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The European Securities and Market Authority
11-13 Avenue de Friedland
F-75008 PARIS

January 14, 2011

Re : CESR call for evidence on Implementing measures on the Alternative Investment fund Managers Directive.

Dear Sirs,

CACEIS is pleased to contribute to the call of evidence on implementing measures on the alternative investment fund managers Directive.

CACEIS is of the opinion that this legislation is an extremely important step forward for the fund industry. It is our view that it is a key piece to bring further clarity in relation to the role, the responsibilities and the liability regime attached to the function of the European fund depositary.

1 - CACEIS

CACEIS is a major international group fully dedicated to the asset servicing industry (depositary/trustee, custody, fund administration, transfer agent and corporate trust). CACEIS is active through its locations in the major European fund market industry places (France, Luxembourg, Germany, Ireland, Belgium, The Netherlands and Switzerland). Overall, CACEIS is present in 11 countries, worldwide with a total staff of 3 730.

CACEIS client base is mostly composed of asset and fund managers, life insurance companies, pension funds, banks and other institutional clients.

CACEIS is a subsidiary (85%) of the Credit Agricole Group, the largest French banking group. The remaining 15% are held by the BPCE Group.

CACEIS is rated AA- by Standard & Poor's.

CACEIS

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CACEIS is a leading player in custody, fund services and depositary/trustee activities, as evidenced by the latest available statistics :

- CACEIS : **9th** custodian worldwide, with **€ 2,370 bn**.
- CACEIS : **6th** fund administrator worldwide, with **€ 1,140 bn** assets under administration.
- CACEIS : **1st** fund administrator in Europe.
- CACEIS : **1st** European fund depositary, with **€ 715 bn** assets.

(figures as sept 30, 2010)

CACEIS, being the largest European fund depositary bank has a keen interest in expressing its views and playing a constructive role in ensuring the effectiveness of the future regulation.

In the following detailed comments to the questions of the “Call of Evidence”, CACEIS expresses its opinions and recommendations on the issues we consider to be key for the fund depositaries and valuation functions

RESPONSES TO CESR CALL FOR EVIDENCE

Form of implementing measures: directive or regulation

CACEIS is of the opinion that the implementing measures, at least insofar as they concern depositary/valuator issues, should take the form of a directive.

Given that the majority of implementing measures relating to depositaries and valuers are closely linked to the law of contract, liability and property, all of which are issues for the national law of each Member State, implementing measures must take account of such national laws but. The measures, nevertheless, should be precise enough so that the national interpretations do give way to “regulatory arbitrage” between Member-States regulations and jeopardize one of the main objectives of the proposed regulation (ie.: European Harmonisation).

RESPONSES TO SPECIFIC ISSUES

I. VALUATION

II.9. Issue 9 - Article 19 Valuation

CESR is invited to advise the Commission on:

1. The criteria concerning the procedures for the proper valuation of the assets and the calculation of the net asset value per share or unit to be used by competent authorities in assessing whether an AIFM complies with its obligations under Article 19(1) and Article 19(3). CESR is invited to consider how these procedures should be differentiated to reflect the diverse characteristics of the assets in which an AIF may invest.

As a preliminary remark, it should be reminded that AIFs comply with Standard Accounting Practices as provided for in the national regulations. These standards provide for assets valuation procedures. In addition, AIFs are audited and certified by statutory external auditors.

The following factors are the key points which guarantee a proper valuation of the assets:

- Compliance with accounting regulations and practices established by the relevant regulatory authority of the AIF.
- Certification of the annual accounts and, where applicable, other regulatory periodic reports issued by the external auditors.
- Compliance with the provisions of industry good practices that define the valuation rules of the assets and the rules for the net asset value establishment.

2. The type of specific professional guarantees an external valuer should be required to provide so as to allow the AIFM to fulfill its obligations under Article 19(5). CESR is asked to consider the impact of the required guarantees on the availability of external valuers to the AIFM industry.

The external valuers should, notably, be in a position:

- To have permanent and reliable material and technical means and resources adapted to the assets used by the Management Companies,
- To rely on employees with a good level of professional expertise.
- To rely on an internal control system adapted to the asset used by the Management Companies.

