dell'organo di gestione della società di gestione o della società di investimento o a carico di altra persona fisica considerata responsabile, dall'esercizio di funzioni di gestione in seno a queste o altre società del genere.".

Analogamente, l'art. 70, paragrafo 6, lettera d), della direttiva MiFID II prevede: "l'interdizione temporanea o, per violazioni gravi ripetute, permanente dall'esercizio di funzioni di gestione in seno a imprese di investimento a carico dei membri dell'organo di gestione dell'impresa o di altre persone fisiche considerati responsabili.".

Tuttavia si rileva che la previsione di una sanzione personale con effetti permanenti, senza che sia possibile configurare una forma di riabilitazione, come avviene, ad esempio, per l'interdizione permanente dai pubblici uffici, potrebbe porre dubbi di conformità con i principi costituzionali e con la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (CEDU).

Nella formulazione proposta nello schema di decreto sono state individuate le condizioni (nei casi di dolo o colpa grave) e le soglie temporali (dieci e cinque anni) per l'applicazione della norma che, da una prima analisi, sembrerebbero idonee a restringere il più possibile l'ambito di applicazione della disposizione stessa ai casi effettivamente di maggiore gravità.

La lettera h) sostituisce l'articolo 191 del TUF, sull'offerta al pubblico di sottoscrizione e di vendita, per poter effettuare i seguenti interventi:

- effettuare una correzione del testo per eliminare il rinvio all'art. 98-*quinquies*, comma 2, del TUF, abrogato dal D.lgs. 4.3.2014, n. 44, di attuazione della direttiva 2011/61/UE AIFMD, e le ripetizioni non necessarie (cfr. commi 3-*bis* e 5 del testo vigente);
- correggere i riferimenti interni;
- inserire due nuovi commi, il 3 e il 4, per sanzionare le violazioni delle disposizioni contenute negli artt. 98-*ter* e 98-*quater*, sull'offerta al pubblico di quote o azioni di Oicr aperti, applicando i massimali previsti dalla direttiva UCITS V.
- inserire il nuovo comma 6 che estende alle violazioni previste dai commi 3 e 4, in conformità a quanto previsto dalla direttiva UCITS V, l'applicabilità degli artt. 188, comma 2-*bis* e 190-*bis*, commi 2, 3 e 3-*bis*.

La lettera i) modifica l'art. 194-*bis*, comma 1, del TUF per adeguare la terminologia adottata alle modifiche del regime sanzionatorio introdotte con il recepimento della disciplina europea e per inserire tra i criteri che le Autorità di vigilanza possono adottare per la determinazione della sanzione anche quello del dolo e della colpa grave, come previsto dall'art. 190-bis, comma 3-bis (interdizione permanente dallo svolgimento di funzioni di amministrazione, direzione e controllo presso intermediari autorizzati), nonché quello, esplicitamente richiamato dall'articolo 99-*quater*, paragrafo 1, lettera g),

della direttiva UCITS V, che riguarda le eventuali misure adottate dal responsabile della violazione per evitarne il ripetersi in futuro.

La lettera l) modifica l'art. 194-*quater* del TUF in modo da prevedere la possibilità di irrogare la sanzione consistente nell'ordine di eliminare le infrazioni contestate anche per le violazioni previste dai citati artt. 98-*ter e 98-quater*.

La lettera m) inserisce il nuovo articolo 194-*septies* sulla dichiarazione pubblica prevista dalle direttive UCITS V e MiFID II.

In particolare, l'art. 99, paragrafo 6, della direttiva UCITS V prevede, nell'elenco minimo delle sanzioni amministrative e delle altre misure amministrative che possono essere applicate, la dichiarazione pubblica che identifica il responsabile e la natura della violazione; come anche l'art. 70, paragrafo 6, della direttiva MiFID II, che prevede, tra le varie misure applicabili, la dichiarazione pubblica indicante la persona fisica o giuridica e la natura della violazione.

L'istituto è nuovo nel nostro ordinamento.

La lettera n) modifica l'art. 195-*bis* del TUF in tema di pubblicazione del provvedimento sanzionatorio, per tener conto del fatto che solo alcune direttive europee consentono alle Autorità di escluderne del tutto la pubblicazione in particolari circostanze; è questo il caso delle direttive UCITS V e MiFID II, che prevedono tale possibilità nel caso in cui la pubblicazione possa mettere a rischio la stabilità dei mercati finanziari o risultare sproporzionata rispetto alla misura adottata.

La lettera o) modifica l'art. 195-*ter* del TUF per adeguarlo ai nuovi obblighi di comunicazione all'AESFEM (ESMA) previsti dall'art. 99-*ter*, paragrafo 2, della direttiva UCITS e dall'art. 71, paragrafo 3, della direttiva MiFID II.

Art. 2 : *Disposizioni finanziarie*

La clausola di invarianza finanziaria dà attuazione all'articolo 10, comma 2, della legge delega, che prevede l'assenza di oneri a carico della finanza pubblica.

TABELLA DI CONCORDANZA AI SENSI DELL'ART. 31, COMMA 2, DELLA L. 234/2012

MODIFICHE ALLA DIRETTIVA 2009/65/CE	DISPOSIZIONI NAZIONALI DI ATTUAZIONE (già presenti nell'ordinamento)	ARTICOLI DEL TUF DA MODIFICARE O DA INSERIRE EX NOVO	NORME REGOLAMENTARI DA MODIFICARE O DA INSERIRE EX NOVO
Art. 2, paragrafo 1, definizioni: organo di gestione strumento finanziario	Art. 2 (Definizioni), comma 1, lettere m) e n) del Regolamento congiunto Banca d'Italia e Consob in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio. TUF, art. 1 (Definizioni), comma 2	nessuno	nessuno
Artt. 14-bis e 14-ter, politiche e prassi retributive	Parte 5, Titolo III (Requisiti organizzativo-prudenziali in materia di politiche e prassi di remunerazione e incentivazione) e Allegato 2 del Regolamento congiunto Banca d'Italia e Consob in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio.	nessuno	Occorre estendere l'ambito di applicazione delle disposizioni del Titolo III, adottate per i FIA in attuazione del regolamento delegato (UE) 231/2013 (AIFMD), anche agli OICVM. L'impianto regolamentare è sufficiente a soddisfare i requisiti della direttiva 2014/91/UE.
Artt. 22, 22-bis, 23, 24, 25, 26, 26-bis, funzioni di depositario unico	TUF, artt. 47, 48 e 49 e Titolo VIII del Regolamento sulla gestione collettiva del risparmio di Banca d'Italia, modificati in attuazione della direttiva 2011/61/UE (AIFMD).	La normativa italiana in materia di depositario è conforme alla direttiva 2014/91/UE. Occorre solo modificare l'art. 48, comma 3, lettera b), che attualmente prevede, tra i compiti del depositario, una disposizione specifica per gli OICVM. La fattispecie deve essere ricondotta alla disciplina generale sulla delega di funzioni.	Eventuali interventi di coordinamento nel Regolamento sulla gestione collettiva del risparmio di Banca d'Italia.
Art. 30, condizioni di esercizio	Non occorre una modifica espressa della normativa italiana in quanto le	nessuna	nessuna

	disposizioni del TUF e della disciplina secondaria si applicano anche alle società di investimento a capitale fisso e variabile.		
Art. 69, contenuto del prospetto e della relazione annuale (politica retributiva)	Art. 17 e Allegato 1B del Regolamento emittenti della Consob	Nessuno	Allegato 1B del Regolamento emittenti della Consob
Art. 78, informazioni chiave per gli investitori (politica retributiva)	Il contenuto del KIID è disciplinato con il regolamento delegato (UE) n. 583/2010	nessuno	nessuno
Art. 98, paragrafo 2, poteri delle autorità di vigilanza (richiesta di registrazioni telefoniche)	TUF, art. 187-octies	nessuno	nessuno
Artt. 99, 99-bis, 99-ter, 99-quater, 99-quinquies, 99-sexies, sanzioni	TUF, parte V	Artt. 188, 189, 190, 190-bis, 191, 194-bis, 194-quater, 194-sexies, 195-bis, 195-ter	nessuno
Art. 99-quinquies, segnalazione delle violazioni alle autorità	TUF, art. 8-bis e 8-ter	Modifica dell'art. 98-sexies per estendere la disciplina sugli obblighi di segnalazione delle violazioni, già prevista dagli articoli 8-*bis* e 8-*ter* del TUF, anche all'offerta al pubblico di quote o azioni di OICVM.	Eventuali integrazioni al Regolamento congiunto Banca d'Italia e Consob in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio.
Art. 104-bis, trattamento dati personali	Codice in materia di protezione dei dati personali. La disciplina sul trattamento dei dati già si applica alle materie disciplinate dal TUF.	nessuno	nessuno
Schema A dell'allegato I, informazioni concernenti il depositario	Art. 17 e Allegato 1B del Regolamento emittenti della Consob	nessuno	Allegato 1B del Regolamento emittenti della Consob

RELAZIONE TECNICA

(Articolo 17, comma 3, della legge 31 dicembre 2009, n. 196)

La direttiva 2014/91/UE (di seguito UCITS V) modifica la direttiva 2009/65/CE (UCITS IV) in materia di organismi di investimento collettivo in valori mobiliari (OICVM) per armonizzare le norme nazionali in materia di funzioni e responsabilità dei depositari, di politica retributiva e di sanzioni.

La direttiva UCITS V si inserisce, inoltre, in un più ampio pacchetto legislativo promosso dalla Commissione europea di revisione della normativa settoriale dell'UE in materia di mercati finanziari, mirante a ridare fiducia ai consumatori, dopo le recenti frodi finanziarie che hanno danneggiato, in particolare, gli investitori al dettaglio (c.d. *retail*).

Per potenziare i regimi sanzionatori nel settore dei servizi finanziari, la Commissione ha proposto al Parlamento europeo di fissare norme minime comuni a livello UE su taluni aspetti fondamentali, al fine di promuovere la convergenza e il potenziamento dei regimi sanzionatori nazionali.

La direttiva si applica agli OICVM. Gli Organismi di investimento collettivo in valori mobiliari sono quegli organismi il cui oggetto esclusivo è l'investimento collettivo dei capitali raccolti presso il pubblico in valori mobiliari o in altre attività finanziarie liquide, il cui funzionamento è soggetto al principio della ripartizione dei rischi, e le cui quote o azioni sono, su richiesta dei detentori, riacquistate o rimborsate, direttamente o indirettamente, a valere sul patrimonio degli organismi stessi.

Gli OICVM possono assumere la forma contrattuale (fondo comune di investimento, gestito da una società di gestione) oppure la forma societaria (società di investimento).

In Italia, gli OICVM, ai sensi dell'art. 1, comma 1, lettera m), del decreto legislativo 24 febbraio 1998, n. 58, recante Testo Unico della Finanza (di seguito TUF), possono assumere la forma di fondo comune di investimento o di Sicav, cioè di società di investimento a capitale variabile.

Gli Stati membri devono adottare e pubblicare, entro il 18 marzo 2016, le disposizioni legislative, regolamentari e amministrative necessarie per conformarsi alla direttiva e le applicano a decorrere da tale data.

La delega legislativa è contenuta nell'art. 1, comma 1, della legge 9 luglio 2015, n. 114, (legge di delegazione europea 2014), pubblicata nella G.U. n. 176 del 31 luglio 2015, ed entrata in vigore il 15 agosto 2015.

La delega dev'essere esercitata entro il termine di due mesi antecedenti a quello di recepimento indicato dalla direttiva, cioè entro il 18 gennaio 2016.

I principi e i criteri direttivi specifici per l'esercizio della delega sono contenuti nell'art. 10 della legge 114/2015 e prevedono di:

"a) apportare al testo unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24 febbraio 1998, n. 58, le modifiche e le integrazioni necessarie al

corretto e integrale recepimento della direttiva 2014/91/UE;

b) prevedere, ove opportuno, il ricorso alla disciplina secondaria adottata dalla CONSOB e dalla Banca d'Italia secondo le rispettive competenze e in ogni caso nell'ambito di quanto previsto dalla direttiva 2009/65/CE del Parlamento europeo e del Consiglio, del 13 luglio 2009, come modificata dalla direttiva 2014/91/UE;

c) apportare le opportune modifiche e integrazioni alle disposizioni in materia di sanzioni contenute nel testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, al fine di attribuire alla Banca d'Italia e alla CONSOB, nell'ambito delle rispettive competenze, il potere di imporre le sanzioni e le altre misure amministrative per le violazioni delle disposizioni della direttiva 2014/91/UE con i criteri e i massimi edittali ivi previsti;

d) provvedere affinché siano posti in atto i dispositivi e le procedure per la segnalazione di violazioni di cui all'articolo 99-quinquies della direttiva 2009/65/CE, introdotto dalla direttiva 2014/91/UE, tenendo anche conto dei profili di riservatezza e di protezione dei soggetti coinvolti;

e) adottare, in conformità alle definizioni, alla disciplina della direttiva 2014/91/UE e ai principi e criteri direttivi previsti dal presente comma, le occorrenti modificazioni alla normativa vigente, anche di derivazione europea, per i settori interessati dalla direttiva da attuare, al fine di realizzare il migliore coordinamento con le altre disposizioni vigenti, assicurando un appropriato grado di protezione dell'investitore, di tutela della stabilità finanziaria e dell'integrità dei mercati finanziari.

2. Dall'attuazione del presente articolo non devono derivare nuovi o maggiori oneri a carico della finanza pubblica."

Per adeguare l'apparato sanzionatorio a carico dei gestori di OICVM alle nuove fattispecie disciplinate dalla direttiva UCITS V occorre apportare alcune modifiche al TUF. Lo scopo di tali modifiche è, in un'ottica più ampia, l'adeguamento alla normativa europea di settore e quindi anche al regime sanzionatorio contenuto nella direttiva MiFID II, in corso di recepimento (la delega per MiFID II scade il 3 maggio 2016). Per questo motivo, nelle premesse dello schema di decreto, è stata citata anche la direttiva 2014/65/UE e la relativa delega legislativa (art. 9 della legge 114/2015). Modificare una sola volta le norme sanzionatorie aventi valenza per entrambe le direttive semplifica il procedimento normativo e riduce il rischio di errori e sovrapposizioni.

Pertanto, nel rispetto dei criteri di delega contenuti negli artt. 9 e 10 della legge 114/2015, lo schema di decreto legislativo contiene un articolo con le modifiche da introdurre nel TUF e una clausola di invarianza finanziaria.

Si esaminano nel dettaglio le singole disposizioni

Art. 1	*Modifiche al decreto legislativo 24 febbraio 1998, n. 58.* La lettera a) modifica l'art. 4 del TUF, sulla collaborazione tra autorità e segreto d'ufficio, in attuazione delle direttive UCITS e MiFID che prevedono, nel caso in cui gli Stati membri decidano di stabilire sanzioni penali da irrogare a società e persone per le violazioni delle disposizioni nazionali adottate in attuazione della direttiva (o dei regolamenti delegati), l'adozione di misure adeguate per far sì che le autorità

competenti dispongano di tutti i poteri necessari per stabilire contatti con le autorità giudiziarie nella loro giurisdizione al fine di ricevere informazioni specifiche relative alle indagini o ai procedimenti penali avviati per possibili violazioni della direttiva (o dei regolamenti delegati); nonché fornire le stesse informazioni alle altre autorità competenti e all'ESMA, per soddisfare gli obblighi di cooperazione.

La nuova norma introdotta nel TUF per l'acquisizione di informazioni dall'autorità giudiziaria indica nel dettaglio le fattispecie sanzionatorie per cui si ritiene necessario lo scambio di informazioni ai fini della cooperazione con le altre autorità di vigilanza e con l'ESMA.

La lettera b) modifica l'articolo 48 del TUF, sui compiti del depositario, per allineare la disciplina del depositario di OICVM italiani al quadro normativo europeo. Tra i compiti propri del depositario non rientra, infatti, quella del calcolo del valore delle parti dell'OICVM, bensì la verifica della correttezza di tale calcolo.

Il gestore può, tuttavia, nell'ambito della disciplina sull'esternalizzazione di funzioni, delegare a soggetti terzi e quindi anche al depositario, il calcolo del valore delle parti dell'OICVM, ferma restando la responsabilità del gestore circa il calcolo del valore della quota e la pubblicazione del relativo valore.

La lettera c) inserisce, nella sezione del TUF sull'offerta al pubblico di quote o azioni di Oicr aperti, il nuovo articolo 98-*sexies*, che estende la disciplina sugli obblighi di segnalazione delle violazioni, già prevista dagli articoli 8-*bis* e 8-*ter* del TUF, anche all'offerta al pubblico di quote o azioni di OICVM.

Le lettere d) ed e), di analogo contenuto, modificano gli importi della sanzione amministrativa pecuniaria applicata alle società o agli enti, per le violazioni degli obblighi previsti dagli artt. 188 e 189 del TUF.

La direttiva UCITS V, nel modificare l'articolo 99, paragrafo 6, della direttiva 2009/65/CE, ha fissato sanzioni amministrative pecuniarie massime pari almeno a 5 milioni di euro per le persone fisiche, e pari almeno a 5 milioni di euro o al 10% del fatturato annuale totale per le persone giuridiche. Ai sensi del paragrafo 7, gli Stati membri possono irrogare sanzioni pecuniarie di importo superiore.

La direttiva MiFID II, all'articolo 70, paragrafo 6, prevede per le persone fisiche, ammende amministrative fino a 5 milioni di euro e, per le persone giuridiche, ammende amministrative massime di almeno a 5 milioni di euro o fino al 10 % del fatturato complessivo annuo della persona giuridica. Ai sensi del paragrafo 7, gli Stati membri possono imporre ammende che superano tali importi.

Per le persone fisiche il massimale fino a 5 milioni di euro è già presente nel TUF, per le persone giuridiche occorre adeguarlo in conformità a quanto previsto dalle due direttive.

Si segnala che l'innalzamento del livello minimo della sanzione massima non solo non comporta oneri a carico della finanza pubblica ma semmai eventuali e al momento non quantificabili maggiori entrate, qualora si verifichino le fattispecie sanzionabili e qualora venga applicata la sanzione massima.

La lettera f) apporta alcune modifiche all'art. 190 del TUF per:

a) modificare il massimale della sanzione amministrativa pecuniaria, come previsto dalle direttive UCITS V e MiFID II;

b) espungere dall'elenco delle fattispecie sanzionate i casi di inosservanza delle disposizioni dell'art. 32-*quater* del TUF sulla riserva di attività, in quanto per l'esercizio abusivo dell'attività di gestione collettiva del risparmio è prevista la sanzione penale ai sensi dell'art. 166, comma 1;

c) aggiungere al comma 2-*bis* la lettera b-bis), per poter sanzionare gestori e depositari di FIA per le violazioni delle disposizioni contenute nel regolamento delegato della Commissione di attuazione della direttiva AIFMD. In assenza di tale norma, la violazione del suddetto regolamento europeo – direttamente applicabile per quanto riguarda la disciplina sostanziale – non sarebbe sanzionabile in Italia. Si rammenta che il regolamento delegato UE attuativo della direttiva UCITS V è in corso di adozione.

La lettera g) modifica l'art. 190-*bis* del TUF, sulla responsabilità degli esponenti aziendali e del personale, inserendo il comma 3-*bis*, per recepire quanto richiesto dalle direttive UCITS V e MiFID II in tema di interdizione permanente (*permanent ban*). La disposizione in merito all'interdizione temporanea è già presente nel comma 3 dell'articolo anzidetto.

La lettera h) sostituisce l'articolo 191 del TUF, sull'offerta al pubblico di sottoscrizione e di vendita, per poter effettuare i seguenti interventi:

- effettuare una correzione del testo per eliminare il rinvio all'art. 98-*quinquies*, comma 2, del TUF, abrogato dal D.lgs. 4.3.2014, n. 44, di attuazione della direttiva 2011/61/UE AIFMD, e le ripetizioni non necessarie (cfr. commi 3-*bis* e 5 del testo vigente);
- correggere i riferimenti interni;
- inserire due nuovi commi, il 3 e il 4, per sanzionare le violazioni delle disposizioni contenute negli artt. 98-*ter* e 98-*quater*, sull'offerta al pubblico di quote o azioni di Oicr aperti, applicando i massimali previsti dalla direttiva UCITS V;
- inserire il nuovo comma 6 che estende alle violazioni previste dai commi 3 e 4, in conformità a quanto previsto dalla direttiva UCITS V, l'applicabilità degli artt. 188, comma 2-*bis* e 190-*bis*, commi 2, 3 e 3-*bis*.

La lettera i) modifica l'art. 194-*bis*, comma 1, del TUF per adeguare la terminologia adottata alle modifiche del regime sanzionatorio introdotte con il recepimento della disciplina europea e per inserire tra i criteri che le Autorità di vigilanza possono adottare per la determinazione della sanzione anche quello del dolo e della colpa grave, come previsto dall'art. 190-bis, comma 3-bis (interdizione permanente dallo svolgimento di funzioni di amministrazione, direzione e controllo presso intermediari autorizzati), nonché quello, esplicitamente richiamato dall'articolo 99-*quater*, paragrafo 1, lettera g), della direttiva UCITS V, che riguarda le eventuali misure

	adottate dal responsabile della violazione per evitarne il ripetersi in futuro. La lettera l) modifica l'art. 194-*quater* del TUF in modo da prevedere la possibilità di irrogare la sanzione consistente nell'ordine di eliminare le infrazioni contestate anche per le violazioni previste dai citati artt. 98-*ter* e 98-*quater*. La lettera m) inserisce il nuovo articolo 194-*septies* sulla dichiarazione pubblica che identifica il responsabile e la natura della violazione, prevista dalle direttive UCITS V e MiFID II. L'istituto è nuovo nel nostro ordinamento. La lettera n) modifica l'art. 195-*bis* del TUF in tema di pubblicazione del provvedimento sanzionatorio, per tener conto del fatto che solo alcune direttive europee consentono alle Autorità di escluderne del tutto la pubblicazione in particolari circostanze; è questo il caso delle direttive UCITS V e MiFID II, che prevedono tale possibilità nel caso in cui la pubblicazione possa mettere a rischio la stabilità dei mercati finanziari o risultare sproporzionata rispetto alla misura adottata. La lettera o) modifica l'art. 195-*ter* del TUF per adeguarlo ai nuovi obblighi di comunicazione all'AESFEM (ESMA) previsti dall'art. 99-*ter*, paragrafo 2, della direttiva UCITS e dall'art. 71, paragrafo 3, della direttiva MiFID II. Alle attività di vigilanza e sanzionatorie previste dal presente articolo provvedono la Banca d'Italia e la Consob senza nuovi o maggiori oneri a carico della finanza pubblica, in quanto le suddette Autorità provvedono autonomamente, con forme di autofinanziamento, attraverso le contribuzioni dovute dai soggetti vigilati, alla copertura dei costi derivanti dalle attività svolte. Le disposizioni non comportano nuovi o maggiori oneri a carico della finanza pubblica, pertanto non si redige e non si acclude alla presente il prospetto riepilogativo, previsto dall'articolo 17, comma 3, della legge 31 dicembre 2009, n. 196, descrittivo degli effetti finanziari di ciascun provvedimento ai fini del saldo netto da finanziare del bilancio dello Stato, del saldo di cassa delle amministrazioni pubbliche e dell'indebitamento netto del conto consolidato delle pubbliche amministrazioni.
Art. 2	*Disposizioni finanziarie* La clausola di invarianza finanziaria dà attuazione agli articoli 9 e 10, comma 2, della legge delega, che prevede l'assenza di oneri a carico della finanza pubblica.

18 GEN. 2016

ANALISI TECNICO-NORMATIVA

DECRETO LEGISLATIVO DI ATTUAZIONE DELLA DIRETTIVA 2014/91/UE, RECANTE MODIFICA DELLA DIRETTIVA 2009/65/CE CONCERNENTE IL COORDINAMENTO DELLE DISPOSIZIONI LEGISLATIVE, REGOLAMENTARI E AMMINISTRATIVE IN MATERIA DI TALUNI ORGANISMI D'INVESTIMENTO COLLETTIVO IN VALORI MOBILIARI (OICVM), PER QUANTO RIGUARDA LE FUNZIONI DI DEPOSITARIO, LE POLITICHE RETRIBUTIVE E LE SANZIONI E DI ATTUAZIONE, LIMITATAMENTE AD ALCUNE DISPOSIZIONI SANZIONATORIE, DELLA DIRETTIVA 2014/65/UE RELATIVA AI MERCATI DEGLI STRUMENTI FINANZIARI E CHE MODIFICA LA DIRETTIVA 2002/92/CE E LA DIRETTIVA 2011/61/UE.

PARTE I. ASPETTI TECNICO-NORMATIVI DI DIRITTO INTERNO

1) *Obiettivi e necessità dell'intervento normativo. Coerenza con il programma di governo.*

Gli obiettivi perseguiti dall'intervento normativo sono quelli previsti dalla direttiva 2014/91/UE (UCITS V) oggetto di recepimento e riguardano, l'armonizzazione delle norme nazionali in materia di funzioni e responsabilità dei depositari, di politica retributiva e di sanzioni.

Su queste materie sono emerse, negli ultimi anni, notevoli divergenze delle normative nazionali in ambito UE, in quanto le direttive UCITS, di armonizzazione minima, lasciavano ampio margine per interpretazioni divergenti in merito alla portata delle funzioni del depositario e della sua responsabilità in caso di negligenza. Di conseguenza, nell'UE sono andati sviluppandosi approcci diversi, che hanno posto gli investitori in Organismi di investimento collettivo in valori mobiliari di fronte a livelli disomogenei di tutela nei vari paesi.

Inoltre, per potenziare i regimi sanzionatori nel settore dei servizi finanziari, la Commissione ha proposto al Parlamento europeo di fissare norme minime comuni a livello UE su taluni aspetti fondamentali, al fine di promuovere la convergenza e il potenziamento dei regimi sanzionatori nazionali.

In particolare, nella direttiva UCITS V il legislatore europeo ha voluto conseguire un'armonizzazione minima dei regimi sanzionatori imponendo:

- un catalogo minimo di sanzioni e di misure amministrative, tra cui l'armonizzazione del limite inferiore degli importi massimi delle sanzioni amministrative;
- un elenco minimo dei criteri sanzionatori;
- l'obbligo a carico delle autorità competenti e delle società di gestione di istituire meccanismi di segnalazione delle violazioni.

Tale regime sanzionatorio si applica ad una serie di violazioni delle principali disposizioni di tutela degli investitori previste nella direttiva UCITS.

In merito alla necessità dell'intervento normativo e alla coerenza con il programma di Governo, si precisa che il recepimento della direttiva è un atto dovuto anche ai sensi della delega legislativa al Governo contenuta nell'art. 1, comma 1, della legge 9 luglio 2015, n. 114, (legge di delegazione

europea 2014), pubblicata nella G.U. n. 176 del 31 luglio 2015, ed entrata in vigore il 15 agosto 2015.

La delega dev'essere esercitata entro il **18 gennaio 2016**.

I principi e i criteri direttivi specifici per l'esercizio della delega sono contenuti nell'art. 10 della legge 114/2015 e prevedono di:

"a) apportare al testo unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24 febbraio 1998, n. 58, le modifiche e le integrazioni necessarie al corretto e integrale recepimento della direttiva 2014/91/UE;

b) prevedere, ove opportuno, il ricorso alla disciplina secondaria adottata dalla CONSOB e dalla Banca d'Italia secondo le rispettive competenze e in ogni caso nell'ambito di quanto previsto dalla direttiva 2009/65/CE del Parlamento europeo e del Consiglio, del 13 luglio 2009, come modificata dalla direttiva 2014/91/UE;

c) apportare le opportune modifiche e integrazioni alle disposizioni in materia di sanzioni contenute nel testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, al fine di attribuire alla Banca d'Italia e alla CONSOB, nell'ambito delle rispettive competenze, il potere di imporre le sanzioni e le altre misure amministrative per le violazioni delle disposizioni della direttiva 2014/91/UE con i criteri e i massimi edittali ivi previsti;

d) provvedere affinché siano posti in atto i dispositivi e le procedure per la segnalazione di violazioni di cui all'articolo 99-quinquies della direttiva 2009/65/CE, introdotto dalla direttiva 2014/91/UE, tenendo anche conto dei profili di riservatezza e di protezione dei soggetti coinvolti;

e) adottare, in conformità alle definizioni, alla disciplina della direttiva 2014/91/UE e ai principi e criteri direttivi previsti dal presente comma, le occorrenti modificazioni alla normativa vigente, anche di derivazione europea, per i settori interessati dalla direttiva da attuare, al fine di realizzare il migliore coordinamento con le altre disposizioni vigenti, assicurando un appropriato grado di protezione dell'investitore, di tutela della stabilità finanziaria e dell'integrità dei mercati finanziari.

2. Dall'attuazione del presente articolo non devono derivare nuovi o maggiori oneri a carico della finanza pubblica."

2) *Analisi del quadro normativo nazionale.*

Nel rispetto dei criteri di delega, lo schema di decreto legislativo contiene un articolo con le modifiche da introdurre nel testo unico delle disposizioni in materia di intermediazione finanziaria di cui al D.lgs. 24 febbraio 1998, n. 58 (TUF) e una clausola di invarianza finanziaria.

In particolare, gli interventi da apportare al TUF in tema di **disciplina del depositario** sono minimali in quanto la materia è stata completamente rivisitata, alla luce dei nuovi orientamenti UE, in sede di attuazione della direttiva 2011/61/UE - direttiva AIFMD sui gestori di fondi di investimento alternativi, recepita con il **D. lgs. 4 marzo 2014, n. 44**. In tale sede, nella Parte II del TUF sulla disciplina degli intermediari è stato riscritto completamente il Titolo III, tra cui gli artt. 47, 48 e 49, disciplinanti l'incarico, i compiti e le responsabilità del depositario.

Per quanto riguarda **le politiche e le prassi retributive**, previste dall'articolo 14-*bis* della direttiva UCITS, si segnala che la disciplina è speculare a quella stabilita dalla direttiva AIFMD già recepita. La materia è ampiamente disciplinata in Italia dalla normativa secondaria emanata dalla Banca d'Italia e dalla Consob, nel regolamento congiunto in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio, emanato ai

sensi dell'art. 6, comma 2-bis, lettera a), del TUF. Non appare necessario, pertanto, prevedere modifiche alla normativa primaria, essendo sufficiente l'intervento in normativa secondaria per assicurare che le regole si applichino anche agli OICVM. A normativa vigente tali regole già si applicano ai gestori in relazione ai FIA - fondi di investimento alternativi (cfr. Parte 5, Titolo III e Allegato 2 del regolamento congiunto), occorre estendere l'ambito di applicazione anche agli OICVM.

In merito al **regime sanzionatorio**, si fa presente che, in occasione del recepimento della direttiva 2013/36/UE (CRD IV) sull'accesso all'attività degli enti creditizi e la vigilanza prudenziale sugli enti creditizi e le imprese di investimento, con il decreto legislativo 12 maggio 2015, n. 72, in virtù della delega conferita dal legislatore, è stato riorganizzato in maniera organica il sistema sanzionatorio italiano in materia finanziaria contenuto nel Testo Unico Bancario (TUB) e nel TUF, evitando che gli stessi soggetti, o violazioni tra loro omogenee, fossero assoggettati a regimi e procedure diverse a seconda dell'autorità (Banca d'Italia o Consob) competente ad irrogare la sanzione.

La direttiva UCITS V impone agli Stati membri di prevedere sanzioni o altre misure amministrative da irrogare a società e persone per le violazioni delle disposizioni nazionali di recepimento della direttiva. Le sanzioni possono essere penali o amministrative.

Gran parte dei principi e dei criteri in materia di sanzioni previste dalla direttiva UCITS V sono contenuti anche nella direttiva 2014/65/UE (c.d. MiFID II), relativa ai mercati degli strumenti finanziari, per l'attuazione della quale è previsto apposito criterio di delega nella legge di delegazione europea 2014 (art. 9). A livello europeo, infatti, si sta cercando di allineare per quanto possibile il regime sanzionatorio contenuto nelle direttive CRD, MiFID, UCITS, AIFMD, Market Abuse e Trasparency, che disciplinano a vario titolo il settore dei servizi finanziari. La revisione di tali direttive procede in modo parallelo.

Per adeguare l'apparato sanzionatorio a carico dei gestori di OICVM alle nuove fattispecie disciplinate dalla direttiva UCITS V occorre apportare alcune modifiche al TUF. Per i motivi sopra illustrati, lo scopo di tali modifiche è, in un'ottica più ampia, l'adeguamento alla normativa europea di settore e quindi anche al regime sanzionatorio contenuto nella direttiva MiFID II, in corso di recepimento (la delega per MiFID II scade il 3 maggio 2016). Per questo motivo, nelle premesse dello schema di decreto, è stata citata anche la direttiva 2014/65/UE e la relativa delega legislativa (art. 9 della legge 114/2015). Modificare una sola volta le norme sanzionatorie aventi valenza per entrambe le direttive semplifica il procedimento normativo e riduce il rischio di errori e sovrapposizioni.

A tal fine, nella relazione illustrativa è stata ampiamente motivata l'esigenza di coordinamento, mediante un unico intervento normativo, della disciplina sanzionatoria contenuta nel TUF in attuazione delle direttive UCITS V (2014/91/UE) e MiFID II (2014/65/UE),

3) *Incidenza delle norme proposte sulle leggi e i regolamenti vigenti.*

Lo schema di decreto legislativo va a modificare ed integrare il TUF e, in particolare:

1. modifica gli articoli 4 (*Collaborazione tra autorità e segreto d'ufficio*), 48 (*Compiti del depositario*) e 188, 189, 190, 190-bis, 191, 194-bis, 194-quater, 195-bis e 195-ter sulle sanzioni amministrative;
2. inserisce i nuovi articoli 98-sexies (*Obblighi relativi alla segnalazione delle violazioni*) e 194-septies (*Dichiarazione pubblica*).

4) *Analisi della compatibilità dell'intervento con i principi costituzionali.*

Non si rilevano profili di incompatibilità con i principi costituzionali.

5) *Analisi delle compatibilità dell'intervento con le competenze e le funzioni delle regioni ordinarie e a statuto speciale nonché degli enti locali.*

Non si rilevano profili di incompatibilità con le competenze e le funzioni delle regioni ordinarie e a statuto speciale nonché degli enti locali in quanto, ai sensi dell'art. 117, secondo comma, lettera e), della Costituzione, lo Stato ha legislazione esclusiva in materia di tutela del risparmio e mercati finanziari, e tutela della concorrenza.

6) *Verifica della compatibilità con i principi di sussidiarietà, differenziazione ed adeguatezza sanciti dall'articolo 118, primo comma, della Costituzione.*

Non si rilevano profili di incompatibilità con i principi di sussidiarietà, differenziazione ed adeguatezza sanciti dall'articolo 118, primo comma, della Costituzione.

7) *Verifica dell'assenza di rilegificazioni e della piena utilizzazione delle possibilità di delegificazione e degli strumenti di semplificazione normativa.*

Non sono previste rilegificazioni di norme delegificate. Il decreto legislativo ha ad oggetto materie non suscettibili di delegificazione, né di applicazione di strumenti di semplificazione normativa.

8) *Verifica dell'esistenza di progetti di legge vertenti su materia analoga all'esame del Parlamento e relativo stato dell'iter.*

Non sussistono progetti di legge vertenti su materia analoga all'esame del Parlamento.

9) *Indicazioni delle linee prevalenti della giurisprudenza ovvero della pendenza di giudizi di costituzionalità sul medesimo o analogo oggetto.*

Non risultano indicazioni delle linee prevalenti della giurisprudenza e non sono pendenti giudizi di costituzionalità sul medesimo o analogo oggetto.

PARTE II. CONTESTO NORMATIVO COMUNITARIO E INTERNAZIONALE

10) *Analisi della compatibilità dell'intervento con l'ordinamento comunitario.*

Gli Stati membri devono adottare e pubblicare, entro il **18 marzo 2016**, le disposizioni legislative, regolamentari e amministrative necessarie per conformarsi alla direttiva UCITS V e le applicano a decorrere da tale data.

Ai sensi dell'art. 26-*ter* della direttiva, alla Commissione è conferito il potere di adottare atti delegati per specificare, tra l'altro:

a) gli elementi da includere nel contratto scritto di nomina del depositario;
b) le condizioni per svolgere le funzioni di depositario.

Al riguardo, si fa presente che solo il 17 dicembre u.s. la Commissione ha presentato una proposta di regolamento delegato. Gli Stati membri hanno tempo fino al 29 gennaio 2016 per fare opposizione.

La proposta di regolamento prevede che esso entri in vigore il ventesimo giorno seguente alla data di pubblicazione nella G.U.U.E. e che esso si applichi sei mesi dopo l'entrata in vigore. Solo all'esito della procedura di adozione dell'atto comunitario anzidetto, che integra la direttiva per quanto riguarda gli obblighi del depositario, sarà possibile conoscere il termine esatto entro il quale i gestori e i depositari italiani dovranno adeguare i contratti già in essere alle nuove disposizioni regolamentari europee.

11) *Verifica dell'esistenza di procedure di infrazione da parte della Commissione Europea sul medesimo o analogo oggetto.*

Al momento non sono in atto procedure di infrazione da parte della Commissione europea.

12) *Analisi della compatibilità dell'intervento con gli obblighi internazionali.*

Il provvedimento legislativo in esame non presenta profili di incompatibilità con gli obblighi internazionali.

13) *Indicazioni delle linee prevalenti della giurisprudenza ovvero della pendenza di giudizi innanzi alla Corte di Giustizia delle Comunità Europee sul medesimo o analogo oggetto.*

Non risultano indicazioni sulle linee prevalenti della giurisprudenza ovvero della pendenza di giudizi innanzi alla Corte di Giustizia delle Comunità Europee sul medesimo o analogo oggetto.

14) *Indicazioni delle linee prevalenti della giurisprudenza ovvero della pendenza di giudizi innanzi alla Corte Europea dei Diritti dell'uomo sul medesimo o analogo oggetto.*

Non risultano pendenti giudizi dinanzi alla Corte europea dei diritti dell'uomo sul medesimo o analogo oggetto.

15) *Eventuali indicazioni sulle linee prevalenti della regolamentazione sul medesimo oggetto da parte di altri Stati membri dell'Unione Europea.*

Trattandosi di recepimento di una direttiva UE, tutti gli Stati membri sono tenuti a darne attuazione. Le differenze possono riguardare solo alcune modalità di adeguamento alla nuova normativa.

PARTE III. ELEMENTI DI QUALITA' SISTEMATICA E REDAZIONALE DEL TESTO

1) *Individuazione delle nuove definizioni normative introdotte dal testo, della loro necessità, della coerenza con quelle già in uso.*

Il provvedimento in esame non introduce nuove definizioni nel nostro ordinamento.

2) *Verifica della correttezza dei riferimenti normativi contenuti nel progetto, con particolare riguardo alle successive modificazioni ed integrazioni subite dai medesimi.*

I riferimenti normativi contenuti nel provvedimento in esame sono corretti.

3) *Ricorso alla tecnica della novella legislativa per introdurre modificazioni ed integrazioni a disposizioni vigenti.*

Le norme richiamate sono state modificate facendo ricorso alla tecnica della novella legislativa.

4) *Individuazione di effetti abrogativi impliciti di disposizioni dell'atto normativo e loro traduzione in norme abrogative espresse nel testo normativo.*

L'intervento normativo non produce effetti abrogativi espliciti o impliciti.

5) *Individuazione di disposizioni dell'atto normativo aventi effetto retroattivo o di reviviscenza di norme precedentemente abrogate o di interpretazione autentica o derogatorie rispetto alla normativa vigente.*

Il provvedimento in esame non contiene disposizioni aventi effetto retroattivo o di reviviscenza di norme precedentemente abrogate o di interpretazione autentica o derogatorie rispetto alla normativa vigente.

6) *Verifica della presenza di deleghe aperte sul medesimo oggetto, anche a carattere integrativo o correttivo.*

L'unica delega per l'attuazione della direttiva 2014/91/UE è quella contenuta nella legge 9 luglio 2015, n. 114, (legge di delegazione europea 2014), pubblicata nella G.U. n. 176 del 31 luglio 2015, ed entrata in vigore il 15 agosto 2015.

7) *Indicazione degli eventuali atti successivi attuativi; verifica della congruenza dei termini previsti per la loro adozione.*

Si prevede l'inserimento in normativa primaria delle novità introdotte dalla direttiva UCITS V in materia di obblighi e sanzioni.

Al completo adeguamento della normativa nazionale alle disposizioni della direttiva in tema di depositario e politiche e prassi retributive provvedono le Autorità di vigilanza di settore (Banca d'Italia e Consob), mediante la modifica del regolamento congiunto in materia di organizzazione e procedure degli intermediari che prestano servizi di investimento o di gestione collettiva del risparmio, emanato ai sensi dell'art. 6, comma 2-bis, lettera a), del TUF, del regolamento emittenti della Consob e del regolamento sulla gestione collettiva del risparmio di Banca d'Italia.

8) *Verifica della piena utilizzazione e dell'aggiornamento di dati e di riferimenti statistici attinenti alla materia oggetto del provvedimento, ovvero indicazione della necessità di commissionare all'Istituto nazionale di statistica apposite elaborazioni statistiche con correlata indicazione nella relazione economico-finanziaria della sostenibilità dei relativi costi.*

Sono stati utilizzati dati informativi raccolti ed elaborati sia dalla Commissione UE nei documenti di valutazione di impatto sia dalla Autorità di vigilanza italiane.

ANALISI DI IMPATTO DELLA REGOLAMENTAZIONE (A.I.R.)
(all. "A" alla Direttiva P.C.M. 16 gennaio 2013)

Titolo: schema di decreto legislativo recante di attuazione della direttiva 2014/91/UE, recante modifica della direttiva 2009/65/CE concernente il coordinamento delle disposizioni legislative, regolamentari e amministrative in materia di taluni organismi d'investimento collettivo in valori mobiliari (OICVM), per quanto riguarda le funzioni di depositario, le politiche retributive e le sanzioni e di attuazione, limitatamente ad alcune disposizioni sanzionatorie, della direttiva 2014/65/UE relativa ai mercati degli strumenti finanziari e che modifica la direttiva 2002/92/CE e la direttiva 2011/61/UE.

Allegata la scheda d'Impact Assessment che costituisce parte sostanziale della relazione A.I.R.

Referente: Ufficio legislativo economia

SEZIONE 1 - Contesto e obiettivi dell'intervento di regolamentazione

La sezione illustra il contesto in cui si colloca l'iniziativa di regolazione, l'analisi dei problemi esistenti, le ragioni di opportunità dell'intervento di regolazione, le esigenze e gli obiettivi che l'intervento intende perseguire.

In particolare, la sezione contiene i seguenti elementi:

A) la rappresentazione del problema da risolvere e delle criticità constatate, anche con riferimento al contesto internazionale ed europeo, nonché delle esigenze sociali ed economiche considerate.

La direttiva 2014/91/UE (di seguito UCITS V) modifica la direttiva 2009/65/CE (UCITS IV) in materia di organismi di investimento collettivo in valori mobiliari (OICVM) per armonizzare le norme nazionali in materia di funzioni e responsabilità dei depositari, di politica retributiva e di sanzioni.

Su queste materie sono emerse, negli ultimi anni, notevoli divergenze delle normative nazionali in ambito UE, in quanto le direttive UCITS, di armonizzazione minima, lasciavano ampio margine per interpretazioni divergenti in merito alla portata delle funzioni del depositario e della sua responsabilità in caso di negligenza. Di conseguenza, nell'UE sono andati sviluppandosi approcci diversi, che hanno posto gli investitori in OICVM di fronte a livelli disomogenei di tutela nei vari paesi.

La direttiva UCITS V si inserisce, inoltre, in un più ampio pacchetto legislativo promosso dalla Commissione europea di revisione della normativa settoriale dell'UE in materia di mercati finanziari, mirante a ridare fiducia ai consumatori, dopo le recenti frodi finanziarie che hanno danneggiato, in particolare, gli investitori al dettaglio (c.d. *retail*).

In particolare, le norme europee sui depositari che agiscono per conto di organismi di investimento collettivo, contenute nella direttiva UCITS, sono rimaste immutate dalla loro introduzione nel 1985. La crisi finanziaria, in particolare il caso Madoff, venuto alla luce nel 2008, ha evidenziato i punti deboli delle disposizioni della direttiva UCITS relative alle funzioni e alle responsabilità dei depositari. Il caso Madoff ha sollevato in particolare la questione della responsabilità del depositario nei casi in cui la custodia delle attività di un fondo OICVM è delegata ad un subcustode. Nel caso Madoff, i giudici nazionali di diversi Stati membri hanno adottato approcci diversi nel decidere se il depositario principale di un fondo OICVM è responsabile della restituzione delle attività del fondo andate perse mentre erano tenute in subcustodia.

Inoltre, il quadro armonizzato sugli OICVM non contiene principi generali sulle retribuzioni e sulle sanzioni, coerenti con gli altri settori dei servizi finanziari.

In merito alle criticità constatate in sede di recepimento, si segnala che, ai sensi dell'art. 26-*ter* della direttiva, alla Commissione è conferito il potere di adottare atti delegati per specificare, tra l'altro:

a) gli elementi da includere nel contratto scritto di nomina del depositario;
b) le condizioni per svolgere le funzioni di depositario.

Al riguardo, si fa presente che solo il 17 dicembre u.s. la Commissione ha presentato una proposta di regolamento delegato. Gli Stati membri hanno tempo fino al 29 gennaio 2016 per fare opposizione.

La proposta di regolamento prevede che esso entri in vigore il ventesimo giorno seguente alla data di pubblicazione nella G.U.U.E e che esso si applichi sei mesi dopo l'entrata in vigore. Solo all'esito della procedura di adozione dell'atto comunitario anzidetto, che integra la direttiva per quanto riguarda gli obblighi del depositario, sarà possibile conoscere il termine esatto entro il quale i gestori e i depositari italiani dovranno adeguare i contratti già in essere alle nuove disposizioni regolamentari europee.

B) l'indicazione degli obiettivi (di breve, medio o lungo periodo) perseguiti con l'intervento normativo;

L'obiettivo generale perseguito dalla direttiva e dall'intervento normativo in esame è quello di accrescere la tutela di tutti gli investitori in OICVM e garantire la trasparenza.

