



FINANCIAL SERVICES

UCITS V Directive Implemented into Irish Law

by **Adrian Mulryan**

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The European Union (Undertakings for Collective Investment in Transferable Securities) (Amendment) Regulations 2016 (Regulations) came into force on 21 March 2016. The Regulations transpose the UCITS V Directive (Directive 2014/91/EU) (UCITS V) into Irish law.

UCITS V amends Directive 2009/65/EC (UCITS Directive) and the amendments are predominantly associated with the UCITS depositary function, UCITS Management Company (Manco) remuneration and administrative sanctions. The full text of the Regulations can be found [here](#) and a brief analysis of the key provisions of UCITS V can be found [here](#).

Delegated Regulation Effective from 13 October 2016

On 24 March 2016, the European Commission Delegated Regulation EU 2016/438 (Delegated Regulation) supplementing UCITS V with regard to the obligations of depositaries was published in the Official Journal of the European Union. The Delegated Regulation, otherwise known as the "Level 2 Regulations", came into force on 12 April 2016 and will apply from 13 October 2016. The full text of the Delegated Regulation can be found [here](#) and a brief analysis of the key provisions of the Delegated Regulation can be found [here](#).

ESMA Guidelines on Sound Remuneration Policies

On 31 March 2016, the European Securities and Markets Authority (ESMA) published its final guidelines on sound remuneration policies under the UCITS Directive and AIFMD (Guidelines). The full text of the Guidelines can be found [here](#).

The Guidelines set out the final text on remuneration policies required under UCITS V (UCITS Remuneration Guidelines) and also provides for a targeted revision of the guidelines on sound remuneration policies under AIFMD (ESMA/2013/232) (AIFMD Remuneration Guidelines), which were originally published on 3 July 2013.

The UCITS Remuneration Guidelines provide clarity on the requirements under UCITS V for Mancos when establishing and applying a remuneration policy for key staff. The UCITS Remuneration Guidelines seek to ensure a convergent application of these provisions and provides guidance on the governance of remuneration, requirements on risk alignment and disclosure.

The UCITS Remuneration Guidelines will apply to Mancos and national competent authorities from 1 January 2017.

Proportionality Principle in the Guidelines

It is notable that the Guidelines do not include guidance on the possibility of dis-applying certain specific requirements on the remuneration pay-out process. On that basis, ESMA has written to the European Commission, European Council and European Parliament regarding the issue of the proportionality principle and remuneration rules in the financial sector and suggested that further legal clarity is needed in the form of legislative amendments. A copy of ESMA's correspondence can be found [here](#).

As part of the process of finalising its UCITS Remuneration Guidelines, ESMA had to balance the alignment of the UCITS Remuneration Guidelines and the AIFMD Remuneration Guidelines with the separate obligation to closely cooperate with the European Banking Authority in order to ensure consistency with requirements developed for other financial services sectors, in particular credit institutions and investment firms. The UCITS Directive, as amended by UCITS V, prescribes that proportionality shall apply to the remuneration principles set out under the UCITS Directive. However, as outlined in ESMA's correspondence, recent work and legal analysis have called into question whether the existing proportionality provisions as set out under the UCITS Directive and AIFMD may lead to a result:

Where, under specific circumstances, the requirements on the pay-out process (i.e. the requirements on variable remuneration in instruments, retention, deferral and ex post incorporation of risk for variable remuneration) are not applied; or
where it is possible to apply lower thresholds whenever minimum quantitative thresholds are set for the pay-out requirements (e.g. the requirement to defer at least 40% of variable remuneration).

ESMA considers that the scenarios under (a) and (b) above should remain possible in certain situations and that market participants, investors and regulators would benefit from additional legal clarity.

In addition, ESMA believes that it would be inappropriate for the following categories of fund managers to be subject to the requirements on the pay-out process:

- (a) smaller fund managers (in terms of balance sheet or size of assets under management);
- (b) fund managers with simpler internal organisation or nature of activities; or
- (c) fund managers whose scope and complexity of activities is more limited.

ESMA also considers that it would be disproportionate to apply the requirements to relatively small amounts of variable remuneration and to apply certain requirements to certain staff when this would not result in an effective alignment of interests between the staff and the investors in a fund.

If you would like to discuss any of the measures that have been introduced in relation to UCITS V, please contact any member of the Financial Services Team.

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