ZENTRALER KREDITAUSSCHUSS

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VERBAND DEUTSCHER PFANDBRIEFBANKEN E.V. BERLIN

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Response to CESR's Call for Evidence on possible Implementing Measures concerning the Future UCITS Directive

AZ ZKA: EG-INV-RE

AZ BVR: EG-INV-RE

Dear Mr Comporti,

We are grateful for the opportunity to comment on CESR's Call for Evidence. Please find enclosed our comments to the CESR's consultation paper. In case of any query, please do not hesitate to contact the signer on the right.

Yours sincerely,

on behalf of the Zentraler Kreditausschuss
Bundesverband der Deutschen
Volksbanken und Raiffeisenbanken e.V. BVR
National Association of German Cooperative Banks

by proxy 

Daniel Selle

by proxy 

Dr. Diedrich Lange

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Response to
CESR's Call for Evidence on possible Implementing Measures concerning the Future UCITS Directive

March 2009

* 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 Pfandbriefbanken (VdP), for the mortgage banks. Collectively, they represent more than 2,200 banks.

The ZKA welcomes the opportunity to actively contribute to CESR's Call for Evidence on possible implementing measures concerning the future UCITS Directive and focuses its response on the following questions:

Detailed questions
I. Scope of the Commission's implementing powers (Articles 23(6) and 33 (6))
"5. The Commission may adopt implementing measures on the measures to be taken by a depositary in order to fulfil its duties regarding a UCITS managed by a management company situated in another Member State, including the particulars that need to be included in the standard agreements to be used by the depositary and the management company as referred to in paragraph 4.
..."
II. Questions
1. CESR is requested to advise the Commission on the specific conditions that a depositary must meet to fulfil its duties regarding a UCITS managed by a management company situated in another country.
2. CESR is requested to advise the Commission on standard arrangements between the depositary and management company and identify the particulars of the agreement between them that are required under Articles 23(6) and 33(6) and the regulation of the flow of information deemed necessary to allow the depositary to discharge its duties.
3. CESR is invited to consider the need to regulate through level 2 measures the law applicable to the agreement in order to remove legal uncertainty (whether the agreement should be governed by law of UCITS home Member State, management company home Member State or of any other Member State).

ad 1) The ZKA points to the fact that Art. 22 number 3 UCITS-Directive finally enumerates the tasks of the depositary even in the case of cross border business with a management company situated in another member state using the management passport and that in general no specific conditions for the business of depositaries are to be thought of in this situation. Otherwise the level playing field for depositaries could be distorted. We do not see any particulars to be regulated through implementing measures.
In 2008 CESR advised the Commission on its concept of the "local point of contact in case of common funds"[1]. The concept foresees several tasks to be fulfilled by the depositary in addition to the general functions of the depositary. In case of a refreshed importance of the concept of the depositary as the local point of contact for the clients of the cross border located investment company as well as the authorities, the ZKA criticizes the concept if it is meant to be *obligatory* for depositaries in case of cross border business with investment management companies using the fund

[1] CESR/08-867, CESR's advice to the European Commission on the UCITS Management Company Passport, October 2008, p.9, Box 3.

management passport. We like to point to the freedom of choice of the cross border service level agreement between the management company and the depositary which means that some of the above mentioned points *could* be but not *should* be part of the duties of the depositary in the home country of the respective fund. To take one example of CESR's concept, namely the smoothening of the cooperation with the authorities cross border as an obligation for the depositary, we would like to highlight that this is pointing in our eyes into the wrong direction because the direct exchange and coordination of information between the relevant authorities should be preferable to the indirect communication with both authorities through the intermediary as an interface.

ad 2) The "written agreement" which Art. 33 number 5 UCITS directive is demanding could be part of the service level agreement of an investment management company in Member State X using the management passport and the depositary in Member State Y. In our opinion, CESR should not generally define elements of or the whole of the service level agreement because this is up to the contract partners to decide. In any case the advice of CESR given to the Commission should be restricted to the possible addendum to the normal service level agreement (i. e. the one without management passport of the investment management company) in case of cross border business on the grounds of the management passport. But even in this case, the ZKA is of the opinion that, as explained above, no additional obligations should be created so that in fact the CESR advice could relate to value added services of the depositary for the management company in the context of the management passport. Here for example potential conflicts of interests could be relevant possibly calling for special advice.

