

Z E N T R A L E R K R E D I T A U S S C H U S S

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Response of the *Zentraler Kreditausschuss* to the Consultation Paper

The role of CESR in the regulation and supervision of UCITS and Asset Management Activities in the EU

October 2003

Ref.:CESR/03-378b

Dear Mr. Demarigny,

as Zentraler Kreditausschuss¹ we would like to thank you for the opportunity to comment on CESR's consultation paper "The role of CESR in the regulation and supervision of UCITS and Asset Management Activities in the EU" (Ref. CESR / 03- 378b).

EXECUTIVE SUMMARY

- The German banking industry would like to point out that UCITS on the one hand and further, non-UCITS related asset management activities on the other hand constitute two separate fields which are in need of a separate supervisory treatment.
- Furthermore, the German banking industry would like to raise its concern that, to date, no mandate has been given to CESR for the creation of legally binding and uniform supervisory rules as regards those collective asset management activities that go beyond the regulatory scope of the UCITS directive.

Comments

More specifically, we would like to comment as follows on the consultation paper:

The involvement of the banking industry in the consultation procedure is of paramount importance. When it comes to UCITS, credit institutions are the most important facilitators, for example as sales agents or depository banks. And they run their own asset management activities both in terms of individual and collective portfolio management. Therefore, the banking industry has a vital interest in becoming involved in the consultation process and in the further approach adopted with regard to this issue as well

¹ The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VDH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

as in an adequate representation of the banking industry's interests in the Expert Group and, above all, in the Consultative Working Group.

1. UCITS and other portfolio management: Two separate issues

Since they involve very different issues, it is doubtful whether the entire range of issues involved in the UCITS on the one hand and in asset management activities on the other hand can be treated within one and the same working group. Individual portfolio management which is primarily offered by banks is regulated under the Investment Services Directive (ISD) and is subject to its own specificities as opposed to the field of collective asset management, which is partially covered by its own specific regulatory framework resulting from the UCITS directive. Although, in theory, both areas involve fiduciary management of investor assets, and notwithstanding that, on these grounds, their regulation should not feature any inconsistencies, *de facto* both areas involve two highly heterogeneous business models requiring a highly differentiated, specific supervisory approach. Simultaneously, this means that they also need to be singled out during the preparatory and supporting practitioners' consultations in the run-up to the supervisory decision making process. Otherwise, the specific nature of UCITS related asset management activities might run the risk of overshadowing the debate which would thus fail to reflect the specificities of the bank-side related asset management activities.

The aforementioned mandate of ECOFIN to CESR covers UCITS. Formally speaking, this mandate does not warrant an expansion to include a broad definition of any asset management activities. The consultation paper fails to provide a definition of the concept of asset management activities. Apparently, this term is used as a synonym for the term 'portfolio management' as defined in the ISD. Yet, the ISD's focus is clearly on individual portfolio management whilst the term in the consultation paper apparently relates to collective portfolio management. The Paris hearing on 20 November 2003 has shown that it is CESR's intention to achieve comprehensive convergence of prudential supervision regulations well beyond the scope of the UCITS.

2. Lack of a political mandate for CESR to create uniform supervisory standards

Yet, this is the crux of the political precariousness of such an approach: to date there is an absence of any political mandate for CESR to create binding and uniform supervisory rules for the field of collective asset management (buy side), which would go beyond the regulatory scope of the present UCITS directive. As far as the UCITS directive is concerned, there is no such mandate, contrary to the empowerment under the forthcoming new Investment Services Directive. The new ISD will most likely contain a clear mandate for the Commission to ensure a ‘uniform application’ or at least a ‘consistent application’ (at least this is the wording after the first reading of the EU Parliament) in the field of the conduct of business rules at Level Two of the Comitology procedure. In the case of the UCITS such a mandate is missing. Instead, the EU Commission has been given the task to inform the Council and Parliament by February 2005 on the status of the implementation of the directive within the various Member States. Only then will the political institutions decide whether or not there is a need for further regulatory action towards a maximum degree of harmonisation of prudential supervision rules in the field of collective asset management. CESR – e.g. through a premature self-regulation by way of prudential supervision standards - should not pre-empt this political process.

As far as individual asset management is concerned, it is doubtful whether this should be tackled within the framework of the envisaged convergence process prior to the finalisation of the ISD. It would, in any case, be judicious for CESR to wait for an official mandate warranting inclusion of asset management activities. Once this mandate is obtained and in the light of the new ISD, the German banking industry recommends as a first step to review the proposals made by the CESR group chaired by Jacob Kaptein as regards the Conduct of Business paper.

QUESTIONNAIRE

Do market participants share the views of CESR on the need for its future involvement in the areas of UCIT and asset management?

Since they involve very different issues, it is doubtful whether the entire range of issues pertaining to the UCITS on the one hand and asset management activities on the other hand can be treated jointly. The individual portfolio management which is primarily offered by banks is regulated under the ISD and is subject to its own specificities as opposed to the field of collective asset management for which partially a specific regulatory framework has been set up within the UCITS directive. Although, in theory, both areas involve fiduciary management of investor assets, and notwithstanding that, on these grounds, their regulation should not feature any inconsistencies, *de facto* both areas involve two highly heterogeneous business models requiring highly differentiated, specific supervisory regimes.

