



EUROPEAN COMMISSION
IMPACT ASSESSMENT BOARD

Brussels,
D(2012)

Opinion

Title

DG MARKT - Impact Assessment on a proposal for updating the UCITS provisions on depositaries, managers' remuneration and sanctions (UCITS V)

(draft version of 3 February 2012)

(A) Context

First introduced in 1985, the EU regulatory framework for undertakings for collective investment in transferable securities (UCITS) was revised in 2001 and 2009 to strengthen protection for (predominantly retail) investors. The Commission is now considering a further set of modifications in view of various developments: the Madoff fraud (which revealed weaknesses in the provisions for UCITS fund depositaries), the establishment of a tighter regulatory framework for depositaries serving Alternative Investment Fund Managers and the emergence of EU horizontal policies concerning remuneration schemes and sanctioning regimes in the financial sector.

(B) Overall assessment

The report provides the necessary analysis to support action in this area but should be further improved in some respects. The scope and scale of the problems addressed should be better substantiated on the basis of greater evidence, precautionary reasons, established horizontal policies and on-going market and technological developments. The report should also better justify the choice of options under consideration and more clearly illustrate their content. Finally, the analysis of impacts should be strengthened particularly with regards to costs, smaller players and the wider implications of the proposed liability regime.

During the meeting, DG MARKT agreed to revise the report in line with the recommendations of the Board.

(C) Main recommendations for improvements

(1) Clarify the scope and scale of the problems addressed. The report should better justify the scope of the initiative by providing greater evidence of the existence, and magnitude, of the problems it identifies or by highlighting more clearly the precautionary nature of the policies under consideration. In the case of depositaries, the report should identify more clearly the risks posed by divergent eligibility requirements at the national level. It should also better highlight how the type of risks evidenced by the Madoff fraud would justify a comprehensive review of existing provisions. In so doing, the report should more prominently underline the general need to update UCITS legislation in view of on-going market and technological developments. The report should also briefly explain why the lack of an EU "passport" for depositary services is not considered an issue for the proper functioning of the single market. Finally, the discussion on remuneration practices and sanctioning regimes should be placed into the context of the existing horizontal policies. Against this background, the report should assess more transparently the evidence of actual problems in the UCITS industry caused by current remuneration practices or divergent sanctioning regimes. Claims of regulatory arbitrage should be supported by evidence and take into greater account the limitations already imposed by existing regulatory frameworks and practices at the EU and national level.

(2) Better justify the choice of options under consideration. The report should more clearly demonstrate the appropriateness of the alternatives under consideration in terms of depositary eligibility. It should also illustrate more clearly what the options under consideration imply for the harmonisation of categories of assets and depositary duties and for country-specific capital requirements for depositary activities. In addition, the report should explicitly consider alternative combinations of options in terms of delegation and liability discharge. Finally, it should discuss more extensively the reasons for considering the mandatory establishment of whistleblower provisions in the light of existing evidence on the scope of the problems to be addressed and on the effectiveness of such mechanisms.

(3) Strengthen the analysis of impacts, particularly with regards to costs. The report should assess more precisely compliance costs, systematically identifying their sources and providing estimates, in relative and absolute terms, on the basis of available data. The report should also try to gauge more precisely impacts on smaller players as well as benefits for different types of investors. In addition, it should base the comparison of alternative delegation and liability regimes on as much factual evidence as possible, particularly with regard to the number of non-compliant third country jurisdictions where UCITS managers would like to invest and to the limited impact that increased costs would have for the overall profitability of providers, and users, of depositary services. The report should also illustrate how "compliance" of sub-depositors would be established and explain how the measures under consideration would have prevented the Madoff case. Finally, the report should discuss whether the preferred option for depositor's liability would have more general implications for Member States private law regimes and whether mitigating measures could be considered for depositaries.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report

(D) Procedure and presentation.

The report is longer than necessary and should be shortened accordingly, avoiding overlaps between sections and moving non-essential analysis into annexes. The executive summary should include references to stakeholder views and only contain information already mentioned in the report. Finally, the report should clearly indicate whether the relevant components of the existing framework have been subject to an evaluation or not.

(E) IAB scrutiny process

Reference number	2010/MARKT/040
External expertise used	No
Date of Board Meeting	29 February 2012