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**Consultation Paper on the UCITS depositary function and on the UCITS managers' remuneration**

Assogestioni appreciates the opportunity to comment on the future amendments that the European Commission intends to adopt with reference to the UCITS directive.

In particular, we support the European Commission proposal to harmonise the UCITS depositary functions in order to ensure the same level of investor protection across European Union and to increase its efficacy. In fact, such functions are crucial in the correct performance of the management of UCITS and in the consequent investor reliance in these products. In this respect, we appreciate the approach chosen by the European Commission to use the relevant AIFMD legislation as a benchmark for the definition of the UCITS depositary functions discipline, in order to ensure that management companies which manage both UCITS and AIF have to deal with the same regulation.

As regards the UCITS asset managers' remuneration discipline, Assogestioni understands the wish of the Commission to maintain a level playing field in the financial service sector. In this respect, we share the statement of the European Commission that an harmonised approach to remuneration policy would entail "similar" - though not necessarily identical - principles for all relevant entities (banks, insurance companies, investment companies and management companies). In fact, the business model of the asset management industry and the associated risks are different from banking and investment banking sector.

Please find below our comments on the boxes which summarise the European Commission proposals on the UCITS depositary function and on UCITS managers' remuneration policies.

## DEPOSITARIES' DUTIES

### 1. Safekeeping

**Box 1**
It is necessary to define what activities and responsibilities are related to the notion of "safe-keeping" of assets.

We agree that it is necessary to define which activities and responsibilities are related to the notion of safekeeping of assets, in order to achieve a high level of convergence on the precise meaning of such aspects and, therefore, ensure the same level of investor protection across the European Union. In this respect, we deem important that the European Commission focuses on the need of a precise identification of the single elements of the safekeeping functions, because the latter represents the basis for the further exact delimitation of the extension of the depositary liability.

**Box 2**
It is envisaged to complete articles 22 and 32 of the UCITS Directive, in a way which is consistent with the approach in the AIFM Directive, in order to:

- Distinguish safekeeping duties between (1) custody duties relating to financial instruments (such as securities) that can be held in custody by the depositary and (2) asset monitoring duties relating to the remaining types of assets. A reference to the custody of physical assets, such as real estate or commodities, is not necessary because such assets are currently not eligible for holding within a UCITS portfolio;

- Supplement the requirements on custody duties with a segregation requirement, so that any financial instruments on the depositary's book held for a UCITS can be distinguished from the depositary's own assets and at all times be identified as belonging to that UCITS; such a requirement would confer an additional layer of protection for investors should the depositary default;

- Equip the depositary with a view over all the assets of the UCITS, cash included. The directive should more explicitly make clear that no cash account associated with the funds' transactions can be opened outside of the depositary's acknowledgement, with a view to avoiding the possibility of fraudulent cash transfers;

- Introduce new implementing measures in the mentioned Articles defining detailed conditions for performing depositary monitoring and custody functions, including (i) the type of financial instruments that shall be included in the scope of the depositary's custody duties; (ii) the conditions under which the depositary may exercise its custody duties over financial instruments registered with a central security depositary; and (iii) the conditions under which the depositary shall monitor financial instruments issued in a nominative form and registered with an issuer or a registrar.

As regards the concrete application of safekeeping duties, we agree with the distinction of such duties depending on the fact that the fund's assets are financial instruments which can be kept in custody or not; in the first case, the depositary should custody the fund's assets, in the latter it has to monitor them. In this respect, we underline that it is necessary to provide implementing measures which contain a list including at least the main types of financial instruments which fall under the category of financial instruments that can be held in custody, in order to ensure that the application of the custody duties is consistent across European Union.

Furthermore, we agree with the need to provide a strong segregation obligation of assets in the depositary's book and a mere monitoring requirement with reference to cash. Moreover, we share the view according to which the latter requirement should be detailed through specific implementing measures.

## 2. Oversight functions

**Box 3**
It is envisaged to achieve a higher degree of consistency in the oversight duties to be performed by UCITS depositaries: the oversight duties related to UCITS with a corporate form should be aligned with those to be performed in respect to UCITS with a common fund form (article 22).

