



12/09/2011

ESMA

COMMENTS ON THE ESMA CONSULTATION PAPER ON TECHNICAL ADVICE ON AIFMD

The Swedish Bankers' Association welcomes the opportunity to comment on the draft technical advice presented by ESMA. The Association supports the views presented by the European Banking Federation (EBF) in its position paper as well as the position paper from the European Trustee and Depositary Forum (ETDF). The Association would however like to stress some aspects we regard as particularly important.

General

It is of paramount importance that there is a **full harmonisation** of the rules that govern the duties and liabilities of Depositaries under AIFMD in all member states. Investor protection must be achieved in this respect. It is also important that there are no barriers in certain member states by so called "goldplating". Thus full harmonisation in this area must be the objective.

1. Appointment of depositary

We agree with ESMA's opinion and reasoning that there is no need to define a model agreement (p 142 sec 1.2)

2. Depositary functions

2.1 Cash flow monitoring

In order for a Depositary to carry out its functions there is an obligation of the AIFM to provide the Depositary with the necessary information and arrangements. The AIFM should also make sure that third parties fulfill necessary obligations in relation

to the Depositary (Box 13 and Box 75). It should be a prerequisite that the AIFM has ensured that the Depositary will be provided with necessary information before the AIFM is allowed to enter into any agreement with a third party.

In relation to **cash flow monitoring** we believe that the suggestion that the Depositary should act as a central hub (p 149, Box 76, Option 1) creates a lot of costs without any real benefit or investor protection. The wording that "the depositary could intervene immediately if it considers the cash flow inappropriate" seems, in many cases, a bit unrealistic. Thus, we support Option 2, which would require the Depositary to ensure that there are procedures in place to monitor the AIF's cash flows, check that they are implemented and periodically reviewed. The oversight would be more effective and the function of the Depositary's monitoring clear as opposed to the unclear legal effect of "mirroring" transactions on cash accounts (with third party entities).

2.2 Ensuring AIF's cash is properly booked

The wording of the conditions for ensuring that the AIF's **cash is properly booked** (p 152, Box 77) should be changed from "... or belonging to the third party" to "another party" and thus be segregated in the books of the deposit receiving institutions (and not from that institution itself).

2.3 Safekeeping duties – financial instruments held in custody

In relation to the criteria on **financial instruments held in custody** (Box 78) we believe option 2 is preferable. The element in option 1 – registered/held in an account in the name of the depositary seems to be quite unclear and we do not agree that this option provides little room for interpretation (as level 1 Art 21.8 (a) (i)) since it could be quite different situations (and registrations) between Depositaries. Thus, option 2 seems more precise and objective.

The *a contrario* approach seems appropriate provided the definition of financial instruments held in custody is clear and that such financial instruments are under the control of the Depositary supported by the market conditions. This is achieved through the qualifications of option 2 in Box 78. Further, a requirement should be that the relevant settlement systems **also should provide DVP-settlement** in order to manage the settlement risk.

In relation to the treatment of collateral (p 158, Box 79) we prefer option 3 since the other options require a legal opinion concerning the legal effect of each collateral arrangement.

2.4 Safekeeping duties for financial instruments that can be held in custody

The assessment and monitoring of custody risks should be related to settlement systems, sub-custodians and CSDs. It could not possibly be a question of “all relevant custody risks”.

2.5 Safekeeping duties for “other assets” – ownership verification and record keeping

In relation to the safekeeping duties related to “other assets” and the ownership verification and record keeping requirement (p 160, Box 81) we believe that option 1 is preferable. Other assets can not be directly controlled by the Depositary. Further, this concept entails an extensive variety of assets. The idea of mirroring such transactions in a position keeping record do not increase investor protection, since it will not be legal account stipulating any entitlement or rights in the said assets. The aim should be to create a record, ex post, serving as a record of the AIF’s “other assets”.

2.6 Depositary oversight duties

It is important to clearly establish that the Depositary oversight duties is performed by the Depositary through *ex post* controls. It should be added that the Depositary should be able to rely on reports of qualified third parties.

In relation to oversight duties related to the AIFM’s **valuation** of shares/units (p 167, Box 84) we do not see that this is compliant with level 1 requirement. The function and duty of the Depositary in this respect should be that the Depositary should ensure that the value of the units or shares of the AIF are calculated in accordance with applicable rules. This should be clarified in the text.

Regarding duties related to the **timely settlement of transactions** (p 169, Box 86) it is our opinion that option 1 is preferred taking into account the great span of transaction settlement situations that may occur.

3. Segregation

The obligation of a Depositary should be limited to - within the scope of the due diligence of a third party (sub-custodian) - give adequate attention to the principle of segregation **when recognized** by local legislation. Thus it should be specifically noted that an event of insolvency should be qualified as an external event.

For avoidance of doubt it should be clarified that the obligation of segregation as set out above should only apply when the delegate is selected and appointed by the

Depository and accordingly, not to *mandatory* intermediaries, infrastructure or issuers (or its agent).

It can be disputed whether 1 e) of Box 89 will enhance the investor protection, in any case if such measures should be meaningful they should comply with local legislation (if any) in order to uphold a right of separation in case of an insolvency situation with respect to the sub-custodian. It is believed that such measures will not be proportionate and practical and lead to high costs, thus 1 e) should be deleted or redrafted.

Since it can not be an obligation of a Depository to analyse national legislation with regards to insolvency procedures and the legal effect of segregation, paragraph 2) of Box 89 should be deleted or at least modified to reflect this.

4. Depository's liability regime

Insolvency related events of a sub-custodian should be considered as an "external event" in relation to the Depository since it is beyond the possibility for a Depository to foresee insolvency of a sub-custodian. In case such a liability would be imposed on the Depository it could create systematic risks considering the great values that might be involved.

As a general principle a depository cannot be held liable for events outside its sphere of control and influence whereas the consequences could not have been avoided with reasonable efforts.

Given that the depository cannot be required to analyse the effects of segregation in the jurisdiction of a sub-custodian, it should be clarified that a loss due to insolvency of a sub-custodian should be qualified as an external event beyond the Depository's reasonable control, and thus not a loss for which the depository shall be liable.

In relation to objective reasons for the depository to contract a discharge, we support Option 2 of Box 92. We believe that this should provide for a suitable flexibility and cost efficiency with proper consideration to unit holders' interest through the duality in the agreement.

SWEDISH BANKERS' ASSOCIATION



Tomas Tetzell
Chief Legal Counsel