

Ministerstvo financí České republiky
Ministry of Finance of the Czech Republic

Prague, 31 January 2011

Dear colleagues:

Below you find general as well as specific comments regarding the proposals in this paper. The comments are only an indication of the approach the Ministry of Finance of the Czech Republic takes and are not its final and official policy position.

General assessment

We consider the functioning of depositaries under the UCITS Directive as a key matter. To assure the proper functioning of depositary, we agree on the fact that not every financial institution should be eligible to act as a depositary.

In addition, we understand the notion that the UCITS depositary function can not be regulated less strict than the AIFM depositary under the regime of AIFM Directive proposal. However, we would like to point out that the regime is overly strict and in some domains the proposed changes could be a cause of systemic risk.

We also would like to express our reservation on the proposed UCITS managers' remuneration regime, as the reasons stated by the Commission service to support remuneration rules to retail collective investment schemes are questionable.

UCITS managers' remuneration policies

A. DEPOSITARY'S DUTIES

1. Safe-keeping duties

Box 1) It is necessary to define what activities and responsibilities are related to the notion of "safe-keeping" of assets.

Box 2) It is envisaged to complete articles 22 and 32 of the UCITS Directive, in order to distinguish safekeeping duties between custody duties and asset monitoring duties, supplement the requirements on custody duties with a segregation requirement, equip the depositary with a view over all the assets of the UCITS using the new implementing measures.

<p>1) We do not oppose further clarification of the safekeeping duties; however we would like to keep the definition rather loosely formulated than overly concretized. A sufficiently wide definition with appropriately set liability regime</p>
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allows Member States to effectively control performance of the depositary function.

2) We agree with the Commission activities to more explicitly distinguish the safekeeping duties in a way, which is consistent with the approach in the AIFM Directive. We consider main benefit in clarification of the depositary's own assets. These new implementing measures can be useful to perform the depositary monitoring and custody functions.

2. Oversight functions duties

Box 3) It is envisaged to achieve a higher degree of consistency in the oversight duties to be performed by UCITS depositaries.

Box 4) It is envisaged to clarify further the scope of each listed supervisory duty (for example the calculation of the Net Asset Value of the UCITS).

4) We do not oppose any clarification if it results in more convergent interpretation of oversight duties of the UCITS depositary.

3. Delegation of the depositary's tasks

Box 5) It is envisaged to restrict more explicitly the delegation of the depositary task to the safekeeping duties and the conditions of entrusting its safekeeping duties to a third party.

5) We agree with the proposed alignment of UCITS safekeeping duties delegation to AIFMD regime. However, we do not believe that additional information on sub-depositaries network and risks connected with it in prospectus is needed.

B. UCITS depositary liability regime

1. Improper performance

Box 6) It is envisaged that the depositary liability regime might be clarified in case of a UCITS suffering losses as a result of a depositary's negligence or intentional failure to perform its duties.

2. UCITS depositary specific liability in case of loss of assets

Box 7) It is envisaged to clarify the UCITS depositary liability regime in case of loss of assets.

3. The scope of the UCITS depositary liability when assets are lost by a sub custodian

Box 8) It is envisaged to maintain the rule according to which the depositary's liability is not affected if it has entrusted to a third party all or some of its safekeeping tasks.

4. Burden of the Proof

Box 9) It is envisaged to clarify that the depositary should carry the burden of demonstrating that it has duly performed its duties.

5. Rights of UCITS holders action against the UCITS depositary

Box 10) It is suggested to align the rights of UCITS investors, so that both share- and unit-holders are able to invoke claims relating to the liabilities of depositaries.

6) – 10) We understand the notion to align the UCITS depositary liability regime to the one of AIFMD. However we do not think that it is the best option. We agree with stricter liability regime, but we propose to broaden the envisaged “*force majeure*” liability discharge regime to include other cases of liability discharge, especially in case where the loss suffered by UCITS was caused by an act that couldn’t be foreseeable by depositary and was not caused by depositary’s negligence or willful breach of obligation.