We share the European Commission approach aiming at guaranteeing an equal level of safeguard to shareholders and unit-holders in respect to the depositary functions, aligning the disposition of article 32 of UCITS directive to those of article 22 of the same directive.

**Box 4**
It is envisaged to introduce implementing measures that will clarify further the scope of each listed supervisory duty, for example the methodology to be used for the calculation of the Net Asset Value of the UCITS.

It is very important to define implementing measures which specify in a detailed manner each of the supervisory duties of the UCITS depositary; in this respect, it should be clarified that when, for example, the depositary complies with its function to ensure that the value of units is calculated in accordance with the applicable national law and the fund rules, its task is not to calculate again the NAV, but to verify that the calculation is correct.

Furthermore, from a general perspective, we would like to underline the need to define the precise timing of the single depositary oversight functions, especially when they should be performed on an *ex post* basis. In fact, the timing is an element of primary relevance when assessing whether there is a depositary's liability in relation to such functions.

### 3. Delegation of the depositary's tasks

**Box 5**
It is envisaged to restrict more explicitly the delegation of the depositary task to the safekeeping duties and that the conditions and requirements upon which a UCITS depositary may entrust its safekeeping duties to a third party should be aligned with those under the AIFM Directive.

It is also envisaged to require additional information for UCITS investors be published (for example in the prospectus) where a network of sub-custodians is to be used. Such information would specify the risk that such a sub-depositary network might fail or default, and how this risk can be dealt with.

Finally, implementing measures are envisaged in order to detail the depositary's initial and on going due diligence duties, including those that apply to the selection and appointment of a sub-custodian.

From a general perspective, we agree with the European Commission proposal to align the delegation regime of UCITS depositary to that of the AIF depositary and with the need to provide implementing measures in order to detail the depositary's due diligence duties.

With specific reference to the additional information that should be published, for example in the prospectus, in order to disclose to investors the use of a network of sub-custodians, we deem appropriate to give such disclosure, provided that it is made in a summary and clear form, without using technicalities which could be not understood from investors. In fact, the main aim of such disclosure should be that of informing investors about the risks involved in the use of a network of sub-custodians. Furthermore, the said disclosure should not include a detailed list of sub-custodians, which would not give any additional value to the disclosure, but, at the same time, it would imply an up-date of the prospectus each time a sub-custodian changes.

### 4. UCITS depositary liability regime

#### 4.1 Improper performance

**Box 6**
It is envisaged that the depositary liability regime might be clarified in case of a UCITS suffering losses as a result of a depositary's negligence or intentional failure to perform its duties.

We share the European Commission proposal to clarify the depositary liability regime in case of losses suffered by the UCITS as a result of depositary's negligence

or intentional failure to perform its duties. However, we believe that, in order to achieve a maximum level of harmonisation in this respect across European Union and, therefore, an equal level of investor protection, it is necessary to detail to the maximum possible extent the content of the depositary's negligence. In fact, the exact definition of depositary's liability regime represents a main issue, given that, on the one hand, it is a pre-requisite for an effective investor protection and, on the other hand, it is a basis for the investor reliance in the UCITS sector. In this context, in order to ensure that the said safeguard is effective, an high level of legal certainty should be guaranteed through the precise identification of the circumstances that may give raise to a liability of the depositary.

### 4.2 UCITS depositary specific liability in case of loss of assets

**Box 7**
It is envisaged to clarify the UCITS depositary liability regime in case of loss of assets. Accordingly, the UCITS depositary shall be under the obligation to return the financial instruments of the identical type or of the corresponding amount to the UCITS. No further discharge of liability in case of loss of assets is envisaged, except in case of force majeure. Implementing measures should be introduced, as necessary, to clarify all necessary underlying technical aspects, for example to identify the circumstances under which assets may be lost.

It is important to align the UCITS depositary liability regime in case of loss of assets with that provided by the relevant dispositions of AIFMD, although improving the level of safeguard assured to investors. In this respect, we share the proposal to exclude, for UCITS depositaries, any possibility to discharge their liability, a part from the case of "*force majeure*" circumstance occurs. However, it is essential to define exactly the meaning of "*force majeure*", given that it should be the only case of discharge admitted and, as a consequence, it is the element on which claims will be focused. Furthermore, the convergence on a unique approach on the content of "*force majeure*" would guarantee a consistent application of the depositary's liability regime across Member States and, therefore, the same level of investor protection.

