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ЗАРУБЕЖНЫЙ ОПЫТ ПРАВОВОГО РЕГУЛИРОВАНИЯ ИНВЕСТИЦИОННОЙ ДЕЯТЕЛЬНОСТИ

ВВЕДЕНИЕ. *Одним из главных драйверов развития индустрии инвестиционных фондов в Европе стали организации коллективного инвестирования в обращаемые ценные бумаги (далее – ОКИОЦБ), число которых в настоящее время превышает 35 тысяч, а сумма активов в их управлении составляет немногим больше 9,5 трлн евро. ОКИОЦБ – это один из главных игроков на европейском инвестиционном рынке, их значительное влияние на развитие европейской экономики проявляется на протяжении нескольких десятилетий. Выявление основных правовых причин высокой эффективности указанных организаций коллективного инвестирования является ключевой целью исследования. Для ее достижения необходимо решить следующие задачи: 1) изучить правовые основания деятельности ОКИОЦБ на разных этапах развития и оценить основные правила, которые лежат в основе их деятельности; 2) определить специфику функционирования данных субъектов коллективного инвестирования на современном этапе.*

МЕТОДЫ И МАТЕРИАЛЫ. *Помимо общенаучных (анализ, синтез, индукция, дедукция и пр.), в процессе исследования также использовались следующие специально-научные методы: историко-правовой, формально-юридический, а также технико-юридический методы, детерминировавшие логику повествования, содержание и научную достоверность настоящей статьи. Представленная ниже оценка законодательных актов, прочих правовых актов институтов Европейского союза (далее – ЕС), белых книг, а также официальных документов CESR и ESMA опирается на российскую и зарубежную доктрину главным образом в части, касающейся категоризации различных видов фондов ОКИОЦБ.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Наиболее значимые выводы исследования сводятся к следующему: 1) в ЕС действует детально разработанный свод правил, регулирующих деятельность ОКИОЦБ; 2) созданы условия для справедливой конкуренции между ОКИОЦБ на уровне ЕС, а также между данными организациями и различными видами фондов, действующих в США; 3) обеспечена эффективная и единообразная защита прав инвесторов; 4) сняты ограничения в отношении свободного перемещения ОКИОЦБ в пределах ЕС.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Правовые основания деятельности ОКИОЦБ постоянно совершенствуются и представляют собой хорошо проработанный свод юридических норм. Высокая степень зрелости правовой базы определяется не только значимостью ОКИОЦБ для европейской экономики, но и тем, что указанные фонды коллективных инвестиций привлекают денежные средства большого числа розничных инвесторов, а значит, требуются дополнительные гарантии защиты прав и интересов последних.*

КЛЮЧЕВЫЕ СЛОВА: *право, интеграция, инвестиционная деятельность, инвестиционное право, фонды коллективного инвестирования, ОКИОЦБ, Европейский союз*

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FOREIGN EXPERIENCE IN THE LEGAL GOVERNANCE OF INVESTMENT ACTIVITIES

INTRODUCTION. *One of the catalysts of the development of the European investment fund industry has been the inception of the undertakings for collective investment in transferable securities (UCITS), the number of which currently exceeds 35,000 funds, who manage assets worth more than 9,5 trillion euros. UCITS are central to the European investment market with their substantive impact on the European economy having been evident for several decades. The identification of the legal factors contributing to the high efficacy level of these undertakings constitutes the primary objective of the research. To achieve this goal, the following tasks shall be addressed: 1) to examine the legal framework governing the activities of UCITS schemes at various stages of its development, so as to estimate the fundamental rules underpinning their operations; 2) to determine the specifics of the functioning of the collective investment vehicles under consideration in terms of modern legislation.*

MATERIALS AND METHODS. *Apart from general scientific methods (analysis, synthesis, induction, deduction, etc.), the specific methods employed within the research are as follows: historical-legal, formal-legal and technical legal methods, which determined the logical structure, content and scientific integrity of this article. The assessment of legislation, other legal acts of EU institutions, white papers, so as official documents of CESR and ESMA presented below is based on Russian and foreign doctrine, mainly in terms of categorization of various types of UCITS schemes.*

RESEARCH RESULTS. *The most significant findings of the research are summarized hereinbefore. 1. The European Union has implemented a comprehensive compendium of rules governing the activities of UCITS. 2. Conditions ensuring fair competition among UCITS at the EU level, as well as between these schemes and different types of funds operating in the US have been established. 3. Effective and uniform protection of investors has been provided. 4. Restrictions imposed on the free movement of UCITS within the EU have been eliminated.*

DISCUSSION AND CONCLUSIONS. *The legal framework for UCITS funds, which embodies a comprehensive set of rules, is continuously evolving. The high level of maturity of the regulatory framework for UCITS is determined not only by their significance to the European economy, but also because the collective investment schemes, in general, raise capital from retail investors. It requires additional safeguards to protect the latter's rights and interests.*

KEYWORDS: *law, integration, investment activity, investment law, collective investment schemes, UCITS, European Union*

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1. Introduction

For decades, the undertakings for collective investment in transferable securities (UCITS) have played a prominent role in the European collective investment market. These undertakings allow for the financing of economic development of the EU Member States and, due to their reliability, have become a popular choice for numerous investors, including those from third countries. Several years before the global economic and financial crisis of 2008-2009, UCITS funds (as of 2006) accounted for 74 % of all collective investment schemes in Europe[1]. Currently, their number exceeds 35 thousand[2] funds in operation with a total asset value being slightly over 10 trillion euros[3].