More specifically on the written agreement to be signed between the depositary and the management company to define the flow of information necessary for the depositary to perform its function, it is essential that both the depositary and the management company, and not only the depositary, are in charge of producing the corresponding document. The management company should also be responsible for the definition of this information as it is directly implied in the application of the corresponding provisions.

ad 3) This task of CESR might be closely related to the mapping exercise CESR is currently fulfilling for the European Commission on the regulation of the depositaries in the different Member States because of possibly deviating regulations regarding the flow of information between the regulated firms and the authorities.

Regarding this mapping exercise, *the ZKA asks for a public consultation or at least public communication of CESR on the roadmap before it will be delivered to the Commission so that a chance to*

comment on the results will be given. CESR chose the same procedure with regard to the mapping exercise on clearing and settlement at the end of the last year[2].

However, the response to the above raised question of the European Commission will be rather the need for an improved cooperation between the authorities of the Member States instead of a patchwork of responsibilities of authorities.

As regards the agreement between the depositary and the Management Company in case of cross border management of the fund we propose the following. As the objective of this agreement is to allow the depositary to perform its duties in accordance with the fund's domicile rules, we estimate that the regulation of the fund should be applied to define its content. This principle should also prevent legal fragmentation that still prevails between the different Member States and consequently should contribute to eliminating arbitrage opportunities.

[2] See CESR 08-870, Preliminary draft technical advice by CESR in response to the mandate from the European Commission on access & interoperability arrangements, December 2008.

Content and presentation of KII (Article 78(7))

1. What is the KII to contain and how should this be harmonised at level 2? How should level 2 measures fulfil the requirements of the UCITS IV Directive to specify the content and form of KII in a detailed and exhaustive manner such that the document is sufficient for investors to make informed decisions about planned investments? This should be taken to include the methodologies CESR considers necessary for delivering the information disclosures CESR proposes for the KII (e.g. the methodologies for risk, performance and charges disclosures). CESR should be clear as to the requisite degree of harmonisation it considers necessary for these supporting methodologies.

2. What sort of cross-references to other documents or "signposts" might be permitted, apart from those which are directly referred to in the Directive, given that Article 78 states that "These essential elements shall be understandable by investor without any reference to other documents"?

3. To what extent and in what way should level 2 measures harmonise the detailed presentation of key investor information (such as the layout of the document, its length, headings to be used for sections, etc.)? (Detailed supporting material should be provided relevant to the approach proposed; for instance if CESR considers templates should be used in the implementing measures to harmonise presentation of the KII, then CESR should provide such templates as it thinks necessary in its advice). What supporting work does CESR consider necessary at level 3? How should the measures at level 2 balance the flexibility necessary for allowing the KII to effectively cover the specific characteristics of particular funds or groups of funds, with the necessary harmonisation of the document?

4. How should the KII reflect all the characteristics of the special cases outlined under Article 78(7)(b) that are relevant for the retail investor making an investment decision, for instance the characteristics of master feeder structures?

From a depositary point of view, we consider that CESR should clarify the role of the depositary regarding the KII. As the management company will be responsible for the production of the KII and for the information contained in all sections, the depositary should not have to re-validate this information. Such a process would be very time-consuming and costly for the depositary, so for the final investor at the end.

In this respect we recommend that the depositary only controls that the management company has effectively produced the KII with the appropriate format (i.e. a two-page document with all the sections mentioned in the UCITS Directive) and that this document has been transmitted to the competent authorities for approval of the UCITS fund.

We have no specific comments on the detailed content of the KII and the way to fulfil each section, except that this content should be harmonised as much as possible to avoid some fragmentation at the local level. The objective is not to repeat the situation encountered with the simplified prospectus which resulted in the emergence of specific country formats not adapted to promote the comparibility between all UCITS funds.

Furthermore, we suggest to include in the KII some information about when and to whom a global sub-delegation may have been given by the management company. This would allow to provide some transparency to investors on the way the UCITS fund is managed. This information could be included in the section referring to identification of the UCITS fund.

Finally we consider that a further sentence should be added in this section to clearly specify to investors that rules and regulations of the country where the fund is distributed will apply for all aspects related to the marketing of the fund. The KII should also indicate where these rules and regulations are available for having access to the corresponding information.

