FEDERATION BANCAIRE FRANCAISE

AFTI

Paris, 31 March 2009

Response of the

French Banking Federation

(FBF- *Fédération Bancaire Française*)

and

French Association of Securities Professionals

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

to the

CESR call for evidence on "possible implementing measures concerning the future UCITS directive"

Response to be submitted via CESR'S website (www.cesr.eu)
CESR Ref. 09-179

Deadline for sending responses: 31 March 2009

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

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

The French Association of Securities Professionals "AFTI" 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

Preamble:

The FBF and AFTI welcome the opportunity to contribute to the CESR (Committee of European Securities Regulators) call for evidence on possible implementing measures concerning the future UCITS Directive. The FBF and AFTI consider that the 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 the FBF and AFTI to the CESR's call for evidence is in relation t**o the depositary functions (custody, oversight, and fund administration).**

At this stage of the consultation process, the FBF and AFTI seek to contribute to the CESR's call for evidence by providing general responses that focus on the main points that CESR should take into account when preparing its final advice for the Level 2 measures. Many questions raised by CESR need to be addressed further in a more detailed approach to ensure that the appropriate provisions will be included in Level 2 measures, at the end of the legislative procedure.

Therefore, the FBF and AFTI call for further consultations in the coming weeks. The FBF and AFTI are convinced that extended period for these consultations would enable a deeper analysis by potential respondents and therefore provide more added-value to the entire process.

The FBF and AFTI are of the opinion that the current study CESR is conducting on the way the obligations of depositaries have been implemented by the different Member States will be a very useful working basis for improving the implementation of the UCITS Directive. The FBF and AFTI expect that this study will lead to an assessment of how the corresponding conclusions should be considered when drafting level 2 measure proposals that will impact the roles and responsibilities of the depositaries and of other actors of the value chain.

3 RESPONSE

QUESTION N°1 (CESR CALL FOR EVIDENCE PAGE 7)

Management companies structures and organisational requirements to minimize conflicts of interests (UCITS IV directive article 12)

CESR is invited to advise the Commission on the content of the rules that are proportionate and necessary for specifying the general obligations placed on management companies by Article 12(1)(a) and (b).

In particular CESR is requested:

a) to define procedures and arrangements to be implemented by the management company, having regard to the nature of the UCITS managed by the management company (its characteristics and complexity), that meet requirements of Article 12(1)(a),

b) to define the conditions for the structure and organisational requirements of a management company that are necessary for minimizing conflicts of interests as referred to in paragraph 1(b)

The FBF and AFTI recall that there are already some provisions regarding conflicts of interest in other existing directives such as the MIFID, the Market Abuse Directive and the Markets in Financial Instruments Directive. Therefore there is a need to make sure that the introduction of Level 2 measures in the UCITS IV Directive will contribute to reinforce the coherence between the different regulations in place and to clarify applicable rules, instead of introducing new rules.

In this respect, the FBF and AFTI consider that level 2 provisions should promote and reinforce the compliance with basic principles key to ensure that management companies will have the capacity to minimise conflicts of interests. These principles require that management companies implement appropriate internal procedures and arrangements to guarantee a satisfactory first level of control on operations carried out on a day-to-day basis.

These procedures and arrangements must be formalised in an appropriate format to be distributed to all staff in charge of executing operational treatments and to be consulted by any competent authorities. In addition persons in charge of controlling their correct application are to be appointed and clearly identified at the management company level.

In such a context the depositary will be able to perform its duties in an efficient way by carrying out a second level of controls in accordance with its supervisory obligations as described in the UCITS Directive.

QUESTION N°2 (CESR CALL FOR EVIDENCE PAGE 9)

Management companies rules of conducts including conflicts of interests (article 14)

CESR is invited to advise the Commission:

a) on the rules that should specify the steps management companies should be expected to take pursuant to Article 14(2)(a),

b) on the criteria according to which the conduct of its business by a management company should be assessed by the competent authorities (according to Article 14(2)(b)),

c) on the conditions and principles that will ensure that a management company employs effectively the resources and procedures necessary for the proper performance of its business activities.