2. Legal Basis and Key Stages in the Evolution of the Legal Framework for UCITS Funds

In the European Union, the legal basis for the activities of UCITS is notable for its comprehensive nature. To date, six revisions of the original legal act of 1985 – Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) – which underpinned the legal governance of these collective investment entities, have been passed, thus, significantly contributing to the development of the investment fund industry in Europe.

The primary objective of the *initial stage of the reform* (1993–1994) was to grant a European passport to UCITS depositaries. The concept of "European passport" stands for the compendium of rules, which entitle the EU single market for financial services (SMFS) participants to provide cross-border activities without hindrance once they have obtained a relevant authorization. Notwithstanding the fact that the issuance of a special permit, which is essentially an administrative act, falls within the purview of the national supervisory bodies, the legal validity of such document is recognized across all Member States [Chetverikov 2024:228]. The introduction of the European passport for UCITS funds became one of the crowning achievements of the Directive 85/611/EEC, since this concept paved the way for the establishment of the European single market for investment funds, which entailed the creation of a depositary services sub-sector at the EU level. Additionally, it was suggested to expand the scope of the Directive 85/611/EEC to cover funds of funds, money market funds, cash funds and master-feeder funds. Despite the fact that these modifications proposed by the Commission during the first stage may not appear to be significant, the EU Member States considered them to be quite ambitious. As a result, the legislative act amending the provisions of the Directive 85/611/EEC was not adopted.

The second phase (1998–2001) was marked by the Commission submitting two proposals amending the 1985 Directive. In 2001, these were adopted as two directives: 1) the Directive governing the activities of UCITS management companies (MC), providing them with the access to the SMFS and establishing a uniform simplified prospectus[4]; and 2) the Directive, which provisions increased the number of funds falling under the definition of UCITS through the expansion of asset types such undertakings could

[1] White paper on enhancing the single market framework for investment funds (Brussels, 15.11.2006). – *COM* (2006) 686.

[2] EFAMA: Quarterly Statistical Release. Trends in the European Fund Industry in the Fourth Quarter of 2023 & Results for the Full Year of 2023. Brussels, March 2024. P. 22. URL: https://www.efama.org/sites/default/files/Quarterly%20Statistical%20Release%20Q4%202023.pdf?clckid=964f1ecb (accessed date: 10.12.2024).

[3] ECB: Total Assets Held by UCITS Funds in the Euro Area (Stock), Euro area (Changing Composition), Quarterly (19 November 2024). URL: https://data.ecb.europa.eu/data/datasets/ IVF/IVF.Q.U2.N.TC.T00.A.1.Z5.0000.Z01.E?clckid=fca17d07 (accessed date: 09.12.2024).

[4] Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses. – *OJ L* 41. 13.2.2002. P. 20-34.

invest in[5]. A major portion of amendments proposed by the Commission were incorporated into two 2001 directives; however, the introduction of a European passport for MCs proved to be an extremely contentious issue. One could argue that such passport was *ipso-facto* granted to the aforementioned companies, nevertheless, the harmonization in this area necessitated the formation of the exhaustive list of services that could be provided by MCs.

In course of *stage three* of the reform (2008–2009), as a result of global economic and financial crisis, the UCITS legal framework underwent substantial changes. Austerity policies pursued by various Member States of the EU affected the overall confidence in the financial services market of the Union leading to a swift response from investors, who withdrew their funds en masse from the establishments under consideration. The resulting losses for UCITS sub-sector were dramatic, with a total of approximately 335 billion euros being withdrawn. As some scholars have rightly noted, the long-term economic progress of most nations was largely disrupted and undermined by the 2008 financial crisis [Krugman 2008:184]. Understanding events that occurred during this period is essential, not only because they triggered a reconfiguration of the economy on a global scale, but also because, having induced certain implications for the integration process within the EU, such events catalyzed the development of the SMFS.

It was during the aforementioned timeframe that the Commission tabled the proposal[6], which reconsidered the legal framework for UCITS fundamentally. The alterations proposed were conventionally classified by the Commission into two categories: 1) improvements of the provisions of UCITS Directive in force; and 2) those aimed at the implementation of new market freedoms. The first group included modifications as to the simplification of UCITS prospectus, facilitation of notification procedure designed to inform the host Member States of the UCITS intention to carry out its activities in their jurisdictions, as well as the introduction of the European passport for the MCs of the undertakings, where the latter, by increasing market supply and, therefore, competition, could materially reshape the balance of interests within UCITS sub-sector. Alterations eliminating the impediments for pooling assets within one UCITS fund and those addressing the capacity of the schemes at issue to engage in cross-border mergers were covered by the second group. The measures proposed were all incorporated into European legislation through the adoption of the 2009 Directive[7].