Professional's guarantees may be envisaged as a part of the contractual arrangements between the AIFM and the valuer.

3. The frequency of valuation carried out by open-ended funds that can be considered appropriate to the assets held by the fund and its issuance and redemption frequency. In particular, CESR is invited to consider how the appropriate frequency of valuation should be assessed for funds investing in different types of assets and with different issuance and redemption frequencies, taking into account different (and varying) degrees of market liquidity. CESR is invited to take account of the fact that such valuations shall in any case be performed at least once a year.

As a matter of principle, the fund valuation frequency should be detailed in the fund rules.

The criteria to take into consideration to determine the AIF valuation frequency are :

- the frequency of the exercise of the subscription /redemption rights,
- the fair value of the assets,
- the nature and the liquidity of the assets invested in.

This frequency should be a deterrent to potential market timing practices.

II. DEPOSITARY

III.1. Issue 11 – Contract evidencing appointment of the depositary

1. CESR is requested to advise the Commission on the necessary particulars to be found in the standard agreement evidencing the appointment of the depositary. In its advice, CESR should take into account the consistency with the respective requirements in the UCITS Directive.

1- CACEIS is of the opinion that the main purpose of the standard agreement, besides evidencing the appointment of the depositary should be to provide for appropriate exchanges of information that enable the depositary to properly discharge its duties.

2- Whenever possible, consistency between the UCITS legislation and the AIFM implementing measures should be achieved in order to avoid unnecessary additional costs and diverging interpretations.

Consequently, CACEIS suggests that the contract includes, at a minimum, the following provisions :

- the applicable law of the contract,
- the exchange of information between the AIFM and the depositary,
- the arrangements in order to comply with applicable anti-money-laundering rules,
- the procedures linked to the appointment of third parties,
- The potential amendment to and termination of the agreement.

2. CESR is encouraged to provide the Commission, if possible, with a draft model agreement.

CACEIS is of the opinion that it would not be appropriate to recommend a model agreement .

Indeed, no model contract appears to be fit to accommodate to the diversity of situations, legislations and all types of assets that can be invested in by the AIF.

Please refer to 11-1 for the content of the contract.

III.2. Issue 12 - General criteria for assessing equivalence of the effective prudential regulation and supervision of third countries

1. CESR is requested to advise the Commission on the criteria for assessing whether the prudential regulation and supervision applicable to a depositary established in a third country with respect to its depositary duties are to the same effect as the provisions laid down in European law.

In this regard, CESR is invited to take into account at least whether the depositary :

- is subject to specific capital requirements for the safe-keeping of assets,
- is subject to supervision on an ongoing basis,
- provides sufficient financial and professional guarantees to be able to effectively pursue its business as a depositary and meet the commitments inherent to that function,
- is subject to rules as stringent as those laid down in Article 21 AIFMD

CACEIS agrees that the criteria proposed by the CESR would contribute to the application of equivalent rules in terms of prudential regulation and supervision in third countries. A level playing field should be ensured in all circumstances, including in the case of investment in non-EU AIFs.

Ongoing supervision by the competent authorities of the third country where the fund is domiciled

should be complemented by an independent external audit review, on an annual basis. The third country should benefit from a sound national legal framework.

The most relevant criteria in terms of equivalence should refer to the definition of the functions to be performed by the depositary (safe keeping and oversight) and to its level of liability in case of loss, as defined in Article 21 of the AIFM Directive.

2. CESR is requested to advise the Commission specifying the criteria for assessing that prudential regulation and supervision of a third country applicable to the AIF depositary with respect to its depositary duties established in a third country is to be considered as effectively enforced. Inter alia, CESR should take into account whether the depositary is subject to the oversight of a public authority, meaning that, at least :
- the authority has the power to request information from the depositary,
 - the authority has the power to intervene with respect to, and sanction, the depositary.

CACEIS agrees that the relevant public authority should have the power to request information and to intervene or sanction the depositary.

As a prerequisite, this public authority should be granted the effective authority to explicitly license (authorize) the depositary to perform its functions for non EU AIFs that might be distributed in the European Union.