The FBF and AFTI believe that, in case of cross-border activities where different regulations are to be complied with by the management company, it will be essential to ensure that administrative and accounting functions are correctly performed and that appropriate controls have been introduced at the management company level in this respect.

Therefore, when a management company decides to establish a fund in another Member State (taking the benefit of the management company European passport), its awareness and knowledge of the prospective fund regulation should be absolute. It is essential that the management company knowledge, and correct understanding, of this regulation applicable to the fund is required and complied with from the inception of the fund and during the entire life-span of the fund.

In this respect level 2 measures should include appropriate safeguards to ensure that the rules of the fund's domicile are complied with in all circumstances, especially regarding the accounting rules to be used for the calculation of the NAV. As long as there has been no harmonisation on this matter among EU Member States, it will be essential to verify that the expertise required is effectively in place at the management company level, not only when the fund is created, but also on an-going basis.

The regulator of the management company should check and ensure the existence of an "activity program" **per country** (in this respect CESR may find some merits in the procedures activity programs established by Asset Management Companies and sanctioned by funds regulators, on the model of the French activity program) inside the management company. This activity program should be validated by the regulator of the management company (if necessary after an advice of the regulator of the fund). Moreover, the regulator of the management company should verify the effective implementation of this program.

Delegation rules are also a major aspect to be considered when referring to this topic.

In these conditions there should be some provisions in the Level 2 text to guarantee that due diligence procedures are systematically performed by all actors that wish to delegate some of their functions and these procedures are sufficient and efficient enough to detect any anomalies that could endanger the safety of UCITS funds and of investors.

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QUESTION 3 (CESR CALL FOR EVIDENCE PAGE 10)

Measures to be taken by a depositary of a UCITS managed by a management company on an investment company situated in another Member State (Articles 23 and 33)

1. CESR is requested to advise the Commission on the specific conditions that a depositary must meet to fulfil its duties regarding a UCITS managed by a management company situated in another country.

2. CESR is requested to advise the Commission on standard arrangements between the depositary and management company and identify the particulars of the agreement between them that are 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.

3. CESR is invited to consider the need to regulate through level 2 measures the law applicable to the agreement in order to remove legal uncertainty (whether the agreement should be governed by law of UCITS home Member State, management company home Member State or of any other Member State).

From a general point of view, the FBF and AFTI believe that a Depositary Expert Group should be set-up by the CESR to review and analyse all aspects referring to the depositary's roles and responsibilities. In the current context, and more particularly following the questions raised by the Madoff case, such an instance could have a real added-value in all evolutions referring to the harmonisation of depositary functions and the rules to be applied for delegation of some of these functions.

Concerning the provisions of the UCITS IV Directive, the FBF and AFTI notice that the functions and responsibilities of the depositary remain unchanged in the level 1 text as Article 22 (and 32) mirrors Article 14 (and 24) of UCITS III. The duties to be performed by the depositary following the implementation of UCITS IV should therefore reflect this principle.

The FBF and AFTI consider that any modification of the depositary's responsibilities and duties as a consequence of the asset management company passport must be counterbalanced by a level playing-field between all UCITS funds, wherever the fund and the management company are located.

As already mentioned in our comments regarding Question 1, management companies have to set up internal controls. With the current crisis context, a first level of control is needed inside the management company.

More specifically, regarding the written agreement to be signed between the depositary and the management company to define the flow of information necessary for the depositary to

perform its duties, it is essential that the provisions of the contract clearly state that both the depositary and the management company, and not only the depositary, are in charge of producing the corresponding document. The management company should also be responsible for the definition of this information as it is directly affected and liable for the implementation of the agreement.