Le norme della direttiva UCITS IV consentivano notevoli divergenze nell'interpretazione da parte delle autorità competenti dei doveri di dirigenza e della responsabilità in caso di violazione. Norme più dettagliate sulla delega e sulla responsabilità sono necessarie per ridurre queste divergenze. Ciò riguarda in particolare:

1) l'estensione consentita della delega;

2) le condizioni relative alle deleghe, e

3) il sistema di responsabilità che si applica quando gli strumenti tenuti in custodia sono persi a livello del depositario o del subcustode.

Pertanto, le norme di tutela degli investitori devono essere uniformi: i depositari, soggetti a requisiti patrimoniali e prudenziali uniformi, devono assicurare lo stesso livello di tutela delle attività tenute in custodia, indipendentemente dal loro domicilio.

Il ricorso contro un depositario in caso di perdita di uno strumento finanziario deve essere uniforme ed efficace: norme uniformi in materia di diligenza dovuta e norme uniformi in materia di responsabilità possono evitare lunghe controversie e divergenze nei risultati in funzione del domicilio del depositario.

La certezza del diritto per quanto riguarda le funzioni del depositario in relazione alla custodia e alla delega consente al settore di adottare norme uniformi e di prevedere le misure necessarie nelle loro strutture organizzative aziendali.

Più nello specifico, il Legislatore europeo ha ritenuto necessario:

- prevedere l'obbligo a carico delle società di gestione degli OICVM di creare e mantenere, per determinate categorie di soggetti, politiche e prassi retributive in linea con una gestione sana ed efficace dei rischi;
- adottare norme supplementari per stabilire i compiti e le funzioni dei depositari, per designare i soggetti che possono essere nominati depositari e per chiarire la responsabilità dei depositari nei casi in cui le attività degli OICVM tenute in custodia vengano perse o nei casi di non corretto esercizio da parte del depositario dei suoi doveri di sorveglianza;
- stabilire le condizioni della delega ai terzi delle funzioni di custodia del depositario, in modo tale che la delega e la subdelega siano soggette a rigorosi requisiti in materia di idoneità dei soggetti incaricati e di diligenza da parte del depositario nello scegliere, designare e controllare il soggetto incaricato della funzione delegata;
- adottare disposizioni sulla condotta e sulla gestione dei conflitti di interessi che devono applicarsi anche nei casi di delega delle funzioni di custodia, assicurando in particolare una chiara separazione dei compiti e delle funzioni tra il depositario, l'OICVM e la società di gestione;
- chiarire la responsabilità del depositario di OICVM in caso di perdita di strumenti finanziari tenuti in custodia;
- rafforzare il regime di vigilanza, di indagine e sanzionatorio, dando alle autorità competenti il potere di imporre sanzioni penali e amministrative sufficientemente elevate da essere efficaci, dissuasive e proporzionate, in modo da controbilanciare i vantaggi attesi da comportamenti illeciti;
- stabilire le circostanze nelle quali le sanzioni dovrebbero essere pubblicate, per rafforzare il loro effetto dissuasivo sul pubblico e per informarlo sulle violazioni lesive della tutela degli investitori.

Nel medio-lungo periodo la Commissione europea effettuerà un riesame globale del funzionamento della direttiva e, in particolare, riesaminerà i limiti ai rischi verso le controparti applicabili alle operazioni in strumenti derivati.

Sulla base dei provvedimenti che la Commissione intenderà adottare, gli Stati membri adegueranno, in futuro, la legislazione nazionale.

C) la descrizione degli indicatori che consentiranno di verificare il grado di raggiungimento degli obiettivi indicati e di monitorare l'attuazione dell'intervento nell'ambito della VIR;

Il grado di raggiungimento degli obiettivi sarà verificato attraverso il monitoraggio dei soggetti vigilati effettuato dalle autorità di vigilanza di settore (Banca d'Italia e Consob).
In particolare, il monitoraggio potrà avere ad oggetto:

1. gli statuti dei gestori di OICVM, Sgr e Sicav, per verificare l'adeguatezza delle politiche e prassi retributive adottate dagli stessi;
2. i regolamenti e gli statuti degli OICVM, fondi comuni di investimento e Sicav, nonché gli accordi conclusi tra le società di gestione di OICVM e i depositari, per verificare il contenuto e le condizioni per l'assunzione dell'incarico da parte del depositario.

D) l'indicazione delle categorie dei soggetti, pubblici e privati, destinatari dei principali effetti dell'intervento regolatorio.

Le innovazioni introdotte ai sensi della direttiva interessano:

1. i gestori di OICVM: Sgr e Sicav che gestiscono direttamente i propri patrimoni;
2. gli OICVM italiani: fondi comuni di investimento e Sicav.
3. i depositari: banche autorizzate in Italia, succursali italiane di banche comunitarie, Sim e succursali italiane di imprese di investimento.

In merito alla quantificazione dei suddetti destinatari, è stata interpellata al riguardo l'Autorità di vigilanza competente.

I dati di seguito riportati sono stati forniti dalla Banca d'Italia, l'Autorità di vigilanza italiana deputata al rilascio delle autorizzazioni ai gestori di OICVM, agli OICVM e ai depositari, e si riferiscono ai soggetti autorizzati alla data del **30 giugno 2015**:

Numero gestori Oicvm autorizzati: 45

Numero Oicvm italiani: 728

Numero depositari di Oicvm: 7

SEZIONE 2 - Procedure di consultazione precedenti l'intervento

Lo schema di decreto legislativo è stato elaborato previo confronto a livello tecnico con gli uffici di Banca d'Italia e Consob che hanno collaborato con il Ministero dell'economia e delle finanze nell'ambito del negoziato europeo per l'approvazione della direttiva.

Considerata l'esiguità del tempo disponibile tra l'adozione della proposta di atto delegato da parte della Commissione (17 dicembre u.s.) e il termine per l'esercizio della delega legislativa (18 gennaio 2016) nonché il numero contenuto di modifiche alla normativa primaria necessarie all'attuazione della stessa, è stata ritenuta sufficiente, ai fini della consultazione con gli operatori, l'attività svolta durante il negoziato in ambito UE sulla proposta di direttiva presentata dalla Commissione europea e il confronto più recente mediante le associazioni di categoria.

Al riguardo, si segnala che le novità in materia di depositario e politiche retributive sono coincidenti

con quelle già introdotte recependo la direttiva sui gestori di fondi alternativi (AIFMD) nel 2014, sulle quali gli operatori del mercato sono stati più volte consultati durante le varie fasi negoziali, anche mediante incontri organizzati presso il Ministero dell'economia e delle finanze, ai quali hanno partecipato, oltre a rappresentanti dell'industria, anche le autorità di vigilanza.

SEZIONE 3 - Valutazione dell'opzione di non intervento di regolamentazione (opzione zero)

Da un punto di vista formale non è configurabile l'opzione di non intervento da parte del legislatore italiano poiché gli Stati membri sono obbligati a conformarsi alle disposizioni contenute nella direttiva e ad adottare e pubblicare, entro il 18 marzo 2016, le disposizioni legislative, regolamentari e amministrative necessarie, informandone la Commissione.

Inoltre, il recepimento della direttiva è obbligatorio ai sensi della delega contenuta nell'art. 1, comma 1, della legge di delegazione europea 2014 (legge 9 luglio 2015, n. 114), e in conformità ai criteri di delega stabiliti dal Parlamento italiano nell'art. 10 della legge anzidetta. L'opzione zero non è pertanto configurabile in relazione allo schema normativo in esame.

Da un punto di vista sostanziale, l'opzione di non intervento è stata valutata (cfr. Sezione 4) ed esclusa dal legislatore europeo che ha ritenuto necessario intervenire con una direttiva.

La Commissione europea, nell'effettuare l'*impact assessment,* ha valutato, in particolare, quali soggetti verrebbero maggiormente danneggiati da un mancato intervento legislativo nella disciplina del depositario contenuta nella direttiva UCITS.

Negli OICVM, il gruppo più colpito in caso di perdita di attività tenute in custodia sono gli investitori al dettaglio. Se il depositario principale non è responsabile della restituzione delle attività andate perse mentre erano tenute in custodia, la perdita ricade sugli investitori. In media il 10% delle famiglie europee investe direttamente in fondi, in Italia l'11%.

Un altro gruppo colpito della perdita di attività è quello dei gestori di fondi OICVM. Il gestore del fondo ha bisogno di chiarezza in merito all'estensione della responsabilità del depositario in caso di perdita di attività tenute in custodia, in particolare se la perdita avviene quando le attività sono tenute in custodia da un subcustode. La subcustodia è un fenomeno sempre più diffuso, dato che i gestori di OICVM investono in un'ampia gamma di strumenti finanziari che spesso sono emessi in altri Stati membri o in paesi terzi. Per motivi pratici e talvolta a causa degli obblighi giuridici, questi strumenti devono essere tenuti in custodia nel paese di emissione. La subcustodia ha pertanto implicazioni importanti sulle decisioni di investimento dei gestori dei fondi.

Infine, a risentirne sono i depositari e le pratiche da essi seguite in materia di delega. Anche i grandi depositari internazionali non esercitano direttamente attività di custodia in tutti i paesi in cui un gestore di OICVM intende investire. Si ritiene che nessuna delle banche depositarie abbia operazioni in più di 40 paesi. Pertanto, la custodia è spesso "esternalizzata" a subcustodi che operano in paesi non coperti dalla rete dei depositari internazionali. Le disposizioni che disciplinano la delega sono fondamentali per i depositari.

La Commissione europea ha quindi concluso che:

1. le differenze nell'attuazione di principi di livello superiore in materia di delega nell'ambito della direttiva UCITS, e in particolare sulla responsabilità dei depositari, minano la fiducia degli investitori, soprattutto quando gli OICVM sono venduti a livello transfrontaliero;

2. solo un intervento a livello europeo può affrontare efficacemente questo fenomeno e introdurre norme armonizzate, in relazione sia al dovere di diligenza del depositario nella scelta del subcustode e nella sorveglianza nei suoi riguardi, sia in riferimento alla sua responsabilità per le attività andate perse mentre erano tenute in custodia.

SEZIONE 4 - Opzioni alternative all'intervento regolatorio

La Commissione europea, *nell'impact assessment*, ha valutato varie opzioni alternative all'intervento regolatorio.

Lo scenario di base (opzione zero) relativo ai compiti e alle responsabilità dei depositari è il vigente quadro normativo sugli OICVM. I principi generali delle norme sugli OICVM rimarrebbero in vigore, lasciando un notevole margine di discrezionalità sul livello delle funzioni e delle responsabilità alle autorità competenti, che avrebbero il compito di garantire la tutela e la fiducia degli investitori, in particolare quando realizzano investimenti transfrontalieri con fondi domiciliati in altri Stati membri.

A fronte di questo scenario di base, la valutazione di impatto ha esaminato diverse opzioni in relazione a tre questioni fondamentali:

1) l'ammissibilità a fungere da depositario di OICVM;

2) le condizioni che si applicano in caso di delega della custodia, e

3) l'estensione della responsabilità del depositario, in particolare l'obbligo di restituire gli strumenti finanziari andati persi mentre erano tenuti in custodia.

Sull'ammissibilità a fungere da depositario, sono emerse tre opzioni, che individuano vari soggetti che si ritiene forniscano sufficienti garanzie in termini di regolamentazione prudenziale e di requisiti patrimoniali per svolgere le funzioni di custodia delle attività e per garantire la loro restituzione in caso di perdita mentre sono tenute in custodia.

Sulla questione della delega della custodia, sono state esaminate tre opzioni:

1) lo scenario di base;

2) l'introduzione dell'obbligo di diligenza dovuta e degli obblighi prudenziali per coprire la delega, assieme a norme speciali relative alla delega a depositari di paesi terzi non conformi e

3) l'introduzione degli stessi obblighi di diligenza dovuta e prudenziali per tutte le deleghe.

Sulla questione della responsabilità, la valutazione di impatto ha esaminato quattro opzioni:

1) limitare la responsabilità a casi di "omissione ingiustificata di intervento" (scenario di base);

2) prevedere la responsabilità oggettiva con l'opzione del trasferimento di responsabilità in caso di delega;

3) prevedere la responsabilità oggettiva con l'opzione del trasferimento di responsabilità limitata alla delega obbligatoria a depositari di paesi terzi, e

4) introdurre la responsabilità oggettiva senza possibilità di trasferimento della responsabilità in caso di delega.

In relazione alla retribuzione, lo scenario di base è stato confrontato con un'opzione che impone alle società di gestione di OICVM di dotarsi di principi generali sulle retribuzioni e con un'opzione che impone politiche retributive dettagliate assieme alla pubblicazione delle retribuzioni effettivamente pagate nella relazione annuale.

In relazione alle sanzioni amministrative, lo scenario di base è stato confrontato ad un approccio che prevede l'armonizzazione generale delle sanzioni, come previsto dalle politiche della Commissione in materia, e con un'opzione che prevede un'ulteriore armonizzazione delle sanzioni amministrative.

L'opzione prescelta dalla Commissione è quella di limitare l'ammissibilità a fungere da depositario di OICVM agli enti creditizi o alle imprese di investimento regolamentate.

La delega dovrebbe essere disciplinata da norme sulla diligenza dovuta nella selezione, nella nomina e nella sorveglianza delle attività del subcustode. Per i rari casi in cui la strategia di investimento dell'OICVM comportasse investimenti in strumenti finanziari emessi in paesi che impongono la custodia locale e in cui non operino custodi che soddisfano i summenzionati requisiti in materia di delega, la delega dovrebbe essere consentita, a specifiche condizioni.

In linea con il profilo dell'investitore al dettaglio, la responsabilità in caso di perdita di uno strumento tenuto in custodia dovrebbe essere basata su una norma UE uniforme che comporti l'obbligo a carico del depositario principale di restituire lo strumento andato perso. Non ci dovrebbe essere la possibilità per il depositario principale di esonerarsi dalla responsabilità, anche nei casi in cui la custodia locale è obbligatoria nel paese terzo.

In relazione alle retribuzioni, l'approccio segue quello adottato per i gestori di fondi di investimento alternativi (GFIA). Ciò evita l'arbitraggio regolamentare tra quadro legislativo in materia di OICVM e quadro legislativo relativo ai GFIA.

In materia di sanzioni, si segue la politica generale della Commissione in materia.

SEZIONE 5 - Giustificazione dell'opzione regolatoria proposta e valutazione degli oneri amministrativi e dell'impatto sulle PMI

La sezione descrive l'intervento regolatorio prescelto, riportando:

A) gli svantaggi e i vantaggi dell'opzione prescelta, per i destinatari diretti e indiretti, a breve e a medio-lungo termine, adeguatamente misurati e quantificati, anche con riferimento alla possibile incidenza sulla organizzazione e sulle attività delle pubbliche amministrazioni, evidenziando i relativi vantaggi collettivi netti e le relative fonti di informazione;

Sull'ammissibilità a fungere da depositario, la valutazione di impatto della Commissione conclude che sia gli enti creditizi che le imprese di investimento regolamentate forniscono garanzie sufficienti in termini di regolamentazione prudenziale, di requisiti patrimoniali e di vigilanza effettiva per fungere da depositari di OICVM. Dato che già ora la maggior parte dei depositari di OICVM in quasi tutti gli Stati membri sono enti creditizi o imprese di investimento regolamentate, l'onere di adeguamento è stimato piuttosto basso.

La Commissione valuta che l'impatto dell'opzione prescelta riguarderebbe solo una piccola minoranza di prestatori di servizi non soggetti ad autorizzazione. In questi casi, i costi sostenuti per ottenere l'autorizzazione a esercitare l'attività di impresa di investimento sembrano giustificati, visti i benefici in termini di responsabilità del depositario.

Per quanto riguarda la delega, la valutazione di impatto della Commissione conclude che la delega dovrebbe essere soggetta a elevate norme di qualità per quanto riguarda la scelta e la sorveglianza del subcustode. Questi obblighi dovrebbero essere a carico del depositario principale. Per quanto riguarda i paesi terzi, le delega a depositari di paesi non conformi dovrebbe essere autorizzata solo se la custodia locale è resa obbligatoria dalla legge e a condizione che gli investitori siano debitamente informati che gli investimenti in alcuni paesi possono richiedere la custodia locale.

L'opzione di non consentire le delega a depositari di paesi terzi non conformi è stata scartata dalla Commissione in quanto ciò ridurrebbe le opportunità di investimento dei fondi OICVM. Inoltre, il rischio di delega a depositari di paesi terzi non conformi è stato considerato trascurabile, data l'attuale prevalenza di strategie di investimento prudenti perseguite dai fondi OICVM. Se e nella misura in cui le strategie di investimento evolveranno, questa scelta dovrà forse essere rivista.

Per quanto riguarda la responsabilità, la valutazione di impatto della Commissione conclude che la norma basata sulla "responsabilità oggettiva", che obbliga i depositari a restituire gli strumenti andati persi mentre erano tenuti in custodia a prescindere dalla colpa o dalla negligenza, consente sia di garantire un livello elevato di tutela degli investitori che di giungere a norme uniformi in tutta l'UE. Mentre vi sono validi motivi per escludere le perdite nei casi di delega obbligatoria ad un depositario di un paese terzo, la valutazione di impatto conclude che, alla luce dell'orientamento verso la clientela al dettaglio dei fondi OICVM, tali esclusioni non dovrebbero essere previste.

B) l'individuazione e la stima degli effetti dell'opzione prescelta sulle micro, piccole e medie imprese;

L'intervento regolatorio non prevede una disciplina specifica per le micro, piccole e medie imprese.

C) l'indicazione e la stima degli oneri informativi e dei relativi costi amministrativi, introdotti o eliminati a carico di cittadini e imprese. Per onere informativo si intende qualunque adempimento comportante raccolta, elaborazione, trasmissione, conservazione e produzione di informazioni e documenti alla pubblica amministrazione;

La direttiva non prevede nuovi oneri informativi a carico dei gestori e dei depositari

D) le condizioni e i fattori incidenti sui prevedibili effetti dell'intervento regolatorio, di cui comunque occorre tener conto per l'attuazione (misure di politica economica ed aspetti economici e finanziari suscettibili di incidere in modo significativo sull'attuazione dell'opzione regolatoria prescelta; disponibilità di adeguate risorse amministrative e gestionali; tecnologie utilizzabili, situazioni ambientali e aspetti socio-culturali da considerare per quanto concerne l'attuazione della norma prescelta, ecc.).

Non si ravvisano specifiche condizioni o particolari fattori che possano incidere sull'attuazione delle nuove disposizioni che si inseriscono in un quadro regolamentare consolidato nel quale i destinatari della normativa in materia di gestione collettiva del risparmio già operano.

SEZIONE 6 – Incidenza sul corretto funzionamento concorrenziale del mercato e sulla competitività del Paese

Con l'intervento regolatorio si è intervenuti integrando il quadro normativo vigente al fine di assicurare la tutela degli interessi di tutti i soggetti coinvolti (gestori, depositari, partecipanti, soci e investitori), senza prevedere obblighi ulteriori atti a creare svantaggi concorrenziali per gli operatori nazionali del settore.

In particolare, si precisa che l'intervento regolatorio non crea restrizioni alle possibilità competitive dei gestori, viceversa una regolamentazione uniforme a livello europeo garantisce la parità delle condizioni di concorrenza nell'Unione.

Pertanto, le nuove norme non creano concorrenza sleale. L'armonizzazione sempre maggiore del quadro normativo UE in materia di gestione collettiva del risparmio può favorire l'ulteriore sviluppo degli OICVM e produrre effetti positivi per la competitività del Paese anche a livello internazionale.

SEZIONE 7 - Modalità attuative dell'intervento di regolamentazione

La sezione descrive:

A) i soggetti responsabili dell'attuazione dell'intervento regolatorio;

Le Autorità di vigilanza: Banca d'Italia e Consob.

B) le azioni per la pubblicità e per l'informazione dell'intervento (con esclusione delle forme di pubblicità legale degli atti già previste dall'ordinamento);

L'intervento regolatorio verrà pubblicato nel sito del MEF e Banca d'Italia e Consob provvederanno a pubblicare i loro provvedimenti nei rispettivi siti web.

Ampia informazione a tutti i destinatari sarà poi fornita dalle Associazioni di categoria.

C) strumenti e modalità per il controllo e il monitoraggio dell'intervento regolatorio;

A livello europeo, il controllo e la valutazione si svolgeranno su due fasi.

In una prima fase, la Commissione assicurerà che le norme riformate siano applicate correttamente. In una seconda fase, tre anni dopo la scadenza del termine per la piena attuazione della direttiva, la Commissione procederà a effettuare una valutazione economica per stabilire se le nuove norme avranno contribuito a migliorare la tutela degli investitori, ad accrescere la trasparenza in materia di

remunerazione e a incoraggiare la fiducia degli investitori, necessaria per assicurare la rilevanza degli OICVM nel settore al dettaglio.

La valutazione sarà condotta dai servizi della Commissione, in collaborazione con l'AESFEM e/o con l'ausilio di studi esterni che potranno essere necessari per valutare l'impatto delle modifiche sulla delega e sui regimi di responsabilità dei depositari.

Al fine di valutare gli effetti delle modifiche e, cosa ancor più importante, di raccogliere dati essenziali sulle conseguenze di alcune delle misure proposte sulle imprese che fungono da depositari, è probabile che venga inoltre condotta un'indagine esplorativa con tutti i soggetti interessati.

A livello nazionale, il controllo e il monitoraggio degli effetti dell'intervento regolatorio verrà svolto dalle Autorità di settore (Banca d'Italia e Consob), che vigilano sui soggetti operanti nel mercato e destinatari del provvedimento.

D) i meccanismi eventualmente previsti per la revisione dell'intervento regolatorio;

A livello europeo, il riesame della direttiva si concentrerà:

1. sulla misura in cui saranno stati realizzati i risparmi di costi previsti grazie ad un regime di responsabilità dei depositari più chiaro e armonizzato;
2. sui possibili impatti che una nuova delega e nuove disposizioni in materia di responsabilità potrebbero avere sulle spese di funzionamento dei depositari; sulla valutazione della misura in cui si siano avute deleghe a depositari di paesi terzi non conformi e quale impatto ne sia derivato;
3. sulla stima dell'impatto di eventuali costi operativi aggiuntivi sui costi del fondo OICVM e sul rendimento degli investitori.

In base ai provvedimenti che verranno assunti in sede europea e alle eventuali modifiche che verranno apportate alla direttiva UCITS e ai regolamenti delegati in materia di OICVM, si procederà ad una revisione della normativa italiana di settore.

E) gli aspetti prioritari da monitorare in fase di attuazione dell'intervento regolatorio e considerare ai fini della VIR.

Nella predisposizione della VIR verranno considerati prioritariamente i seguenti aspetti:

- l'adeguamento, ove necessario, da parte di gestori e depositari dei contratti alla nuove disposizioni (in particolare a quelle del Regolamento delegato della Commissione UE che integra la direttiva per quanto concerne gli obblighi dei depositari);

- l'adeguamento da parte dei gestori, che già sono soggetti a tale disciplina per i FIA, alle regole in materia di politiche retributive anche in relazione agli OICVM;

- i dati sulle sanzioni

Il Ministero dell'economia e delle finanze curerà l'elaborazione delle VIR, sulla base dei contributi che potranno essere forniti da Banca d'Italia e Consob sulla base delle verifiche effettuate nell'ambito delle loro attività di vigilanza.

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Sezione aggiuntiva per iniziative normative di recepimento di direttive europee

SEZIONE 8 - Rispetto dei livelli minimi di regolazione europea

Il provvedimento in esame non prevede l'introduzione o il mantenimento di livelli di regolazione superiori a quelli minimi richiesti dalla direttiva, ai sensi dell'articolo 14, commi 24-*bis*, 24-*ter* e 24-*quater*, della legge 28 novembre 2005, n. 246. L'atto normativo UE non prevede opzioni da esercitare da parte degli Stati membri.

EUROPEAN COMMISSION

Strasbourg, 3.7.2012
SWD(2012) 185 final

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

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

{COM(2012) 350 final}
{SWD(2012) 186 final}

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1. INTRODUCTION

Since its introduction in 1985, the UCITS Directive[1] has offered to European investors a wide range of high quality and safe investment products. The subsequent reforms of the Directive (2001 and 2009) have built upon the high level of investor protection and prudential supervision ensured by the Directive. The standards introduced in the UCITS rules have also contributed to the success of the UCITS brand in third countries (notably in Asia and Latin America) where UCITS funds domiciled in the EU enjoy a significant investor base. The requirements relating to depositaries that act on behalf of undertakings for collective investment in transferable securities (UCITS) are one of the key building blocks within the UCITS framework and aim primarily to ensure a high level of investor protection.

The UCITS depositary must be an entity that must be independent from the UCITS fund and the UCTIS fund's manager. Neither the fund manager nor any prime brokers that act as counterparties to the fund may also act as the fund's depositary. The independence of a depositary is necessary because the depositary essentially acts both as a supervisor (the 'legal conscience') of a UCITS fund, overseeing certain fund transactions (redemptions and investor payments to the fund) and as a custodian over the fund's assets.

A depositary "safe-keeps" the assets in which a UCITS invests and thus maintains the UCITS' and its investors' property interests. While the safekeeping of investors assets is a core task of the depositary, the depositary also performs certain oversight functions, such as verifying that a UCITS fund's sales, repurchase and redemption of units or shares is carried out in accordance with applicable laws, that the net asset value of units is calculated in line with national laws and fund rules, that transactions of the fund manager comply with all applicable laws and that transactions involving the fund's assets are carried out within the customary time periods.

Despite its important role, the UCITS rules relating to depositaries in the Directive have remained mostly unchanged since 1985: there are a number of generic principles applying to depositaries, leaving room for diverging interpretations of their duties and related liabilities. As a minimum requirement, the UCITS Directive does mention, however, that the management of a UCITS cannot be entrusted to the same entity that acts as a depositary. What the UCITS directive does not specify is that the separation between portfolio management and custody should also prevail in case the depositary function is delegated to a third party who, in turn, cannot be portfolio manager and custodian at the same time. This latter conflict of interest was present in the Madoff scenario (described in further detail below).

Different national rules have developed in many of those areas not specifically covered by the UCITS Directive. Especially in respect to entities eligible to act as a depositary, rules on delegation, rules on conflict of interest in case of delegation and rules on liability for the loss of assets in custody, the high level principles contained in the

[1] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS),, OJ L302, 17.11.2009, p 32.

Directive have allowed the emergence of different approaches across the European Union. As evidenced by the Madoff case, this has led to different levels of investor protection depending on where the UCITS fund is domiciled.

1.1. The delegation of custody

The potential consequences of these divergences came to the fore in the course of the Madoff fraud, which hit the headlines on 11 December 2008. The brokerage operation of Bernard Madoff was revealed as a giant Ponzi scheme resulting in the largest investor fraud ever committed by one individual. Huge sums that were allegedly invested by Bernard Madoff turned out to have vanished with no corresponding securities in Mr Madoff's investment fund.

The consequences of the Madoff scandal are not confined to the US. The issue has been particularly acute in some EU Member States. One particular fund that acted as a feeder fund for Madoff recorded losses of around $ 1.4 billion due to Madoff investments which turned out to be fictitious. The losses suffered by this 'feeder fund' channelling investments to Madoff, have brought to the issue of depositary's liability to the fore. In this case, both the management of investments and custody in relation to the assets that belong to the fund were delegated to entities operated by Madoff. A 'feeder fund' is essentially a vehicle that collects investors' money and then provides these monies to another financial service provider, usually a broker or another fund, so that the latter can design and execute an investment strategy.

The large scale of the Madoff fraud essentially went undetected for a long period because the depositary responsible for the safekeeping of the fund assets delegated custody over these assets to another entity run by Bernard Madoff, the US broker "Bernard Madoff Investment Securities".

The circumstances of the Madoff case raised several important issues in relation to UCITS funds. First, what are the precise conditions under which the depositary acting on behalf of a UCITS fund can delegate safekeeping of the fund's investment assets to a sub-custodian? The current UCITS Directive is silent on the precise conditions of sub-custody.

But more importantly, the Madoff scandal has also revealed general uncertainties within the UCITS framework, especially, in relation to the principal custodian's on-going liability in case of delegation of custody to a sub-custodian. As will be explained below, the issue of liability in case of delegation, in the absence of harmonised rules in the relevant UCITS Directive, is dealt with differently in individual Member States. The main difference is essentially that, in some jurisdictions, the depositary is obliged to reimburse investors for losses that stem from the decision to sub-delegate custody, while other jurisdictions limit liability to the diligent selection of the sub-custodian.

1.2. Wider issues linked to the 'dematerialisation' of securities

While the Madoff scandal triggered a closer look at the consequences of a loss of instruments that are held in (electronic) custody, some of the issue raised by the Madoff fraud are intrinsically linked to the trend toward recording ownership in financial instruments by means of an electronic book entry.

The current gaps in the UCITS rules on depositaries are also linked to the increasing use of electronic book entry ('computerisation of securities') to register and keep track of ownership changes in securities. The current UCITS framework does not take issues and circumstances linked to electronic custody into account.

The trend toward electronic book entry started much before Madoff and the consequences of this development are not at all reflected in the way the 1985 UCITS rules on depositaries are configured. For example, the basic distinction between electronic custody over transferable securities and record-keeping in relation to all "other" assets is not reflected in UCITS. More precise rules on such financial instruments that are to be held in custody and more clarity on the consequences of their loss are therefore driven by the need to keep pace with technology in the depositary sector. The remainder of this section sets out the main problems inherent in the current regulatory framework that governs the activities of UCITS depositaries, i.e., eligibility to act as a depositary, rules on delegation of custody, liability for the loss of a financial instrument in custody, remuneration policies of UCITS managers and sanctions.

1.3. Previous action by the Commission

In 2009, the Commission introduced its proposal on Alternative Investment Fund Managers to regulate the alternative part of the asset management industry that, until then, had not been subject to any regulation and supervision at EU level. The AIFM Directive[2] that was finally adopted in 2010 draws the lessons from the Madoff case and introduces a complete and fully harmonised system on liability related to the performance of depositary tasks for alternative investment funds. These rules, however, apply only to alternative investment funds that are targeted to professional investors. The precedent set by the AIFMD constitutes nevertheless an essential point of reference for the improvement of the current depositary rules for UCITS. It is obviously an unintended anomaly that retail investors remain less protected than the professional investors covered by the AIFM framework.

In addition, the financial crisis also revealed that the remuneration and incentive schemes commonly applied within financial institutions were themselves exacerbating the impact and scale of the crisis. Remuneration policies contributed to short-term decision making and created incentives for taking excessive risk. These tendencies, in turn, increased levels of systemic risk.

More generally, and in view systemic issues and commitments that were made at the G20 level, the EU is taking coordinated steps across all financial services sectors to introduce consistent requirements governing remuneration policies, as set out in the Commission Recommendation of April 2009.[3] The adoption of CRD III,[4] the AIFM Directive, and the ongoing work on the level 2 measures under Solvency II will confirm the determination

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[2] Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p.1.

[3] http://ec.europa.eu/internal_market/company/docs/directors-remun/financialsector_290409_en.pdf

[4] Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies, OJ L 329, 14.12.2010, p.3

of the EU to fulfil these commitments. Extending this work to also cover the remuneration of UCITS investment managers is a natural additional step in this process.

Sanctions are not harmonised in any financial services legislation at EU level and the analysis of national sanctioning regimes carried out by the Commission, along with the Committees of Supervisors (now transformed into European Supervisory Authorities) has shown a number of divergences and weaknesses which may have a negative impact on the proper application of EU legislation, the effectiveness of financial supervision, and ultimately on competition, stability and integrity of financial markets and consumer protection. Therefore, in its Communication of 9 December 2010 "Reinforcing sanctioning regimes in the financial sector"[5] the Commission suggested setting EU minimum common standards on certain key issues, in order to promote convergence and reinforcement of national sanctioning regimes. A significant majority of respondents to the consultation launched by the Communication shared the Commission's analysis of the shortcomings in the existing national sanctioning regimes and were supportive of EU action to set minimum common rules on the key issues identified, which include level of administrative fines; criteria to be taken into account when applying sanctions and mechanisms facilitating enforcement. Therefore, the Commission has included such common rules, adapted to the specifics of the sectors concerned, in all its recent proposals for the review of the sectoral EU legislation concerned (CRD IV, MiFID, Market Abuse Directive, Transparency Directive). Extending this work to the UCITS framework is a natural additional step in this process.

2. PROCEDURAL ISSUES AND CONSULTATIONS

2.1. Procedural issues

The proposed amendments to the UCITS Directive are part of the Commission's 2012 Work Programme in the area of financial services. The impact assessment process was initiated in September 2010 with the first meeting of the Inter-Service Steering Group (ISSG), comprising the following Commission services: Competition, Health and Consumers, Taxation and Customs Union, Enterprise and Industry, Secretariat General, Economic and Financial Affairs, and the Legal Service. Further meetings of the ISSG took place in January, March and September 2011. Subsequent to the last meeting, the IA assessment was adjusted to widen the breadth of policy options to address the key problems that arise in respect of depositaries, their duties and their liability. In order to enhance the overall presentation, the problem definitions in the IA were streamlined. In addition, more economic evidence on the structure of the depositary markets in the EU and overseas was added, more research was conducted on the typical UCITS investor profile and the economic rationale behind the increasingly frequent sub-delegations to third countries is presented in a more detailed manner (Section 3). Finally, more background was added on the precise facts on the Madoff case, as this case largely triggered the need to reform the rules applicable to UCITS depositaries. The new version was communicated to the ISSG on 1 February 2012 and the latter did not request a new meeting to discuss these adjustments.

The report was sent to the Impact Assessment Board (IAB) on 3 February 2012 and discussed before the IAB on 29 February 2012. Subsequent to the meeting of the IAB

[5] COM(2010)716 final.

changes were introduced, in particular relating to the cost of custody, the cost of recordkeeping, the overall custody fee structure (specifying differences in custody fees in different jurisdictions) and the repercussions that regulatory change might have on these parameters. Improvements were also made in explaining the different legal standards that are currently employed to delineate a custodian's liability to return instrument lost in custody and, in particular, instruments lost at the level of a delegate sub-custodian. Significant changes were made to better describe the economic repercussions of inaction on various stakeholders directly or indirectly linked to providing services to UCITS funds (in the baseline scenario).

2.2. Stakeholder consultation

The Commission launched in 2009, in direct response to the Madoff scandal, a first public consultation in order to strengthen the regulation and supervision of UCITS depositaries. A feedback statement[6] published in 2009 showed that the clarification of the UCITS depositary function was an essential step for a comprehensive review of the existing European regulatory principles applicable to depositary functions. The same year, the Commission published a proposal in order to regulate the alternative funds managers (AIFM) which also introduced some provisions relating to the depositary function. The AIFM Directive[7] that was finally adopted in 2010 draws the lessons from the Madoff case and introduces a complete and fully harmonised system on liability related to the performance of depositary tasks for alternative investment funds.

As part of its wider reform on all provisions pertaining to the role and liability of depositaries, the Commission undertook[8] to introduce targeted changes to the depositary provisions in the UCITS Directive[9]. In its Communication of 2nd June 2011 (COM (2010) 31 final, page 7), the Commission proposes to adopt "changes to the legislation applicable to the UCITS depositaries function in response to the Madoff fraud, which revealed the need to further harmonise certain aspects of the level of protection offered to UCITS investors".

On 9 December 2010, the Commission services launched a second public consultation on the UCITS depositary function and on managers' remuneration, which closed on 31 January, 2011. 58 contributions were received and signalled a broad support of the review initiative, particularly with respect to the clarification of depositary functions and to the simplification of the regulatory landscape as a result of the proposed alignment

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[6] http://ec.europa.eu/internal_market/consultations/2009/ucits_depositary_function_en.htm. Feedback statement is also provided in Annex 2.

[7] Directive 2011/61/EC of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p.1.

[8] In its communication of 2nd June , available at : 2010http://ec.europa.eu/internal_market/finances/docs/general/com2010_en.pdf

[9] Directive: 2009/65/EC.· OJ L 302, 17.11.2009, p. 32-96 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:en:PDF

with the AIFM Directive. Respondents however took a more critical stance *vis-à-vis* the issue of depositary liability[10].

As to the issue of administrative sanctions, this report reflects replies to an *ad hoc* questionnaire prepared by the Commission services and sent to the European Securities Committee (ESC), as well as to ESMA. A summary of the Member State replies to the questionnaires is presented as Annex 7.

3. BACKGROUND AND CONTEXT

3.1. Economic importance of UCITS funds

Investment funds are special investment vehicles, created for the purpose of gathering funds from investors, and investing those funds in a diversified portfolio of financial instruments. Since its origin in 1985, the UCITS Directive has been the basis on which a genuine European retail investment fund 'product' has been built. UCITS has created a comprehensive legal framework that offers increased investment opportunities for businesses and households alike. At the same time, the directive also introduced a financial services 'passport', whereby a UCITS fund can be marketed across the EU, following authorisation from the competent authorities of its country of domicile (i.e. the home country) and notification to the competent authorities of the host market.

Cross border subscriptions to UCITS compliant investment funds have grown considerably since the UCITS rules were first introduced in 1985. The UCITS acronym has developed into a strong brand and is nowadays, apart from Europe, also recognized in Asia and South America. The success of UCITS as a cross border vehicle for investments is borne out by the rapid growth of assets that are managed in UCITS compliant funds. Total assets under management (AuM) grew from €3,403bn at the end of 2001 to €5,889bn by end 2010, according to data from the European Fund and Asset Management Association (EFAMA). In September 2011 AuM stood at € 5,515bn.

About 80% of UCITS assets are invested by funds[11] domiciled in four jurisdictions: Luxembourg (32.4%), France (20.6%), Ireland (14.4%), and the United Kingdom (11.5%).

In line with the requirement that the depositary is located in the same Member State as either the UCITS fund or the investment company, most UCITS assets are safe-kept by depositaries located in either Luxembourg, France, Ireland, the United Kingdom. Overall, the European depositary industry is today entrusted with safe keeping of around €5.3 trillion worth in UCITS assets.

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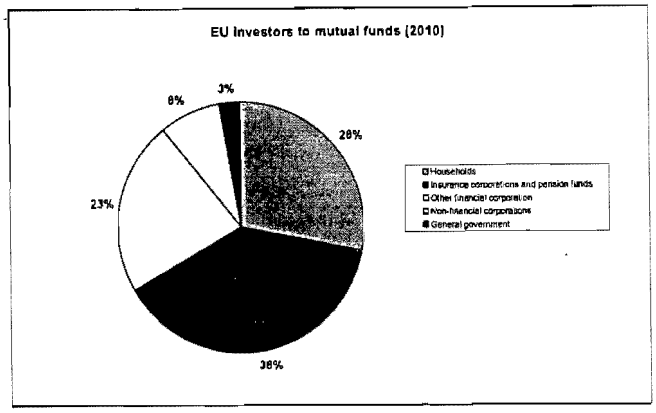
[10] Two public consultations have been published on the UCITS depositary function. The latest, published in December 2010, also includes managers' remuneration issues. They are respectively available at: http://ec.europa.eu/internal_market/consultations/docs/2009/ucits/consultation_paper_en.pdf; and http://ec.europa.eu/internal_market/consultations/docs/2010/ucits/summary_of_responses_en.pdf

[11] Full Member State data is provided in Annex 4. Source: EFAMA Quarterly Statistical Release N°47 (Third Quarter of 2011). At the end September 2011, the number of UCITS reached 35,517. The main domiciles per number of UCITS funds are Luxembourg (26.9%), France (22.2%), Ireland (8.7%) and Spain (7.1%).

3.2. Investor profile of UCITS funds



According to 2010 data[12], EU investors held € 6.9 billion in mutual funds[13], of which about 75% was invested in EU domiciled funds and 25% in funds that are not domiciled in the EU. Non-EU investors invested further € 3,300 billion into the EU domiciled mutual funds. The investor profile of an EU mutual fund is depicted in the graph. As more than 85% of EU mutual fund investments are directed towards UCITS vehicles to (€5,889 out of 6.9 bn in 2010), the graph is representative for the UCITS investor profile as well. The graph shows retail investors are heavily exposed to mutual funds. 28% of fund holdings are made up of direct retail investments while another 61% are intermediated either through insurance policies, pension funds and other financial corporations. Intermediaries, for example pension funds that provide retirement benefits to individual investors, invest monies they collect from retail investors into mutual funds. Essentially this means that around 90% of mutual fund investments are directly or indirectly attributable to retail investors.

Based on data from statistical offices of six Member States[14], it is estimated that about 22.5 million (i.e. 10 %) of EU households are invested in mutual funds. Given the fact that the major EU fund domiciles are concentrated in the above-mentioned four EU jurisdictions, this demonstrates significant cross-border sales of fund units based on the 'passport'.

3.3. Trends in services provided to UCITS funds

A typical UCITS fund uses several service (external or internal) providers to operate and execute its investments. Normally, the fund relies on an investment manager to manage the assets, one or several brokers to execute trades, a fund administrator to calculate the value of the fund's investments and a custodian to safe-keep investment positions. While being obliged to work together, these service providers should be independent of each other and their functions should be strictly separate. Separation of the above services is an essential tool to avoid fraud. One function that should be separate from all of the others is that of safe-keeping of assets by means of a depositary. A depositary should therefore neither be identical to an investment manager, a fund administrator or a broker. A depositary should also not belong to the same corporate group as any of the other fund service providers.

[12] Source: Eurostat, Sectoral Accounts

[13] Both UCITS and non-UCITS

[14] Share of household investing in funds: Germany (16%), Italy (11%), Austria (11%), France (10%), Spain (7%), the United Kingdom (6%). The sources are listed in Annex 3.

Recent trends affecting the custody sector include increased competition, the disappearance of local custodians and the emergence of a handful of global players. The largest global custodians, in terms of client assets under custody (AuC) for 2010, are Bank of New York Mellon ($25.5trillion), State Street ($16.7 trillion), J.P. Morgan $16.6 trillion) and Citigroup ($13.5trilllion)[15].

The table provides an overview of the main suppliers of global custody services, in terms of assets under management (AuM), relative changes in AuM and the number of custody clients.

GLOBAL CUSTODY ASSETS (all mutual funds)			
BNP PARIBAS	7 trillion	N/D	N/D
BNY MELLON * (* includes assets under administration)	25,50 trillion	12,0%	4700
Brown Brothers Harriman	3,10 trillion	31,6%	346
CITI	13,50 trillion	14,5%	N/D
HSBC SECURITIES SERVICES	5,70 trillion	9,5%	1167
JP MORGAN	16,60 trillion	8,0%	2895
NORTHEN TRUST	4,36 trillion	17,0%	1933
RBC DEXIA	2,23 trillion	18,1%	N/D
SGSS	4,76 trillion	8,0%	150
STATE STREET	16,7 trillion	18,8%	2645

In this context it is important to note that not even the largest of the above-mentioned global custodians have custody operations of their own in all of the jurisdictions that a UCITS fund might wish to invest in. According to newspaper reports no single custody bank is believed to have operations in more than 40 jurisdictions[16]. This means that local custody is often "outsourced" to non-affiliated sub-custodians operating in those jurisdictions not covered by a global custodian's network.

Markets where global custodians offer DIRECT CUSTODY	Europe	Asia	Americas	Middle East	Africa	Total
BNP PARIBAS	17	3	1	-	1	*22*
BNY MELLON	5	-	3	-	-	*8*
Brown Brothers Harriman	-	-	1	-	-	*1*
CITI	N/D	N/D	N/D	N/D	N/D	*60*
HSBC SECURITIES SERVICES	6	13	4	6	-	*29*
JP MORGAN	3	3	1	-	-	*7*
NORTHEN TRUST	2	-	2	-	-	*4*
RBC DEXIA	3	-	1	-	-	*4*
SGSS	15	1	-	-	3	*19*
STATE STREET	1	-	2	-	-	*3*

Markets where global custodians offer CUSTODY VIA SUB-CUSTODIANS	Europe	Asia	Americas	Middle East	Africa	Total
BNP PARIBAS	23	16	11	9	21	*80*
BNY MELLON	35	20	12	10	22	*99*
BROWN BROTHERS HARRIMAN	38	17	13	10	15	*93*

[15] Source: Global custody survey 2011. International Custody & Fund administration www.icfamagazine.com

[16] Source: Steve Johnson, in Financial Times, June 7, 2009 *Depositary banks in protest over EU plans.*

CITI	N/D	N/D	N/D	N/D	N/D	34
HSBC SECURITIES SERVICES	6	18	4	12	-	40
JP MORGAN	33	16	12	14	19	94
NORTHEN TRUST	35	17	11	13	22	98
RBC DEXIA	37	19	10	9	11	86
SGSS	21	16	8	8	8	61
STATE STREET	N/D	N/D	N/D	N/D	N/D	104

3.4. The fee structure applicable to depositary duties

The payment schedule for custody and record-keeping of fund assets is set out in a 'ratecard' negotiated with the fund manager which includes a holding fee based on the value of the assets being 'held' in custody (or monitored), as well as a transaction fee. Additional elements affecting the cost of such services are the nature of the assets and the size of the fund.

The cost of custody is normally calculated as a percentage of the assets that are held in custody. The cost of custody, on average, in Europe varies between 0.25 and 1.25 bp. This corresponds to a fee ranging between 0.00025% and 0.001 % of the assets held in custody. There are differences in the cost of custody between different Member States. These differences can amount, on average, to 0.25-1.0 bp. Custody in the United States is even cheaper, ranging from 0.2 bp to maximum of 0.5 bp.

The cost of holding assets in custody in third countries is significantly higher. For most developing countries, the cost of custody varies between 25 to 50 bp. Custody in some developing countries may cost up to 60 bp.

The cost of record-keeping (checking ownership records and recording individual contracts that are not suitable for custody) is higher at between 1 and 1.25 bp. This is due to the fact that custody is nowadays based on electronic data entries reflecting the existence of a security. Therefore, moving to a broader scope of instruments to be held in (electronic) custody might entail cost savings of, on average, between 0.5 and 0.75 bp.

The above described cost structure of custody allows for three conclusions. First, the provision of custody services, which is essentially the clearing, servicing and safekeeping of assets, is typically a low margin product by itself. However, when coupled with other value added services like foreign exchange, securities lending, cash management and fund accounting, margins associated with the total bundled service offering can become higher. Nevertheless, global custodians have largely been able to achieve higher margins by deploying large scale operations and technology which lower per unit costs.