Moreover, in the same perspective of achieving the aims above described, it is necessary to introduce implementing measures on the technical aspects of the depositary's liability regime.

### 4.3 The scope of the UCITS depositary liability when assets are lost by a sub-custodian

**Box 8**
As already provided under art. 22 and art. 32 of the UCITS directive, it is envisaged to maintain the rule according to which the depositary's liability is not affected if it has entrusted to a third party al or some of its safekeeping tasks. As a result, the depositary faces the same level of liability, should the UCITS assets be lost by a sub-custodian. Moreover, it is envisaged that the legislative proposal should clarify the fact that if assets are lost, the UCITS depositary liability regime has the general obligation to return the financial instruments of the identical type or of the corresponding amount to the UCITS with no delay.

As mentioned above, no further discharge of liability (either regulatory or contractual) in case of loss of assets by a sub custodian shall be envisaged, except in case of "force majeure".

We agree with the European Commission intention to clearly state in the UCITS directive that the depositary's liability regime should not be affected from the fact that it has entrusted its safekeeping functions to a third party. In fact, we believe that this principle is the only manner to ensure that safeguards related to the proposed liability regime are substantially improved.

Moreover, as regards the timing of the restitution obligation, it is essential not to leave room to interpretation on the timeframe between the moment when loss of assets occurs and the moment when arises the obligation to return such assets or the corresponding amount. Hence, the future legislative proposal on such issue should maintain the reference to the fact that the said return should occur "with no delay".

### 4.4 Burden of the proof

**Box 9**

It is envisaged to clarify that the depositary should carry the burden of demonstrating that it has duly performed its duties.

We share the European Commission proposal, because we believe that burden the depositary with the obligation to demonstrate that it has duly performed its duties represents an effective manner to strengthen the safeguards related to the depositary's liability regime.

### 4.5. Rights of UCITS holders action against the UCITS depositary

**Box 10**

It is suggested to align the rights of UCITS investors, so that both share- and unit-holders are able to invoke claims relating to the liabilities of depositaries, either directly or indirectly (through the management company), depending on the legal nature of the relationship between the depositary, the management company and the unit-holders.

Finally, implementing measures should also be introduced in order to encourage a high degree of harmonisation, for example to detail the conditions and procedures under which shareholders may directly use their rights towards a UCITS depositary.

We agree with the European Commission proposals, because we deem important to give investors the possibility to act even directly towards the depositary when they have suffered a specific damage related the failure of the depositary to perform its duties.

## 5. Eligibility criteria

### 5.1 Eligibility criteria

**Box 11**

It is suggested to introduce an exhaustive list of entities that should be eligible to act as UCITS depositories, aligned with the AIFM Directive list. Such a list should include: credit institutions, authorised MiFID firms which also provide the ancillary service of safe-keeping and administration of financial instruments, and existing UCITS depositary institutions (by means of a grandfathering clause).

We agree with the European Commission proposal.

### 5.2 Location of the depositary (passport issues)

**Box 12**

It is envisaged that a provision is introduced into the UCITS Directive creating a commitment to assess and re-examine the need to address depositary passport issues, to be undertaken a few years after the new UCITS depositary framework has come into force.

We agree with the European Commission proposal.

## 6. Supervision issues

### 6.1 Supervision by national regulators

**Box 13**

Differences between national supervisors' scope of competencies lead to an uneven supervisory framework, suggesting that such competences might be better harmonised. In the Commission's view, this remains a key issue to be addressed in order to fully achieve due levels of harmonisation in practice for the depositary function at the Community level.

We agree with the European Commission proposal.

### 6.2 Supervision by auditors

**Box 14**

The introduction of a requirement for an annual certification of the assets held in custody by the depositary would clarify the true existence of such entrusted assets. This annual certification could be performed by the depositary's auditors. Details related to any such requirement might need to be further defined in implementing measures or technical standards as appropriate.