The contract between the management company and the depositary must be regulated by the fund law and therefore has to be compliant with the **fund regulation** in order to enable the depositary to perform its duties, according to its own obligations and to the ones of the fund. This principle should also prevent legal fragmentation that still prevails between the different Member States and consequently should contribute to eliminating arbitrage opportunities.

Concerning the detailed content of the agreement, the FBF and AFTI consider that the following points should be included:

a. How the depository can access procedures set up by the management company for the management of the UCITS fund (including e.g.annual due diligence, comprehensive review of all the procedures within the management company, …)
b. Corporate aspects processing starting from the creation of the UCITS (agreement with depositary, initial cash deposit statement issued by the depositary) and during the existence of the fund (e.g.modification of the scheme particulars, winding-up, dissolution, merger, annual accounts review)
c. Supervisory of investment decisions and of eligibility of the assets (both by the management company and the depositary).
d. Control of the way the fund is valuated
e. Control of the portfolio and annual certification of assets
f. How the depositary formally alerts the management company, regulators and unit-holders in case breaches with applicable rules,…
g. The data the depositary needs to perform its investment controls
h. Names of the persons to be contacted in case of incidents and of persons in charge of internal controls

Concerning the standardisation of this agreement, the FBF and AFTI believe that it would be useful to have a general framework in order to facilitate the initial draft and to ensure that a number of areas (as mentioned above) are effectively covered by this document. In the same time there should be some room for customisation in order to allow adjustements to specific situations and to compensate for the absence of harmonisation between rules applied from one Member State to another.

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QUESTION 4 (CESR CALL FOR EVIDENCE PAGE 13)

Risk management (Article 51)

CESR is invited to advise the Commission on the following questions:

1 What should be the conditions that govern risk management processes that can be employed by management/investment companies?

CESR is invited to establish the criteria that competent authorities should take into account when determining whether the risk management process employed by the management company is adequate for monitoring and measuring at any time the risk of a position and its contribution to the overall risk profile of the portfolio. (…)

2. What should be the content of the detailed rules regarding the accurate and independent assessment of the value of OTC derivatives as referred to in Article 51(1)?

3. What detailed rules should govern the content and the procedure to be followed by the management company for communicating the information mentioned in Article 51(1) to the competent authorities of its home Member State?

The FBF and AFTI consider that CESR's recommendations on UCITS risk management (CESR/09-100) are globally a good basis to monitor the different categories of risks supported by UCITS funds. In any case corresponding implementing measures should include controls by the management company to check that rules of the fund's domicile are effectively applied for all aspects related to the fund, in particular for the calculation of the NAV. Event if the entity in charge of the NAV calculation in located in a different state than the fund.

In addition, any verification process should include a clear escalation process and resolution policy for any price discrepancies. In any case, these rules should ensure that practices remain efficient and cost effective.

The FBF and AFTI want therefore underline that the entities in charge of the valorisation or the depositaries should not be imposed the responsibility of an independent NAV calculation but only the responsibility to control this NAV calculation.

QUESTION 5 (CESR CALL FOR EVIDENCE PAGE 14)

On-the-spot verification and investigation (Article 101)

CESR is invited to define the content of the procedures to be followed when competent authorities intend to carry-out verification or an investigation on the territory of another Member State.

- The cross border controls have to be compliant with the cooperation agreement concluded between competent authorities concerned or if such cooperation agreement does not exist in compliance with the member state regulation where such controls are carried..

Moreover a 6 month to one year period could be left after the first notice of the competent authority with a definition of the scope of verifications and investigations...

The FBF and AFTI consider that such investigations and verifications should also cover the compliance of the management company with the fund's domicile regulation for all rules concerning the management of the fund.

In addition, if the management company has delegated some administrative and/or accounting functions to another entity, the FBF and AFTI consider that competent authorities should in all cases contact first the management company, and not this entity, to define the way to conduct the corresponding actions. This principle reflects the fact that the management company remains liable for any functions delegated to another entity.