Second, price differentials between EU Member States seem a question of max. 1 bp. On the other hand, price differentials between Europe and certain emerging markets can become quite significant. The overall rate of custody is therefore heavily influenced by the composition of a fund's portfolio (e.g., the share of instruments issued in emerging markets). As fund clients are generally charged on a per market basis, with emerging markets attracting higher fees, those with large emerging markets portfolios will usually have a higher blended rate. In addition to portfolio composition, emerging markets will typically have additional settlement related requirements and other logistical related issues which increase costs.

3.5. Remuneration structures in the fund management industry

Typical of a principal-agent relationship, the asset management industry is defined by the division between the control of financial wealth and its ownership. Compensation structures, as an intimate part of this relationship, are as a result shaped by the necessity to align the incentives of those fund managers (i.e. the agents) that control wealth by making investment decisions with those of the unit-holders (i.e. the principals) who own but delegate their wealth for this purpose.

Evidence suggests that remuneration for the individual fund managers consists of a fixed base salary, topped by a bonus based partially on a fund's relative performance with respect the previous performance period (t-1) which is typically quarterly (i.e. high water mark). The high water mark shall be the highest NAV per unit/share and is a benchmark for gauging a manager's performance in the period t_0. An independent fund administrator (at times this coincides with the depositary), whose main function is to calculate the NAV of the fund, shall compare performance and authorise a bonus only where NAV exceeds its peak (or high water mark value) of the previous period. References to industry benchmarks (usually standard market indices like MSCI, S&P 500, etc.) or to average peer performance are also more broadly taken into account. Typically, bonuses will be paid from a bonus pool, the size of which is determined by the overall performance of the management company. An individual's share of the pool will largely be driven by its own performance, but there will also be other 'soft' factors not related to investment performance, such as professional experience, teamwork and seniority. As a result, there is no mechanistic relationship between relative return performance of a fund and an individual manager's remuneration[17].

According to a pre-financial crisis study by the Bank for International Settlements (BIS), the size of the bonus component in individual asset managers' compensation varies considerably across countries, with a general trend towards a gradually higher share of variable compensation to total pay. According to gathered evidence, bonuses are, on average, around 25-40% of total pay in Spain, 30% in Germany, and, as a rule, no larger than 50% in France. In Italy, bonuses range from between 15-20% of base pay at the low end, up to 150% at the high end. In the United Kingdom, however, the importance of bonuses seems to be higher: the median fund manager will receive a bonus of about 100% but exceptional asset managers can earn as much as six-times their base salary in the form of bonuses[18]. Many stakeholders stressed in their responses to the consultation that where an individual manager's variable remuneration component is linked to the performance of the fund, multi-year periods are taken into account (between 3 and 5 years) as a safeguard against 'short-termism'.

Besides the direct rewards for achieving higher returns relative to a selected benchmark, performance is also rewarded indirectly through management fees corresponding to a fixed component of total assets under management (AUM), albeit with fee levels differing across management styles and asset classes. In other words, a positive relative performance rewards the fund manager through new fund inflows thereby increasing the AUM. This nexus between relative performance and new fund inflows acts as an implicit

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[17] For further references, see the report *Incentive structures in institutional asset management and their implications for financial markets*, submitted by an *ad hoc* working group established by the Committee on the Global Financial System. Source: Bank of International settlements, March 2003.

[18] *Ibid.*, p. 23.

incentive structure. Finally, the increasing layers of intermediation within the industry and the growing complexity of UCITS-eligible products all imply a series of hidden costs to investors. These range from product servicing costs throughout an investment's lifecycle, to excessive trading due to high portfolio turnover, etc. Fees from stock lending and other transactions (including the re-use of collateral) involving the fund's assets are generally undisclosed, but may well influence the size of executive pay while mitigating real operating costs reflected in the Total Expense Ratio (TER)[19].

4. PROBLEM DEFINITION

4.1. Divergent criteria on eligibility to act as a depositary

Currently, there is little clarity on the institutions that are eligible to act as a depositary for a UCITS fund. According to Article 23(2) UCITS any institution which is subject to prudential regulation and ongoing supervision can act as a depositary for a UCITS fund. According to Article 23(3) UCITS Member States enjoy significant discretion as to the institutions that they can determine as UCITS depositaries[20].

National divergences as to the entities that can act as depositaries for a UCITS fund may be at the origin of significant legal uncertainty and could lead to differential levels of investor protection. This is particularly true as regards the capital that depositaries need to set aside to cover liabilities, especially the obligation to return assets that are held in custody.

More specifically, the eligibility criteria referred to in the Article 23(2) UCITS Directive permit Member States to select the types of entities are suitable to acts as UCITS depositaries at national level. This has led to divergent approaches across Member States: out of the 17 Member States that require depositaries to be credit institutions, 12 impose specific capital requirements for carrying out custody activities or other related UCITS depositary functions.

The results of the public consultation carried out by the Commission in 2009 indicate the following opinions as regards to eligibility criteria:

66% of the respondents[21] agree with harmonisation of rules as to what institutions can be eligible as UCITS depositaries and 49% would like to see only those entities acting as UCITS depositary that are subject to the Capital Requirements Directive (see replies to questions 24 to 26 in the feedback statement).

4.2. Unclear rules on delegation of custody

The fragmentation of the regulatory framework applying to delegation of safe-keeping has become more pronounced due to an increased diversification and internationalisation of UCITS investment portfolios. As more investment opportunities arise in different

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[19] See Glossary, Annex 10.

[20] Please refer to CESR mapping available at http://www.esma.europa.eu/system/files/10_175.pdf . The summary of this CESR mapping is available in Annex 5.

[21] Including 70% of the 10 replies received from public authorities, 55% of the 20 responses received from asset management organisations, and 71% of the 41 responses received from the banking and securities industries.

jurisdictions, the necessity to appoint sub-custodians in these jurisdictions increases (cf. the above tables comparing direct custody with custody through delegation).

Changes to the UCITS directive introduced in 2001 extended the scope of eligible assets for UCITS to new classes of assets.[22] As a result, UCITS managers now invest in a much greater number of countries and in more complex instruments than in 1985.

4.2.1. Conditions of delegation

Despite the enlargement of eligible investment instruments, the UCITS Directive does not define the conditions applicable in case a depositary elects to delegate custody to a sub-custodian.

In order to situate the conditions of delegation of custody functions in proper context, two important issues must be clarified at the outset.

First, custody depends on the characteristics of a financial instrument. Transferable securities (e.g. equities, bonds or money market instruments) have to be held in custody while other assets (e.g., certain derivative contracts or individually negotiated partnerships in non-listed companies) can only be recorded in a position-keeping book.

Second, only custody duties and record-keeping duties can be delegated. For prudential reasons, the depositary's oversight duties (as contained in Article 22(3) UCITS, according to which the depositary supervises compliance of the UCITS manager with legal provisions and investment policies, cannot be delegated. In exercising these duties, the depositary acts as the 'legal conscience' of the UCITS in ensuring that all transactions (sales, redemptions, cancellation of units) are carried out in accordance with applicable national laws and the UCITS instruments of incorporation. This is in line with the principle that quasi-supervisory functions should not be subject to delegation. The lack of clarity pertains both to the conditions under which a delegation of either custody or record-keeping can take place (e.g., objective reason for delegation, level of skill in selecting sub-custodian, intensity of ongoing monitoring of sub-custodian) and to the conditions in which, exceptionally, custody can be delegated to third country custodian who do not match these standards.

CESR's submission to the Commission consultation in 2009 and the CESR mapping exercise published in 2010 both highlight a variety of national regulatory approaches in this respect.[23] Member States impose various conditions in respect of the sub-custodian entity to which a delegation of safe-keeping can take place (e.g., effective prudential regulations, minimum capital requirements and supervision). In particular, Member States' approaches differ in relation to delegations to third country custodians..

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[22] Including money market instruments, index-based funds including exchange traded funds (ETFs) fund of funds, derivatives (options, swaps, futures/forwards) or other over-the-counter derivatives. Please refer to Directive 2007/16/EC, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:079:0011:0019:EN:PDF

[23] Please refer to CESR's response to the 2009 consultation on the UCITS depositary function. http://www.esma.europa.eu/system/files/09_781.pdf. Please also refer to CESR mapping available at: http://www.esma.europa.eu/system/files/10_175.pdf.

4.2.2. Third country delegations

Equally, the UCITS Directive is silent on the conditions that apply when a depositary has, by virtue of national laws, to delegate custody to a third country custodian. Rules on delegations to third country custodians are important as UCITS increasingly seek to invest in third country jurisdictions, primarily in East Asia (Hong Kong, China, Korea). In some of these jurisdictions either practical considerations or local rules may mandate local custody over the financial assets that are issued in these jurisdictions. For that reason, recourse to a local custodian, based on a delegation contract, becomes mandatory. As the above tables comparing direct custody with custody by means of local sub-custodians demonstrate, local sub-custody is rather the rule and direct custody the exception. A local custodian can either be a subsidiary of the principal custodian or an independent entity.

As explained in section 3.2, the Madoff case shed some light on the risks associated with the use of local third country sub-custody networks when they fail to perform their duties appropriately or simply default.

The results of the public consultation carried out by the Commission in 2009 indicate a clear consensus on the following issues with respect to delegation of UCITS depositary duties

- The Commission consultation revealed that *"custody risks"* associated with financial instruments ", i.e. the "loss of assets", are likely to materialize when safekeeping tasks have been delegated to a third party.
- 82% of respondents[24] agree that conditions upon which the depositary shall delegate its activities should be clarified (see replies to questions 15 and 17 in the feedback statement).

4.3. Unclear scope of liability in case of loss (including loss when custody has been delegated)

According to Article 24 of UCITS Directive, liability for loss of a financial instrument that is held in custody only arises in case of 'unjustifiable failure to perform obligations' or 'improper performance' of these duties. These legal terms have given rise to different interpretations in the Member States and thus differences in investor protection, most notably in the case a custodial instrument is lost after the delegation of custody.

The potential consequences of these divergences came to the fore with the Madoff fraud. In some Member States the depositary was immediately liable to return assets in custody as a consequence of fraud at the level of the sub-custodian, in other Member States the situation is less clear and still subject to litigation.

While the liability rules in the UCITS directive haven't changed since 1985, the UCITS investment environment has evolved. UCITS funds are now able to invest in a wider range of financial assets, which may be more complex and also may be registered outside the EU (for instance, in emerging markets); fund portfolios are increasingly diverse and international. In particular, the fact that the UCITS Directive only contains high level legal principle has the following consequences:

Situation 1: Loss of an instrument in custody with the UCITS fund's principal custodian or a sub-delegate

[24] Including all the 10 replies received from public authorities, 90% of the 20 responses received from asset management organisations, and 78% of the 41 responses received from the banking and securities industries.

The UCITS rules are not precise enough to avoid that the depositary's liability is dealt with in a different manner in different Member States[25]. As a consequence, the obligation to return assets lost in custody is not uniform across the Member States. The Madoff case has demonstrated the fundamental difference between the strict liability and the diligence approaches.

Situation 2: Loss of an instrument in custody with a third country sub-custodian

In addition, the current UCITS rules provide no clarity for the situation when custody is delegated to third country sub-custodians. Should the reformed UCITS rules allow delegations of custody, including delegations to third country sub-custodians that do not meet the delegation requirements (in terms of effective prudential regulation, minimum capital requirements and supervision in the country where the sub-custodian is established), the impact of such delegations on the principal custodian's liability needs to be clarified.

The AIFMD currently allows contractual discharge for all instances in which custody is delegated. In line with the retail profile, it needs to be assesses whether such a general discharge is appropriate for a UCITS fund.

4.4. Unclear remuneration practices

Given that remuneration of the UCITS managers is, at least partly, based on the performance of the fund, there is an incentive to increase the level of risk in the funds's portfolio in order to increase the potential returns. However, the higher level of risk can expose the fund investors to higher potential losses. The remuneration structure is typically skewed in the sense that the manager participates in the materialized returns but does not participate in the materialized losses. This creates further incentives to pursue higher risk strategies. In addition, the remuneration structure that does not take into account performance over extended periods induces the manager to pursue strategies with skewed risk return profile, i.e. strategies that are likely to generate higher positive returns at the cost of less frequent but much larger possible losses.

Furthermore, remuneration structures are seldom disclosed in the fund's offering documents, rendering managers largely unaccountable to investors as far as the determinants to executive pay in line with fund performance are concerned.

Another important aspect to consider is expected market developments. Were UCITS funds to be excluded from the scope of the recent international and European standards[26], a potential migration of riskier management practices may occur from the alternative investment into the more risk-averse retail fund industry, albeit insofar as the UCITS Directive allows[27].

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[25] Please refer to CESR mapping available at http://www.esma.europa.eu/system/files/10_175.pdf . The summary of this CESR mapping is available in Annex 5.

[26] For an overview of the Commission's broader approach on remuneration on financial services, see Annex 6 attached to this report

[27] This view was reflected by CESR in its advice to the Commission in October 2009 on the Level 2 measures related to the UCITS management company passport: *remuneration practices may strongly hamper sound and effective risk management if oriented towards rewarding short-term profits and giving*

4.5. Divergent sanctioning regimes

A preliminary mapping exercise of national rules on sanctions for breaches of obligations contained in the UCITS Directive was carried out in 2010 by the Commission . The results were updated through a consecutive survey in the form of a questionnaire addressed to ESMA, as well as to all Members of the ESC, in May 2011. Replies to the questionnaire revealed three salient features: (i) differences in the amounts of pecuniary sanctions (i.e. fines) applied to the same categories of breaches; (ii) divergences different criteria applicable to determining the amount of administrative sanctions; and (iii) variations in the level of enforcement of sanctions. For an overview of the core violations to the UCITS Directive, see Annex 8 to this report.

4.5.1. Differences in levels of administrative fines across Member States

Among the powers granted to competent authorities under Article 98(2) of the UCITS Directive, there is no explicit reference to fines. Rather, they are contemplated under the following Article 99(1) where Member States shall *ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative penalties be imposed against the persons responsible* where the provisions for the implementation of the Directive have not been complied with.

The results of the Commission's 2011 mapping exercise revealed that all UCITS transposing legislation in twenty-five Member States foresees a maximum fine for both legal and natural persons alike[28]. In twelve Member States there are also statutory minimum amounts. As an alternative, where the amount of the illicit profit or economic advantage from the offence can be precisely quantified, the level of the fine is determined by multiplying the profit by a pre-determined factor[29]. This approach, however, seems to be the exception rather than the rule.

Overall, levels of fines vary greatly across the EU and in some member States those levels appear to be too low to ensure sufficient deterrence, given the large gains that may be obtained from infringing the detailed "product" regulations contained in the UCITS Directive. For legal persons, the maximum fines foreseen for offences range from €100.000 in one Member State[30] to €10 million in another. These figures denote considerably wide spectrum in the application of fines for identical or similar types of

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staff incentives to pursue unduly risky activities. Management companies should establish remuneration policies in a way as to ensure that it does not induce risk taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the UCITS they manage (...). On this occasion, CESR also advised that the remuneration policy applied to UCITS managers be *designed in such a way as to avoid conflicts of interest and ensure the independence of the persons involved.* Finally, CESR recommended that *the remuneration and incentive structure for the staff is consistent with principles related to the protection of the interests of clients and investors in the course of collective portfolio management activities and other services provided.*

[28] The United Kingdom does not provide for statutory minimum or maximum fines; nor does Denmark

[29] An example is the relative provision under the French Financial and Monetary Code, whereby any illicit profit or gain from the offence is sanctioned with a fine up to ten times its amount when the offence is committed by a legal person. See Article L621 – 15(3), paragraphs (a) and (b) of the French *Code monétaire et financier.*

[30] See German Investment Law or *Investmentgesetz* (*InvG*), section 143, paragraph (5).

breaches. While certain national systems provide that maximum levels of sanctions (or ranges) must be commensurate to the type or nature of the infringement, other Member States apply a maximum (or range) of sanctions without qualifying the type of infringement. For example, in one Member State, the rules on collective investment schemes define three levels of gravity (each corresponding to a statutory maximum amount), i.e. very serious (€300.000), serious (€150.000) and minor (€60.000)[31]. On the other hand, in another Member State, a violation relating to operating requirements triggers a fine ranging from €2.500 to €250.000 for legal and natural persons alike[32]. For violations of disclosure/reporting requirements (e.g. the rules on the offer of units to investors), the corresponding fine, if the amount of the economic damage remains undetermined, may range between €100.000 and €2 million. In cases where economic damage can be determined, the sanction may range from one-fourth of the values marketed to no more than double their value[33]. As these examples indicate, especially in countries with a maximum fine threshold of below € 1 million[34], the economic gains accruing from a variety of violations can often exceed the potential fine.

Concerning fines applicable to natural persons, the same kinds of discrepancies persist. Certain jurisdictions charge the same maximums for legal persons to individuals, whereas others expressly foresee tailored maximums. Competent authorities in twelve Member States are also capable of imposing criminal sanctions.

However, the fact that some Member States provide for criminal sanctions does not seem to be the main reason for the differences identified. Indeed, the scope of criminal sanctions is much narrower: they are usually applied to individuals rather than to legal persons and only for some of the most serious violations of UCITS

4.5.2. Divergences in criteria for setting the level of administrative sanctions

The results from the 2011 stock-taking review of national rules transposing the UCITS Directive reveal that the criteria national sanctioning authorities consider when determining a fine vary considerably between Member States. Whereas all sanctioning regimes take into account the 'gravity' of a violation, gravity is qualified differently by the national sanctioning authorities, e.g. sometimes in terms of economic damage to fund and investors, others in terms of impact on domestic market stability, or sometimes in terms of duration/frequency of the infringement. Moreover, certain laws only account for a limited number of additional criteria apart from that of gravity, making administrative sanctioning practices less flexible and less proportionate to the offence committed. For instance, it emerges from the evidence collected that only twenty out of the twenty-seven Member States would consider the financial strength of an offender (measured either in terms of turnover or professional income) as a factor in the calculation of a fine.

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[31] See Spain's Law 35/2003 on Collective Investment Funds (*Instituciones de Inversión Colectiva*), Articles 85-87.

[32] See the Italian legislative decree no. 58 of 1998 (*Testo Unico della Finanza*), Section II, Articles 190(1) and 191(1).

[33] *Ibid.*

[34] With the exception of the United Kingdom and Denmark, where no maximums are specified in the law, there are at least six Member States that have a statutory maximum of less than €1 million.

Similarly, few of the applicable laws surveyed by Member States take into account voluntary cooperation as a mitigating factor.

4.5.3. Varying enforcement levels

The effectiveness, proportionality and dissuasiveness of national sanctioning regimes not only depend on those sanctions expressly provided for by law, but also on their effective application and/or enforcement. During an observation period between 2008 and 2010, sanctioned violations of the relevant national laws and regulations vary greatly across the EU. This may be partially explained by the industry concentration in the jurisdictions where a higher number of infringements are detected and sanctioned: most UCITS fund providers are domiciled only in a handful of jurisdictions that collectively make up over 80% of the market[35]. However, a low level of enforcement in MS with significant UCITS market could be symptomatic of a weak enforcement of EU rules.

Consultations with Member States have confirmed the effectiveness of their cross-border cooperation arrangements between competent authorities. However, the information available shows that a majority of Member States do not have in place any mechanism encouraging persons who are aware of potential violations of the UCITS to report those violations ("whistle blowing" systems), while whistle blowing can is an important tool which can facilitate detection of violations and therefore improve the application of sanctions. For the purpose of enhancing enforcement, measures to enhance national supervisory powers, among which, 'whistle-blower' programmes, can be considered, in parallel to other proposed financial services legislation as part of the European *acquis*.

4.6. Consequences under the baseline scenario

4.6.1. Impact on investors

If nothing were done on harmonising depositaries' duties, the delegation of custody and the scope of its liability to return financial instruments that are held in custody, investor confidence in the safety of assets invested through a collective investment vehicle would remain shaken. While the average retail investor certainly has no intimate knowledge of legal proceedings surrounding the loss of assets in the Madoff fraud, the image of investors battling for several years to reclaim instruments were lost as part of this affair, or the reimbursement for the loss of their assets, lingers.

The Madoff affair has not just claimed its victims among a few wealthy "high-net-worth" individuals, banks and hedge funds whose money he apparently invested. The Madoff affair threatens to damage small retail investors and cast a spell on the entire collective investment business.

In this context, three of the above mentioned statistics are relevant. First, as almost 10% of European households are invested in UCITS funds, a further incident in relation to investor assets being lost on account of an unreliable and badly supervised depositary will provide a strong dissuasion for households that invest in mutual fund to accumulate savings or retirement benefits. If nothing were done, the role of mutual funds in

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[35] The Commission services however do recognise that in certain Member States potential controversies between parties are settled at an early stage through means of supervision or through the offices of a financial ombudsman (e.g. United Kingdom).

provisioning for retirement may be irremediably harmed with negative consequences not just for the mutual fund industry but for the level of EU pension income overall.

Secondly, EU investors overall hold 5,889 billion in UCITS compliant mutual funds. In addition, non-EU investors hold another 3,300 billion in UCITS compliant funds. Any incident in relation to the safety of assets held in a UCITS funds, even in the rather arcane sphere of assets in custody, will cause significant ripple effect on investor confidence.

Thirdly, almost 90% of the assets under management in UCITS fund are, directly or indirectly, held by retail investors. Any incident in this area is therefore bound to mainly affect retail investors, an investor public that is much more vulnerable than the professional investor group. Often UCITS is (still) perceived as one of the few reliable and well-regulated and supervised investment tools available in an uncertain financial environment.

Any event casting doubt on the "safety" and "reliability" of the UCITS investment vehicle will therefore risk eroding investor confidence and lead to net outflows of investments in UCITS funds.

Investors would continue to bear the costs of opaque remuneration practices leading to less informed investment choices. Investor would also suffer from misaligned incentives of fund managers due to skewed remuneration practices which would continue to impinge negatively on the risk management of the fund. Investors would further suffer from ineffective sanction regimes.

4.6.2. Impact on the UCITS fund and its management company

A dramatic loss of assets that are held in custody for a UCTS fund primarily affects investors. But such an event can have dramatic repercussions on a fund administrator or investment manager as well as evidenced in the following short extract:

BOX – MADOFF AFFAIR: FEEDER FUND WITHDRAWN FROM LIST AND LIQUIDATED

On 3 February 2009, in view of the establishment of the responsibilities of the various intermediaries in relation to Madoff scandal, the following two decisions were taken (1) to withdraw the feeder fund[36] from the list of authorized UCIs(2) thereafter to request the judicial liquidation of this fund.

The decision to withdraw the fund from the list of authorized UCIs is based on the fact that it does not observe any longer the provisions in relation to the organisation and functioning of undertakings of collective investments. This withdrawal has as consequence the suspension of all payments made by the fund and the prohibition to perform any acts other than conservatory acts. The decision of withdrawal will become permanent after a period of one month, except in case of appeals. In case of a liquidation decided upon by the court, the court will appoint a liquidator to realize the fund assets.

In relation to remuneration policy, if nothing were done, the remuneration practices would continue to be opaque and would encourage the managers to take on excessive risks. As regards sanctioning regime, the lack of harmonization would continue to present regulatory arbitrage opportunities and would render the sanctioning regime ineffective on cross-border basis.

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[36] This UCITS fund recorded losses of around $ 1.4 billion due to Madoff investments which turned out to be fictitious.

4.6.3. *Impact on depositaries*

Depositaries and their reputation would be at stake should a Madoff type incident repeat itself. Naturally, confidence in this system is shaken when sub-delegations of the type experienced in the Madoff case take away the confidence that a shared domicile between fund and depositary intended to create.

Secondly, the loss of assets in custody can have serious repercussions on the operation of a custodian, especially if the matter of liability is not resolved quickly. Apart from the issue of liability to return assets lost in custody, the risk of litigation is most apparent in the case of sub-delegations, a phenomenon that becomes increasingly important as the range of investment opportunities available to UCITS funds increase. Uniform requirements in relation to the sub-custodian are therefore essential to ensure a coherent image of the depositary sector and investors' trust.

Regarding the remuneration policy, there is no direct impact on depositaries. As regards sanctioning regime, as mentioned above, the lack of harmonization would continue to present regulatory arbitrage opportunities and would render the sanctioning regime ineffective on cross-border basis.

4.6.4. *Impact on other financial service providers*

Litigation involving lost securities will not be confined to fund administrators, investment managers or depositaries. Litigation can also involve other provider of financial services, such as accounting services.

BOX – PONZI SCHEME LITIGATION SPREADS TO AUDIT FIRMS

In the United States, several accounting firm were served with legal action has been hit by lawsuits alleging that they failed to detect problems in the Ponzi schemes ran by New York financier Bernard Madoff. In a Connecticut lawsuit, the audit firm stands accused of negligence for failing to detect the Madoff fraud, in which a fund invested all its $280 million assets.

Legal action against auditors is popular as there is a general feeling among plaintiffs that "auditors are out to detect fraud." "In this case, there is reason to be concerned that auditors acted negligently or acted with some level of requisite knowledge because, for the most part, they appear to have accepted financial statements generated by Madoff's auditor from a very small unknown accounting firm," he said" a plaintiff's attorney has told the court.

Source: The National Law Journal, February 5, 2009[37]

4.6.5. *Impact on national authorities*

National supervisors are responsible for the authorisation and on-going supervision of UCITS funds, their management companies and their depositaries. On the basis of the fund's and management company's domiciliation, the UCITS Directive assigns supervisory functions to the competent authorities of both the 'UCITS home' and 'management company's home' Member State. These states have to cooperate in order to ensure seamless supervisory cooperation. The UCITS Directive requires the depositary to

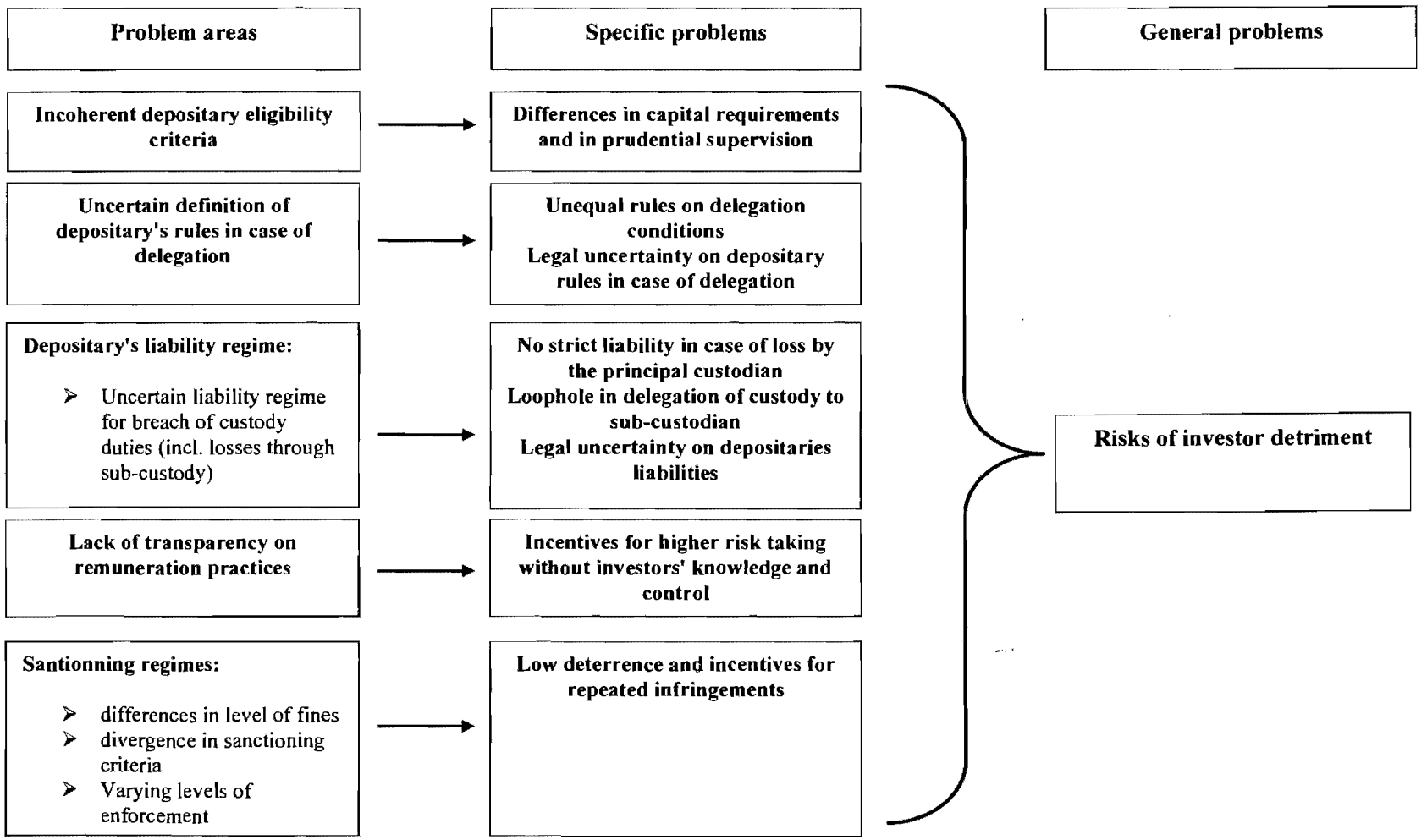
[37] Found at: http://madofffraud.boomja.com/Legal-Actions-targeting-Madoff-and-Participants-434.html

be domiciled in the same Member State as the UCITS fund. Information sharing in relation to depositaries, their safekeeping duties, oversight arrangements and delegation arrangements will be facilitated if uniform conditions apply in respect of delegations and the duties that are triggered by the loss of a custodial instrument, both at depositary and sub-custodian levels.

In addition, if nothing were done in relation to remuneration policy, the efficiency of risk management policies would be eroded, which impact negatively on supervisory efforts of the national authorities in the context of sound risk management policy. As regards sanctioning regime, as mentioned above, the lack of harmonization would continue to present regulatory arbitrage opportunities and would render the sanctioning regime ineffective on cross-border basis.

4.7. Problem tree

The following 'problem tree' visually summarises the problems and their drivers identified so far.


Problem areas
Specific problems
General problems
Incoherent depositary eligibility criteria
Differences in capital requirements and in prudential supervision
Uncertain definition of depositary's rules in case of delegation
Unequal rules on delegation conditions
Legal uncertainty on depositary rules in case of delegation
Depositary's liability regime:
Uncertain liability regime for breach of custody duties (incl. losses through sub-custody)
No strict liability in case of loss by the principal custodian
Loophole in delegation of custody to sub-custodian
Legal uncertainty on depositaries liabilities
Lack of transparency on remuneration practices
Incentives for higher risk taking without investors' knowledge and control
Santionning regimes:
differences in level of fines
divergence in sanctioning criteria
Varying levels of enforcement
Low deterrence and incentives for repeated infringements
Risks of investor detriment

4.8. The EU's right to act and justification

The legal basis of the initiative should be identical to the legal basis of the original UCITS Directive which it intends to amend, namely Article 53(1) TFEU (Article 47(2) of the Treaty establishing the European Community). This article of the Treaty concerns the freedom of establishment and the freedom to provide services, as well as the coordination of the national laws concerning their respective exercise. National laws governing the activities of UCITS funds should moreover be coordinated so as to ensure an approximation of the competitive conditions across the EU for the removal of investment restrictions, while guaranteeing a satisfactory degree of investor protection for unit-holders.

Given the cross-border nature of depositary services for UCITS funds and extent of the problems analysed in the previous sections, EU action is justified on the following grounds:

Problem areas 1, 2 and 3 reflect the lack of a common interpretation in relation to the conditions under which an entity can act as a depositary, the conditions under which certain depositary tasks can be delegated and the liability standard that applies when instruments in custody are lost, either at the level of the depositary or one of its delegates. As the UCITS Directive has exhaustively regulated the product portfolio that a UCITS investment manager can invest in, the counterparty risk that applies to all UCITS transactions and the set of eligible investment tools, it would appear odd that the essential tasks and functions of the UCITS depositary would remain outside the scope of the harmonised framework. Therefore, in order to achieve consistency between the detailed product rules contained in UCITS, the safekeeping of the UCITS' investment tools must also be subject to strict harmonisation requirements.

Problem area 4 needs to be addressed in the light of both the EU's international policy commitments and the necessity to align the UCITS Directive with other Community initiatives in the financial services sector, i.e. the CRD, the Solvency II and the AIFM Directives, as part of a growing *acquis* in this field; in particular an alignment of remuneration principles between UCITS and the AIFMD is indispensable to avoid regulatory arbitrage: Now that the AIFMD, which entered into force in June 2011, contains detailed principles on remuneration, the UCITS rules need to contain remuneration principles as well, otherwise there is a risk that certain risky investment strategies migrate toward UCITS, although the latter should be the 'safer' vehicle (AIFMD) is only open to professional investors. As action on AIFM remuneration required a European approach, the avoidance of regulatory arbitrage between AIFM and UCITS call for a coordinated European approach as well.

Problem area 5 relating to the uneven application of administrative sanctions for violations of the UCITS would necessarily require the further harmonisation among national sanctioning regimes. EU action appears justified by the risk of regulatory arbitrage in those more permissive jurisdictions as a result of the cross-border nature of the asset management industry. Furthermore, only one EU Member States has introduced whistle-blower protection. This might lead to a migration of UCITS managers away from jurisdictions that vigorously pursue infringements against the UCITS investment rules (connection with the first sentence unclear). Indeed, UCITS funds are most likely the most tightly regulated pooled investment vehicle in the EU (or even world-wide) and experience with national regulators show that most irregularities are detected at the pre-sanctioning stage. Nevertheless, effective protection

for whistle-blowers on the European level might be necessary to further tighten confidence not only into the UCITS rules but also in respect to their vigorous application. The absence of effective whistle-blower protection might lead to the result that certain UCITS related irregularities remain below the radar. As UCITS are a highly regulated and harmonised product, enforcement action to keep the integrity of this product intact should equally take a harmonised and coherent approach.

The ensuing section 6 shall lay out a series of policy options addressing each individual problem area. Each option shall later be measured against the principle of proportionality, i.e. to establish if the identified options are both adequate and necessary to effectively and efficiently meet their purpose.

5. OBJECTIVES

Table 1: General, specific and operational objectives

General	Specific	Operational
Investor protection, financial stability and transparency	**enhance investor protection**, prudential rules and capital requirements applicable to depositaries should be uniform across the EU, ensuring the same level of protection of assets, independent on where the depositary is domiciled	Harmonise criteria on eligibility to act as depositary
		Introduce a uniform rules on delegation of custody
	increase effective recourse against principal custodians in case a financial instrument is lost in custody	Introduce a uniform level of depositaries' liability for the loss of an instrument held in custody
	increase legal certainty on depositaries duties and liabilities	Introduce a uniform level of liability for cases when the loss occurs at the level of the sub-custodian in the EU
	increase legal certainty in case custody duties are delegated, including mandatory delegations to sub-delegates in third countries	Introduce a uniform level of liability in cases when the loss occurs at the level of the sub-custodian in a third country
	remuneration practices to be transparent and consistent with sound risk management	Risk alignment and transparency of remuneration practices; introduce principles of sound remuneration policies
	clear rules on administrative sanctions and their consistent enforcement	Uniform UCITS sanctioning regime

5.1. Coherence of objectives with other Commission policies

All of the objectives identified above are coherent with the scope of achieving the completion of the Single Market by guaranteeing a high level of consumer protection while ensuring a harmonious and sustainable development of economic activities. The above objectives are furthermore consistent with the European Commission's reform programme, as endorsed in the Communication of March 2009 'Driving the European Recovery'. In this programme, new regulations for the asset management industry will play an important role, alongside those mentioned in section 2.2.

Finally, the objectives pursued in this impact assessment are consistent with a number of proposals outlined in the recently published Commission Communication 'Towards a Single Market Act' of November 2010[38]. Here, a sound regulatory environment is instrumental to the proper functioning of financial markets in allocating long-term capital and in mobilizing private savings.

The overarching aim of the current review of UCITS directive is to ensure clarity regarding the rules governing UCITS depositaries also taking into account the provisions relating to the depositary function in the AIFM Directive. However, the review of the liability provisions applicable to the UCITS depositary will also take into consideration specificities linked to the UCITS investment environment and its suitability for retail investors.

In view of G20 commitments, the EU aims to introduce consistent requirements governing remuneration policies in all financial services sectors, as set out in the Commission Recommendation of April 2009. The adoption of CRD III, the AIFM Directive, and the ongoing work on the level 2 measures under Solvency II confirms the determination of the EU to fulfil these commitments. Extending this work to also cover the managers of UCITS is consistent with this process.

In its Communication of 9 December 2010 "Reinforcing sanctioning regimes in the financial sector"[39] the Commission suggested setting EU minimum common standards on certain key issues, in order to promote convergence and reinforcement of national sanctioning regimes. The Commission has included such common rules, adapted to the specifics of the sectors concerned, in all its recent proposals for the review of the sectoral EU legislation concerned (CRD IV, MiFID, Market Abuse Directive, Transparency Directive). Extending this work to the UCITS framework is consistent with this process.

6. POLICY OPTIONS

6.1. Problem No 1: Divergent criteria on eligibility to act as depositary

The eligibility to act as a depositary normally requires that the entity that wishes to act in this role meets certain criteria in relation to effective prudential regulation, the existence of a minimum capital requirements and supervision. At a minimum, a depositary needs to have own funds sufficient to allow for continued operations. The minimum level of own funds for the purposes of operational continuity is set at € 125.000 – this amount is applicable to any investment firm that operates under MiFID. This minimum amount applies to all other investment service providers that operate on behalf of a UCITS fund, such as the investment manager, the broker or the fund administrator. In these circumstances, it appears justified not to assess any further modulations in capital requirements for depositaries only.

	Option 1	Option 2	Option 3	Option 4
Eligible	Rely on Article	Establish a closed list	Same as Option 2 but with	Only allow credit

[38] See the Commission Communication 'Towards a Single Market Act. For a highly competitive social market economy', available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0608:REV1:EN:PDF#page=2

[39] COM(2010)716 final.

entities	23(2): any institution which is subject to prudential regulation and ongoing supervision, as chosen by Member States.	of eligible entities: (1) credit institutions; (2) investment firms registered in the EU.	a 'grandfathering clause' allowing all UCITS depositaries that are not in the closed list, but which were operating lawfully on 21 July 2011, to continue operations for e.g., two years before becoming a licensed investment firm.	institutions to act as depositaries for a UCITS fund.
Capital requirements	Subject to national laws, no harmonised threshold	Credit institution (at least € 5 million in own funds) or an investment firm (at least € 125.000). Minimum threshold is therefore € 125.000.	At least € 125.000 in own funds.	At least € 5 million in own funds. Minimum threshold increases to €5 million.

6.2. Problem No 2: Unclear rules on delegation of safe-keeping duties

The premise underlying Options 2 and 3 is that only two depositary duties can be delegated: custody and recordkeeping[40]. The scope of both duties is harmonised across the EU.[41]

	Option 1	Option 2	Option 3
Delegation in general	No specific requirements for delegation of custody or safe-keeping.	Delegations only if sub-custodian is subject to prudential regulation, minimum capital requirements and effective supervision. Sub-custodian has to comply with the conflict of interest and conduct provisions. Delegations have to be justified. The sub-custodian has to be skilfully selected, must remain subject to periodic review by the principal custodian and must be equipped to hold these assets in custody.	Same as Option 2.
Delegation to third countries	Delegations to all third country custodians without any restrictions.	Permit delegations to third parties even if the third country sub-custodian does not comply with the minimum capital and supervision requirements stipulated for delegations in general. In this case, impose three conditions: prior approval of the delegation by the UCITS manager; prior information of the UCITS' investors; and mandatory local custody in the third country.	No delegation of safekeeping duties to non-compliant entities in third countries.

[40] As specified in Section 4.2, for prudential reasons, the depositary's oversight duties (as contained in Article 22(3) UCITS, according to which the depositary supervises compliance of the UCITS manager with legal provisions and investment policies, cannot be delegated.

[41] Custody, in line with the policy chosen by Article 21(8) AIFMD, would pertain to all transferable securities, i.e., all standardised financial instruments that are nowadays registered in the form of electronic book entry (and have to be returned when lost in custody). Recordkeeping would apply to all "other assets" which are not standardised and are not suitable to be held in custody, but where the depositary has to compile and regularly update ownership records.

6.3. Problem No 3: Unclear scope of depositary's liability

	Option 1	Option 2	Option 3	Option 4
Standard of liability	Negligence based standard: Liability for loss only in case of 'unjustifiable failure to perform obligations' or 'improper performance' of these duties	Strict liability to return all instruments lost in custody. Obligation to return a financial instrument of identical type without undue delay.	Same as Option 2	Same as Option 2.
Burden of proof	Failure in performance of duties has to be proven by the claimant	Exception to the duty to return instruments of identical type in case the depositary can prove that the loss is due to an 'external events beyond its reasonable control'.	Same as Option 2.	Same as Option 2.
Liability in case of delegation	Rely on the general rule expressed in UCITS (Article 22(2)): Delegation does not affect liability.	Principal custodian remains liable for the return of the instrument.	Same as Option 2.	Same as Option 2.
Contractual discharge		Discharge applies to all situations in which custody is delegated (i.e., voluntary delegation or mandatory delegation to non-compliant sub-custodians).	Discharge only in case of mandatory delegation to non-compliant sub-custodians	No discharge possible

6.4. Problem No 4: Unclear remuneration practices

	Option 1	Option 2	Option 3
Remuneration policies	No specific requirements for UCITS investment managers	Require remuneration policies for all staff that can impact the UCITS' risk profile.	Introduce detailed guidance on the remuneration of UCITS investment managers, provide for uniform rules on base remuneration and bonuses.
Disclosure	No disclosure	Require disclosure of remuneration policies and actual remuneration for all managers that determine the UCITS' risk profile.	Require disclosure of actual remuneration for all investment managers that determine the UCITS' risk profile

6.5. Problem No 5: Divergent sanctioning regimes

Option 1	Option 2	Option 3
No specific requirements	Introduce minimum rules on type and level of administrative measures and administrative sanctions. Administrative sanctions and measures would have to satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication of sanctions or measures, key sanctioning powers and minimum levels of fines. Introduce whistle-blower provisions.	Introduce uniform types and levels of administrative measures and administrative sanctions across the EU. Introduce whistle-blower provisions.

7. COMPARISON OF POLICY OPTIONS

7.1. Problem No 1: Divergent criteria on eligibility to act as depositary

The consequences of keeping the status quo (Option 1) are evaluated against current practice in the Member States, as permitted by Article 23(2). This Article, which allows Member States to choose any institution which is subject to prudential regulation and ongoing supervision, has not led to major divergences in who can act as a depositary in the different Member States. All major jurisdictions where UCITS funds are domiciled already require that a depositary is either a credit institution or a firm regulated in accordance with the standard applied to MiFID investment firms. This means that depositaries in those jurisdictions have to have own funds amounting to either € 5 million or at least € 125.000. In these circumstances, the main differences between Option 1 and the three other options pertaining to the eligibility to act as a depositary are that the latter three options clarify matters of eligibility and thus increase legal certainty.

Options 2, 3 and 4 are all based on the approach of establishing a closed list of entities that can act as depositaries. If Options 2 and 3 were chosen, all depositaries would have to have own funds of at least € 125.000. With Option 4, the minimum requirement for own funds would be that applicable to credit institutions, i.e., € 5 million.

The introduction of a closed list of eligible entities comprising credit institutions and MifID regulated investment firms has met considerable support among stakeholders. The need to be either a credit institution or an investment firm would address the issue of minimum capital requirements and effective regulation and supervision, aspects which are currently not harmonised for UCITS depositaries.

Option 3 can also be considered as an Option that builds on a closed list, even though it allows certain institutions to continue their services under a 'grandfathering' arrangement. Option 3 is introduced because in one Member State (Malta), depositary services are performed by a third category of institutions that are neither credit institutions nor investment firms, e.g. insurance companies, national subsidiaries of EU and non-EU banks, etc. The latter are licensed to operate provided they comply with specific requirements established by the relevant national laws[42]. Option 3 would allow these entities to continue to provide depositary

[42] In this respect, the 2010 CESR mapping exercise identifies Malta as a clear outlier, where eligible depositaries can either be a credit institution, constituted and licensed under the laws of Malta; or a branch established in Malta, of a credit institution authorised in an EU or EEA Member State; or a branch established in Malta of an

services, although subject them to an *ad hoc* grandfathering clause that would oblige these institutions to transform themselves into eligible entities within a two year period starting from the entry into force of the amended UCITS Directive. As the minimum capital requirements for MiFID investment firms is very low, € 125.000, none of the above mentioned entities would find it difficult to obtain a MiFID authorisation. Most of these institutions, being subsidiaries of credit institutions, would exceed this minimum threshold in any case. The only compliance cost would thus appear the need to seek an authorisation as a MiFID firm. The legal certainty to be obtained from a harmonised minimum range of capital requirement would therefore justify that these operators obtain a MiFID license. This is especially true in light of the fact that all other UCITS service providers to a UCITS fund, investment managers, brokers and the fund administrator, are subject to the identical requirement.

Option 4 would build upon Options 2 and 3 to require all UCITS depositaries to be credit institutions. With this option, the minimum capital requirement applicable to a depositary would dramatically increase from € 125.000 to € 5 million. In terms of prudential rules and continuity, this would be a clear advantage for UCITS investors.

Option 4 would, on the other hand, inevitably disregard an entire sector of depositary services providers that currently provide these services in at least ten different Member States. Option 4 would essentially preclude investment firms covered by the MiFID rules from acting as UCITS depositaries. Eliminating these firms from the role to act as depositaries thus appears to go beyond what is reasonable to ensure that depositaries are subject to effective prudential supervision and minimum capital requirements.

In these circumstances, Option 3 appears the most suitable option to, on the one hand, maintain competition between service providers and, on the other hand, offering the certain residual service providers sufficient time to obtain an authorisation as a credit institution or an investment firm. As the conversion into licensed MiFID firms should not raise particular problems for these entities, the grandfathering arrangements seem an acceptable compromise between prudential supervision and operational continuity. Nevertheless, their gradual phasing out seems justifiable in order to introduce a coherent set of rules and ensure uniform levels of investor protection that is not dependent on where the investment assets are listed and, in consequence, held in custody.

Option 3 would therefore best accommodate the need to establish a harmonised and exhaustive list of eligible depositaries, while at the same time avoiding undue disruptions of established market patterns. Therefore, the preferred option is Option 3.

