



Paris, 17th October 2009

**Response of the
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 relating to mergers of UCITS, master-feeder
structures and cross-border notification of UCITS**

*Response to be submitted via CESR'S website (www.cesr.eu)
CESR Ref. 09-785*

Deadline for sending responses: November 17th 2009

1 PRESENTATION OF THE AFTI AND ITS COMMITMENT TO THE DEVELOPMENT OF THE ACTIVITY OF DEPOSITARY

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.

2 SUMMARY

AFTI welcomes the opportunity to contribute to the CESR (Committee of European Securities Regulators) consultation on possible implementing measures concerning the future UCITS IV Directive on mergers, master-feeder structures and cross-border notification of UCITS. AFTI considers that corresponding provisions will allow to clarify the UCITS legislative framework and to reinforce the efficiency of level 1 measures, especially in terms of investor protection.

Please note that the response of AFTI to this CESR's consultation is focused on **depository aspects**. It will therefore cover only the merger section and questions addressing depository subjects in the master-feeder section.

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 in relation to the depository function.

First we acknowledge that the depository is an essential pillar for investor protection as clearly mentioned by the European Commission when drafting the provisions of the UCITS IV Directive. At the same time reduction of costs and efficiency of the fund investment industry is another key objective of the Commission. In these conditions the Commission should ensure that level 2 measures can be implemented at a reasonable cost by all parties, otherwise investors will ultimately have to bear higher costs.

Consequently it should be guaranteed that level 2 measures correspond to feasible solutions that are compatible with existing legal practices and have a real added-value both in terms of investor protection and operational efficiency.

Mise en forme : Puces et numéros

Secondly we consider that, whatever the location of the different parties involved and the type of operations considered, the depository should not have to perform different and/or additional duties to those required by its local regulation. The depository should not be considered as a substitute to other actors for oversight functions as a consequence of cross-border operations that introduce the need to comply with various regulations.

When referring to the specific case of master-feeder structures, it means concretely that the depository of a feeder fund should not have to control the depository of a master fund through an indirect look-through approach. Inversely the depository of the master fund should not have to comply with obligations imposed by the depository of the feeder fund according to rules different from those applied in the master fund's home Member State.

This principle is all the more important as there is no harmonisation between EU Member States at this stage for roles and responsibilities of depositaries. Depositaries do not have to perform the same duties and to report the same information, especially to unit-holders of a UCITS fund and/or to their supervisors depending of their locations.

Such divergences need to be taken into consideration for the definition of standard elements to be required from depositaries not located in the same Member State. There should be a high level of flexibility when defining which documents / information are to be exchanged between the depositary of a UCITS master fund and the depositary of a UCITS feeder fund and the corresponding procedures.

Actually the key point for ensuring an efficient and secure implementation of master-feeder structures is the information and documents exchanged between both funds, or where applicable, their management companies. Their scope and nature must guarantee that the feeder fund (or its management company) will have the capacity to transmitt to its depositary all information required for the appropriate performance of its duties, as for any other UCITS fund.

Finally we consider that the national law of a UCITS master fund is the most appropriate to govern the agreement between both depositaries. This option will guarantee that the depositary of the master fund will not have to perform, by law, additional obligations than those imposed by its national regulation. This will also allow to keep a level playing field between feeder funds of a same master fund (feeders from different EU countries investing in the same master fund).

3 RESPONSES

Section I – Mergers of UCITS

Content and format of the information

Questions for the consultation

1. Do you agree with CESR's proposals for specifying the information to be given to unit-holders? Is there any other information that is essential for them ?
2. Do you agree that a summary of the key points of the merger proposal should be optional?
3. Should there be more detail at level 2 about what ought to be included in the description of the rights of unit-holders?
4. Do you agree with the proposed treatment of the KID of the receiving UCITS?
5. Would the proposals in Box 1 lead to additional costs for UCITS or management companies? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposals (e.g. compared to no prescription at level 2 on this issue)?

Question1

AFTI agrees globally with CESR's proposal for specifying the information to be given to unit-holders of both funds.

Question 3

- AFTI recommends adding two further elements in the information letter for unit-holders of both funds in case of mergers:
 - as merger techniques due to the existence of different settlement models (i.e. CSD or Transfer Agent model) may differ from one Member State to another, unit-holders should be informed, where applicable, about change on mechanisms for subscriptions and redemptions and about time required for transfer from one model to another. This may have a significant impact for unit-holders of the merging fund as it may change the way to send the orders, especially in terms of cut-off times
 - similarly, as valuation and fiscal rules to be applied to a merger will keep being different from one EU Member State to another, unit-holders should be informed about the corresponding impacts. This information should be produced by the management company of the receiving fund or by its fund administrator and should be validated by the auditor of the receiving fund.