On the top of that, we disagree with the proposed reversal of burden of proof. We should be extra careful not to create a “*probatio diabolica*” or devil’s proof; i.e. effectively enable depositary to discharge its liability.

With the intention to disqualify other firms than credit institutions and investment firms, proposed liability regime can eventually constitute a threat to the financial stability of the financial institutions (typically credit institutions). A default of one depositary could cause a chain reaction through both sub-depositaries network in which the depositary was part of and other credit institutions with whom the depositary dealt with.

C. Eligibility criteria

1. Eligibility criteria

Box 11) It is suggested to introduce an exhaustive list of entities that should be eligible to act as UCITS depositaries, aligned with the AIFM Directive.

2. Location of the depositary (passport issues)

Box 12) It is envisaged that a provision is introduced into the UCITS Directive creating a commitment to assess and re-examine the need to address depositary passport issues, to be undertaken a few years after the new UCITS depositary framework has come into force.

11) We agree with the idea of a list of entities eligible to act as UCITS depositaries, aligned with the draft AIFM regime, as the Czech law already sets similar regime.

12) As to the idea of passport, we are convinced that a cost-benefit analysis on the impact of depositary passport on the markets is needed.

D. Supervision issues

1. Supervision by national regulators

Box 13) Commission is suggesting that such competences depending on legal nature of depositary's duties and the role of the national supervisor might be better harmonized.

2. Supervision by auditors

Box 14) Commission is suggesting that annual certification could be performed by the depositary's auditors.

13) We fully support the idea of the harmonization of such competences to promote an equal supervisory framework for the depositary function at the Community level. This can secure the same conditions for sanctioning the depositary in case of failure in its performance.

14) Under Czech law, the only subjects that can act as depositaries – banks – are already subject to such annual certification. Thus we support this requirement for an annual certification performed by the depositary's auditors.

E. Other issues

Box 15) It is suggested to delete articles 32 (4) and 32 (5) of the UCITS Directive n° 2009/65/EC.

Box 16) It is suggested that the requirement for a single depositary per UCITS should be clarified.

Box 17) It is suggested to introduce for UCITS depositaries similar rules of conduct as in the AIFM Directive.

16) – 17) We agree with setting the single depositary rule and an additional set of rules of conduct. The single depositary rule shall be able to ensure more quality oversight of all the assets and cash transaction of the UCITS managed by one management company.

Box 18) It is suggested to provide any information to the competent authorities, while depositary carrying out its duties.

Box 19) It is suggested that the requirements set out in Article 23 (5) and Article 33 (5) of the UCITS Directive should be also applied to a situation where the management company home Member state is also a UCITS home Member state.

18) We do not see relevancy why to require these information from the depositary.

19) As for the written agreement between depositary and management company from the same Member State, we are in favor of this proposal. Czech law already

requires such a written agreement between the UCITS depositary and the investment company or investment fund.

UCITS managers' remuneration policies

The notion of upholding a level playing field in the financial services sector in regard to the remuneration policy for UCITS managers or investment companies is justified under condition there has been persuading evidence that such an uphold is necessary with regard to the causes of the financial turmoil in the past two years. The paper doesn't identify such evidence. At this point we do not consider it necessary to extend the regulation of remuneration policy to UCITS.

It should be also noted that the UCITS investment policies are highly regulated already. This regulation should be considered sufficient to assure the long-term stability of a UCITS.

Another important feature of the UCITS, which make it unsuitable for the remuneration policy regulation, is that the fee for the services of the fund managers (i.e. Management Company) is usually calculated in a transparent manner as a given percentage from the asset value of the fund for the given period of time. The actual remuneration of fund managers is primarily dependent on the fees paid for the management of the fund and the actual performance of the fund might not have a direct impact on their income. Consequently, rules for the variable component of the remuneration, which constitutes a crucial part of the new remuneration policies in other sectors of financial industry and which aims to bind together the remuneration of the manager and the performance of the managed entity, might not be feasible for UCITS at all.

Finally, the important feature of the remuneration, i.e. that a substantial part of the remuneration should be awarded in shares of the managed entity, cannot be easily realized, as it may be restricted by the conflict of interest rules.