

September 23<sup>th</sup> , 2011

## **ESMA Consultation Paper on Possible Implementing Measures under the AIFMD in relation to supervision and third countries**

### **BNP PARIBAS Contribution**

#### **I- Key messages**

BNP PARIBAS has already answered the principles stated in the ESMA consultation of 13<sup>th</sup> September on possible implementing measures under AIFMD and welcome the opportunity to contribute to the ESMA Consultation Paper on possible implementing measures of the AIFMD in relation to supervision and third countries.

- BNP PARIBAS agrees with ESMA that the implementing measures should provide a high level of comfort as regards investor protection and a level playing field that should be satisfied to by depositaries established in third countries. Best practices and European standards should be encouraged in all jurisdictions which provides depositary services for financial instruments distributed in the EU .
- Therefore, BNP PARIBAS is of the opinion that the prudential regulation and supervision applicable to a depositary established in a third country should not allow the depositaries established in third countries to circumvent the provisions applicable to the European depositaries. The local regulation applicable to the depositaries established in a third country should be equivalent in their requirements to those provided in Article 21 (7 to 16) – “Duties and liabilities applicable to a European depositary”. Nevertheless BNP PARIBAS is of the opinion that ESMA should consider that where an entity is a branch of a European credit institution authorized by the local relevant regulator in accordance with applicable European requirements, then it should be deemed that it meets the criteria regarding :
  - the eligibility to act as a depositary, and,
  - the capital requirements, and,

- the operating conditions.
- BNP PARIBAS is of the opinion that the contractual arrangements between the depositary and the AIF/AIFM in relation to the liability and the rules of the depositary are not sufficient to ensure the same level of safety and of investor protection. It is our view that this level can be reached through adequate and applicable regulations.

## **II- Detailed contribution to the public consultation - Depositary (Article 21(6))**

### **Box 2**

1. For the purposes of the assessment provided for in Article 21 (6) the following criteria should be met:

- a. The entity should be subject to authorisation and on-going supervision by an independent competent authority with adequate resources to fulfil its tasks;
- b. The local regulatory framework should set out criteria for the eligibility to act as depositary that are equivalent to those set out for the access to the business of credit institution or investment firm;
- c. The capital requirements imposed in the third country should be equivalent to those applicable in the EU as set out in Article 21 (6) (b) depending on whether the entity is equivalent to a credit institution or to an investment firm;
- d. The operating conditions are equivalent to those set out for credit institutions or investment firms within the EU depending on the nature of the entity;
- e. The requirement on the performance of the specific duties as AIF depositary established in the third country regulatory framework are equivalent to those provided for in Article 21 (8) to (15) and in the relevant implementing provisions;
- f. The local regulatory framework provides for the application of sufficiently dissuasive sanctions in cases of violations by the depositary;
- g. The liability to the investors of the AIF can be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

**Q3: Do you agree with the above proposal? If not, please give reasons.**

BNP PARIBAS agrees with most of the criteria listed in the above proposal as long as the proposal ensures **a level playing field between the depositaries located in the EU and the depositaries located in third countries.**

In particular, Article 21(6) of the Directive subparagraph b) expressly requires that the relevant entity is subject 'to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced'.

Therefore, BNP PARIBAS is of the opinion that the prudential regulation and supervision applicable to a depositary established in a third country should not allow the depositaries established in third countries to circumvent the provisions applicable to the European depositaries.

Nevertheless we suggest the ESMA should consider that criteria (b), (c) ,(d) are deemed to be met where an entity is a branch of a European credit institution authorized by the local relevant regulator in accordance with applicable European requirements.

**The local regulation applicable to the depositaries established in a third country should be equivalent in their requirements to those provided in Article 21 (7)-(16) (Duties and liabilities applicable to a European depositary).**

Contractual arrangements between the depositary and the AIF/AIFM in relation to the liability and the rules of the depositary are not sufficient to ensure the same comfort of safety and of investor protection.

In addition to the comments to question 3 above, BNP PARIBAS has the following comments on Box 2 (please refer to each sub-paragraph):

- 1.(a): Agree
- 1.(b): Criterion b should clarify (please see explanatory text 6) that the local framework should be equivalent to criteria applicable in **the EU regulation (as in c), d) & e) )**
- 1.(c): Agree
- 1.(d) :Agree
- 1.(e):The reference to article 21 should be **broadened** and include (21-7) (cash monitoring) and (21-16) ( information to the competent authority)
- 1.(f): The local regulatory framework should provide **identical** levels of sanction in case of violations by the depositary

- 1.(g): This criterion does not seem necessary as it is already included in criterion 1.(e), please refer to Article 21 (15)

**Therefore BNP PARIBAS recommends the following amendments:**

**Box 2**

1. For the purposes of the assessment provided for in Article 21 (6) the following criteria should be met:

a. The entity should be subject to authorisation and on-going supervision by an independent competent authority with adequate resources to fulfil its tasks;

b. The local regulatory framework should set out criteria for the eligibility to act as depositary that are equivalent to those set out for the access to the business of credit institution or investment firm **applicable within the EU. A branch of a European credit institution authorized by the local relevant regulator in accordance with applicable European requirements is deemed to meet this requirement ;**

c. The capital requirements imposed in the third country should be equivalent to those applicable in the EU as set out in Article 21 (6) (b) depending on whether the entity is equivalent to a credit institution or to an investment firm . **A branch of a European credit institution authorized by the local relevant regulator in accordance with applicable European requirements is deemed to meet this requirement**

d. The operating conditions are equivalent to those set out for credit institutions or investment firms within the EU depending on the nature of the entity. **A branch of a European credit institution authorized by the local relevant regulator in accordance with applicable European requirements is deemed to meet this requirement**

e. The requirement on the performance of the specific duties as AIF depositary established in the third country regulatory framework are equivalent to those provided for in Article 21 ~~(8)~~ (7) to ~~(15)~~ (16) and in the relevant implementing provisions;

f. The local regulatory framework provides for the application of **identical levels of sufficiently dissuasive** sanctions in cases of violations by the depositary;

g. ~~The liability to the investors of the AIF can be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.~~

**Q4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?**

No further comments.



**BNP PARIBAS**