The economic impact of Option 3 would therefore be limited to the very small minority of firms that presently are not licensed as service providers under the CRD or the MiFID rules. Seeking the relevant license would probably imply one-off costs, coupled with a series of adjustment costs. Overall, given that in a majority of Member States depositaries are already either accredited banking institutions or investment firms and that the few exceptions to

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overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions; or a company incorporated in Malta which is wholly owned by a credit institution, provided that the liabilities of the license holder are guaranteed by the credit institution and the credit institution is either a Maltese credit institution or is an overseas credit institution which is subject to prudential requirements at least equivalent to the requirements applicable to Maltese credit institutions; or a company incorporated in Malta which is wholly owned by a Maltese or foreign institution or company which is deemed by the Maltese Financial Services Authority (MFSA) to be an institution or company which provides unit-holders with protection equivalent to that provided by a license holder fulfilling the certain requirements.

whom the grandfathering clause would apply are already subject to similar (albeit not equal) requirements, the Commission services consider the adjustment costs to be manageable.

	Investor protection and transparency	Efficiency	Coherence
Op. objective / Policy options	Consistent criteria on eligibility		
Option 1 : baseline scenario	0	0	0
Option 2: credit institutions, investment firms	+	+	+
Option 3: same as Option 2 but grandfathering for certain operators	+	++	++
Option 3: credit institutions only	++	0	0

7.2. Problem No 2: Unclear rules on delegation of custody

Option 1, which allows delegations of all depositary tasks and imposes no conditions on delegations to third country custodians, is seen as too risky for UCITS investors. Especially the Madoff scenario, where EU investors monies where invested by a manger whose custodial arrangements were not subject to effective supervision in a third country, pleads in favour of a higher level of harmonisation in respect of rules that apply to delegations, including delegations to third countries.

During the consultations, the distinction between financial instruments held in custody and other assets to which record-keeping applies, was very well received and almost 90% of respondents agreed that safekeeping duties should be further differentiated according to the financial type of assets to be safe-kept. There was unanimity as to the desirable EU-wide approximation of depositary duties. The drive towards approximation also derives from the fact that depositary institutions perform their tasks by splitting custody and recordkeeping tasks not just in relation to UCITS funds but that this distinction prevails in relation to the wider range of alternative investment funds; notably the description of depositary's duties in the AIFMD relies on the same bifurcation of depositary custody and record-keeping tasks. The split between (electronic) custody and recordkeeping also reflects the trend toward dematerialised securities that exist almost exclusively in an electronic book entry (see description in Section 4 above).

Options 2 and 3 are therefore built on the premise that only custody and safekeeping duties can be delegated and that all delegations require that the sub-custodian is subject to prudential regulation, minimum capital requirements and effective supervision. The sub-custodian has to comply with the conflict of interest and conduct provisions. Delegations have to be justified by objective reasons (e.g., on account of a gap in the principal custodians' geographical coverage). The sub-custodian has to be skilfully selected, must remain subject to periodic review by the principal custodian and must be equipped to hold these assets in custody.

As these delegation criteria and conditions are universally accepted – as reflected in the AIFMD – no further sub-options or modulations of these criteria are assessed.

On the other hand, the rules on delegation would also need to reflect the specificities of both industries and well as the fact that UCITS funds are open and used to a large extent[43] by retail investors. This issue comes to the fore when examining the conditions for sub-delegations to custodians located in third countries that cannot meet the above delegation requirements.

In this scenario, Option 2 would permit delegations to third parties in certain jurisdictions even if the third country sub-custodian does not comply with the minimum capital and supervision requirements stipulated for delegations in general. In this case, Option 2 would, however, impose two conditions: prior approval of the delegation by the UCITS manager and prior information of the investors in the UCITS fund. Option 2 would also be limited to a situation when local custody is mandatory in the third country.

In this respect Option 2, while being coherent with the policy choice reflected in the AIFMD, would ensure a lower level of investor protection than Option 3, because in Option 3 the principal EU-domiciled depositary would not be entitled to delegate safekeeping duties to non-compliant entities in third countries under any circumstances. Option 3 would ensure a higher standard of custodial safety as delegation of safekeeping would only be permitted if the third party sub-custodian would be subject to effective prudential oversight, minimum capital requirements and supervision in its country of establishment or domicile.

The distinction between Option 2 and 3 would not come to the fore as long as the UCITS manager invests within the European Union. As the scope of custodial duties and liability will be harmonised across the EU, all EU-based custodians would comply with the proposed delegation rules. The difference between Options 2 and 3 would, however, arise in case the UCITS fund manager wishes to invest in a third country whose laws require that safekeeping of locally issued financial instruments is transferred to a local sub-custodian. In that case, the UCITS fund's principal custodian will be obliged to elect a local sub-custodian that does not comply with the above mentioned standards on delegation. For this scenario, Option 3 prohibits delegation to a non-compliant depositary in a third country while Option 2 would allow delegation, under the above mentioned circumstances.

Essentially, the practical consequence of Option 3 is that a UCITS fund manager can no longer invest in certain third country jurisdictions where recourse to a local depositary is mandatory and where no local depositary exits that fulfils the delegation requirements (e.g., capital requirements, effective prudential regulation and supervision). The consideration behind this bar against delegations to non-compliant third country depositaries is essentially linked to the retail nature of a UCITS fund and the need to ensure that small investors should not be exposed to the risk that a financial instrument of the UCITS fund is lost while in custody in those third countries. Furthermore, Option 3 would appear coherent with a more general aim pursued with the UCITS depositary reform, which is to increase investor protection.

On the other hand, Option 3 proposes a remedy, namely the total prohibition of investments in certain third country jurisdictions that might well exceed the scope of the problem. Third country jurisdictions that impose local custody without providing for a custodian that fulfils the delegation requirements (e.g., capital requirements, effective prudential regulation and supervision) are rare. A survey of relevant custodians conducted by the Commission's

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[43] As mentioned in Section 3.1, based on data from statistical offices of six Member States, it is estimated that about 22.9 million (i.e. 10 %) of EU households have investments in mutual funds.

services has identified only two jurisdictions where this scenario could arise. And even in these two cases, the exact conditions of local custody could not be verified completely, so that a margin of doubt remains even in these cases (which is why these jurisdictions shall not be referred to in this impact assessment).

As mentioned above, a UCITS fund manager, if it were not allowed to delegate custody to certain third country depositaries, would be barred from investing in financial instruments that, by law, have to be held in custody locally. Option 3 would therefore seriously curtail the investment opportunities of a UCITS fund in respect to such third countries, especially since such countries appear to be rare. This prohibition therefore appears disproportionate to the aim of investor protection.

On balance, therefore, the preferred option is Option 2.

From a cost perspective, as corroborated by the investigations carried out by the Commission's services (see Section 3.2), the contemplated changes, even in Option 3, are not expected to significantly impact pre-existing operating cost structures of depositary service providers. This is because the provision of custody services is typically a low margin product. Depositaries do not obtain significant fees from the provision of custody -- prices in Europe are often not more than 0.2 to 1.0 bp. Therefore, custody is regularly coupled with other value added services like cash management and fund accounting and margins associated with the total bundled service offering can become higher.

Second, price differentials between EU Member States seem a question of max. 1 bp. On the other hand, price differentials between Europe and certain emerging markets can become quite significant. Evidence reflected in Section 3.2 indicates that the difference between Europe and certain emerging markets can exceed 59 bp. The overall rate of custody is therefore heavily influenced by the composition of a fund's portfolio (e.g., the share of instruments issued in emerging markets). As fund clients are generally charged on a per market basis, with emerging markets attracting higher fees, large emerging markets portfolios will usually have a higher blended rate. The main driver in the cost of custody is therefore not a change in the regulatory environment in Europe but the extent to which a fund invests in emerging markets.

In this context, it is also relevant that the survey reflected in Section 3.2 appears to indicate that the cost of holding a financial instrument in custody is lower than the cost of recordkeeping. The cost of record-keeping (checking ownership records and recording individual contracts that are not suitable for custody) amounts, on average, to between 1 and 1.25 bp. The cost of custody in Europe varies between 0.25 and 1.25 bp. and, in most Member States examined, rarely exceeds 1 bp. This is due to the fact that custody is nowadays based on electronic data entries reflecting the existence of a security. Therefore, moving to a broader scope of instruments to be held in (electronic) custody might entail cost savings of, on average, between 0.5 and 0.75 bp.

Therefore, even if the harmonisation of financial instruments that must be held in custody would entail that some depositaries must shift these instruments from recordkeeping to custody, there should not be a major negative impact either on cost or on the fees that are charged for the custodial services.

	Investor protection and transparency	Efficiency	Coherence

Op. objective / Policy options	Consistent rules on delegation of custody		
Option 1 : baseline scenario	0	0	0
Option 2: ***Delegation limited to safekeeping with opportunity to delegate to non-compliant third country custodians***	++	+++	++
Option 3: ***Delegation limited to safekeeping with no opportunity to delegate to non-compliant third country custodians***	+++	+	+

7.3. Problem No 3: Unclear scope of a depositary's liability

Option 1, by maintaining a standard based on the failure to perform certain duties, is unable to achieve the requisite a level of harmonisation. The Madoff scandal indicates that the "negligence-based" standard leads to more uncertain results and long court proceedings before the obligation to return certain instruments that were lost in custody is ascertained.

All other options, Options 2, 3 and 4 rely on a strict obligation to return all instruments lost in custody with a narrow exception to the duty to return instruments of identical type in case the depositary can prove that the loss is due to an 'external events beyond its reasonable control'. This reversion of the burden of proof would avoid lengthy litigation as to the negligence of the depositary who lost the instruments in custody or who delegated custody to a sub-custodian that subsequently lost the instruments.

Options 2,3 and 4 would therefore improve the degree of legal certainty and align the liability standards among the Member States. The reversion of the burden of proof inherent in these options would also facilitate legal redress sought by UCITS investors.

In terms of the ability to discharge liability, Option 2 would allow for the emergence of a uniform policy on liability in case custody is delegated (either voluntarily or due to legal requirements) to a third party. This is because Option 2 essentially aligns the discharge provisions in UCITS with those already existing in AIFMD. [44]

However, the "transversal" approach to liability proposed in Option 2 would not make any distinction with respect to the liability standard, depending on whether a fund is open to retail investors or not. Only Options 3 and 4 would allow taking into account the fact that more essentially 90% of the UCITS investor base is (directly or indirectly) made up of private households (see pie-chart in Section 3.1.).

In addition, the approach proposed in Option 2 appears not suitable for retail-oriented investment funds because, even if the discharge of liability in case of either voluntary or mandatory delegation would be disclosed to retail investors, the latter are unable to understand the legal repercussions that such a general discharge may have on their ability to seek redress against the depositary when the instrument is lost at the level of the sub-

[44] cf. Article 21(13) and (14) of Directive 2011/61. Article 21(13) deals with the discharge in case the third country depositary complies with the delegation requirements set out in Article 21(11) while Article 21(14) deals with the situation where the third country depositary does not comply with the delegation requirements of Article 21(11).

custodian. Most investors, while they understand that he custody risk (and corresponding cost) is different according to jurisdiction, would not understand the legal principle of discharge and the result that the fund might be left with a relatively worthless direct claim against a third country sub-custodian who is either bankrupt or in financial difficulties. Also, investors would face the onus of pursuing that claim in a third country jurisdiction in an unfamiliar legal environment.

A choice has thus to be made between Options 3 and 4.

The choice between Options 3 and 4 must essentially be made by considering that the issue of delegation of custody and the issue of liability in case custody is delegated are intrinsically linked.

On the issue of delegations, this IA examined two choices: allow delegations of custody, including delegations to third country sub-custodians that do not meet stringent delegation requirements (in terms of prudential regulation, minimum capital requirements and supervision in the country where the sub-custodian is established). The other choice would be only to allow delegations to third country sub-custodians in jurisdictions that meet the above requirements.

In order not to curtail a UCITS investment opportunities, this IA chose to allow delegations to non-compliant third country sub custodians under two conditions: (1) local custody in the country of the sub-custodian is mandatory and the UCITS depositary must receive a clear instruction from the fund manager that he wishes to invest in the relevant third country jurisdiction. This approach reflects the current approach as taken in the AIFMD in relation to professional investors.

The choice to allow third country delegations in case the local custodian does not meet the delegation requirements leads to two basic options when liability in such cases is examined: (1) allow discharge only in case such delegation is mandatory under the relevant third country's laws (Option 3); or (2) not to allow contractual discharge of liability at all (Option 4).

Option 4, as opposed to Option 3 would not allow for a discharge in all cases where custody is delegated, either voluntarily or by virtue of legal requirements in the third country. Option 3 would limit the option of a discharge to the case where delegation of custody is mandatory in the third country jurisdiction where the financial instrument is issued.

Option 3 would therefore expose retail investors to significant recovery risk. These risks result from the above-mentioned fact that retail investors, while being able to appreciate the risk of custody related to third countries, are nevertheless not in a position (in terms of financial resources and expertise) to pursue recovery claims directly against a third party custodian and in accordance with the laws and procedures that prevail in these third countries.

While prospectuses and key investor information documents that are mandatory under the UCITS Directive may address risks linked to the investment profile of certain securities, investors are not, except for the very wealthy, in a position to recover assets that are lost in a third country jurisdiction.

In these circumstances, the stricter standard proposed in Option 4 (no discharge of liability, even if delegation is mandatory) appears more aligned to a general policy orientation that focuses on the best possible protection of the retail investor community.

In addition, the absence of a contractual discharge entails that UCITS investors, unit-holders and shareholder alike, will benefit from legal certainty when seeking redress for financial instruments lost in custody. The strict standard essentially avoids any litigation focusing on the precise scope of discharge possibilities in case of mandatory sub-delegation to non-compliant third country custodians and this litigation takes place in their own jurisdiction.

Representatives of the depositary industry have pointed that any move towards a strict liability standard (and the absence of a discharge option) leads to an increased cost and capital requirements incumbent on the depositary sector. The industry fears that any form of strict liability increases the costs and fees for depositary services, leads to even further concentration in this industry and will force smaller suppliers of depositary services to exit this market.

According to stakeholders, the costs inherent with a higher standard of liability are essentially of two types: (i) costs associated with the need to return financial instruments lost in custody, and (ii) costs associated with higher capital requirements that result from the need to cover the costs specified in (i). These arguments need to be placed into perspective and evaluated against the evidence gathered by the Commission's services.

First, the depositary industry has not been able to document such additional costs, their origin and the impact that a return obligation has on capital requirements. Quite to the contrary, the investigation conducted by the Commission's services (as evidenced in Section 3.2) shows that there is no clear correlation between the level of liability and the amount of depositary costs. The study rather shows that the depositary fees in France are within the European average of between 0.25 and 1.25 bp, despite the fact that the depositary liability standard in France is based on a strict obligation to return all instruments lost in custody, irrespective of whether custody was delegated or not. In addition, there is no evidence that would demonstrate that the same institution that acts as depositary in France and in another Member State, where lower liability standard prevails, would face differences in capital requirements on account of different liability standard.

Second, the fees for custody seem more driven by the asset class that is held in custody, rather than by the liability standard that prevails in a particular Member State. This is evidenced by the fact that certain stakeholders estimate the custody fees for a UCITS fund at, on average between 0.4 and 0.8 bp while the more heterogeneous range of instruments held by alternative investment funds leads to safe-keeping fees of between 1.75 and 2.0 bp[45].

Third, the evidence presented in Section 3.1 indicates that industry consolidation has been underway for some time. As the major providers of custody services enumerated in Section 3.1 imply, consolidation seems more driven by other reasons not linked to the national liability standards.

Fourth, more relevant cost drivers are, for example, the necessity to incur considerable expenditure on technology (linked to dematerialisation of securities accounts) and the trend to increase the range of depositary services to incorporate neighbouring back-office tasks (e.g. fund accounting, corporate actions, cash management and legal reporting). Especially the latter trend toward fully integrated "packages" comprising a large portfolio of custody and

[45] Confidential source.

other linked services requires depositaries to become large and integrated "full line" service providers, an option that is not available to smaller players.

Fifth, the list of major depositaries in Section 3.1 demonstrates that only the biggest market incumbents above a certain size in terms of balance sheet and assets under custody are able to reap economies of scale, whereas smaller players have already been forced to exit the custody services market or bought up altogether[46].

Sixth, fees extracted by providing pure custody services constitute a small percentage of a depositaries overall revenue stream, making custody a low-margin business. Should higher fees be demanded by depositaries to their fund clients as a result of the need to ensure losses deriving from the tighter liability regime defined above, it is by no means automatic that the industry will be in a position to 'pass-on' these costs to their clients, especially given the competitive market environment[47].

Seventh, the Commission services own analysis does not support the view that the instruments held in custody would count as credit exposure under the CRD. Instruments held in custody, regardless whether the custody was delegated or not, are not included in the calculating credit exposure. Similarly, potential losses are not considered within the scope of the credit risk exposure and therefore no capital charge for credit risk is applied. Consequently, no effect on capital charge for credit risk can be expected.[48] This analysis is also supported by a consultation that was specifically conducted by ESMA with the European Banking Authority[49].

Therefore, the preferred option is the Option 4.

	Investor protection and transparency	Efficiency	Coherence
Op. objective / Policy options	Clarify rules on depositary liability		
Option 1 : baseline scenario	0		
Option 2: *Strict liability with*	+	+	++

[46] See article by Kristina West, 'Smaller players risk being squeezed out of market' in *Financial News*, issue of 13 June 2011, p. 24.

[47] See article by Giles Turner, 'Custodians swamped by growing list of directives' in *ibid.*, p. 28.

[48] Following the CRD, credit institutions need to hold capital against their operational risk arising from the provision of safekeeping services. For the calculation of the capital requirement, they can either use the Basic Indicator, Standardise or Advanced Measurement Approach (AMA). Under the first two approaches, the capital requirement is calculated on the basis of the relevant indicator, which is calculated gross of any provisions and other expenses (e.g. expenses related to lost instruments). Thus, the indicator and the capital requirement will not be affected by the higher liability regime. For example, both credit institutions and investment firms would, under the CRD, need to calculate capital requirements for custody at 15% of interest and on-interest income. As income related to the custody service is very low, 15% of the net earnings does not seem to be a disproportionate charge.

[49] According to the EBA, it can be expected that the number of high impact/low frequency losses, which drive the capital charge, will not be affected significantly compared to the already existing legal liabilities. In addition, the capital charge for operational risk is relatively low (on average less of 10% of the total capital requirement); thus no major effects on the capital charge can be expected.

option of contractual discharge in case of delegation			
Option 3: *Strict liability with option of contractual discharge limited to mandatory delegation of custody*	++	+	+
Option 4: *Strict liability with no option of contractual discharge in case of delegation*	+++	+	+

7.4. Problem No 4: Unclear remuneration practices

The baseline scenario under **option 1** would needlessly stifle transparency in a domain where distorted remuneration practices were identified as one of the main causes of the excesses leading up to the recent financial crisis. Option 1 would not achieve the objective of aligning the risk taking incentives of the UCITS manager with the obligation to management risk adequately. In the replies to the Public consultation, stakeholders highlighted the need to consider provisions that further align asset managers' interests with investors and to adopt sound remuneration rules that take into account the business model of UCITS.
Furthermore, the adoption of new remuneration policies in the UCITS Directive would ensure a level playing concerning the principles for remuneration policies in the financial services sector. Indeed, as remuneration requirements and disclosures are already included in AIFM directive, the absence of consistent requirements for UCITS manager would create incentive for regulatory arbitrage. The managers would use the UCITS framework in order to circumvent the AIFMD requirements on remuneration. The inconsistency between the UCITS and the AIFM directives would encourage the managers to implement risky and complex strategies in UCITS funds in order to increase the fund potential returns (and consequently their fees). The absence of remuneration requirements that limit the risk taking and ensure coherence between remuneration structure and the UCITS risk profile, would induce the migration of alternative investment strategies into the UCITS framework.

In this respect, **option 2** would already carry a decisive step forward by introducing remuneration principles proportionate to the UCITS business model within the UCITS Directive for the first time. This would also be consistent with the respective provisions of AIFM Directive and reduce the possibility of regulatory arbitrage.[50] A majority of respondents to the 2010 public consultation supported the insertion of remuneration principles from the AIFM Directive into the UCITS framework. Investors would benefit from higher transparency of the remuneration policy adopted by the management company which enable them to better understand the drivers of the remuneration packages and ultimately to make more informed comparison between various UCITS.

Under option 3, rules on remuneration would actually specify the remuneration policy for all UCITS management companies. This option would represent a uniform remuneration policy for all UCITS management companies. This would increase transparency of remuneration policy even higher than option 2 as there would not be any differences between the

[50] For instance, consistency and greater disclosure on remuneration rules would be achieved where the UCITS fund annual report reveals the total amount of remuneration for a determined financial year, split into fixed and variable pay components paid and broken down by staff members.

remuneration policies of various UCITS management companies. However, this option would be very intrusive and disproportionate as it would not take into account differences in the business models of UCITS management companies, their sizes and managerial practices.

In terms of effectiveness, efficiency and coherence with other initiatives, **option 2 is preferable**. From an economic cost perspective, the impact of the preferred option is deemed negligible.

	Investor protection and transparency	Efficiency	Coherence
Op. objective / Policy options	Transparency of remuneration practices (related to performance)		
Option 1 : baseline scenario	0	0	0
Option 2: remuneration policy based on harmonized principles and coherent with UCITS business	+	+	+
Option 3 : uniform and detailed remuneration policy	+	-	0

7.5. Problem No 6: Divergent sanctioning regimes

Replies to the Commission's questionnaire on administrative sanctions have confirmed the disparity of maximum and minimum administrative fines applying to legal and natural persons alike, even in those few jurisdictions that account over 80% of UCITS fund domiciliation. Where in one Member State fines are lowest, 31% of the European UCITS funds have chosen its jurisdiction as a domicile, thus demonstrating that low levels of sanctions may to a certain extent explain regulatory arbitrage.

Despite a certain convergence of national legislation towards a list of common reference criteria for the determination of an infringement's gravity, the replies to the Commission's stock-taking questionnaire on sanctions reveal that other important factors are seldom taken into account. For example, while five of the six main UCITS domicile jurisdictions already apply the diffuse catalogue of minimum criteria identified by the Commission's services in the questionnaire, seven Member States still do not consider the financial strength of the perpetrator to be of sufficient weight when their authorities opt for a sanction.

The EU's renewed drive to approximate sanctioning rules in line with the EU's international commitments must therefore move beyond the baseline scenario represented by **option 1.**

Option 2 would ensure that administrative sanctions applied across the different Member States are effective to end any breach of the provisions of the national measures and also deter future breach of these provisions. It would also limit the possibility of cross-border infringements from countries with lower standards. In addition, the setting of appropriate whistle blowing mechanisms would help protect those persons providing information on infringements and provide incentives for whistleblowers to cooperate.

As regards the administrative measures and amounts of the administrative fines, this option would insert a minimum common rule on the maximum level of administrative fines, where the maximum level in national legislation cannot be lower than a common EU level. Their level should exceed the benefits derived from the violations and be sufficiently high to ensure the fine's dissuasiveness. The maximum level would be either referenced to a fixed amount or to the annual turnover/compensation of the author of the infringement, depending on whether the economic benefit or damage from the misconduct can be quantified. Member States would be prevented from setting maximum levels lower that those established at the EU level, although remain free to set higher maximum levels or provide for an unlimited maximum

level. They would also remain free to decide whether or not an eventual lower minimum level has to be set in a proportionate manner depending on the case at hand. Finally, as a further mean to ensure that proportionality is met and for certain national regime specificities to be recognised, option 2 shall not impinge on a competent authority's liberty to seek out an early settlement with offenders.

Replies to the Commission's questionnaire on administrative sanctions confirmed the effectiveness of applying a maximum fine threshold, subject to certain important conditions, i.e. that violations be clearly identified, that they reflect the gravity of the infringement, and considerably exceed the potential gains, or eventual damages, caused to clients. Similarly, the majority of replies greeted a minimum list that is inclusive of the financial strength criterion would be less prescriptive and require only a minor adjustment to the rules of those Member States that presently do not account for this important factor. Also, it would ensure that eventual fines not be too low compared to the financial strength of the offender, thereby improving the sanction's proportionality.

As regards whistle-blower mechanisms, at the EU level, replies to the questionnaire confirm that only one Member State currently has such a regime in place[51]. **Option 2** would extend this requirement to all national regimes by demanding that internal whistle-blower mechanisms are put in place allowing informed individuals to report misdeeds to an appointed independent body that guarantees confidentiality and protection of the whistle-blower's, as well as the alleged perpetrator's presumption of innocence and right of defence. The so-called 'whistle-blower' programmes are an additional and effective mean to discover illegal behaviour within fund management firms and a worthy step forward towards an effective EU-wide sanctioning regime. They would allow a better application of the new sanctioning regime. In hindsight, evidence suggests that had these been effectively implemented prior to the discovery of the Madoff fraud in December 2008, the gravity of the crime could have been significantly mitigated. Under the revamped powers of the United States Securities and Exchange Commission (SEC) following the Dodd-Frank Act, new rules expressly envisage an *ad hoc* programme offering both pecuniary rewards (i.e. bounty programme) and protection to those individuals that provide the SEC with original information about a violation of federal securities laws, leading to a successful enforcement action[52].

This option would also require national supervisors to establish specific procedures to receive outside alerts from individuals and exercise the necessary investigative powers to follow their leads and protect their identity in conformity with the respective articles of the EU Charter. Under this option, Member States shall have sufficient leeway to introduce programmes tailored to their legal traditions and in harmony with their respective judicial procedures and application of criminal law.

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[51] The Member State concerned is the United Kingdom under the Public Interest Disclosure Act (PIDA) of 1999, encouraging financial services/fund employees to raise concerns internally at first instance.

[52] These require the SEC and Commodities Futures Trading Commission (CFTC) to implement rules to pay cash awards of up to 30% in settlements over $1 million to whistle-blowers who voluntarily provide original information about violations of the Securities Exchange Act and Commodity Exchange Act, respectively. For further information, refer to Sections 922 and 748 of the US Dodd-Frank Act., or to the relative SEC press release, available at: http://www.sec.gov/news/press/2011/2011-116.htm.

Assessment of fundamental rights

For this policy option the following fundamental rights are of particular relevance: freedom to conduct business (Article 7), protection of personal data (Article 8), Title VI Justice, particularly the right to an effective remedy and fair trial (Art. 47), presumption of innocence and right of defence (Art 48). Introducing common minimum rules for administrative measures and sanctions will improve the coherent application of sanctions within the EU which is necessary and proportionate to ensure that comparable breaches of UCITS Directive are sanctioned with comparable administrative sanctions and measures. These rules will particularly ensure that the administrative measures and sanctions which are imposed are proportionate to the breach of the offence. As the rules under this option will introduce minimum rules for administrative measures and sanctions only, they will preserve the "right to an effective remedy and to a fair trial" (Article 47 of the charter of fundamental rights) as well as the principle of innocence and right of defence (Article 48). In view of the above, this policy option is considered in compliance with the charter of fundamental rights.

Regarding the introduction of "whistle blowing schemes", this raises issues regarding the protection of personal data (Art 8 of the EU Charter and Art. 16 of the TFEU) and the presumption of innocence and right of defence (Art. 48) of the EU Charter. Therefore, any implementation of whistle blowing schemes should comply and integrate data protection principles and criteria indicated by EU data protection authorities and ensure safeguards in compliance with the Charter of fundamental rights.

Option 3 would entail harmonising, across Member States, the range of administrative measures and amount of administrative fines that could be imposed. The advantage would be a significantly harmonised playing-field in EU financial markets in terms of threat of sanctions. While this option is highly effective in achieving the policy objectives of deterrence, it is not sure that this option is efficient as market situations, legal systems and traditions differ among Member States. To have exactly the same types and levels of sanctions might not be reasonable and proportionate to ensure deterrent sanctions. In addition, the unification of administrative measures and the amounts of administrative fines would necessitate unification of sanctioning criteria. However, the prescription of an exhaustive list of sanctioning criteria accordingly would similarly appear to be too far-fetched, depriving the sanctioning authorities of the necessary flexibility in determining sanctions that are proportionate to the specific case at hand. Therefore this option is considered less efficient then introducing minimum rules for administrative sanctions.

Assessment of fundamental rights

For this policy option the following fundamental rights are of particular relevance: freedom to conduct business (Article 7), protection of personal data (Article 8), Title VI Justice, particularly the right to an effective remedy and fair trial (Art. 47), presumption of innocence and right of defence (Art 48).

This option would ensure that the same offence would be subject to the same type and level of administrative sanction across the EU. This option will contribute to "right to an effective remedy and to a fair trial" (Article 47 of the charter of fundamental rights) as rules will be uniform across all Member States and the principle of innocence and right of defence (Article 48) will be preserved. In light of the above, this policy option is considered in compliance with the charter of fundamental rights. However, designing uniform administrative measures and sanctions against the breach of UCITS Directive across all Member States with different sized markets is disproportionate. Regarding the introduction of "whistleblowing schemes",

this raises issues regarding the protection of personal data (Art 8 of the EU Charter and Art. 16 of the TFEU) and the presumption of innocence and right of defence (Art. 48) of the EU Charter. Therefore, any implementation of whistle blowing schemes should comply and integrate data protection principles and criteria indicated by EU data protection authorities and ensure safeguards in compliance with the Charter of fundamental rights.

To summarize, option 2 offers clear benefits in terms of effectiveness and efficiency and there are limited drawbacks involved. Compliance costs are deemed negligible for national legislators and the coherence of the presented options should be compared with analogous changes to other bodies of EU financial law (i.e. CRD and MiFID). Establishment of internal whistle-blower mechanisms would involve costs for the in-house training programmes or eventual consultancy fees. It is deemed that these are one-off costs whose benefits outweigh the disadvantages of lengthy and costly litigation with a lasting impact on a firm's reputation.

In contrast, a maximum harmonisation of administrative measures (option 3) while being highly effective as measures and sanctions for similar offences across the EU would be more comparable and stricter, which should reduce the scope for regulatory arbitrage. However such an option would not be efficient as market situations, legal systems and traditions differ across Europe. Therefore, to have exactly the same types and levels of sanctions might not be reasonable and proportionate to ensure deterrent sanctions across Europe. As a result the preferred policy option is to insert common minimum rules for administrative measures and sanctions at EU level, accompanied by necessary principles and safeguards to ensure the respect of fundamental rights.

	Investor protection and transparency	Efficiency	Coherence
Op. objective / Policy options	Approximation and consistent enforcement of admin. sanctions / Introduce minimum sanctioning standards		
Option 1 : baseline scenario	0	0	0
Option 2 : minimum harmonisation of the sanctioning regimes	+	+	+
Option 3 : maximum harmonisation of the sanctioning regimes	++	-	-

7.6. Choice of preferred legal instrument

Due to the fact that the proposed changes need to be introduced in an existing directive, an amending act of the same nature would be the most appropriate instrument. The Commission services believe that a certain degree of flexibility should be left to the national legislator as to the form and methods of implementation, albeit without compromising the objectives of the proposal. As this report has highlighted, the underlying purpose of the UCITS review is to improve investor protection and transparency by (i) strengthening and harmonizing the depositary and remuneration rules and (ii) introducing minimum standards for a common administrative sanctions regime as in other areas of the EU financial services *acquis*. Alternative instruments, as for instance voluntary agreements among industry participants, Commission recommendations or even regulations, would not be proportionate to meet the purpose of the review defined by the report's stated objectives. Rather, the choice of the legal instrument on this occasion reflects the desire to reinforce an already solid existing tool with a few targeted interventions in the midst of the recent financial crisis regulatory debate.

8. CUMULATIVE AND OTHER IMPACTS

8.1. Social and environmental impacts

The above impact assessment has highlighted no significant social or environmental impacts from the envisaged proposals. The package of measures as a whole has an indirect social impact only on certain categories of investors, namely those consumers of financial services offered under the UCITS label. Broader and positive social effects are nevertheless expected from the significance of more robust, transparent and efficient capital markets, for instance through better liquidity and by ensuring that unit-holders' savings are allocated efficiently, thereby reducing the burden on public social safety-nets for the future. Greater harmonisation of depositary rules is expected to increase the attractiveness of UCITS funds, further investor confidence, while contributing to the further integration of the asset management industry EU-wide. As a consequence a net expansion of this market is foreseeable, accompanied by positive spill-over effects on industry employment. No environmental impacts can be derived from the proposed measures.

8.2. Cumulative impacts of the proposal

Investors are expected to benefit from higher investor protection when putting their savings into UCITS funds. The clear eligibility criteria will ensure that the depositary entrusted to safe keep the assets of the fund is covered by a harmonized standard of regulation and supervision. The higher liability standard and the reversal of burden of proof should make it easier to recover financial instruments that are lost while held in custody by the depositary. The detailed conditions for delegation custody should limit the possibility of a recurrence of incidents similar to the Madoff case. As a result, while still exposed to investment risks, retail investors in UCITS funds will be better shielded from failures that occur in custody networks (custody risk). Furthermore, the depositor's liability rules are only focused on their responsibility in case of loss of assets held in custody. These specific rules do not affect the general tort law.

Investors should also benefit from more transparency of remuneration practices leading to more informed investment choices. Better alignment of incentives of fund managers through sounder remuneration practices should improve the risk management of the fund. Investors should further benefit from fewer breaches of the UCITS rules as a result of a more dissuasive sanction regime that limits regulatory arbitrage.

These investor benefits are not expected to come at a great cost to investors. The implementation of requirements with respect to remuneration policies and sanctioning regime will be borne by the UCITS management companies but the associated implementation costs are deemed to be negligible. The management companies that manage both UCITS and AIFs should further benefit from coherent requirements in both sectors which should decrease their compliance cost.

The assessment of costs of the higher liability regime is complex and can only be performed after the implementation. On the one hand, the higher liability could mean that higher number of lost instruments must be returned by the depositary which could hit the depositary profits. On the other hand, the higher liability regime is expected to induce higher level of diligence and care from the depositary and consequently decrease the occurrence of losses. The current evidence from one Member State shows that depositary fees can be below the EU average despite a comparatively higher liability standard. Further, the analysis in this report concluded that no major impacts on depositaries' capital requirements can be expected.

The depositaries should further benefit from higher legal clarity as regards their duties and liabilities. The depositaries that are credit institutions and MiFID firms should also benefit from clear eligibility criteria. The current depositaries other than credit institutions and MiFID firms will need to transform themselves into one of the two eligible categories and will incur associated one-off costs.

Impacts on competent authorities are deemed to be negligible.

8.3. Impact on third countries

Since the UCITS framework applies to funds domiciled in the EU and in the countries of the European Economic Area (EEA), the envisaged proposals will have no direct impacts on other third country fund providers, regardless of whether based in the EU or not. Indirectly, however, given the global appetite for investment in European UCITS funds, as confirmed by strong extra-EU demand for investment in UCITS (particularly from a number of Latin American fund managers), clearer rules and tighter regulatory standards on depositaries are to have an evident knock-on effect through a stream of further sales. In fact, according to data published by a leading financial market monitor, extra-EU fund managers accounted for a quarter of the overall sale of UCITS units in 2010, led by foreign wealth managers in the United States and Chile, and accompanied by growing demand in Asia[53]. In view of the high demand for UCITS products coming from the US market, a tighter regulation on depositaries, remuneration and sanctions are to further enhance the attractiveness of the UCITS brand *vis-à-vis* non-EU/EEA investors, while contributing to a closer approximation of international rules for the global fund industry.

9. MONITORING AND EVALUATION

In its role as the guardian of the Treaties, the Commission's services shall duly monitor Member States' implementation of the proposed amendments to the UCITS Directive. Failing this, the Commission shall pursue Article 258 TFEU against those Member States that fail to fulfil their obligations under the Treaties. For the purpose of a smooth and timely implementation, the Commission's services shall offer their assistance in the form of transposition workshops for all Member States national authorities to attend, or via bilateral meetings at the request of any of them. Successive monitoring as to its correct application shall rely on a constant dialogue with Member States through ESMA and with a vast stakeholder network including market participants (i.e. fund management companies, depositaries, and their relative industry associations) and investors via their representative bodies.

The evaluation of the impacts from the changes envisaged above shall take place three years after the entry into force of the amended directive and whose final content shall be presented in the form of a Commission report to the Council and European Parliament. The evaluation shall be performed on the basis of the general objective identified in section 4: to increase

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[53] The results from the survey, as published by the market monitoring firm Lipper, are quoted by *Financial News*. See article by Kit Chellel and Elizabeth Pfeuti, 'Emerging market investors answer Ucits call', in *Financial News*, issue of 29 December 2010, available online at: http://www.efinancialnews.com/story/2010-12-29/ucits-cross-border-sales-grow-2010.

investor protection, financial stability, especially in the retail sector and transparency for all investors that have invested in assets held by a UCITS fund.

It shall be carried out by the Commission's services, in cooperation with ESMA and/or with the aid of external consultants for the purpose of measuring those more specific aspects tied to the directive's implementation. The review shall concentrate its attention on the following aspects in particular:

- Estimates for cost savings (in terms of bp) deriving from a clearer and harmonised liability regime for depositaries (Preferred options mentioned in sub-section 7.1.);
- Estimate of a depositary's cost in transferring financial instruments from record-keeping to electronic custody (in terms of bp);
- Estimate of a depositary's operating costs resulting from the conditions on custody delegation (Preferred options mentioned in sub-section 7.2.);
- Estimate of a depositary's operating costs resulting from the 'strict' liability approach, especially in the event of third party sub-custody losses (Preferred options mentioned in sub-section 7.3.);
- Estimate of costs resulting from introducing harmonized remuneration policies and whistle-blowing mechanism.

The above results shall preciously supplement the scarce figures available with respect to an industry, whose importance was often overlooked and that cases of financial fraud, most notably the Madoff case, have recently brought to the fore.

10. ANNEXES

10.1. ANNEX 1: Related initiatives

There are a number of ongoing Commission initiatives that have impact on investment fund industry in Europe and that are related to the proposed changes to the UCITS legal framework.

- **Initiatives aimed at improving investor protection.**

AIFM Directive

On 8 June 2011 the European Parliament and the Council adopted the Directive 2011/61/EU on Alternative Investment Fund Managers (AIFM Directive). The objective of AIFM Directive is to create a comprehensive and effective regulatory and supervisory framework for AIFM at the Community level. This directive covers investment products that are mainly structured for professional investors. It includes detailed provisions relating to the function of depositaries and their liability in case of loss of the funds assets. It also contains principles of sound remuneration policy for managers of AIFs in line with the Commission Recommendation of April 2009. Measures implementing the AIFM Directives will be adopted in 2012 by the Commission.

PRIPS

In spring 2012 the Commission intends to come forward with the legislative initiative concerning investor disclosure for Packaged Retail Investment Products (PRIPS). PRIPs represent the core of the retail market for investment products, encompassing structured products, insurance investment products and investment funds including UCITS. This initiative aims at making sure that retail investors receive similar pre-contractual information (similar to the Key Investor Information Document provided by the UCITS Directive) before they invest in any of the packaged retail investment products at stake.

MIFID review

On 20 October 2011 the Commission adopted proposals for a Directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID), and for a Regulation on markets in financial instruments (MiFIR). According to this proposal, the safekeeping and the administration of financial instruments for the account of clients, including custodianship and related services such as cash or collateral management has been included into the list of services and activities of investment firms. In the current version of MiFID these services are considered to be ancillary services. The intention of the present proposal is to allow these MiFID to become eligible depositaries for UCITS

Investor Compensation Scheme Directive

The Commission adopted the proposal for amendments to the Investor Compensation Schemes Directive (ICSD, 1997/9/EC)[54] on 12 July 2010. It proposed to include UCITS

[54] http://ec.europa.eu/internal_market/securities/isd/investor_en.htm

depositaries under the scope of the ICSD, in order to protect UCITS holders in the case where the value of the UCITS units or shares has been affected due to the failure of a UCITS depository or its sub custodian to return the financial instruments held in custody.[55] The negotiations on this proposal in the EP and Council are pending.

- **Initiatives related to remuneration structures in investment fund sector**

On the 2nd June 2010, the Commission issued a Green Paper, launching a public consultation on possible ways for improving corporate governance in financial institutions and remuneration policies. The financial crisis revealed that inadequate remuneration structures for both directors and traders in financial institutions led to excessive risk-taking and short-termism. Since the Green Paper, several important pieces of financial services legislations, including the AIFM Directive, have been amended in order to include provisions on remuneration.

- **Other proposal related to depositaries duties, in particular to safe-keeping**

Law on legal certainty of securities holding and transactions

Addressing the legal barriers identified by the Giovannini Report of 2003, the Commission is preparing draft legislation on the legal certainty of securities holding and transactions[56]. This proposal is expected to address the legal aspects of holding and disposition of securities (who is the legal owner? when and where is the ownership transferred?) as well as the activity of safekeeping and administration (who is the account provider? how does he record the securities?). The Commission will seek to coordinate its work on UCITS depositaries with this work on the legal certainty of securities holding and transactions, since a depositary may act as a security account provider, thereby raising similar technical issues. However specificities arise in relation to custody functions in the case of UCITS which require specific legal solutions.

Legislation on Central Securities Depositories

The Commission has announced legislation on Central Securities Depositories ("CSDs") for February 2012. The Commission services are working on a legislative proposal that aims to establish a common prudential framework that ensures safety and soundness of CSDs and to create a uniform framework for settlement activity in the European Union.

The scope of application of these two legislative instruments covers potentially all financial instruments. However certain provisions such as the ones concerning settlement discipline will be limited to transferable securities traded on organised venues.

External expertise

In parallel, the Committee for European Securities Regulators (CESR) – as of 1 January 2011, replaced by the European Securities and Markets Authority (ESMA) - had begun work on an

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[55] The protection granted under the ICSD benefits essentially retail investors.

[56] http://ec.europa.eu/internal_market/consultations/2010/securities_en.htm

important mapping exercise providing a snapshot of depositary rules across each Member State and later published in January 2010[57] (See Annex 5 for summary). Additional key recommendations from CESR were delivered with its advice on the 'Level 2' measures relative to the UCITS management company passport, which also included a list of principles governing UCITS managers' remuneration[58].

ESMA has provided further clarification on the scope depositaries duty and their liability by means of its technical advice on the Level 2 measures to accompany the AIFM Directive, as submitted to the Commission on 16 November 2011.

INITIATIVES AND STUDIES ON THE UCITS DEPOSITARY (2004-2008)

COMMISSION COMMUNICATION IN 2004

In 2004[59], the Commission analysed applicable UCITS depositary regulations as implemented in Member States and identified some important areas where progress was needed. It highlighted four areas were additional measures were warranted, in the view of approximating and updating the legislative framework applicable to the UCITS depositary:

(1) Prevent conflicts of interests by including a list of functions that a depositary (or an entity of its group) can receive from the fund manager by delegation, as well as a list of the depositary's activities which may be delegated;

(2) Clarify the extent of the depositary's liability to promote clarity and convergence of the depositary's liability regimes across Member States, together with a common interpretation of asset "safekeeping" and of the specific control duties assigned to the depositary;

(3) Promote convergence of initial and operating conditions and, in particular, capital requirements, and clarify the typology of eligible depositary institutions;

(4) Enhance transparency standards and investor information.

Extract from the Communication from the Commission to the Council and to the European Parliament on the regulation of ucits depositaries in the Member States: review and possible developments - March 2004

Field of action:

[57] Available at: http://www.cesr-eu.org/index.php?page=contenu_groups&id=28&docmore=1

[58] Available at: http://www.cesr-eu.org/index.php?page=document_details&id=6150&from_id=28

[59] Available at : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0207:FR:NOT

In the Commission's view, the following areas will require additional harmonization:

i/ **Promote better prevention of conflicts of interests:** In light of diverging regulatory and supervisory approaches, progress is needed on convergence of the prudential frameworks, regarding in particular a common typology of conflicts of interests and the necessary prevention and redress measures. This convergence should include the list of the functions that the depositary (or an entity of its group) can receive from the fund manager by delegation and, conversely, the list of the depositary activities which may be delegated.

ii/ **Clarify the extent of the depositary's liability:** Promoting clarity and convergence of the depositary's liability regimes across Member States will require a common reading of the concept of "asset safekeeping" and of the specific control duties assigned to the depositary.

iii/ **Promote convergence of initial and operating conditions and, in particular, capital requirements:** The typology of eligible depositary institutions should be made to converge by identifying a specific group of relevant institutions. This might consist of credit institutions and investment firms, subject to additional organisational and resource requirements where appropriate, plus relevant public institutions (Central Banks).

iv/ **Enhance transparency standards and investor information:** This should be the highest short-term priority and help put pressure on existing discrepancies. Enhanced public information standards should cover: the organisation of the depositary's tasks; measures taken against conflicts of interest; the depositary's liability; all the costs connected to the depositary's services."

GREEN PAPER 2005

In 2005, the Commission issued a Green Paper[60] launching a discussion as to whether fund custody and depositary services could benefit from further rationalisation. At that time, the UCITS Directive required the management company and the depositary to be located in the same Member State. In this context, the Commission proposed to examine the implications for effective supervision and investor protection as a result of splitting the responsibility for supervision of the fund, of the depositary, and of asset-custody functions across Member States via sub-custody arrangements.

Extract form the Green Paper on the enhancement of the EU framework for investment funds - July 2005

"Fund custody and depositary services could benefit also from further rationalisation. The UCITS Directive requires the management company and the depositary to be located in the same Member State. In the past, proximity and integrated supervision were considered essential to ensure effective performance of fund administration, depositary and custody functions. More recently, a number of stakeholders

[60] Green Paper on the enhancement of the EU framework for investment funds. http://www.cc.cec/home/dgserv/sg/sgvista/i/sgv2/repo/repo.cfm?institution=COMM&doc_to_browse=COM/2005/0314&refresh_session=YES

have advocated greater freedom in the choice of the depositary. As previously noted by the Commission[61], moving in this direction will require further harmonisation of the status, mission and responsibilities of these actors. The comparative costs and benefits of changes to the legislative framework will need further analysis – not least compared to what can be achieved through delegation and/or sub-custody arrangements. The Commission proposes to examine the implications for effective supervision and investor protection arising from splitting responsibility for supervision of the fund and depositary and asset-custody.

(...) **Q11:** *Which are the advantages and disadvantages (supervisory or commercial risks) steaming from the possibility to choose a depositary in another Member State? To what extent does delegation or other arrangements obviate the need for legislative action on these issues?"*

Expert Group on investment market efficiency

The Expert Group concluded that the UCITS framework artificially imposes a geographic organization of the value chain, as all funds must have a local depositary/custodian and a local management presence[62]. As a result, costs are unnecessarily duplicated across fund domiciles, the industry is prevented from reaping specialization and efficiency gains and operational risk is increased. More flexibility is needed to provide management company and custody services across borders. However, the Expert Group believed that several pre-conditions must be met prior to establishing any EU depositary passport, given the depositary's essential function for investor protection.