Do market participants agree with the proposed role of CESR in facilitating convergence of the regulation and supervision on the “buy side”?

The aforementioned mandate from ECOFIN to CESR covers UCITS. Formally speaking, this mandate does not warrant an expansion to include a broad definition of any asset management activities. The consultation paper fails to provide a definition of the concept of asset management activities. Apparently, this term is used as a synonym for the term ‘portfolio management’ as defined in the ISD. Yet, the ISD’s focus is clearly on individual portfolio management whilst the term in the consultation paper apparently relates to collective portfolio management. It has become clear during the Paris hearing on 20 November 2003 that it is CESR’s intention to achieve comprehensive convergence of prudential supervision regulations well beyond the UCITS scope.

Yet, this is the crux of the political precariousness of such an approach: to date there is an absence of any political mandate for CESR concerning the creation of binding and

uniform supervisory rules in the field of collective asset management (buy side), which would go beyond the regulatory scope of the present UCITS directive. As far as the UCITS directive is concerned, there is no such mandate, contrary to the empowerment under the forthcoming new Investment Services Directive. The new ISD will most likely contain a clear mandate for the Commission to ensure a 'uniform application' or at least a 'consistent application' (at least this is the wording after the first reading of the EU Parliament) in the field of the conduct of business rules at Level Two of the Comitology procedure. In the case of the UCITS, such a mandate is missing. Instead, the EU Commission has been given the task to inform the Council and Parliament by February 2005 on the status of the implementation of the directive within the various Member States. Only then will the political institutions decide whether or not there is a need for further regulatory action towards a maximum degree of harmonisation of prudential supervision rules in the field of collective asset management. To the extent to which its European-wide interpretation cannot draw upon substantive law provisions, CESR should not pre-empt this political process, e.g. through premature self-regulation by way of prudential supervision standards. For instance, as one European legal benchmark, the Rules of Conduct neither relate to the UCITS nor to a wider definition of asset management. Yet, without such a sound basis, we feel that consistency in a European-wide regulation for the purposes of prudential supervision convergence will become virtually impossible. Therefore, until there is an official mandate warranting such an exercise, we must seriously question any expansion of CESR's remit to include asset management.

Do market participants agree with the list of general points and the definition of priorities and possible input by CESR as set out above?

Are there any areas on which CESR should concentrate?

Which areas of work do you consider to be a priority?

Please confer the foregoing remarks concerning the need for a separate treatment of UCITS and asset management involving the need for a separate preparation, evaluation and prioritisation of the aforementioned list. Furthermore, we would once more like to refer to the missing mandate for an investigation of the asset management field commending a confinement to the UCITS field.

Concerning the depositories listed under 2.2.B, the European Commission is obviously preparing a dossier which will cover the scope of a European passport for investment firms' depository banks. In order to avoid double regulation and duplication of work, any action in this field should not pre-empt the European Commission's work.

Do Market participants agree with this approach?

Do Market participants agree with the approach to consultation?

Do Market participants agree to create a specific Consultative Working Group in order to reflect the specificity of the "buy side"?

Since they involve very different issues, it is doubtful whether the entire range of issues involved in the UCITS on the one hand and in asset management activities on the other hand can be treated within one and the same working group. Individual portfolio management is regulated by the ISD and has its own idiosyncrasies when compared to collective asset management. Instead of indiscriminately treating them in the same way *nolens volens*, which is an impression that is created as a result of the buzz-word 'supervisory convergence process', we feel that it will be necessary to differentiate between these two issues. Simultaneously, this means that they also need to be singled out during the preparatory and supporting practitioners' consultations in the run-up to the supervisory decision making process. Otherwise, the specific nature of UCITS related asset management activities might run the risk of overshadowing the debate which would

thus fail to reflect the specificities of the bank-side related asset management activities. The banking industry needs to be adequately represented both in the practitioner's consultation on the UCITS and in the practitioner's consultations on the asset management side.

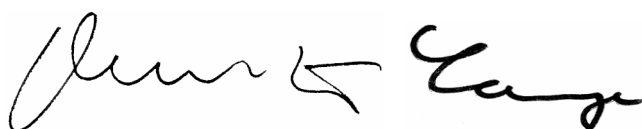
Do Market participants see other areas of expertise that the Consultative Working Group should benefit from?

Although they are specifically listed under 2.2 B in the list of general points, depositories are not included in the remit of neither the Consultative Working Group nor of the Expert Group. Depositories form a business division in their own right and in Germany this business division belongs to the banking area where, consequently, it is subject to the corresponding regulations. Obviously, the European Commission is currently investigating the field of activity of UCITS depositories with a view to a European-wide regulation. It is recommended to wait for the outcome of this project in order to prevent double regulation or duplication of work for the regulated parties. In the event that CESR should subsequently receive a mandate to carry out regulatory work in this specialist area, it will become indispensable to draw upon practitioners' technical expertise.

Yours sincerely

For and on behalf of the Zentraler Kreditausschuss
Federal Association of German Cooperative Banks/
Bundesverband der Deutschen
Volksbanken und Raiffeisenbanken e.V.

by proxy

The image shows two handwritten signatures in black ink. The signature on the left is 'Dr. Pleister' and the signature on the right is 'Dr. Lange'. There is a small arrow pointing from the 'Dr. Lange' signature towards the 'Dr. Pleister' signature.

(Dr. Pleister)

(Dr. Lange)