



Bundesverband Investment
und Asset Management e.V.

Mr. Carlos Tavares
Chair of Review Panel

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9 April 2009

Consultation Paper on Proposals for the Review Panel Work Plan (CESR/09-088)

Dear Mr. Tavares,

BVI¹ is grateful for the opportunity to comment on possible priorities for the future work of the CESR Review Panel. The current consultation is yet another example of CESR's commitment to transparent proceedings and proper involvement of market participants, and we would like to seize the opportunity to once again endorse CESR in this notable attitude.

In terms of the proposed work streams for 2009, we would like to focus our remarks on the following two issues which are of particular interest to the German fund industry:

1. Scrutiny of liability regimes under the UCITS Directive (subject no. 8 in the appendix)

a. Liability of the depositary

The Madoff bankruptcy and its repercussions for a handful of UCITS have given rise to general concerns about the liability of UCITS depositaries for the existence of fund assets. Against that backdrop, it appears appropriate to conduct a thorough analysis of the national liability regimes for depositaries in order to verify compliance with the provisions of the UCITS Directive. Any consequences to be drawn from

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¹ BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 92 members manage currently assets of nearly EUR 1.5 trillion both in mutual funds and mandates. For more information, please visit www.bvi.de.

such an analysis in regulatory terms must put a clear emphasis on protecting the interests of investors.

In order to pay due regard to the interests of UCITS investors who are not involved in the selection of sub-custodian by the depositary but bear the risk of ultimate losses in case of lacking civil liability, the criteria for due selection of the sub-custodian should be clearly specified at EU-level and, in particular, should account for the following aspects:

- Assignment of the sub-custody function to a third party must not lead to a situation where fund management and custody are mingled within one corporate group or performed by entities otherwise affected by structural conflicts of interest. Negligence in execution of the selection duty by the depositary should be irrefutably presumed in this case.
- Presumption of negligence should also apply where the custody function is assigned to a third party in spite of the depositary maintaining a branch in the respective jurisdiction. In these circumstances, however, the depositary should be allowed a proof of exoneration in order to demonstrate due diligence in the selection process.
- In addition, a rebuttable presumption should be also considered in cases where losses in clients' assets are prompted by fraudulent conduct on the part of the sub-custodian. After all, it is the depositary, not the individual investor, who is under the duty to perform due diligence on the selected entity and who under certain conditions might be capable of detecting and exposing the committed fraud. Thus, it appears not appropriate to encumber fund investors with losses which they have no means to escape.

We are confident that these considerations can significantly improve the safety net of the UCITS regime and concurrently, maintain the practicability and cost-efficiency of the depositary function in an international investment environment.

b. Further investigation of liability rules

Moreover, it appears unclear why the fact finding exercise on national liability regimes to be conducted by the Review Panel should also cover liability of the "promoter", "central administration agent", auditor and possibly other parties providing services to the UCITS. The terms "promoter" and "administration agent" have no legal meaning within the UCITS Directive and their understanding at national level should vary to a great extent (e.g. in Germany the function of a "central administration agent" is virtually unknown). The Commission's press release from 26



January 2001² focuses on the responsibility and liability of the UCITS depositary without even mentioning other contributors to the UCITS value chain. Also, the conduct of such parties has as yet not given rise to any problems or concerns in relation to investor protection. Therefore, we prompt the Review Panel to concentrate its efforts on the review of the depositary function in line with the Commission's request.

2. Cross-border issues related to the Transparency Directive

We are surprised that investigation of cross-border issues pertaining to the practical application of the Transparency Directive is raised as a question to market participants, but not reflected in the compilation of work streams to be dealt with by the Review Panel. Indeed, BVI members encounter severe difficulties in their cross-border investment activities due to divergent implementation of the Transparency Directive rules with regard to notification duties on major shareholdings. These divergences relate in particular to applicable notification thresholds, methods for calculation of holdings and rules for aggregation of voting rights. In Germany, for instance, the legislator has first decided to impose separate notification duties on voting rights (Art. 9, 10 of the Transparency Directive) and financial instruments (Art. 13), but has revised this decision in 2008 by introducing the opposite approach.

The lack of legal certainty in this very complex regulatory area which is being prompted by such incidents causes significant operational expenses to BVI members and other institutional investors and hampers effective allocation of assets within the Internal Market. For these reasons, we urge CESR to attach high priority to the scrutiny of national divergences in terms of notification duties under the Transparency Directive.

We hope that our remarks will help members of the CESR Review Panel to establish clear priorities for its future work and remain at your disposal for any questions you may have.

Yours sincerely

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Marcus Mecklenburg

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Dr. Magdalena Kuper

² Commission sets out steps to clarify the responsibilities of UCITS depositaries (IP/09/126) dated 26 January 2009.