

ZENTRALER KREDITAUSSCHUSS

MITGLIEDER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN • BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBANDE. V. BERLIN-BONN • VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V. BERLIN

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European Commission
Directorate General for the Internal Market
FSAP review (progress and prospects)
Unit F1 (Financial Services Policy)

B - 1049 Brussel / Bruxelles

FSAP Review (Progress and Prospects)
Comments on the Final Report of the Asset Management Expert Group
Ref.: KAGG

Dear Sirs,

We gladly seize the opportunity to submit to you our comments on the Final Report of the Asset Management Expert Group. The *Zentraler Kreditausschuss (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 Deutschland (VÖB)*, for the public sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group and the *Verband deutscher Hypothekbanken (VDH)*, for the mortgage banks. Collectively, we represent more than 2,500 banks.

The proposals of the Asset Management Expert Group affects the vast majority of aforementioned German credit institutions either in their capacity as (UCITS) depositaries or as distribution banks for UCITS or other investment funds. Based on the foregoing preliminaries, we would like to provide our comments on a number of selected aspects of said Final Report:

I. „2.1.5. Greater freedom of choice of depositaries”

ZKA would welcome a greater freedom in the choice of UCITS depositaries. The aim is to achieve this through the creation of a balanced single market for UCITS depositaries involving measures such as the creation of a pan-European level playing field for depositaries through the harmonisation of Member States' legal regimes. In order to thus minimise the logistics and regulatory hurdles both for cross-border activities in the context of the free movement of services and also in terms of the cross-border establishment of depositaries, ZKA would particularly welcome the introduction of a 'European Passport' for UCITS depositaries. Due to the depositaries' inherent investor protection function and in order to secure a corresponding standard of quality and protection, we feel the need for a pan-European high-level convergence.

Concerning this broader range of issues we have provided more detailed statements in our comment letter on the communication of the Commission to the Council and the European Parliament "Regulation of UCITS depositaries in the Member States: Review and possible developments" (COM (2004) 207) to which we would like to refer at this juncture. Please find said comment letter enclosed in the **Annex**.

II. „2.1.8. Distribution“

We agree with the Expert Group that it is important for the investor to be in possession of any information that will be necessary for his investment decision. In our view this is sufficiently guaranteed by Directive 2004/39/EC of the European Parliament and the Council, dated 21 April 2004 on Markets for Financial Instruments (MiFID). Art. 19 paragraph 1 MiFID e.g. stipulates that during investment services, an investment firm shall be duty-bound to act honestly, fairly and professionally in accordance with the best interests of its clients; this term 'investment services' also covers investment advice (Art. 4 paragraph 1, no. 2 in combination with Annex 1 section A no. 5 MiFID). Art. 19 paragraph 4 MiFID stipulates that when providing investment services, the investment firm shall obtain the necessary information regarding the client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial

situation and his investment objectives. Even if various Member States were to have divergent investment advice models: a Europe-wide advice that is suitable for the investor taking into account the characteristics of the investment and that is also in accordance with the best interest of the investor is already ensured by the aforementioned provisions. In this regard, the MiFID aims for an advice that is suitable for the investor taking into account the characteristics of the investment and does not focus on an objective and independent advice.

The Expert Group's recommendation to guarantee objectivity and independence during advice and to develop so-called 'high level standards for quality advice' should not lead to a situation where every investment firm is obligated to cover each and any pan-European investment fund in its investment advice. After all, an advice that is suitable for the investor taking into account the characteristics of the investment as envisaged under Art. 19 paragraph 1 and 4 MiFID demands that the investment firm must be in possession of the necessary product specific information; otherwise it would not be capable of assessing whether a given product is suitable for the investor or not. This means that in the case of investment advice, there is already a regulatory provision to the effect that the investment firm shall be in possession of sufficient knowledge concerning the respective product; what is more, this knowledge need to be constantly updated. However, providing this level of knowledge would be virtually impossible for the full range of financial instruments – including but not limited to investment funds – that are being sold across the EU. Instead, it can only be feasible for a selected number of products.

If an investment firm makes such a pre-selection, this information may be openly disclosed to the investor. The investor who is thus aware of such information can always opt for a different investment firm and/or distribution channel. The competition which is thus guaranteed benefits the investor. What is more, the investor is generally also free to choose – potentially even in the absence of investment advice – certain investment funds which have not been covered by the investment firm in its pre-selection.

