Paris, 10th September 2009

Response

French Association of Securities Professionals

(AFTI - *Association Française des Professionnels des Titres*)

to the

CESR's technical advice on the European commission on the level 2 measures related to the UCITS management company passport CESR/09.624

Response to be addressed to www.cesr.eu

Deadline for sending the response: September 10th 2009

The French Association of Securities Professionals “AFTI" has over more than 100 members, all players in the securities market and post-trade activities: banks, investment firms, market infrastructures, issuer services. The AFTI aims to promote and represent their trade activities on the French marketplace and across the European Union.

Summary

1. AFTI welcomes the opportunity to contribute to the CESR’s technical advice on the level 2 measures related to the UCITS management company passport. Our response will cover only the Section III of the consultation paper that relates to the measures to be taken by the depositary in order to fulfil its duties regarding a UCITS managed by a management company situated in another Member States, in respect to the activities of our members as depotbank for a huge number of UCITS funds.

2. As an opening remark, we wish to underline that this contribution is to be considered in conjunction with our response to the European Commission consultation paper on UCTS depositaries for which the deadline is September 15th 2009. In particular the definition of safe-keeping duties by asset classes and the need for harmonisation of depositaries’ roles and responsibilities across the EU are key elements when defining the content of a written agreement between the depositary and the management company.

3. As mentioned previously through our responses and various contributions to CESR’s consultations on the UCITS IV Directive, for Level 1 text and Level 2 measures, we consider that a number of key principles should be respected, whatever the location of the UCITS management company :

    - The depositary’s duties should be the same for all UCITS funds, in particular for all funds in a given location. The depositary should not have to perform further duties when the UCITS fund and the management company are located in different Member States. A level playing field should be guaranteed between all UCITS funds.
    - The investor protection, for which the depositary is an essential pillar, is naturally a key objective of the Commission when drafting the provisions of the UCITS IV Directive. At the same time the Commission should ensure that level 2 measures can be implemented at a reasonable cost by all parties, otherwise investors will have to support further costs at the end.
    - The management company will have to comply with the rules of the fund’s domicile for all UCITS funds as clearly specified in the level 1 text. In this respect it will have to put in place internally all appropriate procedures and arrangements. In any case it will not be the depositary’s responsibility to guarantee the corresponding follow-up on a day-to-day basis and to compensate for the lack of the management company’s knowledge on the fund’s regulation.

4. When considering more specifically the contract to be signed between the depositary and the management company, we wish to recall that an agreement (“the agreement”) is already in place in most EU countries between the depositary and the management

company to define the flow of information to be exchanged between both of them. As all parties are located in the same Member State, there is an unique regulation to comply with which is the fund's one.

5. In the context of the management company passport, we are of the opinion that level 2 measures should be introduced for this agreement in addition to the level 1 text, notably to prevent legal fragmentation that still prevails between EU Member States for the depositary's and management company's obligations. As the depositary will have to control management companies situated cross-border and submitted to different local regulations, it will be crucial that a minimum set of rules for the agreement is covered through level 2 measures, with general requirements defined clearly enough in terms of scope and content. In such conditions level 3 guidelines should not be necessary.

6. The application of the national law of the UCITS fund is the most appropriate to govern the agreement, as the management company will have to apply the fund's rules for any investment decision and for accounting and administration of the fund.

7. In the same time some flexibility should be left to the depositary and the management company to define the detailed content of the agreement and the most appropriate ways to exchange information on the fund. As mentioned previously local regulations applied to depositaries and to management companies in terms of internal organisation differ from one Member State to another, hence it is not realistic to impose a too stringent format that will not be able to cover all potential situations.

8. Finally, we consider that the agreement should not include any information concerning the selection of the sub-custodian network by the depositary. The depositary must remain free to select a sub-custodian according to its own due diligence criteria without any intervention of the management company. The management company is informed about the sub-custodian network of the depositary in the agreement and accepts this network when signing the agreement. If the management company was to be involved in the choice of the sub-custody network of the depositary, it would then imply that the management company's liability is also engaged vis-à-vis investors of the fund.