Question 5

- Regarding off-one costs, AFTI considers that they may double in case of cross-border mergers. Additional administrative costs will result from the translation of documentation required, from fees to be paid to auditors of both funds and from the need to release the corresponding information through the appropriate regulatory channels.
- On-going costs will also increase with at least the introduction of new reporting resulting from diverging fiscal treatment between EU Member States.

Section II –Master-feeder structures

Agreement between depositaries

Questions for the consultation

21. Do you agree with CESR's proposal for defining the content of the depositaries' agreement?
22. Does Box 7 cover the right issues? Should other issues be addressed?
23. Which option do you prefer in relation to the national law and jurisdiction applicable to cross-border agreements? Would you prefer the law of the master depositary's home State to be applicable in every case?
24. What would be the additional costs of the proposal in Box 7? Please quantify your estimate of one-off and ongoing costs? What would be the benefits of these proposals, compared to no prescription at level 2 on this issue?

Question 21

- As noted previously in responses sent on UCITS IV and in our general comments, there is no harmonisation between roles and obligations of depositaries from one Member State to another. In these conditions the introduction of a new agreement to be signed between both depositaries should not lead to create additional obligations for any depositary not in line with its own local regulation. In this respect AFTI agrees with CESR's comments in paragraph 51 of this consultation which underlined that a "depositary cannot be required, under the terms of this Article of the Directive, to carry out any function that is forbidden or not provided for under the national law of its home State".
- AFTI believes that the priority is to ensure that information exchanged between both funds (or their management companies) will allow the feeder fund (or its management company) to communicate to its depositary all elements the latter needs to fulfill its obligations in terms of oversight in conformity with its local rules, as for any other UCITS fund. This information should be included in the agreement signed between the master fund and the feeder fund, as part of elements mentioned in Box 2 of the consultation paper. These should be actually covered by points 1.c and 1.d of Box 2.

- As a consequence the agreement between both depositaries should remain flexible enough to limit its scope to elements considered by both depositaries as necessary to fulfil their respective obligations in a context of diverging laws and rules across the EU. The following principles should therefore prevail:
 - for documents/information to be shared between depositary of the master fund and depositary of the feeder fund to ensure that the depositary of the feeder fund will be able to discharge its obligations: both depositaries should agree conjointly on the necessity to identify such documents on a case-by-case basis. Parameters such as existence of a unique or two different management companies, domicile of each fund involved and cases where each depositary has to report to its national regulator should be considered when defining the scope of the agreement and the nature of documents/information to be shared ;
 - in any case, both depositaries should keep the possibility to agree on the most appropriate way and timing for transmission of these documents;
 - for information to be communicated by the depositary of the master fund on its own initiative to the depositary of the feeder fund: this information should be the one sent to the regulator of the master fund when the depositary of the master fund has identified some irregularities at the master fund level in respect to its oversight obligations and only if the master fund or, where applicable its management company, has not taken the appropriate measures to solve these irregularities.
- Level 2 measures provisions should actually be limited to the definition of a general framework applicable for this agreement to ensure a consistent approach across EU Member States. Should further details be required by the Commission for the content of this agreement they should rather be defined through level 3 measures.
- We wish also to note that a feeder fund is potentially just one of many investors in a master fund. Therefore it does not seem appropriate to allow the depositary of a feeder fund to have access to information not available to other investors and that could create unequal treatment of unit-holders of the master fund. CESR should take this point into consideration when defining the level of details and the nature of elements to be included in the agreement signed between both depositaries.

Question 22

- In respect to elements proposed by CESR in Box 7, AFTI has the following comments:
 - Elements 1 and 2: we agree with these points provided that depositaries have enough flexibility to identify the corresponding documents on a case-by-case basis and to define the most appropriate way to exchange information between them according to their respective organisation.
 - Element 3.a: regarding the NAV calculation, the specific responsibilities (if any) of the depositary vary according to the legal nature and the domicile of the fund. In these circumstances we do not believe that this point should be included at level 2 in the standard agreement to be signed between depositaries.
For market timing aspects, we consider this is the fund's or, where applicable the management company of the fund's responsibility, to establish operational models and procedures that protect against such practices. This point should therefore not be imposed as an element to be included in the agreement signed between depositaries.