Due to this and because the MiFID already safeguards advice that is suitable for the investor taking into account the characteristics of the investment and which is in the best interest of the investor, we do not see any need for action that would go beyond a consistent implementation of the MiFID.

III. „3. The way forward“

Concerning the further development of the statutory framework conditions, the Expert groups differentiates between short and long term measures (page 28, paragraph 49 and 50). Firstly, the focus should be on tapping the potential inherent in existing legal framework conditions. This

approach is explicitly welcomed by us. Secondly, there are discussions by the Expert Group concerning a fundamental reform of EU legislation in the long term. Under this reform, all legal areas relating to asset management should be pooled. We have strong concerns over such an approach. Any such reform should be wary of creating different or even additional prudential supervision requirements for comparable services or investment firms and – unless this is offset by a material benefits for the investor – it should be wary of increasing red tape for Member States and market participants. In order to verify if and to which extent a pooling of the respective legal areas relating to asset management is necessary, we thus feel the need for an in-depth review in the run-up to any such reform. Furthermore, there should be a cost-benefit analysis reflecting – both at a European and at a national level - all knock-on effects of such an undertaking. We are confident that the findings of both, said review and of the cost-benefit analysis, will endorse the approach of an optimisation of EU law implementation and/or its further development on the basis of the existing regulatory framework.

Please feel free to contact Dr Carsten Nickel (+49/30/20225-5353, carsten.nickel@dsgv.de) at any time to discuss any of the above.

Yours Sincerely,

On behalf of the

ZENTRALER KREDITAUSSCHUSS

Deutscher Sparkassen- und Giroverband



Dr Thomas Schürmann

Annex

ZENTRALER KREDITAUSSCHUSS

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Comments on the

Communication from the Commission to the Council and to the European Parliament

Regulation of UCITS depositaries in the Member States: review and possible developments

COM (2004) 207

ZKA (Zentrale Kreditausschuss¹) welcomes a harmonisation of the Regulation of UCITS depositaries in Member States as a means for promoting cross-border services and establishment of depositaries. One matter that is also important for us in this respect is creating a European-wide level playing field for UCITS depositaries through the harmonisation of Member States' legal frameworks. Furthermore, establishing one single, high standard for UCITS depositaries performing prudential investor protection duties is also in the investors' own vested interest.

More specifically, we would like to submit the following comments with regard to the Communication:

1. "4.1 Depositaries have no full right of establishment"

The declared goal of dismantling obstacles to cross-border services and establishment of depositaries receives our explicit backing. In this context we particularly welcome a "European Passport" for UCITS depositaries as a means for minimising the organisational and prudential supervision obstacles with regard to cross-border activities in the context of the free movement of services as well as with regard to the cross-border establishment of depositaries.

2. "4.2 The typology of eligible depositaries and related prudential standards is not harmonised"

With regard to cross-border services and establishment of depositaries, we feel that harmonised prudential standards are of major importance. Given the fact that there are already eight Member States where the tasks of a depositary may currently only be performed by credit institutions, we suggest an EU-wide regime where, as a basic principle, only credit institutions shall be eligible as depositaries. The high standard created by the banking supervision – and this applies more to a credit institution than to other institutions – provides safeguards for enhanced investor protection. This is due to the fact that the special prerequisites which e.g. have to be met by the responsible senior executives and in the wider context of corporate governance, provide safeguards for the

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.

correct performance of the investor protection duties incumbent upon the depositary (e.g. prudential missions).

In order to achieve a level playing field for UCITS depositaries, we also feel a particular need for harmonisation of the capital adequacy requirements and thus welcome the provisions under 4.2.2 and 5.1 iii).