Detailed questions
I. Scope of the Commission's implementing powers (Article 61(3))
"'The Commission may adopt implementing measures specifying:
(a) the particulars that need to be included in the agreement referred to in paragraph 1.
..."
II. Questions
1. CESR is invited to advise the Commission:
a) on the useful and indispensable elements to be covered by the agreement between the depositaries of the feeder and the master UCITS and, if appropriate, the way they should be stipulated in order to satisfy the requirements under Article 61(1),
b) on a need to take account of specific circumstances (e.g. whether the depositaries of the feeder and the master UCITS are established in the same or in different Member States).
2. CESR is encouraged to provide the Commission with a draft model agreement.
3. Article 61(1) does not lay down whether and how the depositaries of the master and the feeder UCITS may choose the applicable law for the agreement. Given that the competent authorities of the feeder UCITS have to check the agreement, CESR is invited to reflect on any restrictions regarding the choice of the applicable law.

Ad 1-2) We like to point to the freedom of choice of the cross border service level agreement between the management company and depositary which means that some of the above mentioned points *could* be but not *should* be part of the duties of the depositary in the home country of the respective fund. It is not up to CESR to draft model agreements, but to the contract partners.
Ad 3) At this stage the roles and responsibilities of depositaries will remain different from one Member State to another (See our answer to question 3 above). Under these conditions the agreement to be set up between depositaries should remain flexible enough to compensate for the lack of harmonisation between the different legislative frameworks.

When required the depositaries should have the possibility to define on a bilateral basis the most appropriate way to cover their respective duties.

As mentioned in Article 60.1., the feeder fund or when applicable, the management company of the feeder fund will be in charge of communicating to the depositary of the feeder fund any information about the master fund and required for the completion of the duties of the depositary of the feeder fund. In these conditions the elements contained in the agreement between depositaries should states this principle and not create any unjustified obligations for depositaries of both funds.

In any case depositaries should not have to comply with obligations which are not part of their legislation.

Regarding the issue of the applicable law for this agreement we consider that the choice of the applicable law shall not prevent the depositaries of the feeders to manage every control their own regulation requests in case of such event.

Detailed questions
I. Scope of the Commission's implementing powers (Article 61(3))
"3. The Commission may adopt implementing measures further specifying the following:
(b) the types of irregularities referred to in paragraph 2 which are deemed to have a negative impact on the feeder UCITS.
...)."
II. Questions
1. When carrying out its tasks, the depositary of the master UCITS may not only detect irregularities in the master UCITS' business that are directly related to the aforementioned tasks of the depositary (e.g. detect that the valuation is not in line with the law or fund rules), but by chance the depositary may become aware of other irregularities in the course of carrying out its tasks.[23]
CESR is invited to advise the Commission on whether also those irregularities that the depositary detected in the course of carrying out its tasks should be relevant in this context.
2. CESR is invited to provide the Commission with a list of irregularities the depositary of a UCITS may detect and to categorize these irregularities.

Ad 1-2) In such conditions only the depositary of the master fund should report to its home state regulator, the feeder fund, the management company of the feeder fund and the depositary of the feeder fund.

We consider that such information should only be limited to irregularities on the NAV calculation with a potential significant impact on the valuation of the feeder fund.

Detailed questions

I. Scope of the Commission's implementing powers (Article 64(4))

" The Commission may adopt implementing measures specifying:
(b) if the feeder UCITS transfers all or parts of its assets to the master UCITS in exchange for units, the procedure for valuing and auditing such a contribution in kind and the role of the depositary of the feeder UCITS in this process.
..."

II. Questions

CESR is invited to advise the Commission on the elements of the procedure for valuing and auditing a contribution in kind while reflecting, in particular, on the following elements:

a) similarities between a merger and a contribution in kind which may justify modelling the procedures for a contribution in kind on Article 42,

b) role for the depositaries of the feeder and the master UCITS in a contribution of kind,

c) the date for valuing the assets and liabilities of the feeder and the master UCITS and for calculating the exchange ratio,

d) the effective date for the contribution in kind.

Ad a-d) We like to point to the freedom of choice of the cross border service level agreement between the management company and depositary which means that some of the above mentioned points *could* be but not *should* be part of the duties of the depositary in the home country of the respective fund.