During *the fourth period* of the reform (2012–2014) careful actions were taken to polish legal rules regarding the operation of depositaries. It was proposed to clarify specific provisions with respect to their liability before UCITS funds and investors. As before, depositaries remain responsible for damages incurred by UCITS schemes, that may result from depositary's failure to fulfill its obligations or from the improper performance of such commitments, the liability for which shall be established independently by each Member State of the EU. The 2014 Directive[8] is, thus, novel in that it identifies specific circumstances that may eventuate, say, in case of loss of the fund's assets [Buttigieg, Agius 2020:597], or in the liability being imposed on the depositaries.

At the latest stage of the reform, the Directive (EU) 2021/2261 of the European Parliament and of the Council of 15 December 2021 amending Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (UCITS)[9] was adopted. With the Directive in effect on January 1, 2023, it has enhanced the regulatory regime set forth for UCITS schemes, for instance, through the establishment of a mandatory

[5] Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS. – *OJ L* 41. 13.2.2002. P. 35-42.

[6] Proposal for a Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). – *COM*/2008/0458.

[7] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). – *OJ L* 302. 17.11.2009. P. 32-96.

[8] Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 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. – *OJ L* 257. 28.8.2014. P. 186-213.

[9] Directive (EU) 2021/2261 of the European Parliament and of the Council of 15 December 2021 amending Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (UCITS). – *OJ L* 455. 20.12.2021. P. 15-17.

requirement for these funds to issue the so-called key information document, where major features and securities of such scheme are briefly described allowing investors to assess the risks associated with the acquisition of UCITS assets and make an informed investment decision.

In total, five stages of the reform undergone by the EU regulatory framework for UCITS activities may be identified, which, in conjunction with the 1985 Directive, constitute six generations of the relevant legislation. A high degree of legislative focus on this area is due to UCITS, almost immediately after their inception, having had a considerable impact on the European economy. The cornucopia of reforms is also attributable to the rapid pace of changes within the financial market, as well as to the potential of systemic crises.

3. UCITS As a Unique Subject of Investment Activities

Within the scope of current EU legislation, the term "UCITS" stands for the undertaking 1) with the exclusive objective of investing pooled funds, attracted from the general public, into transferable securities or other liquid financial assets; 2) the activities of which shall be subject to the risk allocation principle; 3) which units, at the request of their holders, may be (in)directly redeemed or repurchased [Gheorghe 2022:142]. Certain types of funds are excluded from the UCITS legal framework. These include 1) close-ended funds, 2) collective investment schemes (CISs), that bring in investors' funds, but make no public offer as to the purchase of the establishments' units within the territory of the EU; 3) CISs, the units of which, pursuant to their constitutional documents, may be sold exclusively in third countries; 4) CISs that do not comply with a) common requirements as to the implementation of investment policy; and b) rules, subject to which the due level of UCITS borrowings shall be maintained [Kasyanov, Kachalyan 2024:346]. A special place is held here by the close-ended funds, which may not redeem issued units, including those acquired by the unitholders as part of the initial public offering, thus, investors "may not sell them [even in the secondary market] until the expiration of the fund's operational period" [Zhurbin, Merekina 2017:78]. In other words, close-ended funds are those CISs, which units may not be repurchased or redeemed immediately after their primary allocation, but only upon the termination of the schemes' activities as to the specific investment product.

The concept of "UCITS" shall be considered as a generic term, which encompasses a plethora of fund types. With respect to the *investment object* (or the type of assets in which the fund is authorized to invest), UCITS schemes include money market funds, exchange-traded funds and other types of funds specified hereinbefore. Most doctrinal sources focus on the above-mentioned classification of UCITS. This was justifiable at the early stages of the sub-sector's construction due to the lack of those CISs, that could have been established as UCITS, having been attributed at the same time to any other categorization of investment funds. Being deemed substantive, this gap shall be addressed through the provision of the following classification of those CISs which fall under the UCITS regulatory regime set forth.

From the perspective of *organizational structure,* UCITS differ primarily in terms of methods utilized by the schemes under consideration to allocate their liquidity among various sub-funds, existing within one fund. The 2009 Directive, thus, differentiates between funds of funds, master-feeder funds and umbrella funds. Let us examine each of these fund types in more detail.

As introduced by the Directive 2001/108/EC[10], *funds of funds* have two distinct characteristics: firstly, these funds acquire specific type of assets, i.e., units issued by other UCITS; secondly, such schemes enjoy a coherent system, where one UCITS invests in another one with no sub-funds of their own. In this case, it may be argued that the investment object itself determines a specific (horizontal) structure of the given fund type *(figure 1).* Consequently, from a theoretical standpoint, funds of funds are sometimes referred to as "UCITS of UCITS" [Amenc, Sender 2010:40]. Despite the apparent simplicity of the funds of funds organizational structure, the European legislature has laid down certain limitations to prevent the potential misuse or abuse of any kind. Say, UCITS may not invest in those CISs (either of UCITS or of non-UCITS type), where they have already invested in other CISs, and the total amount of the acquired units exceeds 10 % of the fund's total asset value. This requisite of the Directive was prompted by the concerns of the potential emergence on the market of the pyramid-type investment schemes (or the so-called "funds of funds of funds") [Anderberg, Bolton 2006:15].

