


POSITION PAPER



ESBG response to CESR call for evidence on possible implementing measures concerning the future UCITS Directive

March 2009



The European Savings Banks Group (ESBG) welcomes the opportunity to comment on the issue of possible implementing measures concerning the future UCITS Directive (UCITS IV). The ESBG would like to take this opportunity to acknowledge CESR's valuable work in the preparation of the UCITS IV Level 1 Directive, in particular as regards the management company passport. The ESBG also refers to CESR's work as regards the Key Investor Information Disclosure Document.

Looking ahead, CESR's agenda is challenging with a deadline of 30 October 2009 for the delivery of its technical advice. The timeframe will remain tight in view of the general deadline of 1 July 2011 as the end of the transition period for the UCITS IV Level 1 Directive and the Level 2 measures. The ESBG would like to reiterate the importance of this timely process, which will finally bring the long awaited changes in the UCITS field.

The ESBG would like to comment on some issues contained in the consultation document, and would simultaneously like to ask to be consulted again on CESR's draft technical advice in advance of its submission to the European Commission:

Part I Management Company Passport

Articles 23 and 33: Measures to be taken by a depositary of a UCITS managed by a management company on an investment company situated in another Member State

Question 1: CESR is requested to advise the Commission on the specific conditions that a depositary must meet to fulfill its duties regarding a UCITS managed by a management company situated in another country.

Answer: The ESBG supports the Commission's view that depositaries play an essential role in safeguarding the interests of investors. The ESBG agrees with CESR that – as a precondition enabling the depositor to fulfill its duties – the management company needs to provide the depositor with information on the investment activities carried out on behalf of the UCITS. In this context the ESBG also agrees that the depositary must have guaranteed access to the books and records of the fund, and that ensuring this should be covered in particular. Furthermore the ESBG would like to stress that during the period preceding the adoption of Level 2 measures the depositaries should also have guaranteed access to any other documents required by the national legislation in force in order to allow the depositary to fulfill its duties.

The ESBG would like to clarify that the depositors' possible role as a local point of contact¹ is independent from the above discussion.

Question 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.

¹ In CESR's advice to the Commission as regards the management company passport CESR says in box 3:

“If the management company of a common fund is not established in the UCITS home Member State, it should appoint the depositary or a financial institution subject to prudential supervision established in that State, including through a branch, to act as a local point of contact for investors and the UCITS competent authority.”

Answer: The ESBG welcomes the fact that the Commission requests CESR to reflect on standard arrangements arising from Articles 23 (6) and 33 (6) and the regulation of the flow of information deemed necessary to allow the depositary to discharge its duties. Having in mind the ESBG's answer to Question 1, the importance of the arrangements between the depositary and the management company in the above mentioned context becomes obvious. The ESBG considers that such arrangements should include all the necessary clauses to avoid legal uncertainty and to clearly specify that the depositary should have guaranteed access to all the documents necessary to perform its duties.

The ESBG would like to clarify that the standard arrangements in this specific context should not cover the whole of the service level agreements between both contract partners. It should rather be seen as an addendum to the normal services agreement (i.e. the one without management company passport) in cross-border cases.

Question 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).

Answer: The ESBG considers that the agreement should clearly specify the law applicable to its provisions. The ESBG believes that these agreements should always be governed by the law of the UCITS home Member State for the following reasons:

- the depositary has to be established or registered in the fund's home Member State,
- the depositary has to perform its duties in accordance with the fund's domicile rules.

Part II Key Investor Information

Article 81 (2): Specific conditions to be met when providing KID in a durable medium other than paper

Question: CESR is invited to advise the Commission on the specific conditions which need to be met when providing KID in a durable medium other than on paper or by means of a website which does not constitute a durable medium.

Answer: The ESBG believes that in order to achieve the necessary level of consistency, the definition of "durable medium" provided for in the Commission Directive 2006/ 73/ EC (MiFID) should be the only one to be used in this case. Therefore "durable medium" should mean "any instrument which enables a client to store information addressed personally to that client in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored".

Part III Fund mergers, master-feeder structure and notification procedure

Article 61 (3): Agreement between depositaries

Question 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).

Answer: The ESBG confirms that, since there is no contractual relationship between both depositaries, this agreement forms the legal basis for any information requests on the part of the feeder UCITS' depositary. Therefore the ESBG deems that the agreement between the depositaries of the feeder and the master UCITS is a key element in order to allow them to fulfill their duties. The ESBG considers that the implementing measures in this area should focus on a specification of the elements to be covered by the agreement and the entities responsible. The ESBG would, however, like to highlight that the implementing measures should not cover the whole content of the agreement as it should be up to the contract partners to agree on the details and possibly on additional provisions.

Question 2: CESR is encouraged to provide the Commission with a draft model agreement.

See ESBG's answer to Question 1 above.

Question 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.

Answer: The ESBG considers, in line with its comments as regards Part I Question 3, that the agreement should clearly specify the law applicable to its provisions. In the ESBG's view these agreements should in principle be governed by the master and feeder UCITS, subject to further analysis of the master-feeder structure.

Article 61(3): Irregularities the depositary of the master UCITS has to report

Question 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 afore-mentioned 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. 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.

Answer: The ESBG would like to underline that it is important for the depositaries to have a list of irregularities which are deemed to have a negative impact on the feeder UCITS. This list should be exclusively related to the responsibilities covered by the UCITS Directive.

Question 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.

See ESBG's answer to Question 1 above.



About ESBG (European Savings Banks Group)

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of € 5215 billion (1 January 2006). It represents the interest of its Members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organised in decentralised networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



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Published by ESBG. March 2009