Response

I. Specific conditions that a depositary must meet to fulfil its duties regarding a UCITS managed by a management company situated in another country

Questions for the consultation

1. *Do you agree that no additional requirements should be imposed on a depositary when the management company is situated in another Member State?*

2. *What will be the costs of imposing such a requirement for the industry? What would be the implementation difficulties for regulators?*

9. We are of the opinion that no distinction should be made for UCITS funds whose management company is situated in another Member State. The maintenance of a level playing field between depositaries of domestic funds and funds managed cross-border has to be ensured in the European legislation otherwise it could favour some arbitrage opportunities.

10. In addition the management company will have the responsibility to ensure that it has the proper knowledge and expertise on the fund's regulation when the fund is managed cross-border. During the entire life of the fund and on an on-going basis, it will have to comply with the fund's rules regarding investment decisions but also accounting and administrative standards. In this respect it will have to put in place the appropriate internal organisation and controls.

11. Consequently it cannot be asked to the depositary to compensate for the distance between the fund and the management company, through additional duties that will be costly for depositaries and that may exonerate the management company from its own obligations.

12. In these conditions we consider that the definition of a standard agreement to be signed between the depositary and the management company ("the agreement") is a good way to define the respective flows of information to be exchanged between both of them and to guarantee that each party will comply with its own obligations. The agreement will also facilitate the supervision by regulators as it will represent a concrete basis for checking the right application of appropriate rules by each party. This is all the more important as there has been no harmonisation between EU Member States in terms of depositary's duties and management company's obligations in terms of internal organisation.

II. The standard arrangements between the depositary and management company and identification of the particulars of the agreement between them as required under Articles 23(6) and 33(6) and the regulation of the flow of information deemed necessary to allow the depositary to discharge its duties.

Questions for the consultation

3. Are the proposed requirements appropriate?

4. Are the information flows exchanged in relation to the outsourcing of activities by the management company or the depositary relevant?

5. Is it appropriate to indicate in the written agreement that each party may request from the other information on the criteria used to select delegates? In particular, is it appropriate that the parties may agree that the depositary should provide information on such criteria to the management company?

6. Is the split between suggestion for level 2 measures and envisaged level 3 guidelines appropriate?

7. Do you see a need for level 2 measures in this area or are the level 1 provisions sufficiently clear and precise?

8. Do you consider that the proposed standard arrangements and particulars of the agreement are detailed enough?

9. What are the benefits of such a standardisation in terms of harmonisation, clarity, legal, certainty ect.?

10. What are the costs for depositaries and management companies associated with the proposed provisions?

13. In response to Question 3, we consider that many elements suggested by CESR in the consultation are relevant as they correspond to information already included in the existing agreement. In many EU countries the depositary and the management already sign a “depositary agreement” that defines the way they will work together to ensure a smooth functioning of the fund (for the safe-keeping function) and the existence of strong safeguards for investor protection (with the depositary supervisory function). In most cases the general content of the agreement is defined by the local regulation.

14. However there are elements we do not consider as appropriate in respect to the agreement. Our comments mainly concern the information requested on criteria used by the depositary to select sub-custodians. The depositary should remain free to select its sub-custodian network in accordance with its own criteria in terms of due diligence and periodic reviews to be performed. The sub-custodian network used by the depositary is the same for all funds and cannot be adapted to the request of each

management company. Such a case-by-case system would not be manageable and would considerably increase the cost of safe-keeping.

15. Consequently the management company should not intervene in this selection or should not impose constraints for this selection in any case. The information on the depositary's sub-custodians must be limited to the list of the corresponding third parties that the management company accepts when signing the agreement. Otherwise the liability of the management company should be also engaged in reference to these sub-custodians and additional costs should be charged by the depositary.

16. More precisely our comments are as follows regarding the different elements mentioned in Box 2 :

- Element 1 : please refer to comments above in paragraphs 14 and 15.

- Element 2 : this point should be included in the agreement by indicating in particular the notice period to terminate the agreement, the corresponding transition period to find another counterparty and the information to be transmitted to a successor.

- Element 3 : we agree with the inclusion of this element.

- Element 4 : we agree with the inclusion of this element in respect to the satisfactory performance of the safe-keeping function by the depositary.

- Element 5 : we agree with the inclusion of this element in respect to the information needed by the depositary to perform its safe-keeping duties (in particular for assets that cannot be held in custody as such and for which the depositary has only to verify the existence of ownership contracts and/or to keep an inventory of positions) and to ensure its oversight duties, as described in our response to the consultation on UCITS depositaries.