III.3. Issue 13 – Depositary functions

1. CESR is requested to advise the Commission on the conditions for performing the depositary functions pursuant to Article 21(6). CESR is requested to specify conditions for the depositary to ensure that :
- the AIF's cash flows are properly monitored,
 - all payments made by or on behalf of investors upon the subscription of shares or units of - an AIF have been received and booked in one or more cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC,
 - where cash accounts are opened in the name of the depositary acting on behalf of the AIF, none of the depositary's own cash is kept in the same accounts.

In its advice, CESR should take into account the legal structure of the AIF and in particular whether the AIF is of the closed-ended or open-ended type.

When taking in consideration monitoring of cash flows, the following principles should be reaffirmed:

- Control procedures described further have proved to be sufficient and proportionate to ensure the monitoring of the AIF cash flows.
- Banking regulation regulates cash flows and assets in cash.

a) Monitoring of the AIF cash flows

CACEIS is of the opinion that the tasks and responsibilities of the depositary differ depending upon the location of the cash accounts of the AIF - i.e. opened with the depositary itself or with another entity (cash account provider) appointed by the AIFM - and, in the later case, whether the cash account is opened in the name of the AIF (or AIFM), or in the name of the depositary.

Indeed, when cash belonging to the AIF is maintained with cash account providers others than the depositary itself, all relevant information must be provided by the AIF(or the AIFM) to the depositary. The depositary may therefore, in no circumstance, be held liable for any misappropriation or loss related to these assets.

1. Depositary tasks when cash accounts are in the books of the depositary.

In this case, the depositary should comply with the applicable banking laws where the account is located.

2. Depositary tasks when the cash accounts are opened in the books of third parties and opened in the name of the AIF (or the AIFM).

In this circumstance:

- the depositary should verify that the AIFM has set up procedures and controls with regards to :
 - o The opening of the account and the management of the cash flows including :
 - the verification of the appropriate license of the third party,
 - the existence and the communication of statements of accounts.
 - o Account segregation between the cash belonging to each AIF and the cash belonging to the AIFM.
 - o The reconciliation between the external balances accounts and the accounts of the AIF.
- The AIFM should communicate to the depositary the details of all accounts and cash account providers of the AIF.

Cash account providers should communicate, and when requested, confirm to the AIFM and to the depositary the specifics related to all account details, balances, transactions, collateral arrangements, deposits, and compliance with the local regulation applicable to cash accounts.

3. Duties of the depositary when cash accounts are maintained in the books of third parties and opened in the name of the depositary on behalf of the AIF.

In this particular circumstance, the depositary is subject to existing applicable European legislations.

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2. CESR is requested to advise the Commission on the conditions applicable in order to assess whether :

- an entity can be considered to be of the same nature as the entity referred to in Article 18 (1) (a) to (c) of Commission Directive 2006/73/EC, in the relevant non-EU market where opening cash accounts on behalf of the AIF are required,
- such an entity is subject to effective prudential regulation and supervision to the same effect as the provisions laid down in European Union law and which is effectively enforced.

CACEIS agrees that the conditions applicable should provide for the same effect as for the provisions laid down in the European Union law.

More specifically, effective local supervision should be in place and enforced, entities should be subject to, and comply with, recognized prudential international standards.

Reporting requirements and procedures applicable to the account providers should be satisfactory.

ISSUE 13.2 – DEPOSITARY FUNCTIONS PURSUANT TO PARAGRAPH 7

1. CESR is requested to advise the Commission on :

- the type of financial instruments that shall be included in the scope of the depositary's custody duties as referred to in point (a) of Article 21(7), namely (i) the financial instruments⁸ that can be registered in a financial instruments account opened in the name of the AIF in the depositary's books, and (ii) the financial instruments that can be "physically" delivered to the depositary,
- the conditions applicable to the depositary when exercising its safekeeping custody duties for such financial instruments, taking into account the specificities of the various types of financial instruments and where applicable their registration with a central depositary, including but not limited to :
 - o the conditions upon which such financial instruments shall be registered in a financial instruments accounts opened in the depositary's books opened in the name of the AIF or, as the case may be, the AIFM acting on behalf of the AIF,
 - o the conditions upon which such financial instruments shall be deemed (i) to be appropriately segregated in accordance with the principles set forth in Article 16 of Commission Directive 2006/73/EC⁹, and (ii) to be clearly identified at all times as belonging to the AIF, in accordance with the applicable law; and what shall be considered as the applicable law.