Extract form the Report of the Expert Group on Investment Fund Market Efficiency - July 2006

"(...) Following the Green Paper on investment funds, the European Commission established an Expert Group on Investment Fund Market Efficiency to gather the views of market practitioners on how to make the EU framework more relevant. **This Expert Group was mandated to advise the Commission on cost-effective ways to support a more efficient organisation of the European fund value-chain.** This group has not looked at issues regarding the scope of the product passport or rules relating to fund composition and investment policy, as these issues are under examination by competent authorities.

There is a wide-ranging consensus on the obstacles to the further successful development of European fund markets. The Expert Group report provides the first set of clear, detailed and workable recommendations on 'how' to remove those barriers. (...)"

"(...) **Provide more freedoms for the depositary:** The Expert Group believes that several pre-conditions must be met prior to establishing any EU depositary passport, given the depositary's essential function for investor protection. Pending further work on this front,

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61 Communication COM(2004) 207 from the Commission to the Council and the European Parliament of 30 March 2004.

62 Report of the expert group on Investment Fund Market Efficiency: http://ec.europa.eu/internal_market/investment/docs/other_docs/reports/efficiency_en.pdf

the Group recommends:

- Enabling branches of banks from other Member States to act as a depositary;
- Allowing the depositary to be free to delegate asset-safekeeping to custodians in another EU Member State, subject to the custodian complying with the depositary's local regulations on a contractual basis;
- In a longer term, the Commission should 1) harmonise the capital requirements of depositaries and 2) study the barriers to further harmonising the role and responsibilities of the depositary."

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(...) **"V. More freedoms for the Depositary - *V.1 The role of the Depositary***

The depositary function was enshrined in the original UCITS Directive, dating back to 1985. This text involved the creation of a special function to oversee the activities of the fund manager and protect unit holders against the improper sequestration of assets. The Directive entrusted the depositary with two distinct missions:

1) Safekeeping of the assets of the UCITS,

2) An oversight function that involves controlling the assets (for both mission of safekeeping and trustee monitoring).

In some Member States, depositaries have been charged with additional responsibilities of a fiduciary nature.

No common definition of depositary's role and responsibilities: The EU legal framework governing the activities of the depositary has been left untouched since 1985. The Directive does not require that the depositary be a separate legal entity from the fund manager – only that it should be functionally separate. The Directive requires that the depositary be domiciled in the same country as the management company (and by extension of the fund). This reflects the view that there is a need for close proximity between the depositary and fund to allow the depositary to perform effective real-time monitoring in respect of the activities of the fund.

Depositary has a key role re-investor confidence: The depositary function plays an important role in sustaining a high level of investor confidence. It has been particularly important in winning investor acceptance for products domiciled in other Member States by building in a common structural safeguard against fraud or operational error. Given the increased complexity and heterogeneity of funds, the role of the depositary becomes even more important control on the way in which the fund manager conducts its business.

(For example, in Austria, the depositaries are required to calculate the NAV; in Italy, the depositaries are required to review and to approve the NAV; in Germany, the depositaries are required to provide (and to take responsibility for) the portfolio prices that go into the NAV).

V.2 Where do we stand?

Custody function practically harmonised, control function differs widely... The

safekeeping (often known as "custody function") is already very similar across EU Member States. The principal area of divergence relates to the absence of a harmonised definition of asset safekeeping definition – particularly regarding the extent of obligations to return assets. Conversely, the control/trustee function" differs widely across Member States, each national regulator imposing different type of controls. In the absence of a precise EU-level definition, the depositary has been assigned different roles and responsibilities at national level. Those differences are widening as a result of new national legislative initiatives triggered by the development of the fund industry and the increasing complexity of products.

A long-running debate in the fund industry is whether fund managers should be forced to rely on the services of depositaries located in the same jurisdiction. The Commission Green Paper of 2005 asks whether depositaries should be free to provide services to funds in other Member States – which roughly translates into a European depositary passport. The intuition behind this proposal probably reflects the fact that all Member States recognise that depositary functions are carried out, inter alia, by financial institutions which are authorised and supervised in accordance with EU financial services legislation and otherwise capable of operating cross-border.

... but harmonisation of some elements will support the development of the industry, facilitate cross-border business, risk mitigation and reduce costs. A shared understanding of the role of the depositary – based on deeper harmonisation is first needed to sustain investor confidence in UCITS. Harmonising the role and responsibilities of depositaries will contribute to the stability and strength of the UCITS label. Harmonisation – and ultimately a depositary passport - will also support the facilitate development of the fund industry on a pan-European basis since it will:

- facilitate cross-border fund distribution;
- increase investor acceptance of UCITS across the EU and globally;
- improve risk mitigation
- contribute to confidence between regulators: regulators rely significantly on the depositary function to ensure investor protection. Some harmonisation of the rule and functions of the depositary will contribute to build trust among regulators which will facilitate cross border business;
- reduce costs as the ability to implement a common business model on a European scale will enable the depositaries to maximise economies of scale and minimise operational costs.

There are many obstacles in the way to harmonisation... As a precondition to a depositary passport, the Group believes that further work is needed to determine the features of the regulatory landscape which need to be harmonised and the conditions under which this can be best achieved. The Commission Communication on the "regulation of UCITS depositaries in the Member States" provides a largely up-to-date inventory of the principal features of depositary activity which would warrant harmonisation. Business practices have revealed some additional issues.

...That need to be tackled. The following include some of the principal areas of divergence that would need to be tackled:

Different capital requirements create an unlevelled playing field. Member States allow different types of entities to perform depositary services, including but not limited to investment firms, credit institutions and insurance companies. This means that depositaries are subject to very different prudential rules – particularly regarding capital requirements with minimum capital requirements varying from € 5 million to € 100 million. Harmonisation of the **capital requirements**, as a first step on the road to the depositary statute harmonisation, is necessary to create a level playing field. **Definitions terms and responsibilities** pertaining to the depositary function should be harmonised.

Different approaches lead to legal uncertainty. Legal uncertainty can result from the commingling of depositary-specific legal obligations and broad civil case law. This is especially true in jurisdictions where the principle of the depositary's liability according to the Directive ("unjustifiable failure to perform ... or improper performance") is, explicitly or not, subject to limitations or derogations. Only three Member States seem to exclude "force majeure" as an extreme waiver of responsibility. Under such conditions, retail investors actually bear a risk (and costs) which are a priori hidden to them.

Definition of depositary functions not harmonised. The absence of a common understanding of 'asset safekeeping' is an important drawback. Safekeeping the assets of a UCITS is the first *raison d'être* of the depositary. But the Directive does not specify the content of its responsibility: is it only in charge of prudential controls over possible external custodians or is it a full-fledged "keeper" bound by obligations towards the manager and the investors, independently from its controls? To achieve the potential economies of scale on the custody side, the definition of asset safekeeping for all types of assets need to be studied and harmonized across the EU. This is partly achieved for classical types of assets such as equities and bonds but not for other asset classes which w ill become an increasing part of UCITS assets. The underlying obligations will also need to be studied, in order to determine if harmonization would allow the custodians to rationalize their custody platform across the EU including the type of reporting required and to ensure a level playing field between custodians.

Depending on the Member State, the mission of asset safekeeping may, or not, necessarily involve a custodian sub-function. Custody is subject to significant economies of scale and requires considerable investments in computer systems distinct from those of depositary control. A second issue which differentiates Member States is whether or not the depositary is really subject to an obligation to return the assets, or may limit its liability.

Harmonisation of these regulatory features remains a **long-term** goal. It will require a thorough reworking of existing Directive provisions. Some initial steps could be taken quickly on the basis of existing UCITS provisions, which would provide some improvements in the competitive sourcing of custodian and depositary services. These incremental improvements would already constitute a significant step towards realising tangible benefits at this step of the value chain. **In the short term,** Member States should make use of the discretion available to broaden the range of entities who are allowed to provide depositary services. A case in point concerns the recognition of the right of branches of EU banks to act as a depositary. For example, the UCITS Directive remains silent regarding the statute of branches of EU banks that can act in another EU country. Certain Member States do not allow bank branches to be registered as a depositary. A second 'quick win' would be for Member States to allow the depositary to delegate safe-keeping to a custodian located in another EU country. The delegate custodian should

nevertheless contractually agree to comply with the depositary's local regulations, with regards to asset safe-keeping and restitution. This would insure protection even if assets are held in another EU jurisdiction and a level playing filed for custodians. At present, certain Member States (such as Luxembourg) implement restrictive practices in this regard. The group encourages all jurisdictions to implement enlightened practices, and drawing comfort from the experience of regulators and supervisors that currently implement such an approach.

V.3 How can we improve the situation? A two-stage approach: In light of the above, the Group recommends following:

1) in the short-term, on more easily achievable but effective measures,

2) in the longer-term, analyse the main legal barriers in order to have a further harmonisation of the role and responsibilities of the depositary. The proposed measures are summarised below."

In the short-term, the Group recommends that:

i) Member States allow branches of EU established banks to act as depositary for locally domiciled funds.

ii) Member States allow the depositary to delegate custodial functions to licensed custodians located elsewhere in the EU: This would allow important scale effects resulting in lower units costs for safekeeping/custody functions. To allow implementation of this proposal while maintaining the existing level of investor protection, the delegated custodian should contractually agree to comply with the depositary's local regulations, with regards to asset safekeeping and restitution.

In the long-term, the Group recommends that the Commission undertake:

i) A harmonisation of the capital requirements for depositaries: Depositaries do not have the same status across the different Member States. Some or all of the following - investment firms, credit institutions, insurance companies, other firms - may qualify for authorisation as depositary in different Member States. A harmonisation of the capital requirements, and more broadly of the status of the depositary, is necessary in order to support the sound management of risks and continued investor confidence.

ii) An investigation to remove legal barriers: Further study is needed regarding the impact of differences between depositary obligations which are couched as "obligations as to result", or as 'obligation of (prudential) means'. To realize scale economies on the custody side, the definition of asset safekeeping for all types of assets need to be studied across the EU. Differences in liabilities regarding the safekeeping of assets (e.g.: restitution obligation in France, an obligation that does not exist or is more limited in other member countries) should be removed."

In light of the previous analysis, an impact assessment[63] was focused on the freedom of depositaries to offer their services cross-border without the need for a local presence (i.e. a depositary 'passport'). To this end, it considered three different options. These options were designed to address not only the flexibility of the organisational arrangements for depositaries, but also the related regulatory problems as already identified in the Commission's Communication of 2004.

The first option considered amending the directive to enable depositaries to passport their services, including harmonised provisions on the role and responsibilities of depositaries. The second option considered amending the directive to introduce a passport for custody services only, with oversight functions to be performed in the fund's domicile. The third option, a non-legislative one (e.g. a recommendation or CESR Level 3 guidelines), considered incentives for depositaries to organise their business on a pan- European basis.

However, the public consultations on the Green Paper failed to demonstrate that there were significant missed opportunities requiring EU action in this area. Therefore, the first and second options seemed disproportionate. It was concluded that no legislative changes were necessary and that non-legislative initiatives would be more cost-efficient and effective.

Impact Assessment of the legislative proposal amending the "UCITS IV" Directive

The White Paper and supporting impact assessment[64] concluded that the Management Company Passport (MCP) passport was a worthwhile objective, and that the directive should be amended to that end. In this regard, the Commission considered that it was important that any new mechanisms required to ensure the proper supervision of funds managed on a cross-border basis should not lead to disproportionate compliance costs and increased complexity for business operators.

However, practical solutions for an effective supervision did not materialise at the time of finalisation of the impact assessment for the 'UCITS IV' review. In parallel, the Commission asked CESR for its advice on robust yet effective solutions to the identified challenges. CESR members were pragmatic in identifying solutions necessary for establishing a well functioning MCP[65], and on this basis, the co-legislators opted to use the 'UCITS IV' framework to this end. The new regime clearly limited the respective responsibilities of competent authorities where the authorisation and supervision of a fund is performed in a different Member State from the authorisation and supervision of its management company.

The new framework put in place as a result of the legislative changes clearly distinguishes between provisions that apply to the management company and those which apply at the level

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[63] SEC (2006) 1450

http://ec.europa.eu/internal_market/investment/docs/legal_texts/whitepaper/impact_assessment_en.pdf

[64] SEC (2008) 2263

http://ec.europa.eu/internal_market/investment/docs/legal_texts/framework/ia_report_en.pdf

[65] CESR/08-867,http://www.cesreu.org/index.php?page=document_details&from_title=Documents&id=5367

of the fund only. The supervisory responsibilities for compliance with the relevant provisions of the 'UCITS IV' Directive can thus be clearly allocated.

10.2. ANNEX 2: Feed-back statements to the public consultations

CONSULTATION ON THE UCITS DEPOSITARY FUNCTION (2009)

General remarks on consultation procedure and feedback

As announced by Commissioner McCreevy on 28th May,[66] the European Commission launched a wide-ranging public consultation on the UCITS depositary function in July 2009.

The Madoff fraud and the Lehman Brothers default revealed divergences in interpretation of the existence of UCITS depositary risks and liabilities, and a number of questions arose relating to the need to harmonise and strengthen UCITS requirements. The objective of the consultation paper was to gather evidence and experienced opinion in order to clarify and strengthen the regulation and supervision of UCITS depositaries, with a view to consolidate the level of protection of UCITS investors. It also aimed at playing an important role in identifying and shaping the European response to vulnerabilities emanating from the UCITS depositary sector.

The issues on which the Commission invited views and evidence included:

- **Depositary's duties:** The consultation invited views on whether depositary safe-keeping and supervisory duties should be better harmonised, and if so, how. It sought clarification on the depositary safe-keeping duties for each class of assets that are eligible for being held within a UCITS portfolio, and invited views on whether the existing list of supervisory duties should also be further clarified or extended.

- **Liability regime:** The consultation invited views on how to improve UCITS investor protection if a depositary performs its duties "improperly". To that end, an attempt was made through this consultation to identify when the risks associated with the safe keeping of assets might materialise, especially where assets are entrusted for safe-keeping through a network of sub-custodians. It also sought views on the form of liability regime which would allow investors to adequately mitigate any losses.

- **Organisational requirements:** The consultation invited views on the introduction of rules on organisation and conflicts of interest, based on existing EU rules.

- **Eligibility criteria and supervision:** The consultation asked whether and to what extent eligibility criteria and supervisory rules applicable to the UCITS depositary could be harmonised.

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[66] Midday Express EXME09 published on 28th May 2009.

The consultation also covered issues not directly linked to the duties of depositaries but which are particularly relevant for ensuring an increased level of investor protection within the UCITS framework (for example on the valuation process).

The deadline for responses to this consultation paper was 15th September 2009. Seventy nine answers have been received: 86 % from organisations, including representative bodies from across the banking and securities sectors, asset managers and investors' representatives, 1% from citizens and 13% from public authorities. It should be noted, when drawing conclusions from this feedback statement, that the largest proportion of opinions stated, reflects the views of banking and securities industries (86 %) whilst investor organisations and associations represent a much smaller proportion, amounting to a mere 4% of the total opinions.

Responses to the consultation highlighted the following messages:

- **The appropriate starting point for any possible UCITS amendments and clarifications is the current UCITS Directive,[67] which has worked well over many years.** The proposed Directive on Alternative Investment Fund Managers (AIFM) should not be used as the *only* basis for reviewing the UCITS Directive;

- **There is a critical need to clarify depositary duties.** UCITS legislation was adopted in 1985 and depositary rules have remained mostly unchanged since then. However, circumstances have changed – assets eligible for inclusion in the UCITS portfolio are increasing in number, complexity and in addition, management of company's activities now extends cross border;

- Uncertainty regarding the liability regime does not necessarily arise from imprecision with regard to liability in the UCITS Directive, but rather from **imprecision with regard to proper performance of duties** and the fact that the Directive leaves it for national legislation to define the liability regime;

- **Maintaining investor confidence in the UCITS label is a high priority** and a UCITS depositary should be liable so as to mitigate investor's losses when it is negligent in performing its duties.

- There are special circumstances where the risk associated with the safekeeping of assets is not under the control of a UCITS depositary, and it is now essential to define if and how these risks can be acceptable for UCITS and UCITS investors. Focus should be on the appropriate management of these risks in a manner which is sustainable for industry and UCITS investors and would allow greater consistency within the EU collective investment regulatory framework, including with the proposal on alternative investment funds and managers.

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[67] Directive 2009/65/EC

- Finally, if additional rules such as organisational requirements are to be introduced, they should be aligned and be consistent with existing EU rules such as MiFID, where appropriate.

Responses to this consultation serve as a basis for an on-going review of the existing European regulatory principles by the European Commission. The goal is to clarify the regulation and supervision of UCITS depositaries; if a need is identified to strengthen this regulation, the Commission will consider the necessary proposals to achieve this strengthening.

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OVERVIEW OF RESPONSES TO THE CONSULTATION

The consultation was launched on 3rd July 2009 and closed on 15th September 2009.

Responses were invited from all interested parties including representatives from the banking and securities industries, asset managers, legal service providers and investors. Seventy nine answers were received from a wide range of professional representatives, citizens and public authorities.

Figure 1 provides a general presentation of the spread of the responses received, from organisations, public authorities and citizens.

Figure 2 provides a more detailed presentation of the status of organisational respondents, broken down into four categories: asset managers, banking and securities industries, legal services and investor associations. Figure 3 lists the sixty eight answers received from organisations according to their nationality: sixty two responses were received from EU-domiciled organisations and six answers were received from non-EU domiciled organisations (US, Switzerland and Norway).

A list of all the organisations, citizens and public authorities, who have accepted for their answers to the consultation to be published, is attached in annex 1.

Figure 1:

Organisations	68	86%
Public Authorities	10	13%
Citizens	1	1%
Total Contributions	79	100%

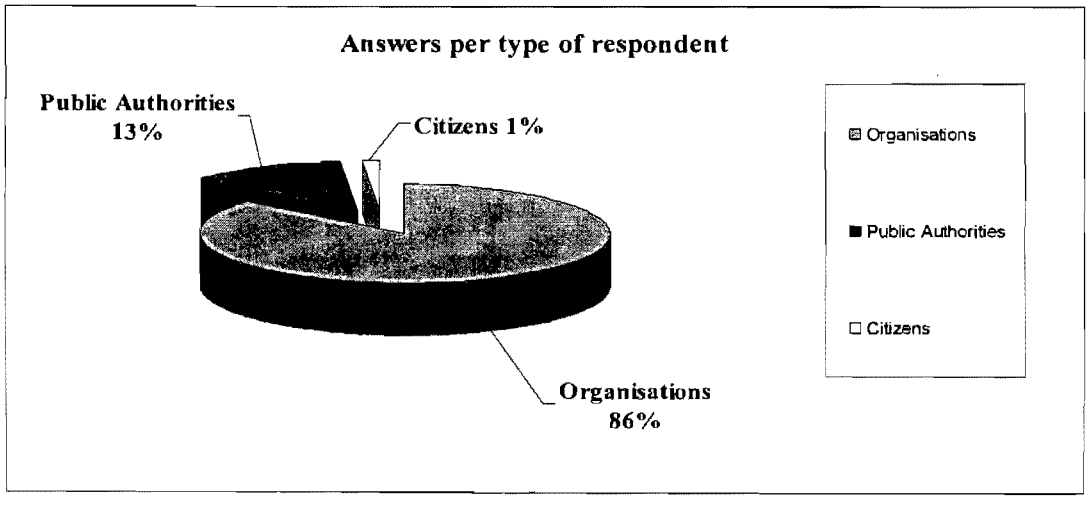


Figure 2:

For the purposes of this feedback statement, answers from respondents have been classified into four sub-groups: asset managers and their associations (including one asset management research centre), institutions and associations from the banking and securities industry, legal service practionners and investors associations.

BANKING AND SECURITIES INDUSTRY	41	60%
INVESTMENT MANAGEMENT	20	29%
INVESTORS REPRESENTATIVES	3	4%
LEGAL SERVICES	4	6%
TOTAL	68	100%

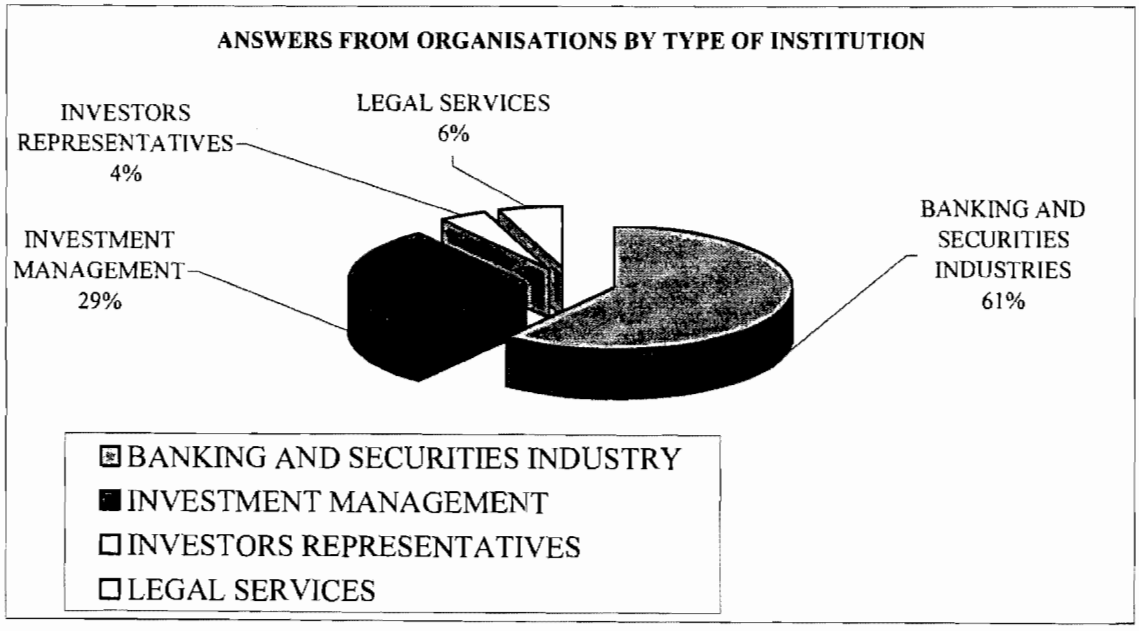


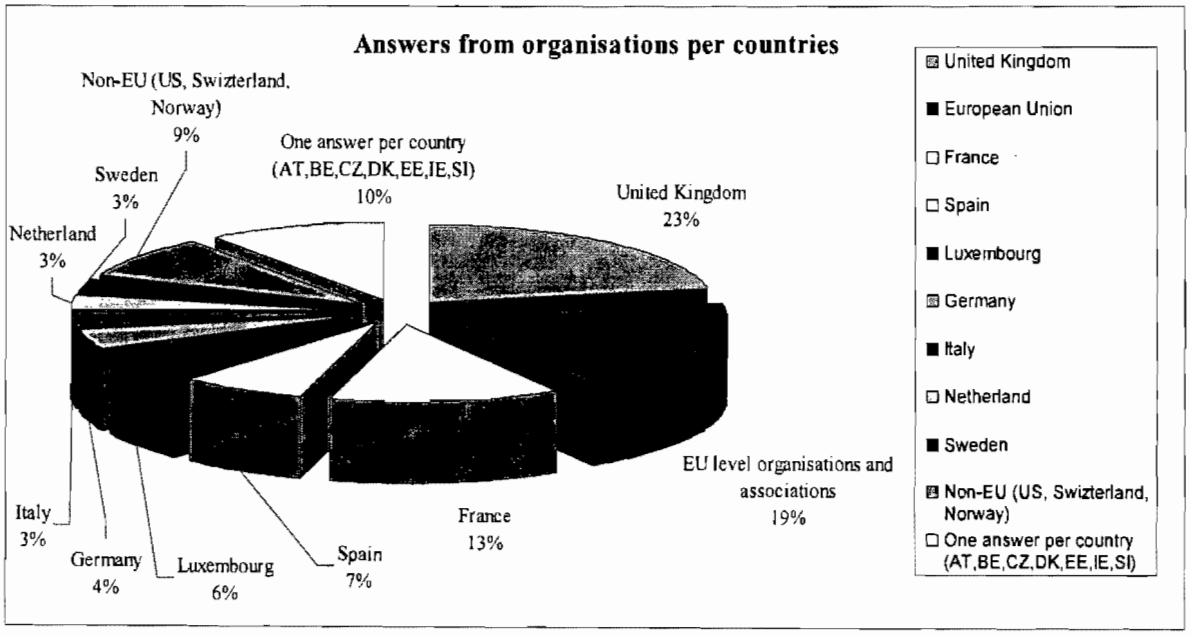
Figure 3:

List the sixty eight answers received from organisations according to their nationality.

United Kingdom	15	22%
EU level organisations and associations	13	20%

France	9	13%
Spain	5	7%
Luxembourg	4	6%
Germany	3	4%
Italy	2	3%
Netherland	2	3%
Sweden	2	3%

Non-EU (US, Swizterland, Norway)	6	9%
One answer per country (AT,BE,CZ,DK,EE,IE,SI)	7	10%
TOTAL	68	100%



DETAILED ANALYSIS OF THE RESPONSES

The feedback statement presents a broad summary of responses to each of the thirty one questions raised in the consultation paper. It should be noted, when drawing conclusions from this feedback statement, that the largest proportion of opinions stated, reflects the views of banking and securities industries (86 %) whilst investor organisations and associations represent a much smaller proportion, amounting to a mere 4% of the total opinions.

The tables provide a quick overview of the balance of respondent opinions. These opinions have been categorized into 'yes/no' categories of answers where possible. Some respondents have also provided qualitative commentaries to supplement or nuance their 'yes/no' answers. In such cases, the explanations have been grouped under a number of sub-headings ("*For one or more of the following reasons* :") to enable a more detailed analysis of the respondents' views.

Please note that some respondents have expressed more than one opinion in answer to a question. Therefore the cumulative total of answers to a question may exceed 100% of answers received.

QUESTION 1

Do you agree that safe-keeping (and administration) duties of depositaries should be clarified?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the safekeeping and the administration duties should be clarified and harmonized	77	97%	41	100%	18	90%	3	100%	4	100%	10	100%	1	100%

Nearly 100% of the respondents, including the banking and securities industry, investors and public authorities considered that there is a strong need to clarify the safe-keeping and administration duties of UCITS depositaries. The main reasons highlighted are as follows:

1) **The harmonisation of the depositary function is a key means for restoring investor confidence**

The depositary is an institution in which investors can place their trust for keeping their savings safe.

Some participants insisted that retail investors should never have to face losses as a result of failures in depositary safe-keeping; they should they have to worry about losses associated with the safekeeping of assets when they invest in UCITS. Investor should not face higher 'custody' risk when they invest in UCITS compared with when they invest in saving accounts. The fact that UCITS assets are kept safe was deemed to be essential in ensuring a high level of investor confidence in UCITS.

2) **There is a need to clarify and harmonise the depositary functions**

Respondents highlighted a crucial need to clarify UCITS depositary safekeeping and supervisory functions for the following reasons:

- UCITS legislation was adopted in 1985 and depositary rules have remained mostly unchanged since then. However, there are more and increasingly complex assets which are now eligible for inclusion in UCITS portfolios and management of company's activities can now be done cross border. New UCITS eligible assets are subject to detailed investment risk management rules which do not necessarily aim at addressing safe-keeping constraints and custody risks.

- Differences and inconsistencies in the application of UCITS depositary rules at national level create legal and technical uncertainties for the industry and are detrimental to the single market. Therefore, participants strongly encouraged a higher degree of harmonisation of technical rules, for example through implementing measures.

- There is a need for a consistent approach between the fund's depositary rules and other EU regulations, such as MiFID and/or banking regulation. Participants noted that it was often practically difficult to assess the consistency of EU rules and grasp their interaction with each other.

Some respondents also pointed out that the review of the depositary function should be distinguished from the causes of the financial crisis and the aftermath of the Madoff fraud. The UCITS depositary industry already works to high standards. Depositary institutions have played a crucial role in the European funds industry since 1985 and have contributed to the UCITS regulatory model becoming the global benchmark for sound fund regulation and the cornerstone of a fully integrated European fund market. Therefore, some participants considered that the Madoff fraud should not cause the EU legislator to overreact.

3) **There is a need to appropriately address the risks relating to custody of financial instruments**

UCITS investors should be aware and understand that they are not only exposed to investment risks but also to other risks such as liquidity, operational, and custody risks. As brought to light by the recent Madoff fraud, some investment strategies do imply custody constraints which are dealt with according to the level of risk that is considered to be acceptable for the fund. To that end, some participants underlined that once identified, the levels of custody risk acceptable for retail or more sophisticated investors could be different, and handled in different ways.

4) **Reviewing of the UCITS standards in line with the AIFM proposal**

A majority of participants insisted on the critical need for a consistent approach in dealing with depositaries across the EU regulatory framework - including UCITS and AIFM. There seems to be similarities for both UCITS and non-UCITS depositary functions as depositaries often faces similar technical constraints for example when they safe-keep a derivative contract or a security. Therefore, the technical findings of this consultation could also be applied to depositary arrangements in the AIFM Directive.

However, for some respondents the proposed AIFM Directive should not be used as the only basis for reviewing UCITS. The appropriate starting point for any possible UCITS amendments and clarifications should be the current UCITS Directive, which has worked well over many years. The reference to liability standards mentioned in the AIFM proposal was also felt to be inappropriate because the AIFM Directive proposal is a draft, currently under discussion within the Council and European Parliament and hence may still be amended. From a similar perspective, some participants expressed the view that they do not feel confident with the idea of extending AIFM provisions - that should primarily address professional funds depositaries - to UCITS.

QUESTIONS 2 & 3

Do you agree that these duties should be clarified for each class of assets eligible for UCITS portfolios? Are there any other appropriate approaches?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
No, there is no need to clarify the safekeeping duties per asset type	4	5%	1	2%	1	5%	0	0%	1	25%	1	10%	0	0%
Yes, the depositary duties should be differenciated according to the type of assets to be safekept. Safekeeping duties should include at least :	69	87%	38	93%	17	85%	3	100%	1	25%	9	90%	1	100%
(i) The Custody of the fund's securities	*50*	*63%*	*29*	*71%*	*13*	*65%*	*2*	*67%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
(ii) An oversight of the other eligible assets	*43*	*54%*	*26*	*63%*	*10*	*50%*	*1*	*33%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
No specific opinion expressed	6	8%	2	5%	2	10%	0	0%	2	50%	0	0%	0	0%

Article 22 of the UCITS Directive provides: "*The assets of a common fund shall be entrusted to a depositary for safe-keeping*".[68]

Less than 10 % of respondents either did not express any opinion as to how safe-keeping should be clarified or disagreed with any further clarification of safe-keeping duties by asset type at EU level because they considered existing national regulations and industry guidelines to be explicit enough.

Over 3/4 of the other respondents, including investors' associations and representatives from the banking industry, agreed with the fact that the safe-keeping duties and administration duties of a UCITS depositary should be further clarified and clearly distinguished for each class of assets eligible for UCITS portfolios. This large majority of respondents generally defined safe-keeping as **an overall control that the depositary should have over UCITS assets.** The depositary should be in a position to know where and how the UCITS assets are held at all times.

Most respondents recognized a need to further define what exact duties a depositary is supposed to perform when it safe-keeps the funds assets - depending on the legal characteristics and safe-keeping constraints which are associated with the financial assets that

[68] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

are eligible for being held in a UCITS. According to the broad type of eligible asset, most participants summed up safe keeping constraints as follows:

- **Custody duties:** It is a registration in the UCITS depositary's books that reflects the fund's right of ownership of the asset. According to some securities professionals, a depositary can *only* hold **registered securities** on its books (e.g. keep in custody) - the two most common being those in bearer form and those registered with a (International) Central Securities Depositary ((I)CSD). Most respondents, including securities organisations stressed that further reflection should determine the exact scope of the custody duties and what should be the nature of depositary custody duties relating to cash kept by the depositary on behalf of the UCITS.

- **Monitoring duties:** Other assets eligible for holding in a UCITS portfolio cannot be kept in custody by the UCITS depositary (they "*cannot be "physically" kept in custody by a depositary*"). In such cases, the depositary should keep an inventory (through a 'mirror record' or a 'position keeping' record) so as to have an exhaustive view over all the assets of the fund.[69] These assets include:

(5) Other forms of securities that cannot be keep in custody by the UCITS depositary – the ownership of these securities is determined through registration either in the issuer's book, with a registrar, or sometimes in the (I)CSD's book;

(6) Other forms of financial instrument[70] such as derivatives contracts,

(7) Other forms of eligible assets such as cash placed on deposit with one of the fund's counterparties.

QUESTION 4

Do you agree to a common horizontal and functional approach of the custody duties on the listed financial instruments, to be applied to UCITS depositaries?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, Custody issues are highly transversal issues	54	68%	30	73%	12	60%	2	67%	1	25%	8	80%	1	100%
No, introducing to much uniformity at any EU level may create further problems.	2	3%	0	0%	1	5%	0	0%	0	0%	1	10%	0	0%
No opinion, the concept of "common horizontal approach" is unclear.	23	29%	11	27%	7	35%	1	33%	3	75%	1	10%	0	0%

[69] Most respondents, including UCITS depositaries, believed that it is essential in order to enable the UCITS depositary to perform its supervisory duties in an appropriate way.

[70] As defined in Section C of annex I of the Mifid Directive 2004/39/EC.

A majority of participants considered that the custody duties of UCITS depositaries should be consistent with the MiFID Directive (2004/39/EC)[71] and highlighted a crucial need to harmonise the interaction of EU safe-keeping regulations. At the present time an institution which safe-keeps financial instruments can be subject to different sets of rules - depending on whether the safe-keeping applies to an investment service (provisions of Directives 2004/39/EEC 2005/34/EC and 2006/73/EC) or to collective investment services (provisions of Directive 2009/65/EC). Similarly, most participants urged the Commission to be consistent when clarifying the rules applicable to safe-keeping of assets for UCITS and alternative funds, even if the scope of duties may vary.

QUESTION 5

Is there some specificity that may be applicable to the custody functions of a UCITS depositary that should be taken into account?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS' REP.(3)		LEGAL SERVICES (4)					
Yes, some elements are specific to the custody of UCITS assets shall be taken into consideration.	48	61%	28	68%	9	45%	2	67%	1	25%	8	80%	0	0%
No, they are no specific elements to take into consideration.	7	9%	3	7%	3	15%	0	0%	0	0%	0	0%	1	100%
No opinion expressed	24	30%	10	24%	8	40%	1	33%	3	75%	2	20%	0	0%

The following elements have been stressed:

- UCITS depositaries are subject to specific administrative constraints (including in relation to corporate actions and tax duties). Therefore technical clarifications over administration duties would be welcome.

- Special considerations should be taken for the safe-keeping of the fund's liquidity (cash held by the depositary on behalf of the UCITS). Some professionals consider that this liquidity should be held by the depositary in a regular cash account. This approach implies that as soon as liquidity is transferred into collateral or deposited in another institution, it falls outside the scope of the depositaries custody duties. Uncertainties also remain where a depositary finances a fund's overdraft (e.g. when the funds' account is temporarily in cash debit).

QUESTIONS 6, 7& 8

Do you agree that the existing supervisory duties of the UCITS depositary should be clarified? If so, what clarification do you suggest? To what extent does the list of supervisory duties need to be extended?

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[71] Mifid Directive (2004/39/EC) Annex I. Section B:"***Ancillary services:*** *(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management."*

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITY INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the list of the supervisory duties needs to be clarified	53	67%	31	76%	14	70%	3	100%	1	25%	4	40%	0	0%
No, the list of the supervisory duties is clear enough	13	16%	4	10%	1	5%	0	0%	1	25%	6	60%	1	100%
No opinion expressed	13	16%	6	15%	5	25%	0	0%	2	50%	0	0%	0	0%
But the list of the supervisory does not need to be extended	*39*	*49%*	*27*	*66%*	*6*	*30%*	*0*	*0%*	*1*	*25%*	*4*	*40%*	*1*	*100%*

Article 25.2 and article 22 of the UCITS Directive state: *"(...) In the context of their respective roles, the management company and the depositary shall act independently and solely in the interest of the unit-holders."*

" (...) 3. A depositary shall:

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected on behalf of a common fund or by a management company are carried out in accordance with the applicable national law and the fund rules;

(b) ensure that the value of units is calculated in accordance with the applicable national law and the fund rules;

(c) carry out the instructions of the management company, unless they conflict with the applicable national law or the fund rules;

(d) ensure that in transactions involving a common fund's assets any consideration is remitted to it within the usual time limits;

(e) ensure that a common fund's income is applied in accordance with the applicable national law and the fund rules (...) ".[72]

A majority of participants felt that the current list of supervisory duties mentioned in article 22 of the UCITS directive is satisfactory and does not need to be extended. However, an even larger majority of respondents considered that this list should nonetheless be clarified. They underlined a need to harmonise and reach a common understanding as to supervisory duties. Amongst the elements to be harmonised at EU level, respondents made the following comments:

- Depositary supervisory duties should not constitute unnecessary duplication of work already accomplished by the asset manager. Supervisory duties should vary according to the complexity and risk levels attached to the fund and should only consist of **"independent" compliance controls.**

- Even if there is global consensus on the list of supervisory duties, there are however substantial differences in national transposition of these provisions. Some respondents reported that the supervision of a UCITS covers the verification that the investment decisions made by the management company are in compliance with the fund regulation

[72] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

and the fund prospectus, whilst for others supervision merely consists in checking the investment limits applicable to the fund following the execution and reporting of trades.

- Existing national differences on **the depositary's supervisory duties relating to the calculation of net asset values** should be removed;

- There is a need to clarify the role of the depositary in the subscription and redemption process;

- The wording used in the UCITS Directive should be more explicit. The use of expressions such as "**shall ensure**" seem not to be interpreted in the same way across Members States and respondents believe that the UCITS Directive should use more straightforward wording;

- The UCITS Directive should also be clear as to the **Ex Post** control duties that should be performed.

QUESTION 9

Do you agree that the 'only one depositary' requirement should be clarified?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITY INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	55	70%	31	76%	12	60%	2	67%	0	0%	9	90%	1	100%
No	6	8%	2	5%	2	10%	1	33%	0	0%	1	10%	0	0%
No opinion expressed	18	23%	8	20%	6	30%	0	0%	4	100%	0	0%	0	0%

Some respondents pointed out that the existing text does not expressly mention that a fund may only have *one* depositary and most participants recommended a clarification on this point.

The existence of a single depositary for safe-keeping is perceived by most professionals as the only way to guarantee that the depositary has an exhaustive and complete overview of the fund's assets (e.g. one depositary for an umbrella structure or an individual fund). This was believed to be a key element to ensure investor protection.

Nonetheless, most participants, including from the securities industry or investors representatives, were in support of an express recognition allowing a UCITS depositary to delegate its safe-keeping to multiple local sub-custodians. To that end, the requirement of a single depositary should not be an obstacle for widespread use of sub-custodians, which are necessary when taking the global character of UCITS into consideration and the impossibility for depositaries to have representations in all countries. Most participants believed that a clarifying legal statement in this respect would be useful to remove any uncertainty.

QUESTION 10 & 11

Do you think that the risks related to improper performance have been correctly identified? Do you foresee other situations where a risk associated with improper performance of the depositary duties might materialise?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the main risks associated with the depositary function has been broadly identified in the consultation paper.	49	62%	25	61%	12	60%	1	33%	2	50%	8	80%	1	100%
But other substancial risks should be taken into consideration, especialy in the case where custody of the assets are delegated to a third entity	29	37%	24	56%	2	11%	1	33%	0	0%	2	22%	0	0%

Even though a majority of respondents believed that the main risks associated with the depositary function have been broadly identified in the consultation paper, some respondents raised other risks inherent to the depositary function requiring due consideration in order to clarify the liability regime applicable to the UCITS depositary:

(1) Risk associated with the safe keeping duties

- **Risk associated with the custody of the funds assets:** the risks associated with assets held directly in custody on the depositary's books seemed to respondents to be correctly identified.[73] In such cases for most respondents, introducing a segregation requirement at EU level would greatly contribute to secure safe-keeping of assets. Securities could only be lost in cases of improper performance or negligence when performing the custody duties and in the case of fraud.

- **Risk associated with the sub-custody of the funds assets:** Financial markets and UCITS have now become global in nature, and the use of global or local custodians is now a reality which often goes beyond the choice of the fund's depositary. In most countries, securities registered with a local Central Security Depositary must be held in custody locally by a custodian that is affiliated to the local Central Security Depositary. No institutions can today ensure a worldwide physical presence and depositaries must rely on a network of local custodians in order to settle a fund's transactions and deal with post-market processes. Therefore, safe-keeping of UCITS assets requires the use of a network of sub-custodians.

Given these circumstances, respondents stressed that depositaries face unavoidable operational and legal constraints associated with local rules applying to the custody of securities:

- There are, for example, cases where a fund is investing in certain jurisdictions (for example in emerging markets). Investments in emerging market can imply that it is the fund's strategy to deliberately take on the additional risks that arise due to the poor

[73] It is however worth mentioning that the depositary may also face risks related to operational and settlement issues.

local post-market infrastructure (for example, there may be no segregation requirements and insolvency protection rules may not exist) or high political uncertainties (for example, nationalisation of assets). These risks could lead to the loss of the fund's assets;

- There can also be, for example, cases where local rules do not impose any segregation requirements so as to protect the fund's assets from being lost;

- Sometimes, even if assets are duly segregated, insolvency rules do not allow for the assets to be *immediately* identified, isolated and returned to their beneficial owner. There is therefore a risk, if the sub-custodian goes bankrupt, that the fund's assets will only be identified, isolated and returned to their owners, once insolvency proceedings are completed. This can take months or even years.

These examples highlight the fact that once assets are transferred to sub-custody, there can be circumstances where, even if the depositary performs its due diligence properly, the assets cannot immediately be returned to their owners.

• **Risk associated with monitored assets:** the depositary may experience difficulties in getting access to accurate and up-to-date information in a timely manner (for example the confirmation of derivative transactions), which may ultimately prevent the depositary from performing its safekeeping duties and appropriately monitoring the inventory of the assets.

(2) Risk associated with the supervisory duties

Most professionals stressed that the liability of the depositary towards the fund's investors can only be established through national standards of "improper performance" - if a causal link between the supervisory failure and the loss incurred by the investors can be established.

QUESTION 12

Do you agree that safeguards against the risk associated with improper performance of depositary duties, such as requiring that UCITS assets be segregated from the depositary's and sub-custodian's assets, should be introduced?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, introducing additional requirements to secure assets holding are strongly encouraged	59	75%	33	80%	12	60%	2	67%	2	50%	9	90%	1	100%
No, safeguards should be dealt with at national and industry level	2	3%	0	0%	1	5%	0	0%	0	0%	1	10%	0	0%
No opinion expressed	18	23%	8	20%	7	35%	1	33%	2	50%	0	0%	0	0%

- For a large majority of respondents, introducing a segregation requirement at EU level would greatly contribute to secure safe-keeping of assets. Segregation requirements are designed to enhance investor protection and a large majority of participants not only agreed but are also strongly in favour of the introduction of general segregation requirements for UCITS safe-keeping rules at EU level, with implementing measures to complement such requirements.

- However, respondents felt that a segregation of assets cannot provide for a total ring-fence in the context of insolvency.

- Respondents also believed that additional requirements, such as preventing depositaries and sub-custodians from re-using assets they keep safe could also be introduced to further secure the funds asset holdings at sub-custody level.

QUESTIONS 13 & 14

Do you agree there should be a general clarification of the liability regime applicable to the UCITS depositary in cases of improper performance of custody duties? What adjustments to the liability regime associated with custody duties of the UCITS depositary would be appropriate and under what conditions?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
The provisions contained in the Directive already aims at a high standards.The existing reference to the unjustifiable failure and improper performance should remain and the liability regime needs to be based on evidence of failure to perform.	56	71%	26	63%	16	80%	3	100%	3	75%	8	80%	0	0%
Nevertheless a more 'harmonised regime' of liability is a desirable outcome...	46	58%	24	59%	8	40%	3	100%	2	50%	8	80%	1	100%
... And it is a priority to maintain (retail) investors' confidence in the UCITS label, in all circumstances, including in circumstances where a 'custody' risk may materialise.	21	27%	9	22%	7	35%	2	67%	0	0%	3	30%	0	0%

- As a preliminary remark, it should be noted that the reference to liability standards mentioned in the proposal for the AIFM Directive was felt to be inappropriate because the proposal for the AIFM Directive is a draft, designed to address the specific issues faced by non-UCITS funds. They insisted on the fact that the appropriate starting point for any possible UCITS amendments and clarifications should be the current UCITS Directive, which has worked well over many years. According to Article 24 of the UCITS Directive: "*A depositary shall, in accordance with the national law of the UCITS home Member State, be liable to the management company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them. (...) Liability to unit-holders may be invoked 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.*" For many respondents, the existing high level wording of the UCITS Directive should not be modified. Uncertainty regarding the liability regime arises mainly from the Directive's imprecision with regard to proper performance of depositary duties, rather than imprecision on liability.

- The reference to "performance" in the definition of liability should be clarified. For a majority of respondents, it was deemed necessary to keep a liability regime based on "negligence" or "improper performance" of well-defined safe-keeping and supervisory duties. The duties of the depositary need first to be clarified if an effective liability regime

is to be developed and the liability regime should be based on evidence of failure to perform.

- Most representatives of the securities and banking industry also considered it important to maintain the existing wording relating to **'unjustifiable failure'** as there are always existing risks which may materialise under unforeseeable circumstances – for example where assets are lost or become unavailable – even if due diligence has been correctly performed. Many of them warned that strengthening liability regime of the UCITS depositary in such circumstances could have substantial negative impact on the industry:

  - There are no other investment products which fully protect investors from risks of criminal fraud or delays in the release of securities as a result of insolvency procedures, (although there may be some limited protection via capped deposit guarantee schemes or other insurance schemes);

  - Imposing a stricter liability standard on depositaries is very likely to result in higher costs being borne by final investors; however this would not remove the 'custody' risks that may be inherent within some UCITS investment strategies - where a fund is invested in an emerging market, for example;

  - An immediate mitigation of the investor's losses would put UCITS depositaries in the position of delivering a function that is similar to that of being "insurers," and would also create some exposure to market risks related to the value of assets that may be returned to the depositary, but at a later stage;

  - Immediate mitigation would also require that industry allocate substantial capital against potential losses, to an extent that would not be sustainable;

  - A depositary may not meet its liability to repay lost assets to investors and default. Introducing a strict liability regime, may increase the risk of depositary default and may introduce additional systemic risk to the banking system.

