



Brussels,
D(2015)

Opinion

Title: DG FISMA - Impact Assessment on Commission Delegated Regulations supplementing Directive 2014/91/EU (UCITS V) of the European Parliament and of the Council with regards to depositaries (draft version of 21 May 2015)*

(A) Context

Article 26b (e) and (h) of the UCITS V Directive empower the Commission to adopt Delegated Acts on conditions for sub-delegation of the depository to a third party and on the fulfilling of the independence requirement between the investment management company and the depository. While the Directive has long stated that UCITS investment management companies and their depositaries (including sub-delegated custodians) have to be independent of each other, it did not specify what this means in practice and Member States have therefore developed differing approaches. However, with the empowerments introduced in UCITS V, adopted on 23 July 2014, the Commission is required to issue specific EU wide rules.

The background for addressing these issues is the MADOFF financial fraud scandal of 2008. The Impact Assessment focuses on two main problems, namely how to ensure independence between the UCITS and their depositaries (or sub-delegated custodians) and a weak protection against insolvency of sub-delegated custodians, when these are based in third countries.

(B) Overall opinion: POSITIVE

The Board recommends that the following aspects of the IA report are improved:

- 1) The policy problem relating to lack of protection against insolvency should be further analysed in terms of objectives, options and impacts.**
- 2) The options to tackle the independency issue should be clarified and related impacts spelt out more clearly (e.g. on international competitiveness, on the structure of the sector, on systemic financial risks and on administrative burdens). Trade-offs should be made clear and views of different stakeholder groups referred to.**
- 3) Monitoring and evaluation provisions should be further specified.**

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted

(C) Main recommendations for improvements

(1) Protection against insolvency – intervention logic: The problem of lack of protection against insolvency in third countries should be clarified in terms of objectives, options and impacts. Further evidence, beyond the Madoff case, should be provided to justify the need to act. This should include explaining why the option of relying on in-house lawyers is rejected and how the option of a requirement of independent legal advice will only take effect for certain third countries. It should also be made clear that the industry will be able to share the costs of independent legal advice, thus limiting the additional costs for individual UCITS.

(2) Clarification of independency options: The role and effective powers of the independent board members should be clarified, in particular with regard to their relationship with regulatory authorities and whistleblowing capacities. The role of the regulatory authorities should also be further explained, including their capacity to oversee boards and intervene on behalf of independent members to prevent any systematic isolation of them.

(3) Analysis of impacts: The impact of the preferred option on the international competitiveness of the UCITS sector should be spelled out more clearly, in particular by explaining how the regulation would compare to that of other main trading partners. The objectives and expected impacts on the structure of the sector, market concentration and systemic financial risks should be clarified. Moreover, which balance is envisaged between exploiting economics of scale and scope and risks of increasing systemic risks and market power? The report should explain if the increased complexity of the preferred option could in itself be a factor adding to financial risks? The report should also spell out the administrative burdens impact more clearly, including by singling out and assessing those proposed rules and procedures, which will de facto add new administrative burdens to UCITS, while explaining why the others will not generate new burdens. This should include an assessment of whether smaller companies are likely to be affected differently from larger ones. When assessing the costs for depositaries of moving assets to independent custodians, the report should clearly spell out whether the costs considered are one-off or repeated. Finally, the report should better describe the views of different stakeholder groups collected in the consultation on the various options and their impacts.

(4) Monitoring: In the monitoring and evaluation part, the report should specify a number of concrete monitoring indicators on the independent board members, such as whistleblowing incidences, regulator interventions and number of board members removed.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated into the final version of the impact assessment report.

(D) Procedure and presentation

The drafting of the report should generally be improved to make the intervention logic more apparent and improve reader-friendliness. In addition, an overview of legal approaches in Member States and important third countries should be annexed.

(E) IAB scrutiny process

Reference number	2015/FISMA/005
External expertise used	No
Date of IAB meeting	17 June 2015