

# UCITS IV News

## A Pan-European Newsletter

December 2009



The recast Directive 2009/65/EC of the European Parliament and of the Council of 13th July 2009 on the coordination of laws, regulations and administrative provisions relating to Undertakings for Collective Investment in Transferable Securities (“UCITS IV”) was published in the Official Journal of the European Union on 17 November 2009.

Even if there was no surprise in the content of this final Directive that will enter into force in July 2011, it is worth noting that CESR already published at the end of October 2009 its technical advice to the EU Commission on the content of the UCITS IV implementing measures regarding the management company passport (“MCP”), and, partially, on the Key Information Document (the “KID”). CESR’s final recommendations related to the KID and the other UCITS IV measures will probably be released by the end of this year. In the meantime, the Commission is working on the controversial issue of the role and the responsibility of the UCITS depositary.

## MiFID is back

In this edition, we want to focus on the 28 October technical advice on the management company passport. The proposed implementing measures require MiFID rules to be applied to UCITS management activities to facilitate mutual recognition between regulators, rather than focusing on the practical provisions about how management companies will manage UCITS on a remote basis.

Initially, only management companies being authorised to perform MiFID investment services (individual portfolio management and investment advice) were required to comply with MiFID. However, some Member States have already applied MiFID to UCITS management companies which therefore means we are not starting with a level playing field in Europe.

The table below indicates the countries where MiFID applies to collective portfolio management activities. In these countries compliance with MiFID rules should in principle be reached with a little less effort than in those countries which chose not to apply MiFID previously to management companies.

Whilst CESR insists on the fact that proposed rules have been adapted to the collective portfolio management activities and that the principle of proportionality should apply, it clearly indicates that management companies and self-managed investment companies will have to ensure that entities to which activities have been delegated comply with these rules as well. They can, however take into account the fact that the delegated third party is itself subject to MiFID.

Finally, the rules on inducements may force management companies and the whole industry to reconsider the remuneration model in the value chain and this could lead to a fundamental change in how distribution will have to be overseen by management companies. These requirements are in-line with the transparency on charges in the KID and the Retail Distribution Review (“RDR”) initiative of the UK.

**What is the level of MiFID requirements already applicable to management companies of UCITS rendering collective portfolio management services only?**

Austria	High	Italy	Medium
Belgium	Medium	Luxembourg	Low
Germany	Medium	Netherlands	Low
Spain	Medium	Sweden	High
France	High	UK	High
Ireland	Low		

## The role and the responsibilities of the UCITS depositary

In our last edition, we focused on the discrepancies existing in the interpretation of the depositaries' controlling duties over the management companies. Already at that time, there was a feeling that the EU Commission should propose some clarifications of the roles and responsibilities of the depositary as a consequence of the Madoff scandal and the Lehman Brothers bankruptcy.

The following chart shows existing discrepancies and lack of certainty around the depositary liability regime in certain countries.

	Required depositary status	Obligation of result / obligation of mean
Austria	Bank with exclusive object	Obligation of result
Belgium	Bank or investment firms	Obligation of mean (Civil liability) except more restrictive contractual clauses
Germany	Bank	Obligation of mean
Spain	Bank or investment firms	Obligation of mean with inverted burden of proof in certain circumstances
France	Bank or investment firms	Obligation of result. However, in case of delegation of custody, the depositary of a collective investment scheme with streamlined investment rules or a contractual collective investment scheme may draw up an agreement limiting its obligation to return the collective investment scheme's assets.
Ireland	Bank or subsidiary of bank	Obligation of mean (clarification by courts expected)
Italy	Bank	Obligation of mean. The burden of proof follows the ordinary rules in the field of contractual liability.
Luxembourg	Bank	On 27 May 2009, the CSSF recalled the general principle of civil law according to which a depositary bank is bound vis-à-vis a depositor UCI, by the obligation to return the assets in its safe-keeping subject to valid and opposable contractual clauses to the contrary and to a court decision in such matter. When assets are NOT in direct custody with the depositary, the latter would rather have an obligation of mean to supervise the assets of the fund.
Netherlands	No particular license but exclusive corporate object.  Depositaries are however required to hold assets on an account with a bank.	Obligation of result / obligation of mean (depending on the nature of the assets held in custody)
United Kingdom	Bank or subsidiary of bank	Obligation of mean (due diligence duty)

On 3 July 2009 the EU Commission launched a consultation aiming at obtaining information from Member States, the industry and investors on the necessity to further harmonise the legal framework applicable to UCITS depositaries and to clarify which responsibility regime better contributes to investors' protection. In mid-September, CESR responded to the Commission and stated that the depositary must have an exhaustive and complete overview of the fund's assets.

CESR indeed defines the safekeeping duty of assets as an overall control of all assets and recommends that UCITS assets are clearly segregated from the assets of the entity where the assets are in custody. CESR recommends as well that conditions

for delegation to sub-custodians are clarified and that funds' assets should not be transferred without prior knowledge or consent of the depositary. On the other hand, CESR members do not believe inversion of the burden of proof as proposed in the draft AIFM Directive would improve investor protection. The EU Commission should provide an update on this sensitive topic in the coming weeks.

Until the roles and the responsibilities of UCITS depositaries are clarified by the Commission, we do not expect any significant declaration by Member States on this topic. What is clear is that many industry players decided not to wait longer before cleaning the house.

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