- Element 6 : we agree with the inclusion of this element. Generally this point is covered by the local regulation of the fund's domicile, but the depositary and the management company should have the possibility to include in the agreement further cases on a bilateral basis.

- Element 7 : we agree with the inclusion of this element provided that it is limited to the information necessary for the control function of the depositary in respect to sale, issue, re-purchase, redemption and cancellation of units of the UCITS. When the depositary is not the transfer agent of the fund, there is no need to include information on corresponding operational aspects.

- Element 8.a : we agree with the inclusion of this element only if the depositary decides to delegate on its own initiative part of its duties to a third party. In such a case, the depositary has to communicate the names of the corresponding outsourcees and the criteria used to appoint them. On the other hand when the depositary is obliged to select a sub-custodian for economic and legal reasons (notably custody of foreign assets invested in by the fund on the decision of the management company), this is not a delegation by the depositary. In this case, the

depositary must remain free to define its criteria of selection as explained above in paragraphs 14 and 15.

- Element 8.b : we agree with the inclusion of this element provided that it is limited to the list of third parties appointed by the management company and to general information that validate the existence of appropriate procedures for selection and monitoring of these third parties. In other words the depositary has not the obligation to audit these procedures in detail to certify their appropriateness, but the management company must keep them accessible to the depositary at any time if it wants to check some information on a punctual basis.

- Element 9 : we agree with the inclusion of this element with some flexibility for both parties to define the information required.

- Regarding the need of a specific agreement for each fund, we agree that this should not be an obligation. The listing of all UCITS to which the agreement applies to may be a solution, but it may be also envisaged the possibility to have an agreement that applies automatically to all UCITS for which the depositary has been appointed by the management company. The mention of such a provision in the agreement can highly facilitate the follow-up of the agreement, especially when new funds are created or where existing funds are liquidated.

- Regarding the electronic transmission of information, there should be no obligation to mention this element in the agreement. However if it is decided to do so, a distinction should be made between information relating to the safe-keeping function (e.g. instructions, corporate actions, cash movements, statements) and other types of information. In the first case electronic standards are widely used by all market participants and can be mentioned in the agreement. For other types of information, it must be kept in mind that transmission by e-mail is not considered as a legal element in case of disagreement between the depositary and the management company. If such an agreement is made between both of them, we recommend to specify that any information transmitted by e-mail should be confirmed by fax or mail.

- Regarding the possibility to make enquiries of one of the actor by the other, it should be specified in the agreement for those to be made by the depositary. This possibility is part of its supervisory function, so it is appropriate to cover this aspect in the agreement. On the other hand we consider that review by the management company should be included only on a bilateral basis if both parties estimate that it is a key element in the management of their relationships. In any case such a review should be limited to the safe-keeping duties of the depositary and should not cover its supervisory duties.

17. In response to questions 6 and 7, we support the introduction of level 2 measures to define the content of the standard agreement between the depositary and the management company for all reasons mentioned previously. The objective is to guarantee that both the depositary and the management company will benefit from the information they need to perform their duties in a satisfactory manner and that it will not depend from diverging regulations to be applied and/or from commercial pressure.

Hence information contained in Level 2 measures should be precise enough and not subject to interpretation.

18. In the same time we are of the opinion that flexibility should be left for the level of details of the agreement and we support the CESR proposal not to cover the drafting of standards terms, but rather to include a set of general requirements in level 2 measures. Regarding the envisaged level 3 guidelines proposed by CESR, we consider that they are not necessary if two conditions are fulfilled :
    - when making reference to the information transmitted by the management company to the depositary in element 5 of Box 2, it should be specified "so as to allow it (i.e.the depositary) to fulfil its ***safe-keeping*** and oversight duties" instead of "…custody and oversight duties",
    - safe-keeping duties of the depositary should be clarified in the level 1 text (as suggested in our response to the questionnaire sent by the European Commission on the UCITS depositary) and should cover all types of financial instruments, including all derivative instruments and financial contracts.

19. In response to Questions 8 and 9, we consider that the proposals made by CESR are detailed enough with taking into consideration comments made in previous paragraphs (in particular for the sub-custodian network of the depositary). The benefits of such a standardisation are those described previously notably in paragraph 17.