10 Directive 2001/108/EC. Op. cit.

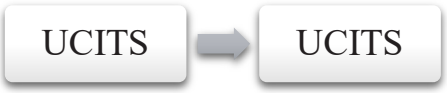

Figure 1. Funds of Funds

Restrictions were also imposed on investments in non-EU CISs, being subject to Art. 1(2)(a) and (b) of the 2009 Directive. Funds of funds are entitled to invest only in units of those non-EU CISs, the countries of origin of which are covered by the so-called "equivalence regime", the application of which, essentially, implies that the regulatory framework of the third country is considered equivalent to that of the EU [Moloney 2021:3]. The imposition of the foregoing regime involves the Commission making unilateral, indisputable decisions, regarding certain fractions of the financial services sector, and providing market access to those areas, the regulation of which in the third country is deemed equivalent [Galushko 2022:35]. However, the implementation of this regime in terms of the Directive in force does not imply that non-EU CISs may sell their units directly to European retail investors. On the contrary, UCITS, established within the EU, are granted the right to acquire units of non-EU CISs upon the establishment of equivalence regime against their countries of origin. Furthermore, it can be argued that one of the shortcomings of current UCITS legislation is the lack of specific provisions on establishing the equivalence regime with respect to the marketing of units of non-EU CISs within the territory of the Union. As a result, to date, if non-EU CISs, even where they are structurally comparable to UCITS and the level of investor protection offered by the laws of their third countries is congruent, wish to market their units within the territory of the Union, they are generally treated as Alternative investment funds. In this case access to the SMFS is granted on the basis of bilateral agreements made between the competent authorities of the EU Member States and third countries [Schmies 2024:171].

Regarding *master-feeder structures (figure 2)*, it shall be identified that, in concordance with Art. 58 of the Directive 2009/65/EC, the term "feeder" refers to those CISs, who direct 85 % of the funds obtained through sale and purchase of the latter's units into the master-fund, which, in its turn, may not act as a feeder-fund and, therefore, have its pooled capital allocated to other feeders. The feeder is authorized to invest the remaining 15 % of the contributed funds to other highly liquid transferable securities or derivative financial instruments [Alshaleel 2016:17].

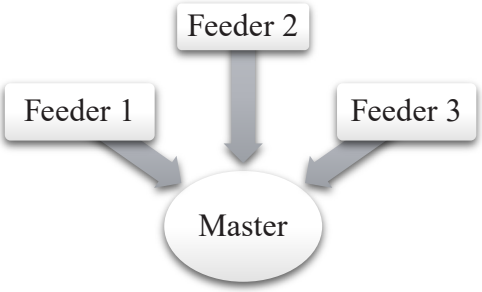

Figure 2. Mater-feeder funds

This type of CIS constitutes a complex (vertical) structure, wherein all feeders direct most of the investors' funds into their master, which is in charge of the portfolio management.

Turning to the analysis of *umbrella funds,* the examination of constraints set out on the national dimension is illustrative enough in terms of the schemes' organizational structure. Assume that within one umbrella fund, incorporated in conformity with the Cypriot legislation as a single legal entity, sub-funds A, B and C are operational *(figure 3)*. Firstly, sub-fund A is empowered to contribute to sub-funds A and B less than 20 % of its net assets, due to which sub-funds B and C are not allowed to direct their investments to sub-fund A. If this is the case, the cumulative investment of sub-fund A in other sub-funds shall not exceed 25 % of the net asset value of the whole fund. Secondly, sub-funds B and C are entitled to invest in each other a maximum of 10 % of their net asset value, given the funds have already been allocated to the latter by the sub-fund A[11]. In order to prevent the situation, where all invested funds continuously circulate within the umbrella fund, the satisfaction of the requirements provided hereinbefore is deemed crucial, since otherwise this could be used by some CISs as an unfair practice aimed at the overstatement of the scheme's assets, which, essentially, shall be considered as a market abuse carried out under the false pretense of the accretion of the capital within the sub-funds. Consequently, the fundamental distinction between the umbrella funds

[11] KPMG: A guide to UCITS funds in Cyprus. Fund Services. Cyprus, March 2017. P. 14. URL: https://assets.kpmg.com/content/dam/kpmg/cy/pdf/2023/A%20guide%20to%20UCITS%20funds%20in%20Cyprus%2010_07_23.pdf?clckid=2dc9190c (accessed date: 07.12.2024).

and master-feeder structures is that in the former case, subject to certain restrictions laid down by the EU Member States, sub-funds are allowed to invest in other sub-funds, all belonging to the same umbrella fund.

