

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

Industry Update – UCITS V ESMA’s Advice to the Commission on Level II Measures

UCITS V which amends the existing UCITS IV regime aims at harmonising the requirements: (i) applicable to depositaries; (ii) on remuneration policies applicable to management companies; and (iii) on sanctions for breaches of UCITS regulation.

On 3 July 2014 ESMA received a provisional request from the European Commission for technical advice on the content of two of the delegated acts on depositaries required by UCITS V dealing with the insolvency protection of UCITS assets when delegating safekeeping and the independence requirement (between the management company or investment company and the depositary). ESMA published a consultation paper on 26 September setting out the draft technical advice on those delegated acts. That consultation closed on 24 October.

On 28 November 2014 ESMA issued its final advice on the delegated acts as follows.

Advice on the insolvency protection of UCITS assets when delegating safekeeping

UCITS V provides that when the custody functions are delegated by the depositary to a third party, such a third party shall take “*all necessary steps to ensure that in the event of insolvency of the third party, assets of a UCITS held by the third party in custody are unavailable for distribution among or realisation for the benefit of creditors of the third party*”. The European Commission will adopt delegated acts specifying the steps to be taken by the third party pursuant to these provisions. This section of the advice proposes measures, arrangements and tasks for the third party to which custody is delegated as well as measures to be put in place by the depositary.

Advice on the independence requirement

UCITS V also states that “*In carrying out their respective functions, the management company [and the investment company] and the depositary shall act [...] independently and solely in the interest of the UCITS and the investors of the UCITS*”. The European Commission will adopt delegated acts specifying the conditions for fulfilling this independence requirement. This section of the advice identifies two types of link between the management company/investment company and the depositary (namely (a) common management/supervision and (b) cross-shareholdings between these entities) which may jeopardise their independence and recommends measures to address the risks that may arise.

ESMA is cooperating closely with the European Commission in view of the transformation of the technical advice into formal delegated acts. The final advice may be accessed from the ESMA website through the following [link](#).

Should you have any queries on UCITS V Directive, please do not hesitate to contact Mr Jonathan Sammut jsammut@mfsa.com.mt.

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5 December 2014