As a matter of principle, all financial instruments that shall be included in the scope of the depositary's duties as referred to in point (a) of Article 21(7) should comply with the following conditions :

In all circumstances, the financial instruments (hereafter "the securities"), are safe kept all along a chain of intermediaries, in a way that gives insurance to the depositary, at any time, about their existence, their location and its rights of disposition and retrieval.

That implies that the securities should be, at the same time (ie: cumulative conditions):

- free of any lien,
- subject to regulated central reconciliation procedures, performed independently from the issuer in order to ensure the integrity of the financial instruments issuances,
- Transferable with all their rights and effects,
- Safe-kept by third parties selected by the depositary according to its own due diligence criteria.

Therefore, the financial instruments that can be included in the above-mentioned scope are the securities (Equities, fixed income securities and units of funds) that :

- are not subject to a partial or full transfer of ownership and to any re-use (re-hypothecation) of the financial instruments,
- are registered in a central security depositary (CSD) performing the so-called notary function,
- are not registered with the Issuer itself or its agent (i.e. a registrar or a transfer agent).

Conversely financial instruments that are excluded from the above-mentioned scope are, namely:

- Physical instruments not held by the depositary and its sub-custodians,
- All financial contracts (including derivatives instruments, listed and OTC). These instruments are financial contracts which cannot be registered into securities accounts,
- Units and shares of collective investment schemes issued in a nominative form or registered with the issuer or a registrar,
- All other financial instruments issued in a nominative form or registered with and issuer or a registrar,
- All financial used as collateral or transferred to a counterparty for a potential re-use.

The securities that can be "physically" delivered to the depositary can be transferred in a physical certificate form of title only. These securities are safe kept in a vault only and not in an account.

As far that the conditions applicable to the Depositary are concerned, level 1 provisions In the AIFM Directive appear to be appropriate and sufficient in their nature and scope.

2. CESR is requested to advise the Commission on :

- the type of "other assets" with respect to which the depositary shall exercise its safekeeping duties pursuant to paragraph 7(b), namely all assets that cannot or are not to be kept in custody by the depositary pursuant paragraph to Article 7(a).

All financial instruments which are not in the scope of the custody as referred in point (a) of Article 21(7) should be subject to safekeeping duties pursuant to paragraph 7(b).

In addition, all assets which are not financial instruments are part of the "other assets".

Main categories comprise :

- commodities,
- receivables,
- real estate properties,
- pieces of fine arts,
- material goods,
- ...

CACEIS understands that level 1 provisions does exclude cash from the scope of the safekeeping functions.

- The conditions applicable to the depositary when exercising its safekeeping duties over such "other assets", taking into account the specificities of the various types of asset, including but not limited to financial instruments issued in a 'nominative' form, financial instruments registered with an issuer or a registrar, other financial instruments and other types of assets.

3. To that end, CESR is requested to advise the Commission on :

- the conditions upon which the depositary shall verify the ownership of the AIF or the AIFM on behalf of the AIF of such assets,
- the information, documents and evidence upon which a depositary may rely in order to be satisfied that the AIF or the AIFM on behalf of the AIF holds the ownership of such assets, and the means by which such information shall be made available to the depositary,
- the conditions upon which the depositary shall maintain a record of these assets, including but not limited to the type of information to be recorded according to the various specificities of these assets; and the conditions upon which such records shall be kept updated.

CACEIS is of the opinion that ownership of other assets should be ascertained through:

- a periodic review of the existing procedures in place in the AIFM with regards to the reconciliation procedure of the AIFM records with the external evidences of ownership,
- a periodic reconciliation of the AIFM records with the depositary records, to be performed by the AIF. The findings of these reconciliation are to be communicated, without delay, to the depositary.

The obligation of information to the depositary lies on the AIF, or on the AIFM, acting on behalf of the AIF.

