

**REPORT 9/2012 BY THE JOINT COMMITTEE FOR THE EUROPEAN UNION, DATED OCTOBER 8, 2012, ON COMPLIANCE OF THE PRINCIPLE OF SUBSIDIARITY BY THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 2009/65/CE ON THE COORDINATION OF LAWS, REGULATIONS AND ADMINISTRATIVE PROVISIONES RELATING TO UNDERTAKINGS FOR COLLECTIVE INVESTMENT IN TRANSFERABLE SECURITIES (UCITS) AS REGARDS DEPOSITARY FUNCTIONS, REMUNERATION POLICIES AND SANCTIONS (TEXT WITH EEA RELEVANCE) [COM (2012) 350 FINAL] [2012/0168 (COD) {SWD (2012) 185 FINAL} {SWD(2012) 186 FINAL}]**

**BACKGROUND**

**A.** The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

**B.** The Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/CE 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, has been adopted by the European Commission and conveyed to the national parliaments, which have a period of eight weeks to verify the subsidiarity check of the initiative, being the deadline October 15, 2012.

**C.** The Bureau and the Spokespersons of the Joint Committee for the European Union agreed on September 11, 2012, to examine the said European legislative initiative, appointing to that end as Rapporteur MP Mr. José López Garrido, and requesting the Government the report envisaged in section 3 j) of act 8/1994.

**D.** No report has been conveyed by the Government.

**E.** The Joint Committee for the European Union, in its meeting held on October 8, 2012, adopted the following

## REPORT

1.- Article 5 of the Treaty on the European Union indicates that “the use of Union competences is governed by the principles of subsidiarity and proportionality”, and adds that “under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, sets out the aim, procedure and results of the subsidiarity monitoring which is to be carried out by EU Member States (articles 5(3) and 12(b) of the TEU).

2.- Since the UCITS Directive was adopted, the rules relating to depositaries have remained unchanged: they consist of a number of generic principles setting out the duties of depositaries. The principal UCITS rule is that all assets of a UCITS fund must be entrusted to a depositary. This depositary shall, in accordance with national law, be liable for losses suffered as a result of a failure to perform its duties. The UCITS Directive, apart from employing a negligence-based standard, makes reference to national laws in respect of the precise contours of these duties. This reference leaves considerable scope for diverging interpretations regarding the scope of a depositary’s duties and the liability for the negligent performance thereof. As a result, different approaches have developed across the European Union, leading to UCITS investors facing uneven levels of protection in different jurisdictions.

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.

Finally, 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” the Commission suggested setting EU minimum common

standards on certain key issues, in order to promote convergence and reinforcement of national sanctioning regimes. Extending this work to the UCITS framework is a national additional step in this process.

This proposal forms part of a wider legislative package dedicated to rebuilding consumer trust in financial markets. The package has two parts. The first is an extensive overhaul of the Insurance Mediation Directive 2002/92/EC to ensure that customers benefit from a high level of protection when buying insurance products. The final part of the package aims at improving transparency in the investment market for retail investors (a proposal for a Regulation on key information documents for investment products).

**3.-** The judicial aspects of this proposal worth being highlighted relate to essential depositary's duties, delegation rules, rules on eligibility to act as a UCITS custodian, those referring to liability, rights of investors to redress, remuneration policies, access powers to data records of these undertakings, as well as breaches of rights and sanctions.

**4. –** There are no implications for the EU budget in that no additional funding and no additional posts will be required to perform these tasks. The tasks envisaged for the European Securities and Markets Authority fall within the scope of existing responsibilities for this Authority, therefore the allocation of resources and staff foreseen in the approved Legislative Financial Statements for this Authority will be sufficient to facilitate the execution of these tasks.

**5.-** We must bear in mind that when applying the principle of subsidiarity, the intervention of the Union in areas which do not fall within its exclusive competence is exceptional, thus establishing that it will only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action be better achieved at Union level.

In this case, the diversity of approaches regarding duties and liability of depositaries, in particular in the custody delegation, have caused uneven levels of protection of the consumers.

The objectives of the actions to be taken to improve investors' confidence in UCITS, by enhancing requirements concerning the duties and the liability of depositaries, the remuneration policies of management companies and investment companies, and by introducing common standards for the sanctions applying to the main breaches of the provisions of this Directive, cannot be sufficiently achieved by Member States acting independently. Since only action at the European level can address the identified

weaknesses, and therefore such action can be better achieved at Union level, the Union should adopt the necessary measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union.

In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

## CONCLUSION

**For the aforementioned reasons, the Joint Committee for the European Union considers that the 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, complies with the principle of subsidiarity established in the Treaty on the European Union in force.**