As a result, a majority of participants considered 'unconditional' liability not to be appropriate; any regulatory changes introduced to the depositary framework should be proportionate to the benefits derived.

- **Nonetheless, maintaining retail investor's confidence in the UCITS label is a priority.**

Any regulatory attempt to review the existing provisions must be done in a sustainable manner - both for industry and investors. To reconcile the priorities of asset management professionals and investors, some participants encouraged the Commission to focus on appropriate management of all identified risks (in particular the risks associated with local sub-custody of a fund's assets) rather than proceeding with a reallocation which would be an artificial attempt to remove the risk. A global management risk process could include an in-depth analysis of local custody risk and insolvency rules, to determine under what circumstances assets could be lost or would no longer be immediately available to funds and how likely these circumstances would be to materialise.

Once such risks are identified, some respondents also considered that it would be essential to define what level of risk should be considered as acceptable for UCITS investors. In that respect, for some participants a distinction needs to be made between the level of protection

offered to UCITS investors and that for other non-harmonised collective investment vehicles, such as alternative investments funds, which generally target sophisticated investors that have chosen to invest in un-harmonised products.

Some respondents also came forward with alternative propositions to reconcile a high level of UCITS investor protection with asset management and securities industry constraints:

- Unconditional liability but with a well defined scope - for example, where assets remain in custody and sub-custody with companies affiliated with the UCITS depositary;

- Introducing due diligence measures for insurance or indemnification arrangements in sub-custody contracts to ensure that the fund would be adequately protected against the risk of loss;[74]

- An assessment of investment strategies and eligible assets to identify at what point the custody risk would become unacceptable for UCITS investors;

- Introducing side pockets to isolate assets that are temporarily unavailable to the fund (but which would ultimately be returned to the fund, for example once insolvency proceedings are complete), should the custody risk materialise.

Finally, some participants considered that an inversion of the burden of proof would enhance investor protection because it would oblige depositaries to be more transparent on their use of sub-custodian networks. Without such an inversion, management companies and investors lack the necessary expertise to investigate the network of providers appointed by their depositary. However, others disagreed with placing the burden of proof on the depositary in that it may add unnecessary legal uncertainties for the depositary business. The appropriate principles relating to the burden of proof will depend on the nature of the depositary's obligations and so such burdens should not be imposed without an underlying clarification of the nature of the duties to be performed. In the absence of such preliminary work, the reversal of burden of the proof is perceived to be "unconditional performance" in disguise.

QUESTIONS 15 to 17

Do you agree that the conditions under which the UCITS depositary shall be able to delegate its duties to a third party should be clarified? Under which conditions should the depositary be allowed to delegate the performance of its duties to a third party? Do you agree that the depositary should be subject to additional ongoing due diligence requirements when delegating the performance of its duties to a third party?

[74] Please refer to Rules 17f-5 of the US investment company Act.

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the conditions upon which the depositary shall delegate its activities, should be clarifed.	65	82%	32	78%	18	90%	2	67%	2	50%	10	100%	1	100%
(Including : depositaries should do due diligence on an ongoing base)	*53*	*67%*	*28*	*68%*	*13*	*65%*	*1*	*33%*	*1*	*25%*	*9*	*90%*	*1*	*100%*
No, it is not necessary since it is already clarified at national level or through industry guidelines.	4	5%	3	7%	0	0%	1	33%	0	0%	0	0%	0	0%
No specific opinon	10	13%	6	15%	2	10%	0	0%	2	50%	0	0%	0	0%

Article 22 of the UCITS directive provides: "*A depositary's liability as referred to in Article 24 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping*".[75] Most participants were indeed of the opinion that the delegation of depositary duties should not affect the depositary's liability.

However, there is also a crucial need to clarify and strengthen the conditions under which a UCITS depositary may delegate its custody functions and to harmonise on-going due diligence. For instance some respondents insisted on the need to introduce segregation requirements - at the level of the sub-custodian. In addition the need to prevent the right of re-use of the transferred assets was raised.

The initial and ongoing (or 'periodic') due diligence should, in so far as possible, be consistent with existing EU and US[76] requirements.

The conditions described in the Commission Consultation paper were believed to be acceptable, though some other criteria were also mentioned:

- **Criteria relating to the scope of activity to delegate:** With regard to delegation, the UCITS Directive should expressly provide that *only* safe-keeping duties can be delegated. Additional criteria that define under what circumstances delegation is allowed[77] should be incorporated into the Directive. Some respondents thought that delegation should be subject to risk analysis, in line with the rules applicable to segregation and insolvency. Any sub-custody risk should be measured accordingly and included as an additional element to the risk profile of the funds, in the Directive.

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[75] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

[76] Please refer to Rules 17f-5 of the US investment company Act.

[77]). J. De Larosière report, 25th February 2009:"*The Madoff case has illustrated the importance of better controlling the quality of processes and functions in the case of funds, funds of funds and delegations of responsibilities. Several measures seem appropriate:*

- delegation of investment management functions should only take place after proper due diligence and continuous monitoring by the "delegator"; - an independent depository should be appointed, preferably a third party; - The depository institution, as custodians, should remain responsible for safe-keeping duties of all the funds assets at all times, in order to be able to perform effectively its compliance-control functions. Delegation of depository functions to a third party should therefore be forbidden. Nevertheless, the depositary institution may have to use sub-custodians to safe-keep foreign assets. Sub-custodians must be completely independent of the fund or the manager. The depositary must continue to perform effective duties as is presently requested. The quality of this duties should be the object of supervision; - Delegation practices to institutions outside of the EU should not be used to pervert EU legislation (UCITS provides strict "Chinese walls" between asset management functions and depositary-safe-keeping functions. This segregation should be respected whatever the delegation model is used. "

- **Criteria relating to the type of entity to appoint as a UCITS' sub custodian:** this list should define the type of eligible institutions and take into account criteria such as reputation, organisation, expertise, financial resources and supervisory requirements.[78]

QUESTIONS 18 & 19

Do you share the Commission services approach to reviewing the ICSD, to allow UCITS to benefit from a compensation scheme where the depositary defaults?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	5	6%	1	2%	0	0%	2	67%	0	0%	1	10%	1	100%
No, UCITS should not be entitled to the ICSD compenstation scheme; It is an issue to be adressed within the review of the	74	94%	40	98%	20	100%	1	33%	4	100%	9	90%	0	0%
No, UCITS should not be entitle to ICSD compenstaion scheme	48	61%	26	63%	11	55%	0	0%	2	50%	9	90%	0	0%
No opinion, it is is an issue to be adressed within the ISCD review consultation	26	33%	14	34%	9	45%	1	33%	2	50%	0	0%	0	0%

Do you agree that UCITS holders should also benefit from compensation if their custodian defaults and these assets are lost?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, all investors in financial instruments should be entitled to mitigate their losses under the ISCD.	11	14%	5	12%	1	5%	2	67%	1	25%	1	10%	1	100%
No, that should not necessarely be the case and it is anyway a issue to be dealt with by the ISCD review consultation.	68	86%	36	88%	19	95%	1	33%	3	75%	9	90%	0	0%
No opinion expressed. This is a specific issue whcih shall be dealt with within the ISCD review consultation	*31*	*39%*	*17*	*41%*	*8*	*40%*	*0*	*0%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
No opinion expressed. This is a specific issue whcih shall be dealt with within the ISCD review consultation	*37*	*47%*	*19*	*46%*	*11*	*55%*	*1*	*33%*	*3*	*75%*	*3*	*30%*	*0*	*0%*

Nearly one third of respondents considered that these are not issues to be addressed within a UCITS depositary review and believe that these issues should be best dealt with within the Directive 97/9/EC (ICSD) review process. The other two thirds of those who expressed opinions argued that the extension of the ICSD would be neither necessary nor relevant, for a variety of reasons:

- The purpose of ICSD is to mitigate investor loss once a firm has gone bankrupt. A review of the ICSD to allow UCITS to benefit from a compensation scheme where a depositary defaults was perceived as inappropriate for addressing issues relating to a firm's liability.

[78] Special criteria should also be introduced when securities are registered with an (I) Central Securities Depositary.

- The purpose of the ICSD is to cover the risk associated with investment services. Those risks are of a different nature to the risk associated with collective investment services.

- The ICSD's objectives are to offer protection to retail investors. Even though they invest on behalf of retail investors, UCITS are themselves professional investors when they trade on the market.

- The level of UCITS losses to be mitigated through the ICSD would be very marginal where a segregation principle has been introduced. Furthermore, the level of compensation offered through the ICSD (a few thousand euros) would be disproportionate to the average value of a UCITS portfolio (122 million euros in average[79]). Furthermore, the cost of organising such compensation for UCITS funds would exceed the level of profit investors could derive.

QUESTIONS 20 to 23

Do you agree that the general organisation requirements that are applicable to a UCITS depositary should be clarified? If so, to what extent? Do you agree that requirements on conflicts of interest applicable to UCITS depositaries should be clarified? if so, to what extent ?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, a clarification on the general organisational requirements is encouraged.	34	43%	12	29%	8	40%	3	100%	2	50%	9	90%	0	0%
No, general organisational requirements do not need to be clarified at EU level.	28	35%	21	51%	5	25%	0	0%	0	0%	1	10%	1	100%
No opinion expressed	17	22%	9	22%	6	30%	0	0%	2	50%	0	0%	0	0%
Yes, Requirements relating to conflict of interest should be clarified, particularly when the asset manager and depositary and asset manager belong to the the same	*48*	*61%*	*23*	*56%*	*11*	*55%*	*2*	*67%*	*4*	*100%*	*8*	*80%*	*0*	*0%*

Some participants considered that existing organisational requirements at national level or in industry guidelines are clear enough. However, if organisational requirements were to be harmonised, they should be aligned and consistent with existing MiFID organisational requirements, where appropriate. With regard to conflicts of interest, a majority of participants considered that these rules should be clarified where the asset manager and the depositary belong to the same group. Moreover, respondents believed that transparency for final investors should be enhanced.

QUESTIONS 24 to 26

Do you agree that there is a need for clarifying the type of institutions that should be eligible to act as UCITS depositaries?

[79] Source : Efama Fact book 2008

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, harmonisation of the eligibility criteria is encouraged.	**52**	**66%**	29	71%	11	55%	2	67%	3	75%	7	70%	0	0%
No, existing criteria in the UCITS Directive are clear enough and no further harmonisation is needed.	12	15%	2	5%	5	25%	0	0%	1	25%	3	30%	1	100%
No opinion expressed	16	20%	10	24%	4	20%	1	33%	1	25%	0	0%	0	0%

Do you agree that only institutions subject to the CRD should be eligible to act as UCITS depositaries? If not, which types of institutions should be eligible to act as UCITS depositaries, and why?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
No opinion	16	20%	9	22%	5	25%	1	33%	1	25%	0	0%	0	0%
Yes, Only CRD institutions should be eligible.	**39**	**49%**	23	56%	7	35%	1	33%	0	0%	7	70%	1	100%
Including : Only Credit institution (and non EU credit institutions branches) should be eligible.	*17*	*22%*	*9*	*22%*	*4*	*20%*	*0*	*0%*	*0*	*0%*	*4*	*40%*	*0*	*0%*
No, it is necessary to establish a larger list of eligible entities according to the risk and liabilities associated with the depositary activities.	24	30%	9	22%	8	40%	1	33%	3	75%	3	30%	0	0%

Article 23 of the UCITS Directive provides: "*(...) A depositary shall be an institution which is subject to prudential regulation and on-going supervision. It shall also furnish sufficient financial and professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function. (....) Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries. (...)* "

A majority of participants considered that the status of the UCITS depositary should be clarified and harmonised.

Institutions subject to the Capital Requirements Directive 2006/48/EC (which includes credit institutions and investment firms) are generally considered as being the most suitable entities to fulfil UCITS depositary requirements, in light of their sound organisation and expertise in investment services and safe-keeping. These institutions are also subject to strong EU mechanisms that protect clients' interests in case of default. Some participants even insisted that the existing annex of the CRD should be clarified with regard to the necessary capital requirements associated with depositary activities (which include safe-keeping but also supervisory duties). A minority also expressed the view that harmonisation of the eligibility criteria of the UCITS depositary should only be undertaken so long as credit institution are made eligible, as is already the case in some Member States. However, many participants also expressed diverging views on the latter. Introducing restrictions based on CRD eligibility criteria could significantly reduce the number of depositaries and thus reduce managers' and investors' choices, leading to an unnecessary market concentration. They believed that the

appropriate approach would be to define criteria based on the operational risk and liability constraints associated with depositary activities.

QUESTION 27

Do you agree that additional auditing requirements should be imposed, such as an annual certification of the depositary's accounts by independent auditors?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, depositary should be subject to proper auditing requirements	20	25%	6	15%	6	30%	2	67%	0	0%	5	50%	1	100%
No, depositary are already subejct to autiding requirement	39	49%	25	61%	7	35%	0	0%	2	50%	5	50%	0	0%
No opinion expressed	20	25%	10	24%	7	35%	1	33%	2	50%	0	0%	0	0%

The respondents indicated that most EU depositaries are already subject to annual audit (such as SAS 70) according to banking or investment services regulations. Introducing additional requirements was perceived as an unnecessary and costly measure.

However, it is important to stress that for most participants the certification not only of the depositary's own assets but also of the assets held on behalf of its clients, would ascertain the actual existence of assets. This was perceived to be a key element in the prevention of fraud. This certification could be required at the sub-custodian level and referred to in the accounting documents of the funds. Some respondents also mentioned that additional eligibility criteria could be introduced – for example systematic replacement of auditors at regular intervals.

QUESTION 28

Do you agree that UCITS depositaries should be subject to a specific 'depositary' approval by national regulators?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	40	51%	20	49%	7	35%	2	67%	2	50%	8	80%	1	100%
No	18	23%	11	27%	6	30%	0	0%	0	0%	1	10%	0	0%
No opinion expressed	21	27%	10	24%	7	35%	1	33%	2	50%	1	10%	0	0%

According to the CESR mapping, there is currently an uneven approach to supervision of UCITS depositaries across Europe. This includes situations where in some Member States, a specific authorisation is already granted by competent authorities to credit institutions or other eligible institutions to act as UCITS depositaries.

For a majority of participants, specific approval should be granted by the national competent authorities to UCITS depositaries, in addition to the licence for providing custody duties.

QUESTIONS 29

Do you believe that there is need to promote further harmonisation of the supervision and cooperation by European regulators of depositary activities? What are your views on the creation of an EU passport for UCITS depositaries?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	**47**	**59%**	25	61%	11	55%	2	67%	1	25%	7	70%	1	100%
No	4	5%	0	0%	2	10%	0	0%	0	0%	2	20%	0	0%
No opinion expressed	28	35%	16	39%	7	35%	1	33%	3	75%	1	10%	0	0%
However a Depositary Passport would only be feasible if the activities of UCITS depositaries were further harmonised	*42*	*53%*	*21*	*51%*	*10*	*50%*	*2*	*67%*	*1*	*25%*	*8*	*80%*	*0*	*0%*

A large majority of respondents viewed the harmonisation of the supervision of depositaries by national authorities and the harmonisation of the national supervisor's administrative powers, as necessary. Full harmonisation of the rules applicable in the supervision of the UCITS depositaries is indeed crucial to the positive development of the European single market.

A majority of respondents, including the banking and securities industry and investors considered that harmonisation of the status, role and liability regime of UCITS depositaries should be an unconditional pre-requisite for a UCITS depositary passport.

QUESTIONS 30 & 31

As far as the UCITS portfolio and UCITS units or shares are concerned, do you agree that their value should be assessed by an independent valuator? If so, what should be the applicable conditions for an entity to be eligible to act as an UCITS Valuator?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, It will provide more comfort to investors as far as the valuation process is concerned.	14	18%	10	24%	2	10%	1	33%	0	0%	0	0%	1	100%
No, it will not necesseraly increase the level of investor protection.	**46**	**58%**	20	49%	13	65%	1	33%	2	50%	10	100%	0	0%
No Opinion expressed	**19**	**24%**	11	27%	5	25%	1	33%	2	50%	0	0%	0	0%

Some respondents stressed that, for off shore hedge funds, most industry guidelines already require that an independent administrator has to be appointed to valuate the funds' units. However, the ultimate decision on value of assets remains with the asset manager.

As far as UCITS are concerned, some respondents took the view that independent valuators should be appointed in cases where this would provide additional comfort to investors. Should the valuation fall under the responsibility of an independent valuator, such an entity should be appropriately regulated (with proper capital and supervisory requirements). It was reiterated that ultimate decisions on value should still remain with the asset manager.

On the other hand, a third of respondents expressed a strong disagreement with such a requirement, feeling that independent UCITS valuation would not necessarily improve investor protection. Issues relating to the valuation process would remain the same irrespective of whether the manager or another legally independent entity performed the valuation. Hard to value assets would remain difficult to value. The valuator's independence would not necessarily ensure his competence and so would not guarantee more accurate pricing.

Moreover, stakeholders mentioned that an integral part of the manager's role is to be expert in asset pricing and so delegation of such a task to a third party would be inconsistent and duplicate his core business. Therefore, most respondents felt the existing model to be appropriate and so no further modification would be required.

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Annex 1.

- List of the public authorities that have participated in the consultation. Most Ministries of Finance have made a single contribution to the consultation also on behalf of their market regulator and their prudential supervisor.

Czech Republic	Central Bank
Czech Republic	Finance Ministry
European Union	CESR
Finland	Finance Ministry
France	Finance Ministry
Germany	Finance Ministry
Ireland	Financial regulator
Luxembourg	Financial regulator
Netherlands	Financial regulator
United Kingdom	Finance Ministry

- List of the citizens which have participated in the consultation.

Jerome TURQUEY	Consultant

- List of the organisations which have participated in the consultation.

ABBL-ALFI-Luxembourg Bankers association
ABI-Italian Banking Association
ADEPO
Advisory panel of the CNMV
Af2i.
AFG - Association Française de Gestion
AFTI & AMAFI-Association Française des Professionnels des Titres
AIMA - Alternative Investment Management Association

AMCHAM EU - American Chamber of Commerce to the European Union
Association of Foreign Banks in Germany
Association of Global Custodian
Association of Investment Companies
ASSOGESTIONI- Associazione del risparmio gestito
AXA Investment Manager
BANCO SANTANDER
BGIL-Barclays Global Investors
BLACKROCK
BNP Paribas Securities Services
BNY Mellon
BVCA Regulatory Committee
BVI- Bundesverband Investment und Asset Management e.V.
CACEIS
ČESKÁ SPOŘITELNA, a.s
CITCO Bank Nederland N.V.
Citigroup International Plc (Luxembourg Branch)
City of London Law Society Regulatory Committee (The)
CLEARSTREAM International
Danish Shareholders Associations
DATA - Depositary and Trustee Association
Deutsche Bank AG, London
DUFAS -Dutch Fund & Asset Management Association
EACB-European Association of Co-operative Banks
EAPB-European Association of Public Banks (EAPB)
EBF- European Banking federation
ECSDA
EDHEC

EFAMA
EFRP - European Federation for Retirement Provision
ESBG - European Savings Banks Group aisbl
ESSF-SIFMA Securities Industry and Financial Markets Association
ETDF - European Trustee & Depositary Forum
EUROCLEAR S.A
EUROSHAREHOLDERS
EVCA - European Private Equity & Equity Capital Venture
FBF - Fédération Bancaire Française
FIDELITY INTERNATIONAL
FINUSE
IFIA - Irish Funds Industry Association
IMA - Investment Manager Association
INTESASANPAOLO S.p.A.
INVERSEGUROS
ISSA - International Securities Services Association
JP MORGAN Trust and Fiduciary Services
Law Society of England and Wales (The)
Legal & General Investment Management Limited
Matheson Ormsby Prentice
NFU - Nordiska Finansanställdas Union
RBC - Dexia Investor Services
SKAGEN Funds International
SOCIETE GENERALE
STATE STREET CORPORATION
SWEDBANK AS
Swedish Bankers Association
UBS AG

WKO - Austrian federal Economic Chamber
ZBS - Bank Association of Slovenia
ZKA - ZENTRALER KREDITAUSSCHUSS
One organisation has submitted a contribution on a confidential basis

CONSULTATION ON LEGISLATIVE CHANGES TO THE UCITS DEPOSITARY FUNCTION AND TO THE UCITS MANAGERS' REMUNERATION (2010)

The European Commission launched a public consultation to review the current framework applicable to the UCITS depositaries and to introduce provisions on remuneration for UCITS managers. The objective of the consultation was to gather evidence-based views, particularly on any foreseen costs and benefits relating to the main changes that the Commission's services may envisage. It is important to highlight that the responses to the consultation (in total 57) revealed a very broad support on the Commission's initiatives described in the consultation document. These initiatives are perceived as a significant and positive step forward in order to improve investor protection, notably through a more harmonised EU regulatory framework to enhance fair competition between all UCITS fund providers.

The responses to the consultation highlighted in particular the following conclusions:

With respect to **UCITS depositary functions**, the clarification of the UCITS depositary duties and liability regimes was perceived as a key policy priority, given that UCITS depositaries are responsible for investors' safety. More specifically:

- Alignment with the AIFM Directive: the so-called 'UCITS V' review initiative should be conducted in accordance with the respective requirements under the AIFM Directive, to enhance consistency in the regulatory framework applicable to the depositary function. Stakeholders encouraged the use of similar and consistent terminology between the AIFM and the UCITS provisions. However a pure alignment of the AIFM Directive is not considered appropriate, in particular as UCITS investors addressed through fund 'passporting' are mostly retail investors. In this context, the depositary's role to ensure that investors' interests are protected is crucial;

- Liability regime: the two most controversial aspects relate to (i) the reference to 'force majeure', to allow a liability discharge of the UCITS depositary, and (ii) the obligation to return 'lost' assets "with no delay" (where according to the AIFM Directive standards, AIF depositaries must return 'lost' assets 'without any undue delay'). In this context, nevertheless, a majority of stakeholders have highlighted the fact that the key outstanding question is rather to know when an asset can be considered "lost";

- UCITS holders' rights: The UCITS unit holders' and shareholders' rights should be clarified and aligned, regardless of the legal form of the UCITS fund. Some stakeholders even suggest that the Commission introduce UCITS class actions to ensure that the retail investors can benefit from all existing legal tools to ensure that their interests are duly protected;

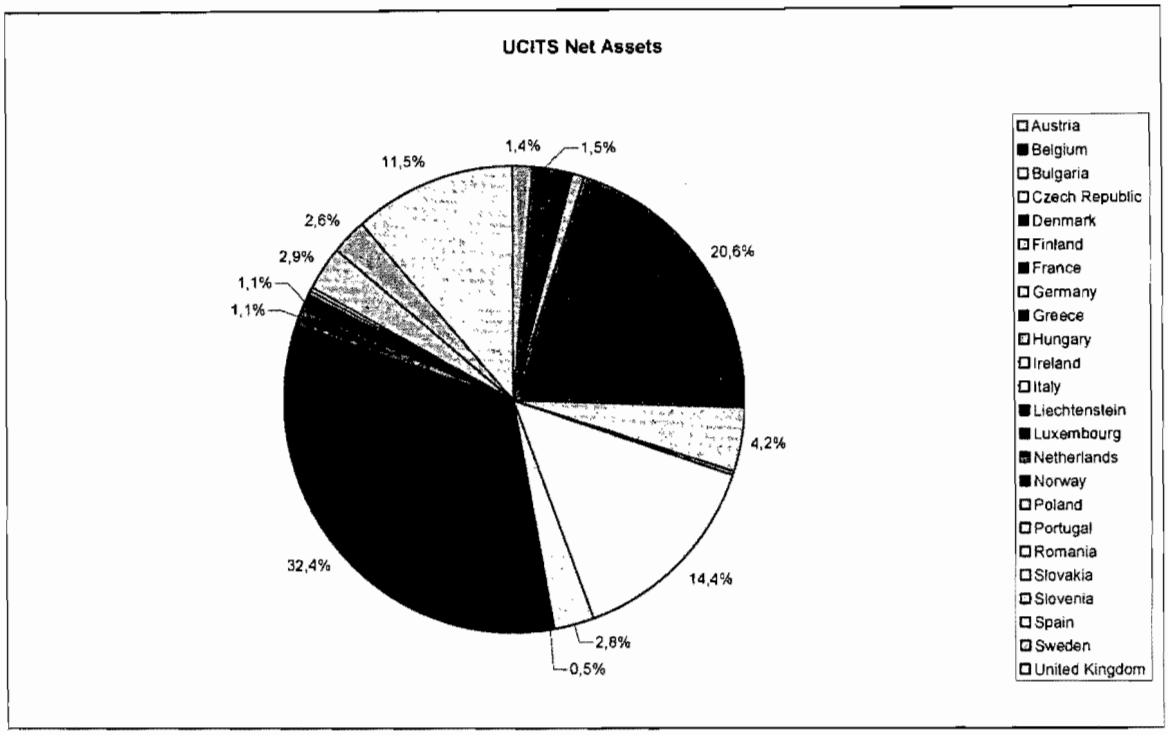
- Supervision: This has been highlighted as an essential 'single market' issue in the responses to the consultation. The majority of stakeholders believe that the competencies of supervisors should be further harmonised and that competent national authorities should be allowed to enforce EU rules in an effective and harmonised manner.

On **managers' remuneration** policy, the majority of the contributions stress that rules on remuneration policies should be consistent with rules laid down in the AIFMD albeit adjusted to the UCITS model. For instance, some stakeholders have highlighted that requirements relating to the fact that a substantial portion of variable remuneration should consist of units or shares of the fund or a company concerned is not suitable in a UCITS environment.

10.3. ANNEX 3: Shares of Households that invest in UCITS Funds

Member State	Share of households	Source (2005-2008 data)
Germany	16%	http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Publikationen/Fachveroeffentlichungen/WirtschaftsrechnungenZeitbudget/EinkommenVerbrauch/EVS__GeldImmobilienvermoegenSchulden2152602089004,property=file.pdf
Italy	11%	http://www.bancaditalia.it/statistiche/indcamp/bilfait/boll_stat/suppl_08_10_corr.pdf
Austria	11%	http://www.hfcs.at/de/img/gewi_2006_2_05_tcm14-43181.pdf
France	10%	http://www.insee.fr/fr/ffc/docs_ffc/ip985.pdf
Spain	7%	http://www.bde.es/webbde/es/estadis/eff/eff2008_be1210.pdf
United Kingdom	6%	http://www.ons.gov.uk/ons/rel/was/wealth-in-great-britain/main-results-from-the-wealth-and-assets-survey-2006-2008/index.html
Average	*10%*	

10.4. ANNEX 4: UCITS Net Assets by Country of Domiciliation



Net assets of UCITS - 30/09/2011		
Members	**Assets (EURm)**	**Share**
Austria	75 788	1,4%
Belgium	79 131	1,5%
Bulgaria	226	0,0%
Czech Republic	4 375	0,1%
Denmark	62 373	1,2%
Finland	46 969	0,9%
France	1 080 382	20,6%
Germany	221 914	4,2%
Greece	5 140	0,1%
Hungary	7 856	0,1%
Ireland	754 903	14,4%
Italy	149 371	2,8%
Liechtenstein	25 769	0,5%

Luxembourg	1 704 978	32,4%
Netherlands	58 591	1,1%
Norway	59 614	1,1%
Poland	15 197	0,3%
Portugal	6 565	0,1%
Romania	1 871	0,0%
Slovakia	3 011	0,1%
Slovenia	1 752	0,0%
Spain	152 792	2,9%
Sweden	134 790	2,6%
United Kingdom	602 269	11,5%
EEA	**5 255 627**	**100,0%**

10.5. ANNEX 5: Summary of the 2010 CESR mapping exercise

Summary of the CESR mapping exercise of the duties and liabilities of UCITS depositaries as published in January 2010 and complemented by the Commission Communication on depositaries in the Member States of March 2004

(Mapping for 10 EU counties representing 92% of the UCITS Markets)

	UCITS MARKET SHARES	**ELIGIBILITY CRITERIA**			**WHAT LIABILITY REGIME IN CASE OF LOSS OF ASSETS**		**REGULATION UPON DELEGATION**	
		Applicable Criteria	Capital requirement	Approval	What liability for safekeeping	Civil or Administrative ruling	Restrictions on task to be delegated	Existing due diligence
AUSTRIA	1.6%	Credit institutions Domestic branch of a EEA credit institutions	5 M€	--	--	Civil ruling Outside FMA's jurisdiction	No prohibition, all task can be delegated	No specific rules - Must respect fund's rules and shareholders interests.
BELGUM	1.6%	Credit institutions Belgium Central bank	As applicable to CRD firms*	Yes	--	Civil court ruling; CBFA may only take administrative measures to	Safekeeping only	Contractual duty of care and due diligence on the choice of delegate and Adequate monitoring of the delegated function.

		Investment firms				remedy organisational, rules of conduct deficiencies.		Extension of Mifid rules on safekeeping to depositary function when depositary is a credit institution.
FRANCE	23.7%	Credit institutions Investment firms Insurance companies	3.8 M€*	No	Obligation of result to return safe kept assets	General civil law principal, complemented by the AMF rulebook ; Competence of AMF, to be challenge to the Court, if necessary.	Safekeeping only	Administrative framework applicable upon delegation (contract and due diligence requirements)

	UCITS MARKET SHARES	ELIGIBILITY CRITERIA			LIABILITY REGIME IN CASE OF LOSS OF ASSETS		REGULATION UPON DELEGATION	
		Applicable Criteria	Capital requirement	Approval	What liability for safekeeping	Civil or Administrative ruling	Restrictions on task to be delegated	Existing due diligence
GERMANY	4.2%	Credit institutions	5 M€	Yes	If failure (negligence or failure to met accepted standard of due care) to comply with a duty arising under the obligation (e.g. to return the assets held in custody), possible may claim for compensation.	Civil court ruling; Outside Bafin's jurisdiction	--	Administrative framework applicable upon delegation. Specific conditions applicable: . Type of eligible the sub-custodian . local regulation shall not impair the right of request delivery of the depositary, . on the type of the equities to be kept in sub custody : must be fungible and eligible to the scheme.
IRELAND	11.3%	UCITS principles " ...subject to prudential regulation and on-going Supervision. (...)"	--	--	This requires a depositary to return the assets to the UCITS on request (...). Depositary is liable as a result of its unjustifiable failure to perform its obligations, or its improper	Tribunal ruling	--	Administrative framework applicable upon delegation. No eligibility criteria upon

	UCITS MARKET SHARES	ELIGIBILITY CRITERIA			LIABILITY REGIME IN CASE OF LOSS OF ASSETS		REGULATION UPON DELEGATION	
		Applicable Criteria	Capital requirement	Approval	What liability for safekeeping	Civil or Administrative ruling	Restrictions on task to be delegated	Existing due diligence
		Credit intuition (+ branch) Company incorporated in IR wholly owned by a credit institution in an EU or non EU country, upon condition (equivalence of protection)			performance of them.			sub custodian; .Specific Due diligence requirements upon sub custody of assets (for example, segregation)
ITALY	3.7%	Credit institutions + Other requirements (organisational structure, capital requirement adequate... experience)	100M€	--	If failure, the depositary is liable unless it can prove that it could not have avoided the loss.	Civil competence Supervisory authority may impose administrative sanction and other remedial measures for breach of administrative regulation	--	Administrative framework applicable upon delegation Specific conditions applicable: .Upon the sub custodian (credit institution or authorised custodian) . Operational requirement (consent of asset manager, segregation) . no minimum content of

	UCITS MARKET SHARES	ELIGIBILITY CRITERIA			LIABILITY REGIME IN CASE OF LOSS OF ASSETS		REGULATION UPON DELEGATION	
		Applicable Criteria	Capital requirement	Approval	What liability for safekeeping	Civil or Administrative ruling	Restrictions on task to be delegated	Existing due diligence
								the sub custody contract
LUXEMBOURG	30.1%	Credit institutions Implying at MS level requirements and supervision of the depositary function (adequate organisational structure, capital requirement adequate experience)	8.7 M€*	Yes (as a Bank)	In case of wrongful/improper performance and failure to perform. On the burden of the proof : Anyone suffering damages must prove the depositary negligence	Civil competence exclusively CSSF may impose administrative sanction (fine/ withdrawal of approval) for breach of administrative regulation.	--	Administrative framework applicable upon delegation and CSSF supervisory practices Specific conditions applicable: . check-list on the sub custodian entity and task delegated Operational requirement (segregation)
SPAIN	3.5%	Credit institutions Investment firm + Other requirements (organisational structure, capital requirement adequate,	Yes	Yes	If the UCITS depositary breaches of their duties, according to best standards.	Administrative legislation Competence of CNMV, to be challenge to the Court, if necessary.	--	Administrative framework applicable upon delegation Specific conditions applicable: . Upon the sub custodian . Operational

	UCITS MARKET SHARES	ELIGIBILITY CRITERIA			LIABILITY REGIME IN CASE OF LOSS OF ASSETS		REGULATION UPON DELEGATION	
		Applicable Criteria	Capital requirement	Approval	What liability for safekeeping	Civil or Administrative ruling	Restrictions on task to be delegated	Existing due diligence
		rules of conduct...)						requirement (segregation, and in specific case of Omnibus account) . Due diligence over the delegated duties. . No rules as to the content of the contract.
SWEDEN	2.3%	Credit institutions	Yes	--	Obligation of result	Civil law Supervisor may issue administrative sanction that do not affect civil liability	--	Guidelines
UK	10.0%	UCITS principles " ...subject to prudential regulation and on-going Supervision. (...)" + Other requirements (adequate resources , sutability, ...)	Threshold condition upon approval (4M£*)	Yes	Liability for improper performance or in case of unjustifiable failure to perform.	Depending on the nature and extent of any breach by the depositary, the FSA may be able to exercise the own-initiative powers conferred on it by primary legislation. All decisions by the FSA to exercise its disciplinary powers are subject to an independent appeals process.	No restriction – any function can be delegated	Administrative framework applicable upon delegation Subject to specific conditions and due diligence requirements (depending on the type of function which is to be delegated) .

10.6. ANNEX 6: The Commission's broad Framework on remuneration

Post-2008, the case for regulating remuneration policies across the financial services industry is founded on well-documented evidence that skewed remuneration practices within credit institutions, investment and insurance companies, as well as in other large corporate entities, played a significant role in the build-up of leverage, and ultimately of financial risk, across financial markets world-wide[80]. The pro-cyclical effect of these misguided incentive schemes in the financial services industry was further recognised by the G20 Group at its April 2009 Summit in London, where leaders engaged to *endorse and implement the Financial Stability Forum's (FSF) tough new principles on pay and compensation and to support sustainable compensation schemes and the corporate social responsibility of al firms*[81]. On the basis of this mandate, the Financial Stability Board (FSB) issued its *Principles for Sound Compensation Practices* in September 2009 to be applied globally[82].

The above FSB principles were translated into the EU regulatory context in April 2009 with the Commission *Recommendation on remuneration policies in the financial services sector*[83].

The main objective of the Recommendation is to ensure that remuneration policies of financial institutions do not encourage excessive risk taking and are in line with the long-term interests of financial institutions, their objectives, values, business strategy and risk tolerance. This will in turn lead to reduced levels of systemic risk and greater transparency within the financial services.

The Recommendation includes new principles on the structure of remuneration, on processes for designing and operating the remuneration policy, on the disclosure of remuneration policy to stakeholders and on the supervisory review of such policies. The Recommendation takes the view that these new principles on sound remuneration policies must apply to all sectors in the financial services industry, regardless of the size of the financial institution. This breadth of application avoids any possible loopholes and prevents a distortion of competition between different sectors and financial institutions. However, some of the general principles on sound remuneration practices may be of more relevance to certain categories of financial institutions than others. For this reason, a proportionality test was introduced in the Recommendation to

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[80] In the words of the de Larosière Report of February 2009, *remuneration and incentive schemes within financial institutions contributed to excessive risk-taking by rewarding short-term expansion of the volume of (risky) trades rather than the long-term profitability of investments.* See the Report of the High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière. Available at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

[81] See the final communiqué of the G20 London Summit in April 2009. Available at: http://www.londonsummit.gov.uk/resources/en/PDF/final-communique

[82] Available at: http://www.financialstabilityboard.org/publications/r_090925c.pdf

[83] See the Commission's *Recommendation on remuneration policies in the financial services sector* of 30 April 2009. Available at: http://ec.europa.eu/internal_market/company/docs/directors-remun/financialsector_290409_en.pdf

ensure that Member States, when implementing the general principles, should take into account the nature, the size, as well as the specific scope of activities of the financial undertakings concerned. Furthermore, the application of these principles would be limited to those categories of staff whose professional activities have an impact on the risk profile of the financial institution.

The conclusion of the Recommendation also stated that it shall be followed by a legislative proposal in the banking and investment firms' sector and further extension into the other financial services sectors should also be considered.

An ensuing report by the Commission in June 2010 on the application by Member States of the aforementioned Recommendation showed substantial differences in the approaches of Member States to the agreed principles[84]. Furthermore, it announced the Commission intended to take *legislative measures on remuneration in the non-banking financial services sector (insurance, UCITS)*[85], similar to those adopted under the Capital Requirements Directive (CRD).

As far as the insurance industry is concerned, the Commission's services are currently working on level 2 measures to the Solvency II measure, where rules on remuneration policy will be introduced, following the advice of the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

Implementation of principles enshrined in the Recommendation in the asset management area

At the time of the adoption of the proposal for an **Alternative Investment Fund Managers (AIFM) Directive**, there were no specific provisions contained in the text on remuneration policies, since the adoption of this proposal coincided with the adoption of the Commission's Recommendations on Remuneration – end of April 2009. Since then discussions were underway as to whether the proposal might be adjusted to include remuneration policy provisions. Finally, the Member States decided to follow the political agreement reached on CRD III and include in the text of the AIFMD similar provisions setting up principles of sound remuneration policy for managers of alternative investment funds. The AIFMD awaits its formal adoption (foreseen in June 2011) after favourable vote in the European Parliament on 11 November 2010.

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[84] Only sixteen Member States had applied the measure, though to different extents; six were in a process of adjusting their national legislation; while a relatively high number of them had not initiated any measures or had taken unsatisfactory ones. Only seven Member States had applied pertinent measures across the whole financial services sector. Not surprisingly the Report concluded that further efforts were needed in order to bring firms' remuneration policies into line with the principles stated in the aforementioned Recommendation.

[85] See the *Report on the application by Member States of the EU of the Commission 2009/384/EC Recommendation on remuneration policies in the financial services sector* of 2 June 2010. Available at: http://ec.europa.eu/internal_market/company/docs/directors-remun/com-2010-286-2_en.pdf

10.7. ANNEX 7: Summary of replies to the questionnaire on administrative sanctions

FRANCE

What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations to prior authorisation requirements: Article L621-9 II of the Financial and Monetary Code provides that the Financial Markets Authority (*Autorité des marchés financiers*) monitors compliance with the professional obligations that eligible legal entities and natural persons must fulfil by virtue of the law and regulations. For the persons referred to in 1 to 8, 11, 12 and 15 of Article L621-9 II of the Financial and Monetary Code: A warning (although not public prior to a sanctioning decision), administrative or judiciary orders – the latter issued by a Paris court - , or temporary or permanent prohibition from providing any or all of the services offered through the revocation of license or in emergency situations where disciplinary proceedings concern the manager or depositary; the disciplinary committee of the Financial Markets Authority may pronounce, either instead of, or in addition to, those sanctions, an administrative sanction in the form of a fine. For violations to operating requirements: A warning (although not public prior to a sanctioning decision), a reprimand, temporary or permanent revocation of their professional license, temporary or permanent prohibition from engaging in any or all of their activities; the disciplinary committee may pronounce, either instead of, or in addition to, those sanctions, also the dismissal of one or more natural persons exercising functions in the asset management industry, as well as fines. For violations of disclosure / reporting requirements: All of the above. Publication of sanctions is not 'nominative', i.e. does not reveal the offenders' identity. Settlement proceedings are being currently introduced in the French legislation. Presently, the above sanctioning regime applies equally to both UCITS and non-UCITS funds, although adaptations may be necessary.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
For the persons referred to in 1 to 8, 11, 12 and 15 of Article L621-9 II of the Financial and Monetary Code: a fine of an amount not exceeding €10 million or 10 times the amount of any profit realised; the sums are paid to the guarantee fund to which the person fined is affiliated, or, failing this, to the *Trésor public*. For natural persons, fine of €300,000 or five times the amount of any profit realised; the sums are paid to the guarantee fund to which the legal entity under whose authority or on whose behalf the person being fined acted, is affiliated, or, failing this, to the *Trésor public*.	The addressees of the administrative sanctions can be either a legal person (entity) or a natural person (individual) - See response in column 1.	Article L621-15 II of the Financial and Monetary provides that the board of the Financial Markets Authority examines the investigation or inspection report drawn up by the services of the Financial Markets Authority, or the request formulated by the chairman of the French regulator for the banking and insurance industries, the *Autorité de contrôle prudentiel* (the authority of prudential supervision, ACP). If the board of the Financial Markets Authority decides to initiate disciplinary proceedings, it informs the persons concerned of the allegations and sends details thereof to the disciplinary committee. The latter appoints a *rapporteur* from among its members. The disciplinary committee is not competent to hear	The amount of the penalty must be commensurate with the seriousness of the breaches committed, any advantages or profits derived from those breaches, gravity/seriousness/magnitude of infringement; duration or frequency; financial strength of the perpetrator if a legal person ; realised illicit gains; perpetrator's past conduct/recidivism; eventual acts to dissimulate/cover-up alleged breaches; perpetrator's motives/negligence; perpetrator's cooperation with authorities; where a natural person, the perpetrator's position and level of responsibility; economic effects of infringement on investors, third parties and in the domestic market insofar as these can be determined. The same criteria can be applied in settlement proceedings.	In 2007, 33 proceedings, of which 28 gave rise to sanctions against natural persons and legal entities. Most of the sanctions were related to breaches of rules on public disclosure (13 proceedings), insider dealing (5 proceedings) and price manipulation (1 proceeding). The other sanctions were issued in cases involving providers of investment services other than asset management (5 proceedings) and providers of asset management services (4 proceedings). In 2008, 40 proceedings, 34 of which gave rise to sanctions against natural persons and legal entities. 2 administrative orders where handed down to depositaries. The sanctions handed down related to breaches of rules on public disclosure (5 proceedings), insider dealing (10 proceedings) and price manipulation (1 proceeding). The other proceedings resulted in sanctions for rule breaches by investment services providers carrying on	In 2007, 60 fines ranging from €1,000 to €5,000,000 making a total of €19,894,000 were levied against 24 entities (for €10,680,000) and 36 individuals (for €9,214,000). In 2008, 80 fines ranging from €1,000 to €5,000,000 making a total of €24,715,000 were levied against 34 entities (€6,546,000) and 46 individuals (€18,169,000). In 2009, 38 fines ranging from €100 to €1,500,000 making a total of €6,345,100 were levied against 21 entities (for €3,165,000) and 17 individuals (for €3,180,000).	Sanctions should not be automatic, as they would violate the principle of proportionality and necessity. Where other administrative measures are foreseen, fines should not additionally apply. Achieving minimum standards requires that an exhaustive list of violations needs to be identified from the directive. The 10% criterion is inadequate since not all violations generate illicit benefits. Also, a 10% fine could impose an amount higher than the level of own funds of the management company as foreseen by Article 7 the directive. Suggestion: establishing precise and defined principles in the directive in order to ensure penalties established in Member States reflect the gravity of the infringements and considerably exceed the real (direct or indirect) or potential gains as well as the damage caused to clients; - introducing a peer review as regards to the effectiveness of the sanctioning regime across Member States and managed by	No

There is no minimum fine.		facts which date back more than three years if no action was taken to detect, record or sanction them during that prior period. In an emergency, the board may suspend the activities of the persons against whom disciplinary proceedings are initiated. If the board sends the report referred to in the first paragraph to the Public Prosecutor, the board may decide to make that fact public.		an asset management business (7 proceedings) or on the grounds of provisions governing providers of investment services other than asset management (1 proceedings). In 2009, a total of 46 persons and entities lodged appeals against sanction decisions with the Paris Appeal Court. 1 judiciary restriction order was issued against a management company where a manager controller was designated. Administrative sanctions were handed down 9 times each in 2008, 2009 and 2010, among which 2 permanent revocations of licenses in 2008 and 2009 respectively.		ESMA; - establishing maximum common levels for fines would be useful (only if they are very high).	

