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REPORT

From:	Presidency
To:	Permanent Representatives Committee (Part 2)
Subject:	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 (UCITS V) *- General approach (Declarations for the minutes)*

DECLARATION BY THE CZECH REPUBLIC

Exemption of central securities depositaries from sub-custody rules

The Review of UCITS directive (UCITS V) represents a very important piece of legislation complementing the Alternative Investment Managers Directive (AIFMD). UCITS V cannot be seen in isolation and we should very carefully scrutinize the interplay between UCITS V, AIFMD and currently negotiated the Draft Regulation on Central Securities Depositaries (CSDR).

For reasons expressed during negotiations the Czech Republic is concerned regarding the compromise text of Recital 16 of UCITS V dealing with the exemption of central securities depositaries from sub-custody rules. We expect that this Recital can be revisited during the negotiations with the European Parliament in order achieve a more appropriate solution.

It is essential to align the wording of the Recital 16 of UCITS V with the wording of the complementary Recital 41 in AIFMD to ensure legal consistency across different pieces of legislation governing collective investment schemes. Any other approach would put UCITS into an enormous disadvantage to the detriment of UCITS investors because of significant restrictions on UCITS investments.

Concentration rules

According to the UCITS Directive, the limits on investments of UCITS funds are calculated as a percentage of their assets (see for example Articles 52 to 55, 58 and 83). In July 2012, ESMA has published an answer regarding Article 54 (ESMA/2012/429, question 3), claiming that the limits should be calculated as a percentage of net assets (net asset value). The Czech Republic considers it crucial to ensure a single interpretation of the UCITS Directive and a consistency between the interpretation and the wording of the UCITS Directive. Although this issue is not dealt with in the current proposal, we would like to discuss it during the trilogues negotiations with the European Parliament.

DECLARATION BY ITALY

Italy recognises the Presidency efforts to reach an overall compromise in the Council in order to start negotiations with the European Parliament. However, Italy believes that the current text needs to be improved so as to enhance the harmonization of depositary functions, remuneration policies and sanctions.

Firstly, with regards to the list of legal entities eligible to being depositaries, we deem that, in view of the introduction of the EU passport, the list should in principle include only credit institutions and investment firms. However, the reference to "*another legal entity*" in article 23 might be acceptable as long as the Directive establishes not only that such entities must be subject to the existing EU prudential regulation and capital requirements but also to effective supervision carried out by competent public authorities entrusted with the same powers applied to credit institutions and investment companies. This is crucial to ensure the safety and soundness of the depositary.

Secondly, the remuneration policies for management companies should be more closely aligned with the corresponding CRD IV provisions, in order to maintain a level playing field with the credit institutions, taking into account, where appropriate, the specificities of the asset management sector.

Thirdly, as expressed in other EU negotiations, we disfavour the introduction of an optional regime for administrative sanctions, since this would run against the goal of achieving a more coherent, effective and harmonized regime, as envisaged by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions reinforcing sanctioning regimes in the financial services sector (Brussels, 8.12.2010 - COM(2010) 716). Administrative sanctions have proven to be the most efficient and swiftest way of sanctioning infringements in the financial sector. A harmonised use of administrative sanctions would also enhance day-to-day cooperation amongst national authorities, thus strengthening investor confidence in the Single Market.

Bearing in mind the rationale behind the Presidency compromise and the urgency to adopt this Directive, Italy is able to support the general approach but expects that the above mentioned issues will be revised in the course of the inter-institutional trilogue so as to ensure, where appropriate, the consistency with other EU relevant pieces of legislation.

DECLARATION BY POLAND AND THE NETHERLANDS

Despite the acceptance of the proposed approach, Poland and the Netherlands remain concerned with the provisions relating to entities permitted to act as UCITS depositaries. In the opinion of Poland and the Netherlands it is important that in addition to banks and investment firms, other entities are entitled to act as UCITS depositories under certain conditions. We consider that introducing restrictions based on CRD eligibility criteria is not an appropriate approach and could significantly limit the number of the UCITS depositaries. Harmonisation of the eligibility criteria of the UCITS depositary should be based on the operational risk and liability constraints associated with depositary activities. In the opinion of the Netherlands and Poland any institution which is subject to prudential regulation and ongoing supervision and were appointed as a depositary before entry into force of UCITS V should be able to act as a depositary for a UCITS fund.

Poland and the Netherlands expect that this subject can be revisited during the negotiations with the European Parliament to achieve a more effective and harmonised regime.

DECLARATION BY THE UNITED KINGDOM, CYPRUS, THE CZECH REPUBLIC, BULGARIA AND IRELAND

(1) The UK, Cyprus, Czech Republic, Bulgaria, and Ireland express concern that Article 52(1) could artificially discriminate against the use of OTC derivatives that are cleared through central counterparties (CCPs). This issue is of immediate concern as the Regulation on OTC derivatives, central counterparties and trade repositories (648/2013) will introduce clearing obligations requiring standardised OTC derivatives to be cleared through CCPs. This could discriminate in favour of exchange-traded derivatives, which have identical exposures but are not subject to such limits;

(2) Furthermore, we are concerned that Article 52(1) may deter UCITS from using OTC derivatives cleared through CCPs, in favour of increasing use of non-centrally cleared derivatives. This would undermine the spirit of the G20 commitments on OTC derivatives, which were intended to encourage use of CCPs, due to the benefit of central clearing in relation to the mitigation of systemic risk.

(3) This issue needs to be addressed in trilogues.

DECLARATION BY PORTUGAL

PT considers that the rule allowing for the appointment of sub-custodians from third countries which are not subject to effective prudential regulations (expressed in art. 22a(3)) is not appropriate.

It is of upmost importance to mitigate the risk of losses associated with financial instruments held by those third country entities, particularly considering that as this directive regulates funds targeted to retail investors, the eligible assets should be liquid and traded in regulated markets or equivalent markets.

We are able to support the mandate for the Presidency to negotiate on the basis of the proposed global package but we expect this subject to be revisited in the course of the trialogues.