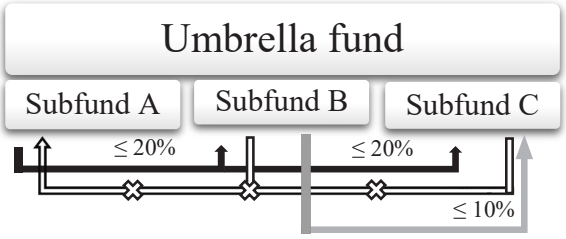

Figure 3. Umbrella funds

At the same time, the umbrella funds may operate as multi-class funds, meaning that these CISs issue two or more classes of shares (for more detail, please see below), acquiring which implies that the fee, being dependent upon the type of the financial instrument chosen for the investment and the legal framework of the UCITS home Member State, shall be paid by the investors[12]. Multiple classes of securities may be issued by the umbrella fund itself, so as by the schemes qualified as its sub-funds [De Luca 2019:732], thus, the issuance of new classes of securities does not necessitate the incorporation of another sub-fund [De Luca 2019:734]. However, where the umbrella fund has two or more investment objectives, it requires the formation of new compartments, so as the issuance of the funds' respective share classes.

UCITS funds may be also classified pursuant to their *legal form*. Where the designated undertakings are formed as a common fund or unit trust, they issue units, since these schemes lack legal personality [Adema 2009:12]. If the fund is set up as an investment company, which is the incorporated business entity, it is the *shares* of UCITS that are issued[13].

In the common fund, the asset management is carried out in accordance with its founding documents with a legal title to such assets being held by the scheme itself. All income received by UCITS is then distributed among investors. These rules also pertain to investment companies. Within the unit trust, the corpus (familiarly referred to as the trust property) is held by a person empowered to administer such assets, aka the trustee, who exercises this right in favor of the scheme's beneficiaries and not in his or her own interest, unless trust agreement specifies otherwise.

In Luxembourg, which is a major European hub for investment funds (most of which are classified as umbrella ones [Hazenberg 2013:121]), UCITS fraction of the financial market has seen a significant development. As of 2021, Luxembourg accounts for 36 % of the European sub-sector for UCITS schemes, amounting to € 4.7 trillion in assets[14]. From a legal standpoint, Luxembourg domiciled UCITS may be set up as: 1) common funds (*"fonds commun de placement"*), which, having no legal identity of their own, shall be managed by Luxembourg MCs (or by MCs situated in other Member States of the EU); and 2) investment companies with variable capital (*"société d'investissement à capital variable"*) or fixed capital (*"société d'investissement à capital fixe"*), which are both constituted as artificial bodies [Grec, Marquais 2020:403].

It shall be mentioned that, despite the absence of direct equivalents of the funds under consideration in the Russian Federation, some prominent Russian financial institutions have embraced the benefits offered by this concept by having their own UCITS funds registered in the European Union. For instance, in 2014, the MC "Sberbank Asset Management" (now known as the MC "Pervaya") incorporated two funds within the territory of Luxembourg, namely: Sberbank Russian Equity Fund and Sberbank Russian Fixed Income Fund, which, correspondingly, invested in shares and bonds of domestic companies[15]. Both of these schemes were incorporated as UCITS ones and, pursuant to Luxembourg legislation, assumed the legal form of SICAVs. Although both funds ceased to exist in 2023, the establishment of such funds serves as a testament to the reliability of UCITS schemes as collective investment vehicles.

[12] ZEW/OEE: Current Trends in the European Asset Management Industry Report. Lot 1. 2006. P. 9. URL: https://web.archive.org/web/20180505175850/http:/ec.europa.eu/internal_market/ investment/docs/other_docs/report_en.pdf (accessed date: 12.12.2024).

[13] CESR Consultation Paper on MiFID complex and non-complex financial instruments for the purposes of the Directive's appropriateness requirements, May 2009. – *CESR*/09-295. P. 18.

[14] EFAMA: Fact Book 2022. Brussels, June 2022. P. 21. ГRL: https://www.efama.org/sites/default/files/files/Fact%20Book%202022%20lowres_2.pdf (accessed date: 10.12.2024).

[15] IPE D.A.C.H. Asset Management Guide 2014. Sberbank Asset Management. 2014. P 2. URL: https://www.institutional-investment.de/uploads/tx_instamg/176-177-Sberbank-final.pdf (accessed date: 09.02.2025).

The latter is also substantiated by the fact that numerous US corporations, functioning in the country's financial market, have also taken notice of the UCITS brand, introduced under the authority of the European legislature. Say, Goldman Sachs, world-renowned investment bank, has established the Goldman Sachs ETF ICAV (Irish Collective Asset-Management Vehicle), which, being domiciled in Ireland, encompasses at least 10 sub-funds, operating as separate UCITS. These funds engage in diverse range of investments, spanning from green bonds to bonds issued by the government of China.

The type of security instruments issued by UCITS rests on the legal form of such CISs. At the EU level, there is currently no legislation, that could arrange miscellaneous share classes in a sufficient, carefully ordered fashion. As a result, a multitude of approaches to addressing this issue, which have emerged at the national level, have been implemented. With this issue having been raised on several occasions by the European Securities and Markets Authority (ESMA), following extensive debate in 2014[16] and 2016[17], two documents, which endeavored to delve into this matter, were made public. In 2017, ESMA published its opinion on "Share classes of UCITS"[18], having this concept explicated as "different types of units or shares, belonging to the same UCITS", which "attribute different rights or features to sub-sets of investors in relation to their investment", despite the fact that all investors contribute their funds to a single investment portfolio. In other words, distinct share classes, existing within a single fund, to a certain extent allow for the "individualization" of investment strategy of a specific investor, albeit this matter is predominantly governed by the soft law of the EU and domestic legislation of the EU Member States.

