

Paris, 15 October 2008

**Response of the
French Association of Securities Professionals -AFTI
and the French Banking Federation - FBF
to the
Consultation paper on UCITS Management Company
Passport**

Reply to be sent by e-mail www.cesr.eu

Deadline for sending in responses: 15 October 2008

1 PRESENTATION

The French Banking Federation (FBF) is the professional body that represents the banking sector in France, i.e. more than 500 cooperative, savings and commercial banking establishments.

The French Association of Securities Professionals (AFTI) brings together more than 90 players active in the post-trade industry and has for mission the promoting the industry and representing their interests in the Paris financial market place and throughout the European Union.

2 RESPONSE

CHAPTER 1 : DEFINITION OF DOMICILE

Comments on BOX 1 and BOX 2

AFTI and FBF consider that the CESR proposal to define the domicile of respectively the Asset management company and the UCIT seems appropriate and workable.

Nevertheless we consider that as part of the authorisation process of the UCIT, the competent authority of the UCIT should not only validate the choice of the management company, the fund rules and the choice of the depositary. It should also, in case of a management company domiciled partially or totally in another Member States than the UCIT domicile, validate the contract between the asset management company and the depositary to ensure that the depositary is able to perform its duties and the measures taken by the asset management company to ensure maintenance of the expertise regarding the regulation of the fund domicile.

UCITS

BOX 2

1. The UCITS home Member State for common funds constituted under the law of contract or trust law should be the Member State in which the management company has applied for authorisation of the UCITS and in which the depositary of the UCITS is established.
2. The UCITS should be regulated in accordance with the law applicable in its home Member State.
3. A UCITS should be authorised only if the UCITS competent authority has approved the choice of the management company, the fund rules and the choice of depositary *as well the arrangements between the asset management company and the depositary which describes the measures taken by the asset management company to ensure the maintenance of the expertise of UCITS fund regulation and the information flows to ensure depositary are able to perform its duties.*

Comments on BOX 3

AFTI and FBF support the principle of the local point of contact for the management company and consider it as the more workable way to make the passport for the management company a reality.

However, we consider that some clarifications are needed to avoid confusion between the role and responsibilities of the various actors (asset management company, distributor and depositary) and to ensure that the roles/functions of the point of contact are well understood and allocated.

First of all, whatever the person performing the role of the point of contact (local representation of the management company itself or another financial institution), it should be clearly precise that all functions performed through the point of contact pertain to the responsibility of the management company.

Secondly, it is also necessary to distinguish the different functions described in the BOX 3.

Three of the functions listed in the BOX 3 have for objective to materialise the asset management company responsibility in the fund domicile (legal address, representation *vis à vis* investors and *vis à vis* the authorities). We have serious doubt that those functions can be entrusted by the depositary as suggested by the explanatory text of the BOX 3. Indeed, it would affect its independence and create potential conflicts of interest between its duties as depositary and its role as representant of the asset management company.

In addition from our point of view, the tasks linked to the maintenance of relations with unit-holders and receipt of complaints should be primarily managed by the distributor. In practise, the first point of contact for the investor is its distributor which may contact the asset manager in case of problem. Furthermore, it seems that the BOX 3 does not really take in account the case where the UCIT is actually distributed in another Member State as part of the product passport. Indeed, we do not see the real value for the investor of having a point of contact in the Member State of the fund domicile if the distribution is taking place in another Member State.

Thirdly, the BOX 3 does not address the necessity to maintain the fund's regulation expertise within the asset management company through proximity to the competent authorities and strong mechanisms of validation.

We recommend that the local point of contact should also be the contact point not only for the authorities but also for the depositary of the fund. The main interest of this local point of contact would be to ensure a proper response from the asset management company throughout the life of the fund and not only at the creation of the fund or in case of significant crisis.

In this case, the point of contact could be a local representation (without capital requirements) of the management company composed of one or more employees with knowledge of local regulations and who are able to perform audits, particularly in terms of valuation, procedures, risks and entering into new business relationships, or to relay requests for information that the local depositary, and possibly the funds regulator may make.

This proposal could also avoid splitting the responsibility of the asset management company among various actors (asset management company and local representation).

Box 3

Local point of contact in case of common funds

1. If the management company of a common fund is not established in the UCITS home Member State, it should appoint a financial institution ~~for the depositary~~ subject to prudential supervision established in that State, including through a branch, to act as a local point of contact for investors, the UCITS competent authority **and the depositary of the fund**.

2. The local point of contact should perform the following functions:

- **provide a contact point for maintain relations with** unit-holders, including receipt of complaints;
- provide a legal address for receipt of all documents addressed to the UCITS and the management company by investors and by the UCITS competent authority;
- provide facilities to the unit-holders in relation to the exercise of their rights, including facilities in relation to payments to unit-holders and to the reception and transmission of orders for subscriptions, issuance and redemption of units;
- make information available at the request of the public or the UCITS competent authority.