PORTUGAL

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	1) Fines: Between €25,000 and €5,000,000, when classified as very serious; Between €12,500 and €2,500,000, when classified as serious; Between €2,500 and €500,000, when classified as less serious. If the economic gain, when doubled, is more than the maximum value of the fine which is envisaged, the highest value shall prevail. Payments resulting from the imposition of fines and economic benefit in administrative offence proceedings revert in full to the Investors' Compensation Scheme. 2) Accessory sanctions: a) Apprehension and loss of the object of the offence, including the benefit obtained by the infringer by the practice of the offence; b) Temporary suspension of the exercise by the infringer of the profession or the activity to which the offence refers (maximum duration: five years from the definitive sanctioning decision); c) Disqualification from the exercise of the function of administration, management, control, supervision and, in general, representation of any financial intermediary within the scope of any or all activities of intermediation in securities or other financial instruments (maximum duration: five years from the definitive sanctioning decision); d) Publication (complete or partial, in accordance with the CMVM's decision) by the CMVM, at the expense of the infringer and in places suitable for the accomplishment of the aims of general prevention of the legal system and protection of securities or other financial instruments markets, of the sanction imposed in view of the offence; e) Revocation of the authorisation or cancellation of the registration necessary for the performance of the activities of financial intermediation in securities or in other financial instruments. There are a series of interim measures necessary for the instruction of proceedings, the defence of the market or the protection of the investors' interests, that the CMVM may order: (i) set out the suspension of the activities carried out by the perpetrator (said order may be published by CMVM); (ii) lay down certain conditions which shall be complied to proceed with the exercise of functions or activities, namely, compliance with the duty to inform; and (iii) seizure or freezing of valuables. Other measures include summary proceedings (for cases of a lesser gravity), warning procedures and the public release of CMVM decisions Presently, the above sanctioning regime applies equally to both UCITS and non-UCITS funds, although adaptations may be necessary.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
1) minimum level of administrative pecuniary sanctions: €2.500 2) maximum level of administrative pecuniary sanctions: €5.000.000	In 2007, 60 fines ranging from €1,000 to €5,000,000 making a total of €19,894,000 were levied against 24 entities (for €10,680,000) and 36 individuals (for €9,214,000). In 2008, 80 fines ranging from €1,000 to €5,000,000 making a total of €24,715,000 were levied against 34 entities (€6,546,000) and 46 individuals (€18,169,000). In 2009, 38 fines ranging from €100 to €1,500,000 making a total of €6,345,100 were levied against 21 entities (for €3,165,000) and 17 individuals (for €3,180,000).	CMVM (the Portuguese Securities Commission) according to Article 408 of Securities Code	Both legal and natural persons: 1) material illegality of the act; 2) agent's negligence; 3) benefits obtained; 4) prevention requirements; 5) whether the agent is an individual or legal entity; 6) agent's economic situation; 7) agent's previous conduct. Legal persons: 8) danger or damage caused to investors or to the securities / financial instrument market;	4 fines: 2007: €50.000 2009: €75.000 and €35.000 (later reduced to €22.000) 2010: €50.000 Total number of infringement cases brought and decided by the CMVM in the period 2008 - 2010: 10 (of which 7 effectively sanctioned). Sanctions were in the form of fines and warnings.	Maximum amount: €75.000 Minimum amount: €50.000	It is highly desirable that sanctions exceed the actual pecuniary gains resulting from the offence. CMVM supports an option to seize gains made by third parties as a result of the offence. CMVM believes that its view should not be construed as preventing or restraining the assessment of each particular case by competent authorities, mainly their discretion to refrain from sanctioning minor offences. Fines should be differentiated according to types of violations: those that typically promise large gains to the perpetrator (e.g. market manipulation and insider trading), and those that usually do not allow for large profits (e.g. untimely notifications or disclosures). Regarding a common minimum level of fines, CMVM emphasizes that setting a common minimum level of fine would have to bear in mind, i.a., that (i) a dissuasive fine for a perpetrator might be disproportionate for another; and (ii) minimum levels of sanctions will heavily depend on the criteria to be taken into account when applying sanctions and upon the	No

			9) occasional or repeated nature of the offence; 10) acts which tend to impair discovery of the offence; 11) existence of acts by the agent, on own initiative, aiming at, repairing the damages or preventing the dangers caused by the offence. <u>Natural persons</u>: 12) level of responsibility, scope of functions and role in the legal entity; 13) intention to obtain, for itself or another entity, an illegitimate benefit or the damage caused; 14) compromise and measures to avoid committing the offence.			benchmark used to assess financial hardship. CMVM considers that minimum amounts would mainly affect minor cases of offences carried out by the financially weakest parties. However, minimum amounts for the upper limit of fines according to the national laws would allow for a more credible deterrent effect throughout the EU. Common minimum levels for the upper limit of administrative fines should be introduced for each category of offences.	

SPAIN

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	Administrative sanctions are regulated by chapter IV "Legal Penalties" of the existing Law 35/2003 on Collective Investment Schemes. This chapter distinguishes between infringements and sanctions. The infringements will result in sanctions. Infringements are classified into three categories depending on their importance: minor, serious and very serious. The gradation of the sanction is based on the type of infringement. According to Articles 85, 86 and 87 of Law 35/2003 on Collective Investment Schemes, the different types of sanctions are described as follows: Sanctions applied to legal person as a result of very serious infringements: €300.000 fine in case of profits obtained because of the infringement which can not be quantified. If the profits can be quantified, the fine will be as a minimum, the profit's amount and as a maximum, five times the profits. • Temporary exclusion from the official registers for a period between 2 and 5 years. • Revocation of authorisations. • Temporary suspension or limitation on the type or volume of operations for a period not exceeding five years. • Public warning, published in the Official Bulletin of Spain "BOE" and replacement of depositary. In case of natural person belonging to the management company, the fine would be up to a maximum of €300.000 per person. Additionally a suspension of a person belonging to the management company can be applied for a period of 3 years to 5 years, or a suspension of up to 10 years for management jobs or administrative positions in any other management company. Sanctions applied to legal person as a result of serious infringements: • Public warning, published in the Official Bulletin of Spain "BOE" and replacement of depositary. • €150.000 fine in case of profits which can not be quantified. If the profits can be quantified, the fine will be up to the amount of profits as a result of the infringement. • Temporary suspension or limitation on the type or volume of operations for a period not exceeding one year. • Temporary exclusion from the official registers for a period between 1 and 3 years,

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied, during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
In general there is no minimum level set for pecuniary sanctions. The maximum level of administrative pecuniary sanctions applied in case of very serious infringements is €300.000 fine, .for serious infringements is €150.000 fine and finally in case of minor infringements the maximum level is €60.000. When the profits as a result of the infringement can be quantified, and the sanction is applied to a legal person, these maximums levels can be extended up to the profits amount and in case of very serious infringements the fine can be five times the profits amount.	According to question I and 2, the addressees of the sanctions are both, legal and natural person. According to Article 89 of Law 35/2003 of Collective Investment Schemes, the addressees of the very serious and serious infringements can be individuals in directing or executive roles. Additionally the addressees can be also the UCITS, management companies, and depositaries of the UCITS.	The authorities responsible for the application of the administrative sanctions are defined in Article 92 of the abovementioned Law 35/2003. The CNMV is the authority responsible of the imposition of minor and serious infringements. In case of very serious infringements, the Ministry of Finance is responsible for the imposition of sanctions, following a proposal from the CNMV. In case of a credit institution, it is needed a previous report of *the Banco de España*.	The Article 88 of the Law 35/2003, defines the criteria to set the level of the administrative sanctions. These main criteria are related to: • The nature and the magnitude of the infringement; • The importance of the damages caused; • The profits as a result of the infringement, or the profits in case of omission or acts that can result in an infringement; • The importance of the UCITS according to its assets under management; • The adverse consequences for the financial system or country's economy; • The attempt or intention of repairing the infringement;	During the year 2007 the number of pecuniary sanctions applied were 2. These sanctions were imposed as a result of serious infringements. On the other hand in 2008 there were no pecuniary sanctions applied. In 2009, the pecuniary sanctions applied were 5, and all of them were as a result of very serious infringements. In 2010, 9 serious infringements, with fines ranging between €1000 and €2000.	In 2007 the maximum amount in the two sanctions imposed to a legal person was €1.000.000 and the minimum was €30.000 respectively. During 2009 the maximum amount of pecuniary sanctions was €90.000 applied to a natural person, and the minimum was €3.000 applied to a legal person. In 2010, fines ranged between €1000 - €2000.	Spanish authorities believe that violations should be classified as minor, serious and very serious. Minimum and maximum amounts could also be set. The 10% criteria is disproportionate and may give rise to very large fines, often larger than the same capital of the management company. Alternatively, fines should be based on the capital of the management company. For natural persons, fines could vary between a minimum and a maximum.	No

			• Duration and frequency; • Perpetrator's past conduct/recidivism; • The perpetrator's position within the company (only those in managerial positions can be sanctioned); • The rectification of the infringement by own initiative; • Objective difficulties the company may have met while attempting to comply with legal requirements; • Compensation for the damages caused, together with measures to avoid the continuity of the infringement.				

ITALY

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations of authorisation requirements: Fine of between €516 and €10.329 for unauthorised use of false or misleading expressions. For natural persons, imprisonment between 6 months and 4 years, with a fine of between €2.066 and €10.329 for unauthorised activities. The Bank of Italy or Consob shall inform the public prosecutor with a view to the adoption of the measures (inspection of the company, appointment of an administrator, etc.) or may apply to the courts for the adoption of the same measures. Article 190 of TUF provides for the imposition of an administrative fine from € 2,500 to € 250,000 in case of a failure to comply with general or specific rules relating to prior authorisation applicable to management companies and intermediaries. A disqualification from office is foreseen for those individuals that fail to comply with experience, good repute and independency requirements valid for the industry. Failure by holders of a qualifying stake in an asset management or an investment company to comply with good repute requirements or mandatory notifications entails automatic suspension of attached voting rights. Any person who fails to comply with a request from Consob within the prescribed time limits or delays the performance of Consob's functions shall be punished by a pecuniary administrative sanction of between € 50,000 and € 1,000,000. For violations to relating to operating requirements, Consob and the Bank of Italy may undertake corrective actions (e.g. convene directors and Board). They can also order the suspension or temporary limitation of the issue or redemption of units or shares of UCITS. Injunctive remedies, such as cease and desist orders and, where necessary, temporary injunction/restraining orders are also foreseen. Any person who fails to comply with a request from Consob within the prescribed time limits or delays the performance of Consob's functions shall be punished by a pecuniary administrative sanction of between € 50,000 and € 1,000,000. Other sanctions include the dismissal of the whole executive and supervisory board and/or the permanent withdrawal of authorisation. Criminal sanctions may apply in case of violations of the provisions governing conflicts of interest and client assets segregation. Furthermore, any person who obstructs the supervisory functions entrusted to Consob shall be punished by imprisonment for a term of up to 2 years and a fine of between €10.000 and €200.000. In case of violations of the rules concerning the offering of the units to the public, the financial penalty could range between one-fourth of the total value of the financial products marketed but not twice more than the total value. If the total value of the financial products marketed is not determined, the financial penalty can range between €100.000 and €2 million. For violations of disclosure reporting requirements: Precautionary measures, e.g. the suspension of units/shares, for the violation of the public offering provisions and related regulations. Where violation is proven, Consob shall prohibit the public offering. Consob may make public the fact that the public offering or issuer fails to meet obligations as a preventive measure and for a period not exceeding ten consecutive working days on each occasion, request that the stock exchange company suspends or prohibits trading on a regulated market. Consob may suspend temporarily the marketing of units of foreign collective investment undertakings, or suspend or prohibit the public offering where a violation is ascertained.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
Between €516 and €2 million, depending on the typology of the infringement.	Pursuant Article 187-quinquiesdecies (Safeguarding of Consob's supervisory functions) , any person who fails to comply with a request from Consob within the prescribed time limits or delays the performance of Consob's functions shall be punished by a financial penalty. Moreover, pursuant the above mentioned Article 190 , persons performing administrative or management functions in and employees of the management company which do not comply with law provisions or related implementing rules shall be punished by a financial penalty. No financial penalties are envisaged for the management	Consob is responsible for the application of the financial penalty in case of breach of rules concerning disclosure and other transparency obligation, conduct of business rules and other market rules. The Bank of Italy is responsible for sanctions concerning violation of capital requirements and prudential rules.	The criteria for setting the level of the financial penalty are: a) the seriousness of the breach; b) the consequences of the breach (in terms of loss or the risk of loss caused to investors in the UCITS or to the market); c) the duration and the extent of the breach; d) the intent; e) whether the breach reveals serious or systemic weakness of the management company; f) the role/position of the individual in the management company; g) acts to dissimulate/cover up breaches; h) offenders past conduct/recidivism;	The figures below refer to the total number of natural persons, performing administrative or management function in Italian management companies, to which financial penalties have been applied by Consob and the Bank of Italy during the last three years (the number is comprehensive of the sanctions applied to management companies which manage non-UCITS funds). 2007 55 infringements 2008 17 infringements 2009 17 infringements	The figures below refer to the minimum and the maximum amount of financial penalties applied by Consob and the Bank of Italy to individuals performing the asset management activity (the amount is comprehensive of the sanctions applied to management companies which manage non-UCITS funds). 2007 Consob: €2,600 / €42,800 Bank of Italy: 0 / 0 2008 Consob: €2,000 / €31,000 Bank of Italy: €6,000 / €63,000 2009	The 10% of AUM criterion is disproportionate as it would force many asset management companies (in IT and elsewhere) into liquidation. It is disproportionate and far beyond the amounts of a company's own funds.	No, although corporate supervisory bodies and external auditors have the obligation to report irregularities and breaches detected to the Bank of Italy or Consob.

	company.		i) realised illicit gains; j) financial strength of the perpetrator; k) voluntary mitigating action undertaken by the relevant person.	2010 20 infringements	Consob: €8,200 / 120,000 Bank of Italy: €2,500 / €60,00		

BELGIUM

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For UCITS, no distinction is made between the 3 categories of infringements mentioned in the Commission's questionnaire. The CBFA may: • order the UCITS, a designated investment company and/or other persons concerned to take the necessary measures in order to make an end to certain infringements in case of a public offer. If no sufficient measures are taken, the CBFA may suspend or prohibit the public offer and suspend, prohibit or withdraw notices, advertisements and other documents that relate to a public offer, or that announce or recommend such an offer, and/or publish a rectification. It may also make public these decisions. Moreover, the CBFA may set a deadline by which the prohibition or order to suspend or withdraw must be complied with. If anyone continues to be in default after that deadline has expired, the CBFA may impose a penalty per infringement or a penalty per day's delay; • make public, at the expense of the UCITS and/or the designated management company, its position regarding certain infringements; • designate a special inspector; • suspend or prohibit the subscription, redemption or trading on the market of the UCITS' units for a period of time determined by the CBFA; • order the UCITS' managers or directors (or those of the designated management company) to be replaced within a period determined by the CBFA, failing which, replace the entirety of its decision-making or management bodies, as well as those of the designated management company, with one or more temporary managers or directors who will, individually or jointly as the case may be, have the same powers as those replaced; • revoke the UCITS registration (or of one of its sub-funds) and, as the case may be, the authorisation granted to this UCITS; • set a deadline by which a UCITS or a designated management company must comply with certain provisions established in the legislation. If the UCITS continues to be in default after that deadline has expired, the CBFA may impose a penalty per infringement or a penalty per day's delay*; • impose administrative fines*. * Administrative sanctions that also apply to foreign UCITS. For management companies: The CBFA may: • make a public announcement that a management company has failed to comply with the injunctions of the CBFA, ordering it to comply with the provisions of the legislation within the period laid down by the CBFA. The costs incurred of making that announcement are borne by the management company concerned; • designate a special inspector;

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
For UCITS: Penalty in case of non-compliance: • Minimum: not determined • Maximum: € 2.500.000 per infringement or € 50.000 per day's delay, Administrative fines: • Minimum: € 5.000 • Maximum: € 2.500.000 For management company:	For UCITS, legal and natural persons. For management company, legal and natural persons.	For UCITS: Belgian Banking, Finance and Insurance Commission (CBFA). For Management companies: Belgian banking, Finance and Insurance Commission (CBFA).	For UCITS: In order to determine the level of the administrative pecuniary sanctions, the principle of proportionality will apply; as a consequence, the main criteria to take into account are the gravity and the duration of the infringement. Other factors that are taken into account are the nature of the infringement, intention, recidivism and the size of the addressee of the sanction.	UCITS: None Management company: None	Not specified	Not specified	No

Penalty in case of non-compliance: • Minimum: not determined • Maximum: € 2.500.000 per infringement or € 50.000 per day's delay. Administrative fines: • Minimum: € 5.000 • Maximum: € 2.500.000							

THE NETHERLANDS

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	<u>For violation relating to prior authorisation</u>: Public warnings / reprimands indicating entity /person responsible and nature of breach, administrative fines (even when prior warnings have not been heeded). <u>For violations relating to operating requirements</u>: Public warnings / reprimands indicating entity/person responsible and nature of the breach, the imposition of temporary injunction / restraining orders, including e.g. the suspension of the public offer of UCITS units / shares both domestically and abroad; the dismissal of one or more natural persons (executives) from the UCITS management body, as well as the dismissal of a an auditor; a temporary or permanent ban for certain natural persons from exercising functions (or manage invested volumes) in the asset management industry; imposition of administrative fines and permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). <u>For violations relating to disclosure / reporting requirements</u>: Public orders and reprimands, the dismissal / replacement of executives and auditors, administrative fines (also for natural persons), withdrawal of a licence. For funds that are under supervision of the AFM and do not publish the (semi-) annual report, the AFM demand incremental penalty payments.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010.**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than <u>twice</u> the amount of the illicit benefit, or no lower than <u>10%</u> of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
The maximum levels of fines for the three categories of offences is € 10.000, € 1.000.000 and € 4.000.000.	Both legal and natural persons.	*Autoriteit Financiële Markten* – Authority for Financial Markets (AFM) and the Dutch Central Bank (DNB)	All key criteria mentioned in the Commission's questionnaire are foreseen already under Dutch law. These include:	Since January 2008, the Department of supervisory groups of the AFM has received 11 signals of potential violations by fund managers, 2 of which	Not specified	Preference for a fixed amount as the minimum level of fines. The proposed amounts make it unlikely that a national authority would want to impose higher amounts, thereby	Not specified

These figures can be doubled for old offenders. For severe offences were the profit for the offender has been larger than € 2.000.000, there is also the option to choose the double amount of the profit as fine.			Gravity/seriousness/magnitude of infringement. The severity of the offence (the law categorizes them in 3 levels), higher fines for old offenders and lower fines for special circumstances; Duration or frequency; Financial strength of the perpetrator (i.e. in terms of AUM) if a legal person, or of professional income if a natural one); Realised illicit gains; Perpetrator's past conduct/recidivism; Eventual acts to dissimulate/cover-up alleged breaches; Perpetrator's motives/negligence; Perpetrator's cooperation with authorities; Where a natural person, the perpetrator's position and level of responsibility; Economic effects of infringement on investors, third parties and in the domestic market insofar as these can be determined.	concerned UCITS funds. Since January 2010, the Department of supervision on transparency of financial products has received 16 signals of potential infringements to the UCITS Directive. Of these only 8 merited a follow-up directly with the management company.		undermining a Member State's sovereignty. Moreover, it would conflict with the present system of bandwidths and exceptions under Dutch law. Exceptions should be inserted that will allow a lower fine than the one proposed.	

UK

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The UK has implemented the UCITS Directive through a combination of primary legislation in the Financial Services and Markets Act 2000 (FSMA), secondary legislation and rules in the FSA's Handbook. For violations relating to prior authorisation: • FSA can apply to the civil courts for an injunction where there has been, or is likely to be, a breach. The court may make three types of injunctive order: to restrain a course of conduct; to require a person to take steps to remedy a course of conduct; and to restrain a person from disposing of, or otherwise dealing with, assets; • FSA has the power to vary or cancel a firm's permission to carry on regulated activities. The FSA may do this where it considers: that the firm is failing or is likely to fail to satisfy the threshold conditions (i.e. the minimum standards the FSA requires firms to meet to become and remain authorised); that the firm has not carried on any regulated activity for a period of at least 12 months; or that it is desirable to do so to meet any of its regulatory objectives (i.e. maintaining market confidence in the UK financial system; contributing to the protection and enhancement of the stability of the UK financial system; securing the appropriate degree of protection for consumers; and reducing financial crime); • It may prohibit an individual, whether approved by the FSA or not, if they are not fit to engage in regulated activity; • It may prevent an individual from undertaking specific regulated activities; • It may suspend a firm for up to 12 months, or an individual for up to two years, from undertaking specific regulated activities; • It may censure firms and individuals through public statements indicating the nature of the breach; • It may impose a financial penalty on a firm or individual. These sanctioning powers also apply, where appropriate, to breaches concerning authorisation prior to a UCITS merger, or mandatory approval prior to master/feeder fund investments. All sanctions are published, except where publication might be prejudicial to consumers or unfair to those subject to an enforcement action. For violations to operating requirements: The FSA has the same sanctioning powers for breaches relating to operating requirements as it does for breaches relating to prior authorisation. These cover all the administrative sanctions listed above, and include (i) varying a firm's permissions to restrain the public offer of UCITS units/shares both domestically and abroad; and (ii) the disqualification of an auditor from being the auditor of an authorised person or a class of authorised person. For violations to disclosure/reporting requirements: The FSA has the same sanctioning powers set out above. Sanctioning powers under AIFM Directive are deemed to be the same as those under UCITS. A different sanctioning regime is not merited.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
The FSA has no statutory minimum or maximum fine.	The FSA has the power to impose penalties on firms (legal persons) and individuals (natural persons).	The Financial Services Authority (FSA)	Since March 2010, the FSA applies a 5-step approach (DEPP) to determining the amount of a fine. All steps include the criteria listed in the Commission's consultation questionnaire. The steps are: Step 1: the removal of any financial benefit derived from the breach; Step 2: the determination of a figure which reflects the seriousness of the breach (seriousness is determined as a % figures of a firm's revenues / individual's income); Step 3: an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances; Step 4: an adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has a deterrent effect; and Step 5: if applicable, a settlement discount will be	No enforcement actions were undertaken for violation of UCITS-specific rules. In 2007: not specified. In 2008-2009: 302 infringement cases closed, 234 of which were sanctioned, 55 of which were fined amounting to a collective total of £27.5 million; Other sanctions included 48 prohibitions, 122 refusal of approval/authorisation, 1 criminal sanction, 7 civil injunctions/restitutions, and 10 public censures only. In 2009-2010: 286 infringement cases closed, 168 of which sanctioned, 41 of which were fined amounting to a collective total of £33.6 million; Other sanctions included 57 prohibitions, 142 refusal of approval/authorisation, 5 criminal sanction, 11 civil injunctions/restitutions, and 8	Not specified.	Minimum fines for both UCITS and AIFM regimes are unworkable, as every case is specific to its facts. However, minimums with respect to other standards are worthwhile if set at an EU level to avoid the risk of arbitrage. Illicit benefits are not always implied in violations. The 10% criterion is excessive and bears no consistency with the capital requirements for the management company under Article 7 of UCITS. AUM-backed fines would therefore be largely disproportionate. All minimum standards for fines should recognise mitigating circumstances, as well as the possibility to settle a case. The latter allows cases to be settled quickly, with less use of resources by the competent authorities.	Yes. The Public Interest Disclosure Act 1998 (PIDA) provides guidance on whistle-blowing. The FSA has a whistle-blowing scheme which, consistent with PIDA, encourages employees to raise concerns internally in the first instance, and explains the situations in which an employee will be protected by PIDA if they contact the FSA.

			applied.	public censures only. In 2010-2011: 297 infringement cases closed, 280 of which sanctioned, 74 of which were fined amounting to a collective total of £98.5 million; Other sanctions included 65 prohibitions, 109 refusal of approval/authorisation, 3 criminal sanction, 10 civil injunctions/restitutions, and 14 public censures only.			

IRELAND

1. – What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The 1942 Central Bank Act (as amended) foresees an Administrative Sanctions Procedure (ASP) that provides for the following sanctions: For violations relating to prior authorisation: 1) a caution or reprimand; 2) a direction to refund or withhold all or part of an amount of money charged or paid, or to be charged or paid, for the provision of a financial service by the regulated financial service provider; 3) a direction to pay to the Central Bank a monetary penalty not exceeding a prescribed amount; 4) if the regulated financial service provider is a natural person, a direction disqualifying the person from being concerned in the management of a regulated financial service provider for such period as is specified in the order; 5) if the regulated financial service provider is found to be still committing the contravention, a direction ordering the regulated financial service provider to cease committing the contravention; 6) a direction to pay to the Central Bank all or a specified part of the costs incurred by the Central Bank in holding the inquiry and in investigating the matter to which the inquiry relates. At any time, however, there is the possibility to negotiate a settlement agreement between the Central Bank and the financial services provider. The regulations transposing UCITS indicate that certain infringements, including those to prior authorisation requirements, may lead to criminal prosecution. For violations to operating requirements: Same as the sanctions above. The conditions are set out in the implementing regulations. The Central Bank has the authority to issue such directions to a financial service provider including the following: the winding-up of a UCITS; or the suspension of the issue of units in the UCITS; or the redemption of the units of the UCITS. Regulation 131 (9) – (10) identifies the power of the Central Bank to seek such interim or interlocutory orders from the High Court as they consider appropriate with regard to the actions of the UCITS. Regulation 131 (11) enables the Central Bank to seek such orders from the High Court to have the UCITS dissolved, and further restrain the disposal of the assets of the UCITS. The Central Bank may revoke the authorisation of a UCITS if it appears to the Central Bank that a) any of the requirements for the authorisation of the UCITS are no longer satisfied; b) that it is undesirable in the interests of the unit-holders or potential unit-holders that the UCITS should continue to be authorised; c) without prejudice to subparagraph (b) above, that the management company or investment company or trustee of the UCITS has seriously or systematically contravened any provision of the Regulations or, in purported compliance with any such provision, has furnished the Central Bank with false, inaccurate or misleading information or has contravened any prohibition or requirement imposed under the Regulations; or d) that the UCITS has not made use of the authorisation within 12 months of the date on which it was authorised under the Regulations, or has failed to operate as a UCITS for a period of more than 6 months. For violations to disclosure/reporting requirements: Same sanctions as the ones for the categories above.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
The maximum amounts prescribed by the Central Bank are for a body corporate or an unincorporated body: €5,000,000; for a natural person: €500,000. Where criminal penalties are foreseen, the maximum fines shall be the following: a) on summary conviction, to a maximum fine of €5,000 or imprisonment for a term not exceeding 6 months or both, or b) on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 3 years or both.	The Administrative Sanctions Procedure applies to both legal and natural persons and may only be applied to a regulated financial service provider (which would include a UCITS or its management company) or those persons concerned in the management of the regulated financial service provider.	The Central Bank and Financial Services Authority of Ireland Act, 2004 provides powers for the Financial Regulator to impose sanctions for prescribed contraventions of legislation or regulatory rules.	All of those mentioned in the Commission's consultation questionnaire. The ASP may require the affected financial services provider to reimburse any illicit profit.	In 2007: not specified. In 2008: 10 fines for a total of €3.595.000, 9 reprimands, and disqualification of a person. In 2009: 8 fines for a total of €3.672.500, 8 reprimands, and disqualification of a person; In 2010: 8 fines for a total of €2.248.700, 3 reprimands.	In 2007: not specified. In 2008: from €5.000 to €3.250.000; In 2009: from €7500 to €2.750.000 In 2010: from €5000 to €2.000.000	Favourable, although the proposed criteria would require greater scrutiny.	No statutory programme, but only general guidelines. The upcoming Central Bank Bill of 2011 will have provisions on whistle-blowing.

FINLAND

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	Sanctions are regulated under FIN-FSA (Act on Financial Supervision Authority – Law 878/2008. For violations relating to prior authorisation: Public warnings/reprimands indicating entity/person responsible and nature of the breach; cease and desist orders; the imposition of administrative fines; For violations to operating requirements: Public warnings/reprimands indicating entity/person responsible and nature of the breach; cease and desist orders; the imposition of administrative fines; the imposition of temporary injunction / restraining orders, including e.g. the suspension of the public offer of UCITS units / shares both domestically and abroad; the dismissal of one or more natural persons (executives) from the UCITS management body, as well as the dismissal of a depositary or of an auditor; the permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). For violations to disclosure/reporting requirements: Public warnings/reprimands indicating entity/person responsible and nature of the breach; cease and desist orders; the dismissal/replacement of one or more natural persons (executives) from the UCITS management body, as well as the dismissal/replacement of an auditor; the imposition of administrative fines; the permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). All of the above sanctions are published on a systematic basis. Extending the current UCITS regime to AIFM funds is appropriate, albeit with the inclusion of other categories of funds presently not regulated under FIN-FSA.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 – Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
Administrative fine: The minimum level for legal person is €500 and the maximum level for legal person is €10,000. The minimum level for natural person is €50 and the maximum level for natural person is €1.000. Penalty payment: The minimum level for legal person is €500 and the maximum level for legal person is €200,000. The minimum level for natural person is €100 and the maximum level for natural person is	Both legal and natural persons are the addressees.	The responsible authority is the FIN-FSA.	Gravity/seriousness/magnitude of infringement; duration or frequency; perpetrator's cooperation with authorities.	In the period during 2008-2010, only 1 fine was levied against a UCITS management company for violations to fund rules. The fine amounted to €5.000.	€5.000.	Finland opposes EU rules on sanctions' harmonisation, as they would require a massive overhaul of existing legislation, most of which is in the criminal realm. The proposed minimums would by far exceed those available under Finnish law. The amount of not lower than twice the illicit benefit is excessively punitive and far too broad. Many breaches of the UCITS Directive are sanctioned by criminal law. There is the danger that the principle of *ne bis in idem* is contravened, were criminal and administrative sanctions to overlap, resulting in an excessively burdensome regime for offenders (in this respect, the Commission should focus on recital 23 of Regulation 1060/2009 on CRAs). The 10% criterion is disproportionate, as it would translate into billions of € that might ultimately even damage unit-holders.	No

€10,000.						Alternatively, Finland suggest calibrating the amount of the fine with the annual turnover of the management company (already this is foreseen in Directive1060/2009 on CRAs, as amended by Regulation 513/2011 – Articles 36a) and b).	

SWEDEN

1 - What type of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The UCITS Directive, as amended, has been implemented in Sweden by the Investment Funds Act (SFS 2004:46, LIF). For violations to authorisation requirements: *Finansinspektionen* can issue warnings, orders and injunctions requiring UCITS companies to take specific action and / or ban certain operations. It can submit a protest to the management company if one or more of the persons managing it does not fulfil the stated requirements and demand that this person no longer hold the position in question. If it does not adhere to *Finansinspektionen's* decision and take action, the management company's authorisation can be withdrawn. Authorisation may also be withdrawn if the company has received it by submitting false or misleading information, or has not begun operating within one year from the time of authorisation. If the management company does not provide the information required by *Finansinspektionen*, a late fee may be issued. *Finansinspektionen* has not yet begun charging late fees, but initial preparations to do so are underway. In conjunction with a ban or injunction, the management company can be issued a conditional fine (fines may not be directed at natural persons). *Finansinspektionen* may forego an intervention if the breach is negligible or excusable, if the company rectifies the matter or if any other body has taken action against the company and this action is deemed sufficient. *Finansinspektionen* can also intervene against companies that conduct fund operations without having obtained authorisation to do so. *Finansinspektionen* shall in such cases issue an injunction that the company cease to conduct the operations. For violations to operating requirements: Same as above. For violations to disclosure/reporting requirements: Same as above. *Finansinspektionen* deems that the present rules (that i.a. are also applied to other financial services providers) should also apply for violations of the AIFM Directive.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010.	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 - Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 - Existence of a 'whistle-blower' programme
According to the applicable provisions set out in LIF, an administrative fine shall have a minimum value of SEK 5,000 (approx. €553) and a maximum value of SEK 50 million (approx. €5.527.000). However, it may not exceed 10% of the management company's turnover during the previous financial year.	The administrative sanctions are directed to legal persons (i.e. management company). An intervention against parties lacking authorisation to conduct fund operation (order to cease operations) may be directed to both legal persons and natural persons.	*Finansinspektionen* is responsible for the application of the administrative sanctions under the IFA. *Finansinspektionen* decisions can be appealed to the Administrative Court.	The criterion for withdrawing authorisation as set out in LIF is that the breach shall be "severe", although a warning may be issued if this is deemed to be sufficient. Government Bill 2007/08:57 specifies that the deciding factor for whether or not *Finansinspektionen* shall intervene is if a management company behaves in a manner that is not in compliance with the laws and other statutes that apply to the company, the fund rules, the articles of association or internal instructions that are based on a statue that regulates the company's operations. When selecting the measure, the severity of the breach should be taken into consideration based on the consequences it has had or could have for the securities market as a whole and for individual investors. Consideration should also be given to the measure that is sufficient and appropriate in reaction to the breach and the effects the measure can have on unit holders. *Finansinspektionen* has considerable freedom to	Most breaches were not worth a pecuniary sanction. Only in 2010, a fine of SEK 400.000 (approx. €44.217) was dealt against a management company for violations of relevant law, regulations and fund rules. In all, only 3 sanctions concerned the breach of the UCITS-specific rules.	N/A	The fine should be calibrated on the amount of the management company's turnover. Sweden highlights that although minimum standards are worthwhile to avoid a competitive "race to the bottom" among jurisdictions, such a standard remains difficult to set among jurisdictions where fund industries are so diversified. A reasonable level in one country, would be too high/low in another.	Not specified.

			decide itself the level of intervention that is reasonable and the criteria that should be taken into consideration. *Finansinspektionen* believes that the most critical criteria when assessing a breach are its severity, the frequency with which the breach occurred, any previous breaches, obstructions to supervision and attempts to hide breaches. Financial strength is relevant when determining the size of the administrative fine. Cooperation from the company can in some cases be viewed as mitigating circumstances, primarily if the company has taken measures to rectify the deficiencies.				

LATVIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For the violation of prior authorisation requirements: Public warnings/reprimands indicating entity/person responsible and nature of the breach; Other violations, if of a certain gravity, are punishable via criminal sanctions. For the violation of operating requirements: The dismissal of one or more natural persons (executives) from the UCITS management body, as well as the dismissal of a depositary or of an auditor; The imposition of administrative fines; The permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). For the violation of disclosure/reporting requirements: The dismissal/replacement of one or more natural persons (executives) from the UCITS management body, as well as the dismissal/replacement of an auditor; The imposition of administrative fines; The permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). Sanctions applicable to UCITS funds are appropriate to apply also to non-UCITS (i.e. AIFM) funds, subject to certain adaptations.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme

The FCMC has the right to impose a penalty on the company and the custodian bank up to 400 minimum monthly salaries (minimum salary is LVL 200, or approx. €278) for the violations above. Should these fail to deter the perpetration of violations, despite the notices addressed by the FCMC to the offender and the expiration of the time limits to comply, a higher level of penalties, depending on the violations, can range from LVL 1000 (approx. €1.390) to a maximum amount of LVL 720 000 (approx. €1.000.980).	Legal persons, but in cases whereby the company's official is prohibited from performing of his/her duties or acquiring or increasing a qualifying holding in a company, both.	The Financial and Capital Market Commission (FCMC) shall be responsible for the supervision of companies licensed by it and supervise the operation of the custodian bank. An administrative act issued by the FCMC in accordance with the Law on Investment Management Companies may be appealed in front of the Administrative Regional Court.	1) Gravity / seriousness / magnitude of infringement; 2) Duration or frequency; 3) Perpetrator's motives/negligence; 4) Perpetrator's cooperation with authorities; 5) Economic effects of infringement on investors, third parties and in the domestic market insofar as these can be determined.	No pecuniary sanctions. Only 1 warning to a management company for delay in submitting annual report to FCMC.	N/A	The mentioned minimum for fines is too high compared to the 400 minimum monthly salaries (minimum salary is LVL 200, or approx. €278) mentioned under column 1.	Not specified.

ESTONIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For the violation of prior authorisation requirements: The FSA sanctions these in cooperation with the police and Prosecutors Office. According to § 372 (2) Penal Code economic activity without activity license within a field of provision of credit, insurance or financial services is criminal offence. The main course followed by the FSA is referring matters for criminal prosecution and publication of a public warning message. Economic activities in a field subject to a special prohibition, or activities without an activity license, other license, registration or through an unapproved enterprise in a field where such activity license, other license, registration or approval of enterprises is required, are punishable by a pecuniary sanction or up to 3 years' imprisonment. For the violation of operating requirements: The FSA has broad competence to issue a precept if there are violations relating to operating requirements. It may suspend the public offer of the units or shares of a foreign fund in Estonia. When the violation has been made by executives from the UCITS management body, then FSA has the right to remove such persons. If needed, the FSA can demand that the auditor of a management company be changed; an employee of a management company be suspended from work or demand that performance of the duties of a management company transferred by the management company to a third party be terminated prematurely. If the addressee of a precept fails to comply with the precept of the FSA, the latter may impose a penalty payment pursuant to the procedure provided for in the Substitutive Enforcement and Penalty Payment Act. In addition, if the addressee of the precept fails to comply with the precept of the FSA, the latter may apply other measures prescribed by this Act, including: revocation of the activity license of the management company; revocation of the authorisation for the foundation of a branch; demanding the removal of a manager of the management company by a court. According to Penal Code for serious violation of restrictions provided by law on investment of assets is punishable by a pecuniary sanction. Depositaries may also be fined for failing to perform their obligations under the Investment Funds Act. For the violation of disclosure/reporting requirements: If necessary, the FSA may issue an order whereby the Authority designates a term for the performance of obligations. The order may contain a warning that upon failure to perform the obligations within the designated term, a penalty payment may be imposed pursuant to the procedure provided for in the Substitutive Enforcement and Penalty Payment Act. In addition, if the addressee of the precept fails to comply with the precept of the FSA, the FSA may apply other measures prescribed by Investment Funds Act, including: revocation of the activity licence of the management company; revocation of the authorisation for the foundation of a branch; demanding the removal of a manager of the management company by a court. The FSA has the right to disclose, in full or in part, a decision, administrative act or contract under public law as of the date of its issue or conclusion if this is necessary for the protection of investors, clients of financial supervision subjects or the public, or for ensuring the lawful or regular functioning of the financial market. There are lot of different possibilities to impose administrative fines for violation relating to public disclosure, disclosure of misleading or incomplete advertising or information about a public offer or reporting requirements to the unit-holders (mandatory reports, documents, explanations or information) , but level of fines are remarkably low. No opinion insofar concerning the applicability of the above rules to non-UCITS funds.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
In case of a natural person: a court or an extra-judicial body may impose a fine of EEK 180 (approx. €11.5) up to EEK 18.000 (approx. €1.150). The fine imposed on a legal person ranges from EEK 500 (approx. €32) to EEK 500,000 (approx. €32,000).	According to Estonian Code of Misdemeanour Procedure both legal and natural persons may be subject to misdemeanour proceedings.	Extra-judicial proceedings concerning the misdemeanours provided for in the Estonian Investment Funds Act are conducted by the Estonian Financial Supervision Authority (FSA).	A comprehensive list of mitigating and aggravating circumstances is set by the Estonian Penal Code. The extra-judicial body conducting the misdemeanour proceedings must consider these accordingly. The main mitigating circumstances are the following: prevention of harmful consequences of the offence, voluntary compensation for damage; appearance for voluntary confession, sincere remorse, or active assistance in detection of the offence; commission of the offence due to a difficult personal situation; commission of the offence under threat or duress, or due to service, financial or family-related dependent relationship; commission of the offence by a pregnant woman or a person in an advanced age etc. The corresponding list of aggravating circumstances is the following: self interest or other base	During 2008 – 2010, 3 infringement cases were treated and all were effectively sanctioned. Criminal legislation with respect to financial crimes is presently being reconsidered.	From €10.000 to €19.000.	There are significant differences in polices and definitions and in the interpretation of penal law between Member States. Estonian FSA supports the opinion that a high level of administrative fines should not be an aim *per se*. The actual level of sanctions imposed should be adequate to the violation and similar for the same type of violation regardless if it is qualified as a criminal or an administrative fine according to the national law of a Member State. It further believes that not only the level of fines, but other coercive measures such as occupational ban, confiscation of the assets gained as a result of violation are also among effective ones in the enforcement toolkit.	No

			motives, commission of the offence during a state of emergency or state of war; commission of the offence by taking advantage of a public accident or natural disaster; commission of the offence in a manner which is dangerous to the public; causing of serious consequences; commission of the offence in order to facilitate or conceal another offence.				

LITHUANIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	Under the Law on Collective Investment Undertakings, and the Code on Administrative Violation of Law (for natural persons), the Securities Commission has a right to: For <u>violations of authorisation requirements</u>: Public warnings and reprimands, cease and desist orders for infringements to law provisions and those of secondary legislation, fines, impose deadlines to the rectification of illicit behaviour, prohibit conclusion of transactions for a defined period, suspend distribution and redemption of units/shares, appoint a temporary representative of the LSC to supervise activities, replace fund managers, suspend validity of licence, or withdraw it completely. For <u>violations of operating requirements</u>: Same as the above, but additionally, the possibility to require the management company to replace the depositary, or to fine the auditor. For <u>violations relating to disclosure/reporting requirements</u>: All of the above. All decisions/resolutions of the LSC are announced publicly, save for where publicity may cause disproportionate harm to affected persons or impair the functioning of the market. Presently, the above sanctioning regime applies equally to both UCITS and non-UCITS funds, although adaptations may be necessary.							
2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than <u>twice</u> the amount of the illicit benefit, or no lower than <u>10%</u> of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
<u>Legal persons</u> without a licence are fined an amount of up to LTL 200.000	Both, legal and natural persons can be the addressees of the administrative	The Lithuanian Securities Commission (LSC) imposes administrative	The LSC takes into account: 1) the amount of the	In 2007 one action was brought upon the management company for the infringement of the Law on	<u>In 2007</u>: LTL 50 000 (approx. €14 500, later reduced the LTL 25.000	Where any illegal proceeds have been generated, or any other property benefit received, loss avoided, and the amounts	No

(approx. €58.000); those in breach of other regulatory provisions up to LTL 100.000 (approx. €29.000) for non-compliance. Where illegal proceeds have been generated and these exceed the maximum foreseen by the applicable sanctions, the LSC has the right to sanction by doubling the amount of the illicitly generated proceeds, of the loss avoided or of the damage incurred. Natural persons, fined an amount from LTL 2,500 (approx. €725) to LTL 5,000 (approx. €1450) for the failure to comply with the LSC's resolutions, or interference in the carrying out of its its duties. A fine of the amount from LTL 2,000 (approx. €580) to LTL 10,000 (approx. €2.900) is for the failure to comply with the laws regulating	sanctions. Rules applying to natural persons are governed by the Code on Administrative Violation of Law.	sanctions. The monetary fines shall be paid into the State budget not later than within one month from the day from the receipt by the person of the decision of the Securities Commission to impose the fine. In the event the fine has not been paid in good faith the decision of the Securities Commission shall be enforced in the manner established by the Civil Code of the Republic of Lithuania.	damage incurred as a result of the infringement; 2) duration of the infringement; 3) the amount of the proceeds, other pecuniary benefit or other benefit generated due to the infringement; 4) circumstances mitigating or aggravating the liability. Actions of the suspected person taken of his own free will in order to prevent the detrimental effects of the violation, to assist the LSC in carrying out the investigation, to compensate for the losses or to undo the damage, shall be considered to be mitigating circumstances. The LSC may decide to deem other circumstances not specified as mitigating as well. The disgorgement of illicit profits is considered as a mitigating circumstance. Aggravating circumstances, e.g. impeding of the investigation procedure by a person suspected, refusal to cooperate with the LSC, recidivism etc. are also taken into account, although their list is exhaustive.	Collective Investment Undertakings. In 2008 one fine was imposed by the Securities Commission to a company which was engaged in the business of management company without possessing the licence prescribed under the Law on Collective Investment Undertakings. In 2009 one manager of a management company was sanctioned. The fine was imposed upon the former manager of management company for its failure, acting as the manager of the 2nd and 3rd pillar pension funds, to comply with the requirements to avoid conflicts of interests and act in the best interest of fund holders.	(approx. €7250). In 2008: LTL 100.000 (approx. €29.000) – later reduced to LTL 20.000 (approx. €5792). In 2009: 2 management companies were fined LTL 1000 (approx. €289) and LTL 2700 (approx. €782). 2010: warnings and license suspension against certain management companies. These violations were not specific of UCITS funds. Legislation applies to bother retail and alternative investment vehicles.	of such pecuniary benefit, loss avoided or the damage exceeded the amounts of the fines, the LSC shall have the right to impose a fine double in the amount of the illegally generated proceeds, other pecuniary benefit, loss avoided, or the damage incurred, the first proposal for a level of fines seems to be acceptable for the legal persons. However, the abovementioned fines if applied to the natural persons could be hardly treated as administrative sanctions – generally the amounts of the fines are expected to exceed the threshold of the administrative sanctions and probably shall be assessed as criminal sanctions. Therefore certain alterations of fines applicable to individuals would normally have to result in necessity to criminalize these actions in the framework of national legislation and therefore would be related to lengthy legislative procedures.	

pension associations, pension fund management companies, operation of pension asset depositary. A fine of the amount from LTL 1,000 (approx. €290) to LTL 5000 (approx. €1450) is levied for failure to comply with the laws regulating the activities of investment companies with variable capital, closed-end type investment companies, management companies, holding companies, public investment companies. A fine of the amount from LTL 3 000 (approx. €869) to LTL 5 000 (approx. €1 450) is levied for failure to comply with the laws regulating the activities of depository. Fines for auditors range from LTL 2000 (approx. €579) to LTL 5000 (approx. €1448).							