3. "4.3 Cross-border provision of depositary services is hindered by diverging liability regimes"

a) Harmonisation of liability regimes

Furthermore, we advocate in favour of harmonisation of liability regimes, notably the extent of the depositary's liability. If and when another institution (e.g. sub-depositary) other than the actual depositary is entrusted with the safekeeping of UCITS assets, these institutions, too, should become subject to the same liability regime as UCITS depositaries – be it with regard to the investor or be it in the context of a *relation inter se* liability (Binnenhaftung) with regard to the UCITS depositary. This way, a homogenous compensation regime for damage both with regard to the investor and with regard to the *relation inter se* of various stakeholders can be created.

b) Exercise of custodian function

Furthermore, we hold the view that the safekeeping of UCITS assets should primarily devolve upon depositaries. Whenever necessary, this may even take place indirectly through the involvement of a sub-custodian. The depositary performs the safekeeping of the UCITS assets. It is this very fact that allows it to control the management company respectively, the management of the unit trust in line with its prudential mission. Shifting the safekeeping of UCITS assets away from depositaries would therefore undermine the depositaries' control capability: In the final analysis, this would hence also reduce investor protection. Avoidance of any complete segregation of the safekeeping function and the UCITS depositaries is, therefore, of vital importance.

On the other hand, depositaries should be entitled to involve a sub-custodian in the safekeeping of securities belonging to separate trust assets. In part, these are specialised investment firms (so-called transaction banks) and partly they are global sub-custodians as contemplated by the Communication. In practice, there is a strong need for such a kind of provision. A similar provision, for instance, has already been implemented under German Investment Law (cf.

section 24 paragraph 1 sentence 2 and 3 Investment Act). Any European regime should reflect the strong need for such a kind of provision. The tasks which may be delegated to custodians should not be limited *a priori*; after all, whenever the liability has been clarified (cf. above), there is no need for such a limitation.

In our view, the middle-of-the-road approach outlined above would take adequate account of the legitimate interests of practical realities on the ground and of investors alike.

4. "4.5 Conflicts of interest and prudential safeguards"

We feel that, in order to prevent conflicts of interests, better safeguards are a pivotal and sensible move; yet, it is of paramount importance that any such measures be in line with the existing and forthcoming European regulatory framework (Directive on Markets in Financial Instruments, Market Abuse Directive, etc.). We particularly recommend using the existing tools for the prevention of conflicts of interest instead of creating of a parallel supervisory regime in addition to the one already in existence today.

5. "4.6 Further harmonisation of investor information"

We see investor information as an important tool for the purposes of investor protection. Investors shall be enabled to make an informed investment decision on the basis of any material information. However, in terms of the information on costs and liability regimes, we do perceive the need for a more differentiated approach.

For instance, as far as the investor is concerned, costs associated with the depositary shall only be regarded as material information when it comes to choosing the UCITS. After all, the investor does not have any influence on the choice of the depositary (cf. also 4.6.2). Costs are only relevant if and when they reduce the investor's return from the respective UCITS. On these grounds, we feel it would be more appropriate if not the UCITS depositary but the management company was entrusted with the task of ensuring a sufficient degree of cost transparency. Already at present, both in the simplified prospectus and in the detailed sales prospectus², this takes place by way of a detailed breakdown of costs and charges. In these documents, payable costs are broken down into

² Cf. Article 1 paragraph 9 in combination with scheme C as well as paragraph 19 No. 3 of the Directive 2001/107/EC of the Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) concerning the stipulation of criteria for management companies and simplified prospectuses.

costs to be borne by the unit-holder and into costs payable from the separate trust assets of the unit trust or, moreover, by the investment company. The investor is thus already in possession of detailed information on the costs, particularly as far as depositaries are concerned. Even if this information should be regarded as insufficient, the provision of investor information should be a task of the management company or of its sales network since – contrary to the depositary – they are the ones who are directly in contact with the investor.

Only when such regimes, notably their extent, differ between individual Member State will the information on the depositary's liability regime constitute meaningful information. If and when the liability regime and particularly the extent of the liability in the context of UCITS depositaries will be harmonised across the whole of Europe, there will be no need for providing the investor with separate information on this. Hence, a general information concerning the European-wide standard would appear sufficient in this respect. The only potentially meaningful information for the investor arises in those cases where a Member State has enacted a liability regime that is more stringent than the minimum harmonisation or which allows more stringent rules in the form of contractual agreements between the management company and the depositary. Any special information obligation should remain limited to these cases. Again, as far as a suitable medium for investor information is concerned, the first tool that comes to our mind is the sales prospectus; this is owed to the fact that such sales prospectuses serve as the main information basis during the investor's investment decision.

Berlin, June 23, 2004