A unique status of UCITS schemes is also contingent upon the specific nature of those contributing to the CISs at issue. Since offers on the acquisition of units/shares of funds, falling under this category, as detailed above, shall be made publicly, the majority of those purchasing such assets are retail investors, who tend to adhere to more conservative investment practices and lack the expertise and skills required. Having acknowledged the substantial risks associated with the investments of the kind, the European legislator has provided for a series of safeguards to protect the legal rights and interests of non-sophisticated investors.

4. The Fundamental Rules Governing the Operation of UCITS Schemes

UCITS that intend to provide their services within the territory of the EU Member States, other than those, where such entities were established and obtained their license, shall submit the relevant *notification* to such countries. This requirement, introduced as a part of the initial UCITS Directive, has proven its efficacy over time on a market-wide scale, enabling numerous financial institutions with a "European passport" to conduct their operations throughout the EU. While taking its first steps, the UCITS sub-sector encountered challenges, related to protectionist measures employed by some states, leading to delays in obtaining a special permit to carry out investing activities in the host Member States, to discrepancies in the national marketing rules, so as to the lack of convergence in terms of the supervisory practices, thus, giving rise to uncertainty within the sub-sector. Consequently, the impediments for trans-border execution of UCITS activities persisted for 24 years, spanning from 1985 to 2009.

With the Directive 2009/65/EC entering into force, the fundamental modification as to the existing notification procedure was introduced. Instead of the burdensome procedure, whereby the UCITS should have notified the host Member State's supervisory authorities on the intent to conduct its activities there, it is the appropriate governmental body of UCITS home Member State, which is now bound to forward such notice. The aforesaid alteration has eliminated the possibility of the host country imposing excessive requirements on the schemes involved, thereby ensuring compliance with domestic legislation of the host. This rule has enhanced the efficiency of the sub-sector by having reduced the transaction costs, which, in its turn, facilitated the creation of the level playing field and promoted fair competition among UCITS funds both within and outside the territory of the EU [Krupa 2024:664].

To be more specific, the entire simplified notification procedure may be now broken down into two steps.

Step 1. A UCITS (or its management company) notifies the financial supervisor of the state of such undertaking's origin. The competent body of the home country shall, within 10 business days

[16] ESMA: Discussion Paper: Share classes of UCITS, 23 December 2014. – *ESMA*/2014/1577.
[17] ESMA: Discussion Paper: UCITS share classes, 6 April 2016. – *ESMA*/2016/570.
[18] ESMA: Opinion: Share classes of UCITS, 30 January 2017. – *ESMA*-34-43-296.

of receiving the notice, direct it to the appropriate agency of the country, where UCITS intends to provide services. Note should be made here as regards the Commission, adopting a range of supplementary regulations and directives, which clarify the specific provisions of the legal act under analysis. One such example is the (implementing) Commission Regulation (EU) No 584/2010 of 1 July 2010[19] on the standard notification form and the exchange of information between competent authorities, covering the procedure for and the content of notification. As it is inferred from the title, this Regulation provides for the *standard notification form*, which the home supervisor shall send to the host authority. The form enclosed to the Regulation as Annex I must include: the undertaking's name, its compartments (if any), scheme's constituent documents, details requested by the competent bodies of the host Member State, etc. Pursuant to Art. 3 of the Regulation 584/2010 the home supervisor is empowered to communicate the standard form of notice via E-mail[20].

Step 2. The competent body of the host MS undertakes to confirm the receipt of such notifications within five working days. As soon as it has been brought to the attention of the UCITS that the notices explicated herein have been *submitted* to the appropriate governmental agency of the host Member State, this entity is deemed to have been granted the right to commence its activities in host country. Therefore, UCITS are now vested with the power to operate in the host Member States of the EU without awaiting regulatory approval[21]. In this regard, the intention of the European legislator is obviously that of addressing the artificial obstacles, that may arise from the insufficient level of approximation of supervisory practices.

Still, where the enforcement practices applied by the supervisory bodies have been further refined, some Member States of the EU act inconsistently. Say, in 2012 the Irish Funds Industry Association indicated that "the approach taken by some countries has been that a UCITS is not permitted to access the market until it has been notified by the home regulator that the host Member State has received the complete notification package"[22]. The host has five business days to notify the home of the *receipt* of such notifications, resulting in UCITS waiting a maximum of 15 business days upon the submission of the identified instruments to access the market of the host country. The foregoing circumstances contravene the provisions of the Directive, being deemed incompatible with the smooth functioning of the SMFS fund industry.