The description of the nature of the information flow to be communicated by the AIF (or AIFM) to the depositary should be included in the agreement evidencing the appointment of the depositary.

In the course of its periodic reviews, the depositary should be satisfied with the reconciliation procedures in place in the AIF (or the AIFM).

That includes the existence and the nature of the proof of evidence (eg certifications from issuers and

third parties), the frequency of the reconciliation procedure, the nature and the justifications for discrepancies).

The depositary makes its own independent assessment of AIFM procedures and of the compliance by the AIF (or the AIFM) of its obligations.

Finding and breaches must be communicated to the AIF (or the AIFM), and to the relevant regulatory authority if the problems persist

4. In its advice, CESR should also consider the circumstances where assets belonging to the AIF, are subject to temporary lending or repurchase arrangements or any type of arrangements under which financial instruments may be re-used or provided as collateral by the AIF or AIFM on behalf of the AIF, whether or not such arrangements involve transfer of legal title to the financial instruments, and advise on the conditions applicable to the depositary to perform its safekeeping duties accordingly.

As a matter of principle:

- Appropriate authorization, and information, relative to the ability of the AIF to enter into collateral arrangements should be explicitly part of the AIF legal and commercial documents.
- The depositary cannot be held liable for any loss of assets transferred as collateral to a counterparty, unless the assets remain with the depositary (or its agent).

ISSUE 13.3 – DEPOSITARY FUNCTIONS PURSUANT TO PARAGRAPH 8

1. CESR is requested to advise the Commission on the conditions the depositary must comply with in order to fulfill its duties pursuant to Article 21(8). The advice shall include all necessary elements specifying the depositary control duties when inter alia verifying the compliance of instructions of the AIFM with the applicable national law or the AIF rules or instruments of incorporation, or when ensuring that the value of the shares or units of the AIF is calculated in accordance with the applicable national law and the AIF rules or instruments of incorporation and procedures laid down in Article 19

The proposed implementation measures should follow the following principles:

- A risk-based approach that implies proportionality when fulfilling the duties.
- An efficiency approach that implies that:

The depositary does not replicate works and processes done by others. In particular the depositary, when the applicable national legislation does not require the depositary to process calculations of NAVs, should not be induced to “recalculate” the NAVs. Conversely, should these tasks be included in the depositary duties, it should be taken into account when defining the scope and the nature of other tasks and controls to be performed by the depositary. These functions are to be performed on ex-post basis as they are always carried out by the depositary, in addition to the controls already performed by the AIF itself or the AIFM.

It is therefore essential that, in the proposed legislation, neither a prevailing, nor a forbidden, procedure for controls (samples, assessment of procedures, on site due diligence, ...) is designated.

III.4. Issue 14 – Due diligence

1. CESR is requested to advise the Commission on the duties the depositary has to carry out in exercising its due diligence duties pursuant to Article 21(10), namely,

- procedures for the selection and the appointment of any third party to whom it wants to delegate parts of its tasks; and
- procedures for the periodic review and ongoing monitoring of that third party and of the arrangements of that third party in respect of the matters delegated to it.

CACEIS is of the opinion that the description of the due diligence duties to be performed by the depositary as provided for in the level 1 text of the Directive (Art 21.10.d) appears to be already very detailed as it provides for a large number of conditions to be fulfilled by a third party.

The depositary should establish, implement and maintain internal procedures referring to:

- The selection and appointment of a sub-custodian,
- The periodic review and ongoing monitoring of this sub-custodian.

This includes :

- Regular market reviews.
- The verification of :
 - o The existence of contractual arrangements for assets in custody with the third party, and in particular, arrangements applicable to the obligation of segregation of assets (ie: existence of the obligation and enforceability with regard to local bankruptcy laws).
 - o All others dispositions provided for in art 21.10 (d).
- The appraisal of :
 - o The means and organization of the third party to perform the delegated tasks, including its internal reconciliation procedures.
 - o The sufficient good repute and experience of the third party.
 - o The financial soundness of the third party (appraised through internal/external rating procedures).