20. In response to Question 10, we consider that associated costs will not result from the implementation of the agreement itself as it exists already in many EU countries. Additional costs will rather stem from the need to write the agreement in a common language agreed by both parties (English in most cases) or in two different languages. In addition the existing agreements will have to be adapted to take into consideration differences between both regulations to be applied. In any case most important costs will result from the need to train the depositary staff on one side and the management company staff on the other side to get knowledge about other regulations and corresponding consequences in terms of both operational and legal aspects.

III. Level 2 measures on the law applicable to the agreement between the management company and the depositary

Questions for the consultation

11. Do you agree that the agreement between the management company the depositary should be governed by the national law of the UCITS? If not, what alternative would you propose?

12. What are the benefits of such a proposal? Do you see costs associated with such a provision?

In particular, is this requirement burdensome for the UCITS management company that will be subject to the law of another Member State regarding the agreement with the depositary?

21. As clearly mentioned above, we estimate that the national law of the UCITS fund is to be applied to govern the agreement. The main reason is due to the obligation for the management company to comply with the fund domicile's rules for all aspects relating to the functioning of the fund. In addition it will facilitate the ability of the depositary to perform its supervisory function regarding the compliance of the management company with the fund's law and prospectus.

22. If the management company national law was to be applied for the agreement, the depositary would have to manage to different sets of controls: those defined in accordance with the fund's domicile rules and those specified in the agreement in accordance with the management company domicile's rules. Once again it might have significant impacts in terms of additional costs for the investor.

IV. Need for different provisions in relation to investment companies

Questions for the consultation

13. Do you agree that investment companies should not be treated differently from common funds in respect of CESR's proposals?
14. In your view, would such an approach impose unnecessary and/or burdensome requirements on investment companies? Would equal treatment improve the level playing field between different types of UCITS?

23. For the agreement as defined in the previous sections, we do not see any reason to have a different approach in the case of an investment company. The information required by the depositary for ensuring proper performance of its duties is similar in case of an investment company.

24. The main difference with common funds lies in the existence in some cases of two different agreements signed by the depositary when the fund is an investment company:
    - one with the Board of Directors of the Investment company for points relating to the general functioning of the investment company and to the depositary's duties and liability,
    - one signed with the management company of the fund, appointed by the Board of Directors: this one covers the flows of information to be exchanged between the depositary and the management company to ensure the proper performance of their respective duties, as described in previous section.

    AFTI considers that the second agreement should be systematically signed with the management company of the fund.

V. Possibility to advise the European Commission to extend these requirements to domestic structures(depositary and management company/UCITS domiciled in the same Member State)

Questions for the consultation

15. Do you agree with CESR's proposal that equivalent rules should apply to domestic and cross-border situations? In particular, do you agree that depositary should enter into a written agreement with the management company irrespective of where the latter is situated?

16. Do think that such a recommendation would increase the level of protection for UCITS investors? Do you agree that a level playing field between rules applicable to domestic situations and those applicable to cross-border management of UCITS offsets potential costs for industry?

17. What would be the benefits of such an extension in terms of harmonisation of rules across Europe? What would be the costs of extending rules designed for cross-border situations to purely domestic situations? In particular, would a provision stating that the management company and the UCITS depositary have to enter into a written agreement irrespective of their location add burdensome requirements to the asset management sector?

25. As mentioned in responses to previous questions, we are of the opinion that equivalent rules should apply to domestic and cross-border situations and that a written agreement between the depositary and the management company is a key element for the investor protection. We are all the more in favour of such an agreement that it is already exists in most EU countries.

26. As there is no harmonisation between EU Member States for rules relating to the depositary and to the functioning of funds (e.g. in terms if eligible assets, accounting rules, definition of a complex fund), a level-playing field between applicable rules to domestic and cross-border situations is a key element. Otherwise many arbitrage opportunities might result from the absence of such a contractual framework.

27. The general content of the agreement is to be clearly defined (with identification of key sections as suggested by CESR), however there should be some place left for customisation. Such flexibility may be a good way to manage differently domestic and cross-border situations.

28. Regarding the cost aspect, cost increase is linked more globally to the management company passport implementation as a whole as all parties will have to extend their knowledge to one or several cross-border regulations and to ensure that they have the capacity to follow-up any evolution of these regulations on an on-going basis.