- Element 3.b: we consider that these aspects are defined freely by the feeder fund or where applicable by the management company of the feeder fund, as for any other UCITS fund. We do not believe that the inclusion of this point in the agreement signed between depositaries may have added-value in terms of investor protection.
- Element 4: we agree with this point but we consider that it could be part of those covered by the first element proposed by CESR. However we do not agree with reference to the depositary's report to unit-holders as this document does not exist in some EU Member States.
- Element 5: on this point, the divergences between EU Member States on how to report and to monitor breaches need to be taken into consideration. In addition, it must be clearly specified that the depositary of the feeder fund can only receive information transmitted voluntarily by the depositary of the master fund in accordance with rules imposed by national regulation of the master fund. In any case the depositary of the master fund should not be constrained to comply with rules which are not imposed by its own regulation.
- Elements 6 and 7: we agree with these points with the level of flexibility mentioned previously for other elements.
- Elements 8.a and .b: : we consider that Option B is the most appropriate and more specifically that the agreement signed between depositaries should be governed by the law of the master fund in every case. As mentioned in comments for Element 5, it is essential to guarantee that the depositary of the master fund will have to comply with its own regulation only and that it will not have any open-ended obligation to comply with any other regulations. Where there are more than one feeder fund for a given master fund, this principle should also facilitate the definition of the legal framework to govern the agreement signed between depositaries. If the framework proposed is too complicated and too burdensome for any depositary involved, the set-up of master-feeder structures will be very costly and management companies will not be encouraged to implement such cross-border solutions.

Question 23

- Please see our comments above for Element 8 in Box 7.

Question 24

- The introduction of an agreement between both depositaries will undoubtedly generate additional costs one-off and on an on-going basis. As explained above the agreement will need to be defined on a case-by-case basis due to the lack of harmonisation regarding rules imposed on depositaries across the EU and to the specificities of each master-feeder structure. Economies of scales resulting from the definition of a unique standard agreement cannot be envisaged in this respect.
- In addition depositaries will have to face difficulties resulting from the use of different languages in EU Member States. Translation will be certainly required in a number of cases even if English is considered as the international standard to be used at the EU level.

- Legal aspects will also have to be considered for the set-up of such an agreement as it does exist at the present time. This will be reinforced by the risks and difficulties stemming from different transpositions of the Directive at local level (e.g. rules that prevent exchange of information with third countries, professional confidentiality, data privacy, etc.).
- For all these reasons additional costs are to be foreseen with the implementation and the maintenance of this agreement between both depositaries. However the magnitude of the expected increase in costs is difficult to quantify at this stage.

2. Reporting by the master UCITS depositary

Questions for the consultation

25. Do you agree with CESR's proposals in relation to the irregularities to be reported by the depositary?

26. Do you agree that the interest of other unit-holders in a master UCITS will be adequately protected under national laws if these proposals are implemented?

27. What would be the additional costs of the proposals in Box 8? Please quantify your estimate of one-off and ongoing costs. What would be the benefits of these proposals compared to no prescription at level 2 on this issue?

Question 25

- As explained in responses to previous questions we fully agree with the fact that the depositary of the master fund can be expected to report only on what it is required to oversee in accordance with its national law and regulation. We consider that this principle should also be applied for the types of irregularities and breaches to be communicated by the depositary of the master fund to the depositary of the feeder fund. We therefore agree with CESR's proposal in relation to the nature of irregularities outlined in point 1 of Box 8.
- In these conditions Article 61 should not imply any additional obligations on the depositary of the master fund to oversee, approve and report on the resolution of irregularities beyond what is required under the existing laws of its home Member State. Therefore we consider that CESR should not be prescriptive on the list of errors that should be identified at level 2.
- Regarding the scope of the reporting, we wish to underline that a depositary, for any UCITS fund, reports irregularities to its regulator only when it has informed the fund or the management company of the fund of the corresponding events and when the fund or its management company has failed to solve them properly within a reasonable time. We consider that the same principle should apply to define the cases where the depositary of the master fund will inform the depositary of the feeder fund on irregularities at the master fund's level.
- Otherwise a frequent reporting to the depositary of the feeder fund for a wide range of irregularities as proposed in point 2 of Box 8 would not have any added-value for the

depository of the feeder fund as this information would not be usable in most cases and could not be interpreted in terms of impacts on the feeder fund.

- In addition we recommend extending this reporting to all other unitholders of the master fund to ensure equal treatment of its shareholders.

Question 26

- We agree that these proposals should preserve the interests of other unit-holders in a master fund.

Question 27

- We consider that proposals made in Box 8 could potentially generate significant additional costs for both depositaries especially because there are no similar rules applied across the EU on irregularities to be reported by a depository to its regulator. As an illustration rules applied in case of errors in the NAV calculation diverge from one Member State to another: in France no materiality thresholds are applied to indicate when the depository has to inform the regulator. Such thresholds have been introduced in the Luxembourg and Italian regulations but with very diverging levels.
- We therefore recommend the alternative approach that is described above in our response to Question 25. The principle of an exceptional reporting of irregularities to the depository and all shareholders of the feeder fund should limit additional costs resulting from such a reporting.