The procedures should take into account the proportionality principle of the controls and the local characteristics of the market where the third party is located. Accordingly, the procedures may provide for different means to conduct due diligence processes (eg: questionnaires, visits in situ, third parties assistance and services, ...).

2. CESR is encouraged to develop a comprehensive template of evaluation, selection, review and monitoring criteria to be considered by the depositary while exercising its due diligence duties under Article 21(10).

CACEIS is of the opinion that, given the diversity of countries that are included in the depositary's sub-custodian network, any regulatory template should be limited to the principles mentioned above.

III.5. Issue 15 – The segregation obligation

1. CESR is requested to advise the Commission on criteria to be satisfied to comply with the segregation obligation whereby the depositary shall ensure on an ongoing basis that the third party fulfils the conditions referred to in Article 21(10)(d)(iv).

Current market best practices already require segregation and “ring-fencing” of securities on behalf of the fund, where possible under current market practice.

There are, however, limitations in some typically less developed markets or in some legal environments. These limitations should be given the appropriate level of disclosure to the investors.

Any standards addressing the question of segregation below the level of the depositary need to take into account the legal and operational realities of the way in which assets are currently held in the

international custodial system and the cost implications of making any changes to that. In particular full segregation on a client by client basis throughout the custody chain would be impossible to achieve in practice. At depositary level, depositaries that are subject to MiFID are required to segregate assets so as to be able to identify assets held for one client from assets of another and from the depositary's own assets. Intermediaries in the custody chain are equally usually required to segregate their client assets from their own assets. This requirement is considered to be the main ring-fencing procedure. Below the depositary, however, assets are generally mixed with those of all other client assets and held in an "omnibus client" account. Indeed, full segregation throughout the sub-custody chain by designation of each individual client at each level would not add clear benefits in terms of security of the assets and may not be possible under local law in the jurisdiction in which the third party is located.

The contractual arrangement between the depositary and the third party should include the segregation obligation. More concretely, the contract should provide for the obligation of segregation between the client assets and the own assets of the Third party and provide for the obligation to inform the depositary whenever any change of internal procedures or local regulation is applicable to the segregation and custody arrangements.

III.6. Issue 16 – Loss of financial instruments

1. CESR is requested to advise the Commission on the conditions and circumstances under which financial instruments held in custody pursuant paragraph 7(a) shall be considered as "lost" according to Article 21(11). In its advice, CESR should take into account the various legal rights attached to the financial instruments depending, for example, on the legal concepts ('ius ad rem' vs. 'ius in personam') used in the jurisdiction where they have been issued and any legal restrictions applicable to the place where they are kept in (sub-)custody.

Legally speaking a material loss affecting the AIF is a result of the following circumstances:

- The financial instrument does not longer exist (without any relation to a decision of the issuer or its agent), or
- The rights of the AIF over the financial instrument have been suspended or terminated.

We agree that unavailability of financial instruments do not qualify for a loss. Therefore, a clear distinction should be done between a temporary unavailability of an asset (i.e. an asset is "blocked" for a certain period of time, due to e.g. bankruptcy proceedings or governmental measures) and a definitive "loss" (due to e.g. embezzlement or fraud).

It is our opinion that no other qualified authority than a judiciary authority should be given the capacity to judge of the loss of financial Instruments.

2. In its advice, CESR should specify circumstances when such financial instrument should be considered permanently "lost", to be distinguished from circumstances when such financial instruments should be considered temporarily "unavailable" (held up or frozen).
To that end, CESR shall consider inter alia the following circumstances :

- Insolvency of, and other administrative proceedings against, a sub-custodian; it's not temporarily lost, this case is a case of external events beyond reasonable control.
- Legal or political changes in the country where financial instruments are held in sub custody; it's not temporarily lost, this case is a case of external events beyond reasonable control.
- Actions of authorities imposing restrictions on securities markets; it's not temporarily lost, this case is a case of external events beyond reasonable control.
- Risks involved through the use of settlement systems; and it's not temporarily lost, this case is a case of external events beyond reasonable control.
- Any other circumstances which may prevent the AIF from using or disposing of its assets that are kept in custody by a depositary or a sub custodian.