POLAND

I - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations relating to authorisation requirements: The Polish Financial Supervision Authority (PFSA) is empowered to publish warnings indicating entity or person responsible for a breach of law. **Neither cease and desist orders or pecuniary sanctions are contemplated.** For violations relating to operating requirements: The Polish Financial Supervision Authority is empowered to publish warnings indicating entity or person responsible for a breach of law. Polish UCITS funds do not issue securities thus the public offer is not the case of the Polish UCITS. The PFSA is empowered to give temporary injunction/restraining orders in case of securities of foreign UCITS that intend to admit their securities to public trading. Also, it is empowered to order the dismissal of one or more natural persons (executives) from the UCITS management body and of a depositary or of an auditor. The PFSA can also impose fines (including for violation of delegation requirements, rules of conduct, and for those relating to depositaries). The withdrawal of a license to provide services is also foreseen. Fines are applied against management companies, depositaries, distributors, transfer agents, entities commissioned by a management company to carry out its responsibilities, persons acquiring or subscribing for shares in a management company or persons not notifying of a disposal of shares in a management company, foreign funds, paying agents, representatives of foreign funds, foreign management companies (sanctions against foreign management companies may be imposed only as a definitive measure). For violations relating to disclosure/reporting requirements: The PFSA is empowered to publish public warnings indicating entity or person responsible for the breach of the law, including a description of the nature of the breach. Moreover, sanctions include the dismissal of natural persons, as well as that of an auditor, the imposition of fines and the decision to permanently withdraw the provider's licence. Other specific sanctions (as mentioned in the 2010 CESR mapping exercise) are: • prohibiting shareholders from exercising their voting rights when their influence proves detrimental to sound and prudent management by the management company, observance of the principles of fair trading, or due protection of the interests of unit-holders or ordering shareholders to sell their shares (similarly, ordering persons who indirectly acquired shares in the management company to terminate such influence); • ordering to amend an investment fund's Articles of association; • ordering management companies to replace management company's management and supervisory board members, employees of the management company or the entities commissioned by a management company to carry out its responsibilities, who have a material influence on the fund's activities or to replace persons designated by a depositary to carry out its responsibilities; • ordering a fund to replace its depositary; • revoking the authorisation for distributors; • prohibiting further sale of the units of foreign funds (properly speaking it is a preventive measure not the sanction); • demanding that a management company discontinue the breach of the regulations in force in other Member State; • prohibiting a management company from conducting activities in other Member State;

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
No maximum or minimum level of fines has been reported by the PFSA.	Both legal and natural persons.	The Polish Financial Supervision Authority.	The factors mentioned in the Commission's consultation questionnaire are not explicitly foreseen under Polish law. However, the PFSA has the right to impose a fine taking into account every one of the mentioned factors by the Commission. According to an earlier answer (to the 2010 CESR mapping exercise), Polish authorities may look more closely at the following: a) the impact of irregularities on functioning of the capital market and the interests of unit-holders; b) the types of irregularities and actions taken by an entity to eliminate them in the future; c) detection of irregularities by an entity itself.	In 2007: not specified. During 2008-2010, there were 17 cases of infringements to the UCITS regulation. All resulted in sanctions against offenders, all of which were of the pecuniary type.	In 2007: not specified. The amounts during 2008 – 2010 ranged from PLN 10.000 (approx. €2.500) to PLN 800.000 (approx. €200.000).	Polish authorities consider that fines should not be based on illicit benefits as they are not always determined. AUM as a measure is proper and proportionate, although there is no need to set up a minimum. The AUM would also not be applicable to natural persons.	No

CZECH REPUBLIC

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations relating to authorisation requirements: Public warnings are issued by the competent authority in case there is a need to warn investors (e.g. in case of unauthorized collective investment schemes). The domestic law also provides for public reprimands indicating entity and nature of the respective breach. However, the Czech competent authority (CNB) does not use such measure very often. The CNB has a statutory duty to publish the verdict of every sanction decision that came into force (this is not considered as a sanction in the strict sense of the word). The imposition of administrative penalty is possible in this case and in general, the competent authority can impose remedial measures (including cease and desist orders) on a person/entity that is subject to supervision in case of violation of Law/prospectus/depositary agreement/management contract. For violations relating to operating requirements: Dismissal of a depositary or auditor is a possible remedial measure, as well as forced administration in case of serious breaches of law. Furthermore, the change of management company can be imposed upon the investment company or the common funds may be ordered to be transferred to other management company. The imposition of administrative fines for the violation of delegation requirements, the rules of conduct of the management company and the depositary is possible as well as withdrawal of license in serious cases (insolvency, no activity, breach of capital adequacy, etc.). In general the competent authority can impose several remedial measures upon a person/entity that is subject to supervision in case of violation of Law/prospectus/depositary agreement/management contract. The competent authority may for example impose a temporary suspension of the issue and/or redemption of UCITS units or change the scope of authorisation of the management company. For violations relating to disclosure/reporting requirements: Dismissal of an auditor is a possible remedial measure, as well as forced administration in case of serious or repeated breaches of law and existing threat to the investors. Furthermore the change of management company can be imposed. The imposition of administrative fines is a common and prevalent measure for violations relating to disclosure duties. In serious cases the license could also be withdrawn (when the authorisation was issued on the basis of false or incomplete information or when there was substantial change of the conditions for authorisation). In general, the competent authority can impose remedial measures upon a person/entity that is subject to supervision in case of violation of Law/implementing acts/decision of the competent authority/EU regulations/prospectus/depositary agreement/management contract. Ordering an extraordinary audit of fund assets at the expense of the fund is also a possible remedial measure in cases of ascertained shortcomings in the audit or when the auditor fails to fulfil its reporting duty. The verdict of the administrative decision in force (including the name of the entity/offender, brief description of the unlawful conduct and the type of inflicted sanction) is systematically published on the website of the competent authority. Sanctions applicable under UCITS would be appropriate also for the AIFM regime, although doubts remain as to the enforcement of sanctions vis-à-vis non-EU AIFMs that sell and market non-EU AIFs.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
The minimum level of the pecuniary sanction is not stipulated by the law, but the amount of the fine imposed in every single case shall correspond to the nature and the gravity of the infringement. The maximum level of fine laid down in the Act implementing UCITS Directive amounts to CZK 20.000.000 (approx. €800.000). The maximum amount of the fine (cap) that can be inflicted in these cases on natural persons amounts to CZK 5 000 000 (approx. €200.000).	Both legal and natural persons.	The Czech National Bank (CNB).	The fundamental criteria that shall determine the final amount of administrative fine and that are defined by the Act implementing UCITS Directive are as follows: the gravity of the illegal behavior, the manner in which the offence was committed, circumstances under which it was committed and consequences resulting from the offence. It shall be, however, noted that there are some of the other criteria that ensue either from established case-law of higher courts or from the CNB's practice. For example, the amount of damage (illicit gain) caused by the illegal behavior, financial strength of the offender, duration of the illegal behavior and systemic consequences of the illegal behavior, offender's cooperation with the competent authority and compliance history of the offender.	No infringement was recorded for 2007. For the period 2008-2010, there were 7 recorded infringements (only 1relating to a UCITS fund), of which only 5 were effectively sanctioned with 3 permanent withdrawal of license to provide investment management services, and 3 fines amounting to a total of €51.000).	In 2007: N/A In 2008: From CZK 0 to CZK 50,000 (approx. €2,000) In 2009: From CZK 750,000 (approx. €30,000) to Max CZK 1,000,000 (approx. €40,000). In 2010: Not specified.	Revenues of the management company are a more appropriate criterion since they represent the own assets of the fund management company. A minimum level of fines risks disregarding the principle of sanction individualisation, with the consequence that a prescribed minimum may be disproportionate and possibly also sanctionable as unconstitutional by the Czech Constitutional Court. Moreover, it is not appropriate also in the light of the other criteria the CNB has to take into account.	No

SLOVENIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The Investment Fund and Management Companies Act (ZISDU) implements the UCITS Directive For violations to the prior authorisation requirement: Public warnings / admonitions (even on the SMA's website); Temporary prohibition of offering investment management services; cease and desist orders to eliminate violations, fines. For violations to operating requirements: Same as above, but additionally injunctions and temporary restrictions to the marketing and issue/redemption of units/shares; the dismissal of executives from company boards (the latter may also be reached by a letter of admonishment), ban for certain natural persons from exercising functions in asset management; fines (e.g. for violation of delegation requirements, rules of conduct or those of the depositary); permanent withdrawal of license. For violations to disclosure/reporting requirements: All of the above, and additionally, the dismissal of the auditor. SMA considers that the current regime for UCITS will be appropriate for AIFM (i.e. non-UCITS) funds as well.						
2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**

Major Violations committed by <u>legal person</u> (management company, custodian, other legal person, sole proprietor, self-employed person): Minimum: €1.250 Maximum: €125.000 Where gravity of offence is particularly severe (amount of damage caused or the amount of acquired illegal proceeds, or due to offender's intent of unlawful gain) a fine of €41.000 to €370.000 shall be imposed on the offender who is a legal person, sole proprietor or a self-employed person. Minor Violations committed by the <u>legal person</u>: Minimum: €400 Maximum: €125.000	The addressees of the administrative sanctions are legal and natural persons: - Management company - Custodian - Responsible person of the management company - Responsible person of the custodian - Other legal person, sole proprietor or a self-employed person - Natural person	Security Market Agency (*Agencija za trg vrednostnih papirjev*) is responsible for the application of the administrative sanctions.	According to Minor Offences Act, the main criteria to take into account to set the level of the administrative pecuniary sanctions within those limits as prescribed by law. The Investments Funds and Management Companies Act (or the Government Regulation or Local Self-Government Ordinance) considers the gravity of the offense, the offender's negligence or intent, as well as the following mitigating and aggravating circumstances: - Level of offender's responsibility; - Motives for committing minor offence; - Degree of threat or violation of secured good; - Circumstances, in which offence was made; - Previous life of offender; - Offender's personal circumstances; - Offender's behaviour after committing minor offence, especially if he/she compensated the damage. When meting out a fine	<u>Year 2007</u>: 6 out of which 3 for legal persons (management company) and 3 for responsible persons of the legal persons (the responsible person of a management company); <u>Year 2008</u>: 7 initiated procedures, of which 6 involved pecuniary sanctions (misdemeanour cases); <u>Year 2009</u>: 28 initiated procedures, of which 6 involved pecuniary sanctions (misdemeanour cases); <u>Year 2010</u>: 13 initiated procedures, of which 2 involved pecuniary sanctions (misdemeanour cases).	<u>Year 2007</u>: Minimum for legal person (management company): €600 EUR; minimum for responsible person of the legal person (the responsible person of management company): €100; Maximum for legal person (management company): €2.000; maximum for responsible person of the legal person (the responsible person of management company): €700. <u>Year 2008</u>: Minimum for legal person (management company): €800; minimum for responsible person of the legal person (the responsible person of management company): €80; Maximum for legal person (management company): €3.300; maximum for responsible person of the legal person (the responsible person of management company):	The SMA does not see the need to modify the *status quo*.	No

The responsible person of the legal person: Minimum: €125 Maximum: €4.100 If the gravity of the offence is particularly severe (amount of damage caused or the amount of acquired illegal proceeds, or due to offender's intent of unlawful gain), a fine of €2.500 to €12.000 shall be imposed on the offender who is the responsible person of the legal person, the responsible person of the sole proprietor or the responsible person of the self-employed person. The responsible person of the legal person who committed minor violation: Minimum: €40			(pecuniary sanction), the offender's economic situation, amount of wage and other incomes, property and family obligations are also taken in consideration. For legal persons it is economic power and previous sanctions. Previous sanctions (in case fines and warnings) cannot be taken into account as mitigating circumstance, if more than three years past between final provision or final judgment and a new minor offence.		€330. Year 2009: Minimum for legal person (management company): €1.250; minimum for responsible person of the legal person (the responsible person of management company): €125; Maximum for legal person (management company): €200.000; maximum for responsible person of the legal person (the responsible person of management company): €6.000. Year 2010: Not specified.		

Maximum: €4.100 Violations committed by the natural person Minimum: €125 Maximum: €1.200 If the gravity of the offence is particularly severe (amount of damage caused or the amount of acquired illegal proceeds, or due to offender's intent of unlawful gain), a fine of €400 to €3.600 shall be imposed on the offender who is a natural person.							

AUSTRIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations to the prior authorisation requirement: The Austrian legislation provides for the following administrative sanctions with regard to violations relating to prior authorisation: public warnings/reprimands; cease and desist orders; administrative fines. The offering of foreign collective investment funds in Austria without prior notification to the FMA or offering Austrian collective investment funds (including Master-Feeder Structures) without prior authorisation by the FMA constitutes a criminal offense under Austrian Law and is prosecuted by criminal courts. For violations to operating requirements: The Austrian legislation provides for the following administrative sanctions with regard to violations relating to operating requirements: public warnings/reprimands; cease and desist orders; imposition of temporary restraining orders; dismissal of one or more national persons; administrative fines; permanent withdrawal of authorisation. For violations to disclosure/reporting requirements: The Austrian legislation provides for the following administrative sanctions with regard to violations relating to reporting/disclosure requirements: public warnings/reprimands; cease and desist orders; dismissal of one or more national persons; administrative fines; permanent withdrawal of authorisation. Making false declarations in a prospect, a key investor information document, an annual report on the financial year or in information on the proposed merger to unit-holders constitutes a criminal offense under Austrian Law and is prosecuted by criminal courts. FMA does not publish sanctions on a systematic basis. Alignment of the sanctions regimes between UCITS and AIFM is appropriate, although differences should apply to sanctions disciplining the marketing regime and the depositary functions.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 - Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
There is no minimum level of sanctions. The maximum ranges up to €75,000 per violation (accumulation of violations is possible) or up to six weeks imprisonment.	In general the directors of the investment fund management companies as responsible representatives of the legal person are the addressees of the administrative sanctions. It is possible to nominate a natural person in charge who is responsible for the legal compliance in certain areas (e.g. marketing, management) and subject of the proceeding.	In Austria the FMA is responsible for the application of the administrative sanctions. In case of aggravated violations the criminal courts are responsible.	The FMA may take into account all criteria listed in the Commission's questionnaire when imposing administrative fines. In this regard, the Austrian Code of Administrative Penalties establishes a flexible system that takes into account an open ended list of aggravating and mitigating criteria/circumstances when settling a fine. There is no hierarchy of these criteria, i.e. illicit profits may be taken into account but may not be the only decisive criteria or prevail on other (possibly mitigating) circumstances of a given case. It is further noted that the financial strength of the perpetrator is a general criterion which does not explicitly refer to assets under management.	In 2008: Number of infringements dealt with amounted to 11, all of which were fines for a total of €2.500. Other measured included 13 cease and desist orders. In 2009: Number of infringements dealt with amounted to 197, 123 of which were fines for a total of €8.500. Other measured included 14 cease and desist orders. In 2010: Number of infringements dealt with amounted to 221, 165 of which were fines for a total of €8.500. Other measures have not been specified.	See column 6.	Reply from the Austrian Ministry of Finance: Harmonisation on minimums appears difficult as they to not provide the level of discretion necessary to ensure the proportionality of the imposed fine with respect to the nature of the violation. Choosing AUM as a parameter would lead to an exaggerated level of fines. Reply from the Austrian Financial Markets Authority (FMA): the FMA suggests establishing minimum amounts of the maximum instead. The criterion of twice the amount for an illicit benefit (if quantified) may be supported although it is challenging to quantify the benefit. The 10% criterion does not find support for the abovementioned reason. Alternatively, a minimum amount of an upper limit of fines may be established, e.g. the amount of management fees of the previous financial year (thereby also reflecting the company's financial strength and thus ensuring proportionality).	No

GERMANY

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The administrative sanctions rules of the German Investment Act (*Investmentgesetz* - "*InvG*") concern infringements of notification-, publication- or accounting obligations or with infringements of investment rules. Violation relating to prior authorisation: In case, a management company commences business without the required permission, BaFin may order the company and the members of its bodies to discontinue such business operations immediately and to settle such transactions without undue delay (section 17c *InvG*). Moreover, any person who carries on the business of a management company without the required licence insures a penalty and shall be punished with imprisonment of up to three years or with a fine (section 143a *InvG*). The license of the management company may be revoked, or alternatively, the senior mangers / executives are dismissed from his/her position in the management company (section 17a *InvG*) particularly in cases were license conditions are no longer met and in case of ongoing infringements of provisions. Sanctions are also applicable with regard to mergers or master/feeder investments (e.g., fines with regard to merger information or investment restrictions for master feeders. For violations of operating rules requirements: The BaFin may withdraw the license of the management company and the executives may be dismissed. This would generally also imply a permanent ban for the person from exercising executive functions in the asset management industry. BaFin may also dismiss the auditor. The management company shall notify the BaFin of the auditor they have appointed immediately after making the appointment. Within one month of the receipt of such notification, BaFin may request the appointment of a different auditor if this appears necessary to achieve the object of the audit. BaFin may also dismiss the depositary. According to section 21 paragraph 1 *InvG* the appointment and any change of the depositary is subject to authorisation by BaFin and according to section 21 paragraph 2 *InvG* BaFin may order a change of the depositary, particularly in cases where the depositary does not adequately fulfil its duties by law or contract or breaches of capital requirements. However, the rules in section 143 *InvG* concerning administrative fines deal mainly with infringements of notification-, publication- or accounting obligations or with infringements of investment rules, but not with general rules of conduct or depositary duties. Note also, that the sanction with administrative fines according to section 143 *InvG* requires at least a negligent act, which in practice may be difficult to evidence. Much more practical is therefore the following measure: BaFin may issue administrative acts (e.g. any orders according to section 5 *InvG*) which are enforceable by appropriate measures of compulsory execution (*Zwangsvollstreckung*), for example imposition of penalty payments (*Zwangsgeld*)) which may also be higher than the maximum levels in case of administrative fines. Zwangsgeld is intended as an enforcement measure to coerce compliance with an order or decision, more than as a sanction as such. It can be of an amount up to €250.000. For violations to disclosure / reporting requirements: The Dismissal of executives or the withdrawal of the license may be ordered by BaFin in case of ongoing violation of requirements. Also, as specified above auditors may be dismissed by BaFin. Violations relating to disclosure or reporting requirements are also subject to sanctions with administrative fines as detailed in a catalogue in section 143 *InvG*. Bafin expects the UCITS sanctioning regime to be efficient for the purpose of sanctioning non-UCITS funds under AIFM.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
According to section 143 *InvG* an administrative sanction can, mainly in the cases of infringement of investment rules, be punished with an administrative fine of up to €50.000 (maximum level). In other cases, i.e. for violation of notification, publication and accounting obligations, an administrative sanction of up to €100.000 (maximum level) can be dealt. There are administrative sanctions for offences either committed wilfully or negligently. Please note that negligent actions can only be punished with a fine of up to the half of the maximum level set out above.	Addressees of the administrative sanctions can be natural persons (for example managing directors of the management company) or legal persons (for example management company itself) or even both.	The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* - "BaFin") is responsible for the application of administrative sanctions.	Main criteria for the determination of the level of the administrative sanction are (i) if the offence was committed wilfully or negligently (please refer to answer in column 2 above) and (ii) the "degree of unlawfulness" (*Unrechtsgehalt*). The German Administrative Offenses Act (*OWiG*) considers further criteria, among which the financial strength of the offender.	No administrative sanctions were applied during 2007, 2008 and 2009 since BaFin made use of other appropriate and effective supervisory instruments (issue of an administrative act which is enforceable by appropriate measures of compulsory execution (*Zwangsvollstreckung*), for example imposition of a penalty payment (*Zwangsgeld*). Bafin admitted that lower degree infringements (i.e. the violation of investment limit rules) were dealt with via early contacts with offenders. These measures, accompanied by warnings or notices, have proved sufficient throughout the whole 2008 – 2010 period to discourage infringements. Only 3 formal warnings have been issued since 2008.	Please refer to answer in column 6.	Bafin considers that minimum standards for administrative fines are unnecessary as national regulators are already equipped with better measures for ensuring proportionality.	No

SLOVAKIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violations to the prior authorisation requirement: Publication of warnings, cease and desist orders, the National Bank of Slovakia (NBS) is empowered to order the termination of the unlicensed activity and to impose a fine of up to €1.000.000 when the conditions for prior approval are infringed. This rule also applies to infringements of rules settled for using the required mark and violating of duties to provide the NBS with information relating to winding-up and liquidation of a fund. For violations to operating requirements: Apart from issuing public warnings, if the NBS finds out that the supervised entity has violated or is violating the Act on Collective Investments, fund rules, the rules of incorporation, the conditions stated in a license, a duty to provide the key investor information or that it has violated a separate legal regulation which applies to its activities, or that it has not fulfilled a measure imposed by a decision of the NBS, the NBS shall: a) order the termination of an unlicensed activity; b) restrict or suspend the management company, foreign management company, or foreign collective investment undertaking from performing one or more licensed activities; or c) revoke a license. Moreover, it shall a) suspend for a defined period and to a defined extent the use of a fund's assets and the issue of units; and b) suspend or restrict the distribution of securities of foreign collective investment undertaking for a defined period (max. up to 1 year) within the territory of the Slovak Republic. It shall have the powers to a) order a change of the depositary and the conditions of the change, recall and nominate the compulsory administrator of fund's assets, or order a change of the liquidator and the conditions of the change, or it shall order the replacement of persons on the bodies of the management company, the replacement of management employees reporting directly to the board of directors who are responsible for professional activities, and the replacement of the employee responsible for internal control and b) where a person has ceased to be trustworthy as a result of being validly fined, a management company, foreign collective investment undertaking or foreign management company is obliged immediately dismiss such person from his/her position. Where a person has ceased to be trustworthy as a result of being validly fined, a management company, foreign collective investment undertaking or foreign management company is obliged to immediately dismiss such person from his/her position. Subsequently such person can not become member of management company bodies, because by losing trustworthiness it is impossible for him/her to obtain (according to law) preliminary approval from the NBS to be appointed or to receive authorisation. The NBS shall revoke a license for the establishment and activities of a management company where a series of conditions materialize. For violations to disclosure/reporting requirements: In addition to the above where applicable, the NBS shall require the correction of accounting records or other records in accordance with the findings of the NBS or an auditor, and require publication of the correction of incomplete, incorrect or false information which the management company, foreign management company, or foreign collective investment undertaking has published. All of the above sanctions and published and disseminated on a systematic basis. The NBS considers the UCITS sanctioning regime to be appropriate for non-UCITS funds.

GREECE

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	The Greek law for the transposition of UCITS (2009/65/EC) is currently being reviewed. The distinction of violation categories as identified by the Commission is not replicated at the national level. However, the Hellenic Capital Markets Commission is empowered to issue reprimands, as well as pecuniary sanctions within limits specified under column 2). Where infringements have been knowingly committed by natural persons, they shall be punished with imprisonment of at least 3 months and fines ranging between €50.000 and €300.000. Publications are always foreseen save where they risk destabilising financial markets or risk causing disproportionate damages to parties involved. Another provision of the draft law also stipulates that the Hellenic Capital Market Commission, may, among other things require the cessation of any practice that is contrary to the provisions of the UCITS law and the decisions implementing the law, request the freezing or the sequestration of assets, request the temporary cessation of professional activity, require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public, withdraw the authorisation granted to a UCITS, or management company or the approval granted to a depositary. Finally, the Hellenic Capital Market Commission may request the correct repetition of an inaccurate disclosure submitted by a management company of UCITS and may ask the relevant supervised entity to refrain from similar behavior in the future. The Hellenic Capital Markets Commission considers the UCITS sanctioning regime to be appropriate for non-UCITS funds, subject to appropriate adaptations.							
2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
For legal persons: fines have an upper limit of €3.000.000, or an amount equal to twice the amount of the illicit benefit	The addressees of the administrative sanctions are both legal and natural persons.	The Hellenic Capital Markets Commission	The draft law provides indicatively the following criteria for the setting of administrative sanctions: a) The impact of the	In 2007: 26 sanctioned cases (fines) In 2008: 7 sanctioned cases (4	The minimum and maximum amount of administrative pecuniary sanctions applied during 2007, 2008 and 2009 are (€1,000.00 - €3,000.00), (€300.00 - €5,000.00) and	Favourable to minimums, although thresholds should be revisited taking into account the size of the fund industry.	No

obtained. For natural persons: fines have an upper limit of €200.000, or an amount equal to twice the amount of the illicit benefit obtained. Where offences been knowingly committed by natural persons, they shall be punished with imprisonment of at least 3 months and fines ranging between €50.000 and €300.000. For non-cooperation in inquiries, the fine may be up to €500.000.			violation on the proper functioning of the market; b) The presentation of basic information for the investors in a way not understandable by retail investors; c) The danger of damage to investor interests; d) The magnitude of the induced damage to the investors and the possibility of recovery; e) The taking of measures for the correction of the violation; f) The degree of cooperation with the Hellenic Capital Market Commission during the various stages of investigation; g) The necessities of the general and specific prevention; h) The possible relapse of the infringement upon the provisions of the law or the decisions implementing the law.	of which fines). In 2009: 7 sanctioned cases (6 of which fines). In 2010: 14 sanctioned cases (12 of which fines).	(€1,000.00 - €8,000.00) respectively (per infringement ascertained). Maximum and minimum for 2010 are not specified.		

MALTA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	<u>For violations to the prior authorisation requirement</u>: The MFSA has powers to issue reprimands and warnings that are published systematically. Cease and desist orders in the form of a directive against license holders, also requiring any natural persons to be removed and replaced by another person approved by the MFSA. Finally, fines are also contemplated. <u>For violations to operating requirements</u>: Same as the above powers, only that additionally the MFSA has the right to require the suspension of the repurchase / redemption or sale / issue of units. Through a directive the MFSA has the right to order the same activities to be ceased. A license may be cancelled or suspended in various cases. A removal of executives, as well as depositaries and auditors, is also contemplated to be replaced with a person approved by the MFSA. The latter may also decide to ban an individual on a provisional or permanent basis from performing certain functions in the industry. <u>For violations to disclosure/reporting requirements</u>: Same as above. All sanctions relating to a license holder are published systematically on the MFSA's website. The MFSA is favourable to aligning the UCITS sanctioning regime with that of the AIFM.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than <u>twice</u> the amount of the illicit benefit, or no lower than <u>10%</u> of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
An administrative penalty imposed by the MFSA under the	Both natural and legal persons.	Malta Financial Services Authority	All criteria indicated by the Commission in its consultation questionnaire,	<u>In 2010</u>: the MFSA	<u>In 2010</u>: fines ranged from	The suggestion that the amount shall be no lower than 10% of the management company's	No

Investment Services Act (ISA) may not exceed €93,174.		(MFSA)	save the perpetrator's (where a natural person) position and level of responsibility.	sanctioned 9 infringement cases, 6 of which with fines. In 2009: the MFSA sanctioned 4 infringement cases, 2 of which with fines. In 2008: the MFSA sanctioned 2 infringement cases, 2 of which with fines. In 2007: the MFSA sanctioned 3 infringement cases, none of which with fines.	€232.94 to €1.500. In 2009: fines ranged from €1.365 to €12.500. In 2008: fines were of €5.124 and €28.200.	AUM seems to be most attractive, given that in applying this threshold the MFSA would not need to calculate the illicit benefit whose calculation is not always straightforward or indeed possible.	

CYPRUS

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	According to the new draft Law transposing UCITS (2009/65/EC), the Cyprus Security and Exchange Commission (CySEC), has powers to impose all of the following sanctions: For the violation relating to prior authorisation: Public warnings/reprimands indicating entity/person responsible and nature of the breach; Cease and desist orders; The imposition of administrative fines. For violations relating to operating requirements: Public warnings/reprimands indicating entity/person responsible and nature of the breach; Cease and desist orders; The imposition of temporary injunction/restraining orders, including e g. the suspension of the public offer of UCITS units/shares both domestically and abroad; The dismissal of one or more natural persons (executives) from the UCITS management body, as well as the dismissal of a depositary or of an auditor; A temporary or permanent ban for certain natural persons from exercising functions (or manage invested volumes) in the asset management industry; The imposition of administrative fines; The permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). For violations relating to disclosure/reporting requirements: Public warnings/reprimands indicating entity/person responsible and nature of the breach; Cease and desist orders; The dismissal/replacement of one or more natural persons (executives) from the UCITS management body, as well as the dismissal/replacement of an auditor; The imposition of administrative fines; The permanent withdrawal of authorisation for the take-up of business for fund management companies (i.e. license). The CySEC agrees that the approach to sanction UCITS violations is appropriate to sanctions those under the AIFM Directive.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 - Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 - Existence of a 'whistle-blower' programme
CySEC may impose on the person responsible for the violation an administrative fine of up to €350.000 and in case of a repeated violation, a fine of up to €700.000, depending on the gravity of the violation. Furthermore, the CySEC has the power to impose an administrative fine of up to double the amount of the gain that the person responsible for the violation has provoked as a result of this action. In addition to the above, any person who, in the course of providing information for any matter falling in the field of the Law, makes a false,	Both legal and natural persons.	The CySEC and judicial courts.	The level of administrative pecuniary sanctions is determined on a case-by-case basis, however, he main criteria taken into account for setting the level of administrative pecuniary sanctions are: • The type and severity and of the violation. • The maximum level of amount of administrative sanction provided for in accordance to the Law. • Whether the violation constitutes a repeated violation. • Any oral or/and written representations made to the Commission.	Up to date, there are no local UCITS funds and UCITS Management Companies authorised by the Securities and Exchange Commission. Only the market of foreign UCITS is actively operating in our jurisdiction. Over the period 2008 – 2010, only one case of a violation was detected that that constituted a possible criminal offence under the UCITS Law. For this, the CySEC drew up a report of the relevant facts and submitted them to the Attorney-General of the Republic of Cyprus for criminal investigation. This particular case took place in 2008 and involved the submission of a false and/or misleading statement to the CySEC by a foreign management company which marketed UCITS in the Republic. The CySEC did still not receive any official notification of the outcome of	See response in column 6.	The imposition of an illicit benefit as a general sanctioning principle would not work, as not always do violations give rise to illicit benefits, and not always are illicit benefits quantifiable. Other considerations: a) The minimum level of 10% of management company's total assets under management may result to a big amount for minor infringements. However, by setting the maximum level of the fine, the supervisory authority is more flexible to determine the amount within that specific range according to the type of the infringement; b) There will not be consistency of the absolute amounts of the fines imposed for the same or similar infringements, as the amount of the fine will depend on the amount of total assets under management; c) Complications might arise concerning the calculation of the fine. Further guidance might be required concerning the determination of assets under management or the calculation	No

misleading or deceitful statement or announcement as to a material fact thereof or conceals a material fact or fails to submit facts, or in any manner impedes the CySEC's direct collection of information or direct conduct of monitoring or entrance or investigation, is committing an offence punishable by imprisonment of up to five years or a fine of up to €350.000 or both such penalties.				the criminal investigation.		of the illicit benefit. Alternatively, the CySEC proposes that the amount shall be up to 10% of the management company's total assets under management as reported at the close of the previous financial year. In case the person responsible for the violation obtained an economic gain as a result of the violation, the competent authority may, also, impose an administrative fine up to twice the amount of the illicit benefit'.	

HUNGARY

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	According to Section 400 of Act CXX of 2001 (i.e. Capital Market Act), the HFSA shall have powers to take the following measures and/or to impose the following sanctions: a) issue an official warning to the investment fund management company, to their executive officers and employees in the event of any infringement of the relevant statutory provisions, internal regulations and the authorisation concerning its activities, for compliance with the said provisions, or - if necessary - shall order compliance within the prescribed deadline; b) prohibit the conduct of unauthorized investment fund management activities, c) demand reimbursement of the costs and expenses incurred in connection with the activities of an expert or a regulatory commissioner delegated by the Authority; d) initiate the dismissal of an executive employee or the auditor of an investment fund management company, or initiate disciplinary action against an employee of such bodies; e) order the management body of an investment fund management company, to call an extraordinary general meeting, and may specify the mandatory agenda for such sessions; f) instruct an investment fund management company to draw up a restoration plan within the prescribed deadline, and submit it to the Authority; g) order an investment fund management company to disclose specific data or information; h) order the suspension of all or part of investment fund management activities for a fixed period of time; i) revoke the authorisation of an investment fund management company; j) order an investment fund management company to transfer its pending contractual commitments to another service provider; k) appoint a regulatory commissioner to an investment fund management company; l) impose fines in the cases and in the measure prescribed by law; m) initiate procedures with other competent supervisory authorities; n) ban, restrict or impose conditions on investment fund management companies in terms of: 1. their payment of dividends. 2. any payment made to an executive officer. 3. their owners to raise loans from the said organizations or that these organizations provide any services to them that involve any degree of exposure. 4. their providing any loan or credit to, or any similar transaction with, companies in which their owners or executive officers have any interest. 5. the extension (prolongation) of deadlines specified in loan or credit agreements. 6. their opening of any new branches, introducing new services and new operations. o) order investment fund management companies, venture capital fund management companies, the exchange, bodies providing clearing and settlement services and the central depository: 1. to draw up new internal regulations, or to revise or apply the existing regulations along specific guidelines.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
The amount of administrative fine could range between the minimum of HUF 100.000 (approx. €369) and the maximum of HUF 2 billion (approx. €7.374.690). In such cases where the annual supervisory fee for an institution or natural person is more than HUF 2 billion (approx. the maximum amount of the fines will rise to 200 percent of its or his actual supervisory fee.	Both legal and natural persons. In general the addressees of these sanctions are the companies, but sanctions would apply to their executive officers and employees.	The authority responsible for the application is Hungarian Financial Supervisory Authority (HFSA).	The HFSA applies the following criteria for the setting of administrative sanctions: Gravity/seriousness/ magnitude of infringement; Duration or frequency; Realised illicit gains; Perpetrator's past conduct/recidivism; sanction; Perpetrator's motives/negligence; Perpetrator's cooperation with authorities; Economic effects of infringement on investors, third parties and in the domestic market insofar as these can be determined; Additional criteria: the HFSA shall take into account the perpetrator's good faith or malevolence, the risk triggered by the infringement, the extent of the economic damage, as well as willingness to	No statistics available given small size of the market in Hungary	No statistics available given small size of the market in Hungary	Minimum thresholds should be calibrated very cautiously as the range of violations to UCITS is very wide. Quantifying illicit profits is very difficult. 10% is disproportionately high and a 0.001% of the AUM would be acceptable. Fines are no longer specifically applied to the investment management industry, but are harmonised to include all activities falling underneath Act CXX.	Only general rules exist

			mitigate damages.				

LUXEMBOURG

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	UCITS (2009/65/EC) was transposed in December 2010 with a Law (Law of 2010). For the violation relating to prior authorisation: Aside from public warnings/reprimands, cease and desist orders, and administrative fines, the CSSF may always lodge a complaint with the Public Prosecutor of any investment fund active without prior authorisation. Moreover, in case of entities that are subject to the CSSF's supervision (i.e. including entities involved in authorisations prior to a UCITS merger and master/feeder fund investments), order a fine on the directors or members of the management board, as the case may be, managers and officers of UCITS, of management companies, depositaries as well as of any other undertaking contributing towards the business activity of the UCITS in the event of any other serious irregularity being recorded. For violations relating to operating requirements: - withdrawal of a UCITS from the official list; - withdrawal of the authorisation issued to a management company; - suspension of the activities of the depositary bank; - withdrawal of the authorisation issued to the director of a UCITS / management company (i.e. no longer consider as of sufficiently good repute and experienced); - suspension of the redemption of units in the interest of the unit holders; - ordering of a fine on the directors or members of the management board, as the case may be, managers and officers of UCITS, of management companies, depositaries as well as of any other undertaking contributing towards the business activity of the UCITS, as well as the liquidators in the case of voluntary liquidation of a UCITS in the event of their refusing to provide the financial reports and the requested information or where such documents prove to be incomplete, inaccurate or false, and in the event of any infringement of the chapter on the publication of a prospectus and periodical reports, or in the event of any other serious irregularity being recorded. Furthermore, the CSSF has to lodge a complaint with the Public Prosecutor of any instance of non-compliance with the relevant legal provisions notably in the Law of 2010, giving rise to penal sanctions and that could entail prosecution against the implicated persons. For violations relating to disclosure/reporting requirements: Same as those sanctions above. The CSSF may make public any fine as mentioned above, unless such a disclosure would seriously jeopardise the financial markets, be detrimental to the interests of investors or cause disproportionate damage to the parties concerned. Publication is therefore not systematic. The CSSF deems the sanctioning rules under UCITS to be appropriate for AIFM-compliant funds.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
The Law of 2010 confers to the CSSF the power to impose fines between €125 and €12.500.	The may be imposed on legal or natural persons depending on the type of the sanctioning measure. Administrative sanctions where the addresses are legal persons: withdrawal of a UCITS from the official list; withdrawal of the authorisation issued to a management company; request to the judicial authorities to order the dissolution and liquidation of a UCITS. Administrative sanctions where the addressees are natural persons: withdrawal of the authorisation issued to the director of a UCITS / management	The *Commission de Surveillance du Secteur Financier* (CSSF) is the authority responsible for the application of the administrative sanctions in the field of UCITS.	The Law of 2010 does not specifically define the criteria to take into account in order to set the level of the administrative (pecuniary) sanctions imposed by the CSSF. The level of the sanction(s) finally imposed will depend on the individual case at hand and on the seriousness of the infringements reported to, respectively detected by, the CSSF.	In the period 2008-2010, the CSSF has dealt with 51 infringement cases, leading to 3 withdrawals of UCITS form the official list of authorised entities, 2 withdrawals of authorisation issued to directors, 1 suspension of redemption of units in the interest of their holders, and 21 fines for not transmitting relevant reports to the CSSF on time.	Not specified.	The CSSF cannot opine as of yet.	No

	company; ordering of a fine on the directors and managers of UCITS as well as the liquidators in the case of voluntary liquidation of a UCITS.						

ROMANIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	Applicable sanctions are governed by the provisions of Law No 297/2004 regarding the capital market, as well as by Regulation 15/2004 of the CNVM on the authorisation and functioning of asset management companies, collective investment undertakings and depositaries. For violation of authorisation requirements: a) public warnings; b) fines; c) complementary sanctions, including suspension of authorisation, withdrawal of authorisation and a temporary prohibition from carrying out certain activities and services. Publication is subject to conditions to avoid that public disclosures impair the normal functioning of the market or jeopardise the position of the parties involved. For violation of operational requirements: a) Public warnings or reprimands; b) injunction/restraining orders (including suspension of issue/redemption of units/shares); c) dismissal of persons (executives) of management company, auditor and depositary; d) individual and joint responsibility of persons for non-compliance; e) fines; f) withdrawal or suspension of authorisation. For violation of disclosure/reporting requirements: No specific sanctions are foreseen for this category and sanctions are determined on a case-by-case basis on the basis of the sanctions described above. The UCITS regime, subject to adaptation, would be appropriate for the enforcement of AIFM rules.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?	4 - Who are the authorities responsible for the application of the administrative sanctions?	5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?	6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010	7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010	8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY	9 – Existence of a 'whistle-blower' programme
The limits of the fines are established as follows: - between 0.5% and 5% of the paid-up share capital, according to the seriousness of the offence, for legal persons; - between ROL* 5,000,000 (approx. € 500) and ROL 500,000,000 (approx. €11.653), for natural persons, subject to updating by order of the President of CNVM. - between half and the full amount of the transaction carried out by committing the deeds referred to in Articles 245-248 of Law 247/2004.	The addressees may be natural persons and legal persons.	The Romanian National Securities Commission	Under Article 275 of Law 297/2004: (1) When customising the sanction, the personal and real circumstances of the deed and the conduct of the doer shall be taken into consideration; (2) If an offence is committed by a person repeatedly within a period of three years, or if the offence is committed by a person who has been sanctioned during the past three years, and the sanction has not been annulled yet, the sanction established shall be applied cumulatively with the maximum fine for the last offence committed; (3) If two or more offences are acknowledged, the highest penalty, increased by up to 50%, shall be applied, as the case may be.	2007: N/A 2008: 12 cases fined 2009: 9 cases fined 2010: 7 cases fined	2007: between RON 500 - 2500 (approx. €118 – 588) 2008: between RON 500 - 5000 (approx. €118 – 1.176) 2009: between RON 500 - 1500 (approx. €118 – 352) 2010: between RON 1500 – 5000 (approx. €352 – 1.176)	EU standard for a minimum level of fines is appropriate, but of the view that the level of no lower than 10% is inappropriate because it might give rise to situations where the sanctions will be established at 100% of AUM. The suggested approach is that the amount should not be lower than twice the amount of the illicit benefit (where the latter can be quantified) and in no case higher than 10% of the management company's total AUM as reported at the close of the previous financial year.	Not specified

* As of 1 July 2005, the new Romanian Leu (RON) was introduced at a value of 1 RON = 10.000 ROL.

BULGARIA

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violation of authorisation requirements: Public warnings, cease and desist orders and fines are provided for and permitted by the Bulgarian law in cases of violation of prior authorisation For violation of operational requirements: All sanctions listed in the Commission's questionnaire are provided for under the relevant national law. For violation of disclosure/reporting requirements: All sanctions listed in the Commission's questionnaire are provided for under the relevant national law. All sanctions are promptly published on the FSC's website and the disgorgement of illicit profits is also foreseen. The FSC deems the sanctioning rules under UCITS to be appropriate for AIFM-compliant funds.						
2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 – Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 – Existence of a 'whistle-blower' programme**
The minimum administrative pecuniary sanction is 500 BGN	Both legal and natural persons.	The Financial Supervision	All of the criteria indicated in the Commission's questionnaire are	In 2007: not specified.	N/A	Object that illicit benefits may always be determined and the 10% criterion should not be	No

DENMARK

1 - What types of administrative sanctions are envisaged in national rules transposing the UCITS Directive?	For violation of authorisation requirements: The Danish FSA can issue public warnings if entities operate in the Danish Market without proper licences. C&D orders can also be used. Administrative fines can be used. This is a new sanction and it has never been used. In addition the above, the Danish FSA also uses the sanction of reporting persons or entities to the police for them to initiate investigations against the persons or entities for violation of the relevant financial legislation. For violation of operational requirements: No public warnings/reprimands are given, but C&D orders are used. The Danish FSA has these options: The imposition of temporary injunction/restraining orders, including e.g. the suspension of the public offer of UCITS units/shares both domestically and abroad. Executives can be dismissed. No temporary or permanent ban for certain natural persons can be imposed. These will have to be turned down case by case when handling 'Fit & Proper' applications. Administrative fines can be used to enforce corrections. The licence can be revoked for fund management business. In addition the above, the Danish FSA also uses the sanction of reporting persons or entities to the police for them to initiate investigations against the persons or entities for violation of the relevant financial legislation. For violation of disclosure/reporting requirements: No public warnings/reprimands are given, but C&D orders are used. The Danish FSA has these options: The imposition of temporary injunction/restraining orders, including e.g. the suspension of the public offer of UCITS units/shares both domestically and abroad. Executives and auditors can be dismissed. Administrative fines can be used to enforce corrections. The licence can be revoked for fund management business. In addition the above, the Danish FSA also uses the sanction of reporting persons or entities to the police for them to initiate investigations against the persons or entities for violation of the relevant financial legislation. Actions against these violations are not publicised.

2 - What is the minimum and maximum level of administrative pecuniary sanctions?	**3 - Who are the addressees of the administrative sanctions: legal persons, natural persons, both?**	**4 - Who are the authorities responsible for the application of the administrative sanctions?**	**5 - What are the main criteria to take into account to set the level of the administrative pecuniary sanctions finally applied?**	**6 - If available, number of administrative pecuniary sanctions and other measures applied during 2007 - 2010**	**7 - If available, minimum and maximum amount of administrative pecuniary sanctions applied during 2007 - 2010**	**8 - Feedback to the Commission's proposal on a minimum level of fines, i.e. no lower than twice the amount of the illicit benefit, or no lower than 10% of AUM reported in previous FY**	**9 - Existence of a 'whistle-blower' programme**
Not specified	Both legal and natural persons.	The Danish FSA	All criteria listed in the Commission's questionnaire are taken into account when setting fines.	N/A	N/A	Minimum fines should be set at low levels so that they can be used to sanction smaller offences. They should not be based on AUM as a company may easily go into receivership	No

						when applied. Fines could be calculated based on an average of the last 5 year surplus, combined with a fixed minimum.	

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10.8. ANNEX 8: Core violations of the UCITS Directive

Violations relating to disclosure of qualifying holding in the management company		
Article	**Obligation**	**Current sanctions**
Article 11 of MiFID	Notification of acquisition or disposing of qualifying holding in a management company	No stand-alone provisions in the UCITS Directive

Violations relating to prior authorisation		
Article	**Obligation**	**Current sanctions**
Art. 5	Prior authorisation of a UCITS fund	Request end of breach, take measures under Articles 98-99
Art. 6-7	Prior authorisation from the competent authority for the take-up of business for management companies	
Art. 27 and 29	Prior authorisation from the competent authority for the take-up of business for investment companies	
Art. 39	Prior authorisation from the competent authority for UCITS mergers	
Core provisions on operating requirements and applicable sanctions		
Art. 12-14	Operating conditions for the management company including delegation of functions and conduct of business ruels	Request end of breach, take measures under Articles 98-99, including authorisation withdrawal
Art. 18-21	Operating conditions for freedom to provide services on a cross-border basis – disclosure requirements to host MS authorities	Request end of breach, take measures under Articles 98-99, including authorisation withdrawal.
Art. 30-31	Operating conditions for the **investment company** (same conditions of for management company apply *mutatis mutandis*)	Request end of breach, take measures under Articles 98-99, including authorisation withdrawal
Art. 22-25	Obligations regarding the depositary	
Chapter VII	Obligations regarding investment policies[86]	
Art. 51(1)	Obligations regarding risk management process	

[86] Here it is important to clarify that the temporary departures from the eligible assets, and investment limits under Article 57(2), shall not be sanctioned.

Art. 93	Notification for a UCITS to market units in a MS other than its home MS	
Core disclosure requirements and applicable sanctions		
Art. 68-82	Obligations concerning information to be provided to investors, i.e. prospectus, annual report, KIID and contents thereof, etc.	

10.9. ANNEX 9: Glossary of key terms

Money market funds	An investment fund whose portfolio is comprised of short-term (less than one year) securities representing high-quality, liquid debt and monetary instruments.
Bond funds	Bond funds are pooled amounts of money invested in bonds.
Equity funds	Equity funds are pooled amounts of money invested in stocks. Stocks are often categorized by their capitalization (or market cap) and, like many other things, come in three basic sizes: small, medium, and large. Many funds invest primarily in one of these sizes and are thus classified as large-cap, mid-cap, or small-cap funds.
Balanced funds	Balanced funds mix some stocks and some bonds. A typical balanced fund might contain about 50-65% stocks, and hold the rest of the shareholder's money in bonds and cash. It is important to know the distribution of stocks to bonds in a specific balanced fund to understand the risks and rewards inherent in that fund.
Index funds	An index fund matches the shareholdings of a target index, such as the Standard & Poor's 500 Composite Stock Price Index (S&P 500). Index funds are distinct from actively managed funds in that they do not involve any stock picking by supposedly skilled professionals. Rather, they simply seek to replicate the returns of the specific index.
Leverage	The use of various financial instruments or borrowed capital to increase the potential return of an investment.
Central Securities Depositary (CSD)	A central security depositary (CSD) is a facility (or an institution) for the holding of securities, enabling securities transactions to be processed by book entry. Physical securities may be physically held (or *immobilised*) by the depository or securities may be dematerialised (i.e. so that they exist only as electronic records). In addition to safekeeping, a CSD may incorporate comparison, clearing and settlement functions.
Net Asset Value (NAV)	The value of a single unit/share of a fund, based on the value of the underlying assets minus the fund's liabilities over the number of units/shares outstanding. It is usually

	calculated at the end of each business day.
'Loss' of financial instruments	Although a precise legal definition of what constitutes a "loss" of assets is lacking, the second public consultation confirmed the shared opinion among regulators and industry practitioners that a loss of assets should be understood as a situation where the entrusted assets are permanently and irretrievably no longer available to the custodian and that rights over them are therefore no longer exercisable. Consequentially, an asset that is only temporarily unavailable cannot be deemed as 'lost'.
Total Expense Ratio (TER)	A measure of the total costs associated with managing and operating an investment fund such as a mutual fund. These costs consist primarily of management fees and additional expenses such as trading fees, legal fees, auditor fees and other operational expenses.
High Water Mark	The highest peak in value that an investment fund/account has reached. This term is often used in the context of fund manager compensation, which is performance based. The high-water mark ensures that the manager does not get paid large sums for poor performance. So if the manager loses money over a period, he or she must get the fund above the high watermark before receiving a performance bonus.