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CACEIS CONTRIBUTION

to the consultation paper on possible
implementing measures of the AIFM
Directive in relation to supervision and third
countries

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I- PRESENTATION OF CACEIS

CACEIS is a major international group fully dedicated to the asset servicing industry (depository/trustee, custody, fund administration, transfer agent and corporate trust). CACEIS is active in the major European market places for the fund industry (France, Luxembourg, Germany, Ireland, Belgium, The Netherlands and Switzerland). Overall, CACEIS is present in 11 countries worldwide with a total staff of 3 500.

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 A+ by Standard & Poor's.

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

- CACEIS : **9th** custodian worldwide, with **€ 2,379 bn**.
- CACEIS : **5th** fund administrator worldwide, with **€ 1,150 bn** of assets under administration.
- CACEIS : **1st** fund administrator in Europe.
- CACEIS : **1st** European fund depository, with **€ 705 bn** of assets.

(figures as dec. 31, 2010)

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

CACEIS welcomes the opportunity to contribute to the Consultation Paper on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries.

Please refer to CACEIS contribution to ESMA public consultation on possible implementing measures (consultation closed on sep. 13, 2011), for CACEIS comments and messages on the European fund depository functions and liability regime under the AIFM Directive.

II- KEY MESSAGES

CACEIS agrees with ESMA that the implementing measures should provide a high level of comfort as regards investor protection and that a level playing field that should be satisfied to by depositaries established in third countries Best practices and European standards should be encouraged in all jurisdictions which provide depositary services for financial instruments distributed in the EU .

CACEIS is of the opinion that the prudential regulation and supervision applicable to a depositary established in a third country should not allow the depositaries established in third countries to circumvent the provisions applicable to the European depositaries. The local regulation applicable to the depositaries established in a third country should therefore be equivalent in their requirements to those provided in Article 21 (7 to 16) – “Duties and liabilities applicable to a European depositary”.

CACEIS is of the opinion that contractual arrangements between the depositary and the AIF/AIFM in relation to the liability and the rules of the depositary are not sufficient to ensure the same level of safety and of investor protection. This level can be reached through adequate and applicable regulations.

III- Detailed contribution to the public consultation

I. Delegation (Articles 20 (1)(c), 20(1)(d) and 20(4))

Box 1

1. In order to fulfil the requirement set out in Article 20(1)(d) of the AIFMD a written arrangement should exist between the competent authorities of the home Member State of the AIFM or ESMA and the supervisory authorities of the undertaking to which delegation is conferred.
2. Where the undertaking sub-delegates any of the functions delegated to it, a written arrangement should exist between the competent authorities of the home Member State of the AIFM or ESMA and the relevant supervisory authorities of the undertaking to which sub-delegation is conferred.
3. Where the sub-delegate further delegates any of the functions delegated to it the conditions in paragraph 2 shall apply mutatis mutandis.
4. With respect to the delegated functions from the entity to which functions were delegated or sub-delegated, the arrangement referred to in paragraphs 1 and 2 above should entitle the competent authorities to:
 - a) obtain on request the relevant information necessary to carry out their supervisory tasks as provided for in AIFMD;
 - b) obtain access to the documents relevant for the performance of their supervisory duties maintained in the third country;
 - c) have the right to request an on-site inspection on the entity to which functions were delegated or sub-delegated. The practical procedures for on-site inspections should also be detailed in the arrangement;

d) receive immediately information from the supervisory authority in the third country in the case of breach of regulations;

e) ensure that enforcement actions can be performed in cases of breach of regulations.

5. The third country undertaking should be deemed to satisfy the requirement under Article 20(1)(c) when it is authorised or registered for the purpose of asset management based on local criteria which are equivalent to those established under EU legislation and is effectively supervised by an independent competent authority.

Q1: Do you agree with the above proposal? If not, please give reasons.

CACEIS CONTRIBUTION

CACEIS agrees with the ESMA proposals. The list of these written arrangements should be made publicly available (e.g.: ESMA website).

II. Depositary (Article 21(6))

Box 2

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

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

b. The local regulatory framework should set out criteria for the eligibility to act as depositary that are equivalent to those set out for the access to the business of credit institution or investment firm;

c. The capital requirements imposed in the third country should be equivalent to those applicable in the EU as set out in Article 21 (6) (b) depending on whether the entity is equivalent to a credit institution or to an investment firm;

d. The operating conditions are equivalent to those set out for credit institutions or investment firms within the EU depending on the nature of the entity;

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

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

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

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

CACEIS COMMENTS

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

In particular, Article 21(6) of the Directive subparagraph b) expressly requires that the relevant entity is subject 'to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as Union law and are effectively enforced'. Therefore the Associations are of the opinion that the prudential regulation and supervision applicable to a depositary established in a third country should not allow the depositaries established in third countries to circumvent the provisions applicable to the European depositaries.

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

As per the proposed "box 2", CACEIS submits the following comments:

- 1.(b): Criterion b should be clarified (please see explanatory text 6) and make an explicit reference to **the EU regulation (as in c), d) & e))**
- 1.(e): The reference to article 21 should be **broadened** and include (21-7) (cash monitoring) and (21-16) (information to the competent authority)
- 1.(f): The local regulatory framework should provide **identical** levels of sanction in case of violations by the depositary
- 1.(g): This Criterion does not seem necessary as it is already included in criterion 1.(e) (please see Article 21 (15)

Therefore , CACEIS recommends the following amendments to BOX 2:

Box 2

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

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

b. The local regulatory framework should set out criteria for the eligibility to act as depositary that are equivalent to those set out for the access to the business of credit institution or investment firm **applicable within the EU;**

c. The capital requirements imposed in the third country should be equivalent to those applicable in the EU as set out in Article 21 (6) (b) depending on whether the entity is equivalent to a credit institution or to an investment firm;

d. The operating conditions are equivalent to those set out for credit institutions or investment firms within the EU depending on the nature of the entity;

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

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

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