Comments on BOX 4

AFTI and FBF generally support the proposal of CESR with regards to the depositary. However, we would like to make two important comments.

Point 3 and 6.

We believe that it is crucial for the maintenance of the high level of investor protection that the asset management companies maintain a proper knowledge and expertise of the regulation of the fund domiciled, whether the asset management companies are located in the same Member State or not.

In that respect, we consider that the written agreement between the depositary and the asset management company should:

- 1) Address the information flow as proposed by CESR but also;
- 2) Make a description of the measure taken by the asset management company to ensure the maintenance of this local expertise throughout the life of the fund and;
- 3) Provide a main contact point for the depositary to handle all queries on a day to day basis.

AFTI and FBF fully support CESR proposal to develop at level 2 some standards with regards to the agreement between the depositary and the asset management company. In that respect, we believe it would be valuable to define generic principles and chapters to be included in those agreements.

Point 5

To guarantee protection of investors and the stability of the financial system, and improve the readability and the coherence of the proposed UCIT 4 Directive with Community law in force (notably with the “platform” Capital Adequacy, MIF and Solvency directives), AFTI and FBF are in favour of a clear definition of the depositary. AFTI and FBF propose to describe the depositary as a credit institution, investment firm or insurance company in the sense of the Community directives (Capital Adequacy, MIF and Solvency). According to the Commission

study performed in 2004¹, depositaries across Members States are in practices one of those institutions although it is not yet specified in the directive.

BOX 4

Depositary

1. The depositary should either have its registered office in the UCITS home Member State or be established in that Member State if its registered office is in another Member State.
2. A UCITS should be authorised only if the UCITS competent authority has approved the choice of the depositary.
3. The depositary and the management company should sign a written agreement regulating **all arrangements including** the flow of information deemed necessary to allow the depositary to perform the functions referred to in Articles 7 and 14 of the Directive.
4. A depositary should, in accordance with the national law of the State in which the UCITS is authorised, be liable to the management company and to the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them.
5. A depositary should be ~~an institution~~ **a credit institution, or an investment firm or an insurance company, as defined in the Directives 2006/48/EC, 2004/34/EC and 2002/12/EC which is** ~~subject to on-going supervision by its home competent authority, including for prudential purposes.~~
6. The Commission, in accordance with the procedure set out in article XX, should provide for implementing measures on the measures to be taken by the depositary in order to fulfil its duties in the case of UCITS managed by a management company established in another Member State, including possible standard agreements to be used by depositary and management company. **These measures should, among others provisions, provide for specific arrangements that give comfort to the depositary that the management company will retain an adequate level of knowledge and expertise, throughout the existence of the UCITS, of the regulations applicable to the UCITS where registered.**

CHAPTER 2 : APPLICABLE LAW AND ALLOCATION OF SUPERVISORY RESPONSIBILITIES

Comments on BOX 5 (point 7) & 6

AFTI and FBF support the proposal of CESR to develop harmonisation measures at level 2 to facilitate the split of the supervision between the UCIT competent authority and the asset management competent authority. Indeed, apart from the cost of and burden of joint supervision, the inconsistency of requirements across Member states may lead to situation where it would extremely difficult for an asset management company to comply with both the requirements of its home Member state and the requirement of the UCIT competent authority.

¹ Communication from the Commission to the Council and the European Parliament on « *Regulation of UCITS depositaries in the Members States : review and possible developments* », COM (2004) 207 final

CHAPTER 4 : ON-GOING SUPERVISION OF THE MANAGEMENT OF THE FUND

Comments on BOX 10

As mentioned in our comment on BOX 4, AFTI and FBF consider that the written agreement between the depositary and the asset management company should address not only:

- 1) The information flow as proposed by CESR but also;
- 2) A description of the measure taken by the asset management company to ensure the maintenance of this local expertise throughout the life of the fund and;
- 3) Provide a main contact point for the depositary to handle all queries on a day to day basis.

In addition the explanatory text (§5) should be modified. The depositary is not in a position to provide information on the subscription and redemption of the fund to the Asset management company as it does not have that information.

Box 10

Information flow between management company, UCITS and depositary

1. Adequate arrangements should be established to ensure the flow of information necessary for the management company, the UCITS and the depositary to perform their respective functions.
2. The Commission, in accordance with the procedure set out in article XX, should establish implementing measures with respect to the detailed information to be exchanged in accordance with para. 1 above. **This information should provide for adequate measures applicable throughout the existence of the UCITS, to ensure a satisfactory and constant level of expertise of the Management Company when established in another Member State and provide for bilateral incident reporting and escalation procedures between the depositary and the management company.**