When determining that the conditions for a loss are met the judiciary decision may take into account *inter alia* the following circumstances:

- Insolvency of, and other administrative proceedings against, a sub-custodian,
- Legal or political changes in the country where financial instruments are held in sub custody,
- Actions of authorities imposing restrictions on securities markets,
- Risks involved through the use of settlement systems,
- Any other circumstances which may prevent the AIF from using or disposing of its assets that are kept in custody by a depositary or a sub custodian.

None of the above circumstances, however, qualifies as a loss of financial instrument *per se*. as the above circumstances may qualify for a loss only when they lead to a proven and definitive disappearance of the assets.

In the investors interest, temporary unavailability of the assets of the AIF may lead to implement exceptional and provisional measures, to be determined by the AIF (or the AIFM) in compliance with applicable regulations (eg: amendments to NAV calculation rules, temporary suspension of subscription /redemption rights, side pockets,...).

III.7. Issue 17 - External events beyond reasonable control

1. CESR is requested to advise the Commission on conditions and circumstances for events to be considered as :
 - external,
 - going beyond reasonable control, and
 - having consequences which would have been unavoidable despite all reasonable efforts to the contrary.
2. If possible, CESR is requested to advise the Commission on a non-exhaustive list of events where the loss of assets can be considered to be a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. CESR is encouraged to consider the appropriate form (e.g. guidelines) of such a list.

When drafting its advice, CESR should bear in mind that:

1. Safekeeping arrangements are a consequence of Investment decisions made by the AIFM that may generate specific incremental risk factors that the depositary cannot monitor.
Practical cases are: investments in non mature financial markets (eg weak centralized infrastructures, absence, or limited effects, of the segregation obligation), in unstable political environments, in markets with limited availability of sub custodian services appropriate for selection.
2. Compliance with the provisions laid by Art 21 para 10 cannot, eliminate the risks linked to :
 - o The organization and the effectiveness of the oversight of the local financial systems by the local competent authorities, over the financial infrastructures and the regulated actors. In this respect, prevention and punishment of fraud appears to be clearly within the remit of the relevant authorities (regulatory, administrative and judiciary).
Indeed, no due diligence process over 1/3 parties can be superior to ongoing local regulatory supervision, local regulators and overseers being, by nature, the strongest authority and having been granted the highest capacity to discharge their duties.
 - o The local and international systemic crises affecting the financial markets.
 - o The local and international political crisis and events.

CACEIS sees a great benefit in establishing a non-exhaustive list of events where the loss of assets can be considered to be a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

Such a list will be a key element contributing to the European harmonization of the fund depositary liability regime

That list should contain, as a minimum, the following events:

- o **Linked to local market conditions.**
- o Market closures.
- o Widespread defaults (systemic/domino effect in one of more markets).
- o Effect of political/ judiciary acts and decisions.
- o Insolvency of sub custodian notwithstanding the fulfillment of the depositary's duties (ie the due diligence obligations).

- o **Linked to markets infrastructures deficiencies.**
- o Failure, outage, and fraud.
- o Local market rules imposing liens and/or reversals.

Additional comment

When responding to Issue 17, CACEIS refers to its comments to issue 13.2 and, more precisely to its views as per the financial instruments that shall be included in the scope of the depositary's duties, as referred to in point (a) of article 21-7.

There is therefore no need to advise on a list of external events affecting other types of assets.

III.8. Issue 18 – Objective reason to contract a discharge

1. CESR is requested to advise the Commission on the conditions and circumstances under which there is an objective reason for the depositary to contract a discharge pursuant to Article 21(12).
2. In its advice, CESR is encouraged to provide an indicative list of scenarios that are to be considered as being objective reasons for the contractual discharge referred to in Article 21 (12).

Conditions and circumstances leading to contract a discharge may be of very diverse in nature, but in all cases result from investment decisions made by the AIFM which can interfere in the ability of the depositary to discharge its duties appropriately. These circumstances may be of *inter alia*, legal (unsatisfactory legal environment), economical (unsatisfactory conditions), operational, nature.

The agreement between the parties (the depositary and the AIF) that there is a need to contract a discharge pursuant to Art 21(12) should be deemed sufficient and should not require additional and unnecessary formalization.