We agree with the European Commission proposal, given that an annual certification of the auditor regarding the assets held in custody by the depositary would strengthen investor protection.

## 7. Other issues

### 7.1 Derogation from the obligation of UCITS to appoint a depositary

**Box 15**

It is suggested to delete articles 32 (4) and 32 (5) of the UCITS Directive n°2009/65/EC.

We agree with the European Commission proposal.

### 7.2 Single depositary rule

**Box 16**

It is suggested that the requirement for a single depositary per UCITS should be clarified (without prejudice to Article 113(2) of the UCITS Directive n°2009/65/EC).

We agree with the European Commission proposal, given that the single depositary rule is the only way to ensure that the depositary has the effective capability to exercise its oversight functions with reference to all the assets of the UCITS.

### 7.3 Organisational requirements and rules of conduct

**Box 17**
It is suggested to:

- Introduce for UCITS depositaries similar rules of conduct as in the AIFM Directive, in addition to the already existing rules stated in the article 22 and 32 of the UCITS Directive;
- Introduce implementing measures in order to encourage a higher degree of harmonisation and consistency between the organisational requirements applicable to all functions of the UCITS depositary (safekeeping as well as oversight) and, where appropriate, the existing MiFID requirements.

We agree with the European Commission proposals.

### 7.4 Exchange of information with competent authorities

**Box 18**
It is suggested to amend existing requirements concerning the disclose of information to the competent authorities, on their request, in such a way that any information, obtained by a depositary while carrying out its duties, should be made available to its competent authorities if such information may be necessary for these authorities.

Implementing measures should also be introduced in order to, for example to detail the conditions and procedures under which UCITS depositaries shall exchange information with their supervisors.

We agree with the European Commission proposals.

### 7.5 The contract between the depositary and the UCITS manager

**Box 19**
It is suggested that the requirements set out in Article 23(5) and Article 33(5) of the UCITS Directive and their corresponding implementing measures should also apply to a situation where the management company home Member State is also a UCITS home Member State.

It appears opportune to require the UCITS depositary to follow conduct of business rules which would oblige a depositary to act honestly, fairly, professionally, independently and in the interest of the UCITS and investors of the UCITS. Furthermore, the depositary should be required to establish appropriate policy for identification, management, monitoring and disclosure of the conflict of interests which may arise when a depositary carries out activities with regard to the UCITS.

We agree with the European Commission proposals, given that the subscription of a specific contract between the depositary and the UCITS manager represents a tool to better exercise and coordinate their respective functions, in the interest of the UCITS and of their participants.

## UCITS MANAGERS' REMUNERATION POLICIES

### 1. Need for a remuneration policy for UCITS managers

Against this background, it is envisaged that the UCITS Directive should be adapted to include requirements on sound remuneration principles for UCITS managers. Furthermore, these requirements should be consistent with those proposed for the managers of AIFs as well as for banks and investment firms. A harmonised approach to remuneration policy would entail similar (though not necessarily identical) principles for all relevant entities. This would not only create a level playing field, but it would also lessen costs of compliance as compared with maintaining different standards.

We understand the European Commission intention to introduce in the UCITS directive specific provisions on the UCITS managers' remuneration policies which should be consistent with the regulations on this topic already provided for other financial intermediaries in order to achieve a level playing field. In this respect, we strongly believe that the Commission should take into account the peculiarities of UCITS management companies, given that the type of service they provide is, from a risk perspective, different from the services provided by banks, investment firms or insurance companies. UCITS assets are segregated from the asset manager itself and from other clients' assets, separately accounted for and held by a depositary institution, unlike banks where clients funds are held on the balance sheet and used in the business.

Moreover asset managers remuneration does not give rise to the same conflicts of interest as bankers remuneration schemes. The variable remuneration of UCITS' managers is typically based on the performance of the funds they manage and so, far from the employees' and clients' interest conflicting, they are perfectly aligned. In the definition of the legislative proposal, it should also be taken into account that it is unlikely that the remuneration policy may favour an excessive risk-taking by UCITS management companies, due to the fact that they already have to comply with stringent limits on the assumption of risks.