Despite this, the degree of harmonization of legal relations affected by the 2009 Directive demonstrates the legislative body's intent to reduce the number of such limitations, which stem from the insufficiency of supervisory convergence. Besides, a deliberate movement towards the unification of the legal basis evidences that the regulatory approach taken within the sub-sector for UCITS funds is suited to the needs of the time and may serve as an example of transition to the second phase in the development of the EU SMFS [Kasyanov, Kachalyan 2024:2]. The simplified notification procedure has significantly decreased the administrative burden on the relevant undertakings, however certain restrictions regarding the marketing of UCITS remain. To facilitate the admission of foreign undertakings of the kind to the market of the host country, the 2009 Directive requires the EU nations to ensure unimpeded access to the internal regulations, governing their marketing practices, through Internet. Such acts shall be published in English, which in Art. 5(7) of the Directive is discreetly referred to as "a language customary in the sphere of international finance"[23].

[19] Commission Regulation (EU) No 584/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities. – *OJ L* 176. 10.7.2010. P. 6-27.

[20] See, e.g., National rules for marketing of units of UCITS units/shares in Hungary and other specific national regulations related to the notification procedure. P. 7. URL: https://www.mnb.hu/ letoltes/national-rules-for-marketing-of-units-of-ucits-units-1.pdf?clckid=abe15c79 (accessed date: 05.12.2024).

[21] Buttigieg C. The development of the EU regulatory and supervisory framework applicable to UCITS: a critical examination of the conditions and limitations of mutual recognition. DPhil in Law Thesis. University of Sussex. 2014. P. 169.

[22] Irish Funds Industry Association. Consultation Document UCITS, Product Rules, Liquidity Management, Depositary, Money Market Funds, Long-term Investments. Brussels, 18 October 2012. P. 39. URL: https://web.archive.org/web/20220118234512/https://ec.europa.eu/finance/consultations/2012/ ucits/docs/contributions/registered-organisations/irish-funds-industry-association_en.pdf (accessed date: 03.12.2024).

[23] Directive 2009/65/EC. Op. cit.

A unique position in terms of the governance of UCITS activities is held by the policy on mergers. Before delving into the analysis of the proposed mechanism, it is necessary to justify the rationale behind harmonization in this area. The fact is that the stock market – not only that of the EU – is generally arranged in the manner, whereby the fund's expenses are reciprocally proportional to its size. That is, the larger the net asset value of the CIS, the lower the cost of the services it provides. In 2007, the Commission raised concerns regarding the average size of the European fund being one-fifth that of the American fund[24], with 54 % of European schemes having managed the assets worth less than € 50 million, at the end of 2004. All these resulted in the Europe-domiciled investors having to pay more than their American counterpart. Relatively modest UCITS asset value hindered the economic growth, reduced the opportunities for such CISs and affected the interests of private investors. Through the introduction of the mechanism for merger, the costs incurred by such schemes, in conjunction with various estimates, could decrease by € 8,6 billion per annum[25].

For this purpose, the UCITS Directive provides for two types of mergers: 1) cross-border merger of at least two UCITS schemes set up in different states of the EU, and 2) domestic one, which implies that at least two undertakings, established in the same Member State, merge into one UCITS. In the latter case, no less than one of the UCITS involved in such reorganization shall have authorization to conduct its operations in another Member State of the EU [Stefanini 2015:25], or, by virtue of Art. 2(1)(r), shall be notified subject to the provisions of Art. 93.

Given the diverse legal traditions of the Member States, the right to determine the *methods of merger* is reserved by the 2009 Directive with the aforementioned states, thus, leading to the imposition of certain constraints regarding the legal form of the undertakings under analysis. The latter is the case, where the laws of some of the EU Member States do not imply that UCITS may choose between all three legal forms outlined above, e.g., in countries that belong to Romano-Germanic legal system, which constitute the vast majority of the EU nations, unit trusts are less common in contrast to mutual funds and investment companies, meaning that in such states mergers are possible, albeit effectuated with due regard for the forms of funds recognized by the legal framework of a jurisdiction. In order to ensure the unhindered operation of the mechanism at issue, the Directive places the Member States under an obligation to acknowledge cross-border mergers whatever legal structure or mode of merger have been opted for by the parties involved.

To protect the investors' interests, the Directive 2009/65/EC sets out a range of prerequisites to be met prior to a merger. These requirements entail, *inter alia, procuring authorization* from the pertinent regulatory body of the home country of UCITS, with regard to which the agreement has been executed and the merger is being undertaken. This is a significant regulatory provision, since the very process of amalgamation may have a stronger impact on the unitholders of such undertaking. As indicated in Art. 39(3) of the Directive, this process shall be overseen in close cooperation with the relevant authorities of the states of origin of the entities involved. Furthermore, Art. 42(1) of the 2009 Directive introduces the rule regarding mandatory *monitoring of mergers* of UCITS by a depositary or by an independent auditor. In having its activities carried out, the auditor shall adhere to the provisions of the Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts[26]. Prior to the conclusion of a relevant transaction, the depositary or the independent auditor shall draw up the report, estimating the agreement for merger upon the following criteria: the standards employed by the parties to determine the value of assets and liabilities of the schemes, the method for the exchange ratio calculation, etc.