**2. Suggested changes in the UCITS directive**

It is suggested that remuneration policies for UCITS managers should be designed to:
- Promote sound and effective risk management, and discourage any risk-taking which is inconsistent with the risk profiles, fund rules of instruments of incorporation of the managed UCITS;
- Prevent conflicts of interest;
- Ensure the protection of the interests of clients and investors in the course of collective portfolio management activities and other services provided.

We agree with the aims identified by the European Commission which the remuneration policies should comply with. In particular, it is coherent with the nature of the activity exercised by management companies and with the UCITS characteristics to provide that the remuneration policies have to discourage any risk-taking which is inconsistent with the risk profile of the UCITS; such approach, in fact, does not affect the freedom of the management company to create UCITS with different level of risk (even high).

**3. Scope of application – to whom requirements should apply**

It is suggested that in the case of UCITS managers, remuneration policies should apply to those categories of staff whose professional activities may have a material impact on the risk profile of a managed UCITS, in particular to senior management including a board of directors, persons carrying out supervisory functions or the permanent risk management function, and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management.

In order to achieve a maximum level of consistency with the scope of application of the remuneration policy discipline across Member States, we deem appropriate to identify more in detail the persons who fall under the said scope. In particular, as regards the control functions, it should be specified that only the persons responsible of such functions are subject to the remuneration policy discipline. Furthermore, the category which include "any employee receiving total remuneration that takes them into the same remuneration bracket as senior management" should be limited to those persons who may effectively influence the management or the risk-taking of the UCITS, independently from the total remuneration received. In

other words, the criteria according to which a person would fall under the last category should be a functional criteria rather than a criteria which refers to the "total remuneration".

**4. Proportionate application of sound remuneration principles**

It is suggested that UCITS managers should be given similar flexibility, so that they could apply the principles of sound remuneration policy in a manner proportionate to their size, internal organisation as well as the nature, scale and complexity of the activities carried out by the UCITS manager and the managed UCITS.

We agree with the application of the principle of proportionality in applying the provisions on remuneration policy, given that, according to UCITS discipline, it is a general principle which management companies should comply with when defining their organisational arrangements and procedures. Furthermore, the said principle assures an adequate level of flexibility which allows management companies to adapt a general discipline to their respective peculiarities.

**5. Governance issues: elaboration, review and disclosure of the remuneration policy**

Taking into account the recommendations mentioned above, rooted in the principles of good governance, it is suggested to include the following requirements for UCITS managers in relation to the internal organisation and procedures:

- The management body in its supervisory function should adopt the general principles of the remuneration policy and be responsible for the implementation and periodical review of these principles;
- The permanent compliance function should review, at least annually, how the remuneration policy is implemented and whether its implementation complies with the general principles of the remuneration policy;
- A remuneration committee should be established where it is justified by the size of a UCITS manager and a UCITS it manages ('significant size' criterion), their internal organisation and the nature, scope and the complexity of their activities. The role of the remuneration committee would be to exercise an independent judgment on remuneration policies and practices;
- The principles of the remuneration policy should be accessible to staff members to whom they apply.

We agree with the European Commission proposal on the allocation of functions relating to the remuneration policy implementation between the management body and, as the case may be, the remuneration committee. However, as regards the specific tasks that compliance function should perform in this respect, we deem necessary to clarify that the said function should verify the consistency of the remuneration policy with the relevant dispositions, while it is the audit function the function which should be in charge to control the effective implementation of such policy.

## 6. Elements of the remuneration structure

It is suggested that principles relating to remuneration structures should be adapted so as to take into account UCITS managers' business models. They should address the following elements:

- Criteria for calculating compensation for different categories of staff in cases where remuneration is performance-related, including the time element in assessing the performance;
- Rules for guaranteed variable remuneration (which might be allowed only in the context of hiring new staff, and should be limited in time);
- Rules for fixed and variable components of total remuneration (restrictions on variable remuneration, deferral of a portion of variable remuneration etc.);
- Rules on pension benefits;
- Rules for payments related to the early termination of contract.

We share the European Commission approach according to which principles relating to remuneration structures should be adapted in order to take into account the peculiarities of UCITS management companies and of their activity.

We remain at your disposal for any request of clarification or further comments on the content of our reply.

The Director General