In order to obtain approval from the relevant authorities, UCITS is required to fulfill another condition precedent prescribed in the Directive. All information regarding the merger shall be provided in a transparent manner, that is to say, not only must it be available to the competent authorities, but also to

[24] European Commission. Initial orientations for discussion on possible adjustments to the UCITS Directive (Exposure Draft). – P. 2. URL: https://web.archive.org/web/20180525010716/http: /ec.europa.eu:80/internal_market/investment/docs/legal_texts/orientations/mergersexposure_en.pdf (accessed date: 05.12.2024).

[25] Ibid. P. 5.

[26] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC. – *OJ L* 157. 9.6.2006. P. 87-107.

the investors of UCITS. As far as it is concerned with the cross-border merger, the foregoing requirement is especially important as it allows to address or mitigate the risk of information asymmetry, which may increase considerably, where retail investors of the UCITS involved in reorganization lack proficiency in the language of UCITS home state.

It is due to this reason that the Commission adopted the (implementing) Directive 2010/42/EU of 1 July 2010[27], which clearly sets forth the requirements on what data shall be communicated to investors: 1) the analysis of all expenses the investors might incur; 2) the details specifying any changes in the scope of unitholders' rights which may result from the merger; 3) the current specimen of the key investor information document of target UCITS, etc.

In some countries mergers may take place exclusively upon the result of the vote. In such cases, the unitholders shall be informed of the voting procedure. In compliance with Art. 7 of the Directive 2010/42/EU, this information may be communicated to the undertakings' investors either in the form of hard copy or through any other durable medium, provided that the investors have explicitly stated such willingness. All preliminary requirements designated hereinbefore shall serve as additional safeguards for the protection of retail investors [Annuziata 2019:7], the practical application of which enables consumers of UCITS services to make informed investment decisions.

5. Conclusion

For approximately 40 years, European lawmakers have been enhancing the UCITS legal framework through either the adoption of amendments to the existing directives, or the enactment of novel legislation specifically tailored to address the needs of the sub-sector. To date, there have been six revisions to the 1985 Directive, which have paved the way for the formation of the modern compendium of rules, governing the activities of one of the most significant actors within the European collective investment market. The global economic and financial crisis of 2008–2009 made European legislative bodies take decisive action in the financial market. Where once EU Member States could hinder financial integration, taking into account parochial interests inherent to their national markets, the bitter aftermath of the crisis underscored the necessity for deeper cooperation in this sensitive area, especially for retail investors. All these substantiates the *meticulous design of the legal framework for UCITS schemes.*

The concept of European passport, the introduction of which has significantly altered the balance of interests on the market, constitutes one of the underlying principles of such regulation. Upon obtaining the passport, UCITS gains the right to conduct its operation within the entire SMFS. As time passed, having recognized its substantive benefits, the lawmakers of the EU expanded the scope of this concept to encompass management companies, *effectively eliminating another barrier to the free movement of UCITS within the Union.*

The legislative focus on this area shall also be viewed in light of the unique nature of entities investing in UCITS. The maintenance of a due level of protection for the rights and interests of private investors is a paramount objective of the regulatory framework governing UCITS activities, since collective investment typically falls outside the purview of such persons, thereby increasing the likelihood of potential risks. To prevent such scenarios, a comprehensive scope of investor protection measures has been implemented at pan-European level, namely: specific categories of funds exempt from the relevant regulation have been clearly delineated; stringent requirements pertaining to the volume of investments in specific assets have been imposed on the majority of complex UCITS schemes, which may be classified not only on the basis of their investment object, but also their organizational structure and legal form.

The introduction of the procedure for the notification of the host Member State of UCITS intention to carry out its operations therein (which constitutes the fraction of the regulatory design granting various financial institutions acting within the SMFS full access to the benefits afforded by the European passport) and subsequently of the simplified procedure have significantly reduced the expenses incurred by UCITS funds. The latter was due to the inception of a requirement under which the competent authorities of the host shall be notified by the respective bodies of the home state. Being some sort of a novelty, this imperative serves as one of the means of fostering *fair competition among UCITS schemes within the EU,* which is essential to maintain an adequate level of investor protection.

[27] Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure. – *OJ L* 176.10.7.2010. P. 28-41.

Adoption of the procedure for merger of UCITS, of both cross-border and domestic type, prompted by the Commission's concerns regarding the average size of European funds, has led to the enhancement of bona *fide competition between the aforesaid undertakings and various types of funds operating within the US*. This advancement is especially important in terms of safeguarding the investors. To ensure transparency and accountability, several measures have been put in place. These include obtaining the approval from home supervisory bodies of target UCITS; monitoring of reorganization through a designated depositary or independent auditor; communicating the details of merger to the undertakings' investors; as well as addressing information asymmetry being resultant from the investors' lack of knowledge of the language utilized in the agreement, etc.

The establishment of a competitive environment with American funds, the rise of new complex fund types qualified as UCITS at the supranational level, the facilitation of the procedures enabling such undertakings to engage in cross-border activities, together with the implementation of the European passport, all further a goal of the legal framework for such undertakings, i.e., *to ensure efficacy and uniformity of safeguards vested with UCITS investors.*

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