QUESTION 6 (CESR CALL FOR EVIDENCE PAGE 15)

Exchange of information between competent authorities (article105)

1. CESR is invited to define the content of the procedure to be followed when competent authorities intend to exchange information.

2. CESR is also requested to indicate if there are areas which could be more effectively regulated at level 3.

FBF and AFTI do not have any specific comments concerning this question.

QUESTION 7 (CESR CALL FOR EVIDENCE PAGE 19)

Content and presentation of KII (Article 78(7))

1. What is the KII to contain and how should this be harmonised at level 2? How should level 2 measures fulfil the requirements of the UCITS IV Directive to specify the content and form of KII in a detailed and exhaustive manner such that the document is sufficient for investors to make informed decisions about planned investments? This should be taken to include the methodologies CESR considers necessary for delivering the information disclosures CESR proposes for the KII (e.g. the methodologies for risk, performance and charges disclosures). CESR should be clear as to the requisite degree of harmonisation it considers necessary for these supporting methodologies.

2. What sort of cross-references to other documents or "signposts" might be permitted, apart from those which are directly referred to in the Directive, given that Article 78 states that "These essential elements shall be understandable by investor without any reference to other documents"?

3. To what extent and in what way should level 2 measures harmonise the detailed presentation of key investor information (such as the layout of the document, its length, headings to be used for sections, etc.)? (Detailed supporting material should be provided relevant to the approach proposed; for instance if CESR considers templates should be used in the implementing measures to harmonise presentation of the KII, then CESR should provide such templates as it thinks necessary in its advice). What supporting work does CESR consider necessary at level 3? How should the measures at level 2 balance the flexibility necessary for allowing the KII to effectively cover the specific characteristics of particular funds or groups of funds, with the necessary harmonisation of the document?

4. How should the KII reflect all the characteristics of the special cases outlined under Article 78(7)(b) that are relevant for the retail investor making an investment decision, for instance the characteristics of master feeder structures?

As a general comment, the FBF and AFTI stresses that the Key Investor Information document (KII) has the objective of simplifying product information for retail investors. It therefore has to remain simple, short and easily readable.

Harmonised format of the KII and respect of limits in length

The FBF and AFTI believes that much valuable work has been carried out to date to specify what information should be part of the KII that will replace today's simplified prospectus, and to ensure that this information is presented in a way that supports investors not only in understanding the UCITS offered to them, but also in making comparisons between different UCITS.

This has proven quite a difficult task even for the most basic types of UCITS funds. It is our understanding that the work on more complex UCITS funds, such as UCITS with different investment compartments, is still to be initiated.

In order to ensure a truly harmonised format of the KII which respects the applicable standards and limit in length, and to avoid national goldplating, our members believe that the legal form of a regulation would be preferable at this occasion over that of a directive.

The FBF and AFTI believe furthermore that in order to make the document as useful and easily readable for investors as possible, the use of cross-references should be clearly limited. This is also in line with Article 78 which requires that "these essential elements shall be understandable by investors without any reference to other documents".

Presentation of the KII

The FBF and AFTI members expect great benefits from the level of harmonisation of the KII that has been agreed so far, including most fundamentally the harmonised content and the fixed order of presenting this content.

In order to ensure full comparability, banks believe that the sections should also have harmonised headings. But some flexibility should be given in terms of layout except the prescription of a minimum font size or a range within which the font size should lie to ensure the readability.

Content of the KII

CESR could in addition consider whether the KII should include information about the delegation of functions by the management company to third parties.

Role of depositaries as regards the KII

The FBF and AFTI strongly encourage to CESR to clarify the role of depositaries with regard to the KII and to recommend to the European Commission according Level 2 measures.

Specifically, as the management company will be responsible for the production of the KII and for the specific information contained in it, it should not be the role of the depositary to re-validate this information. The Level 2 legislation should therefore require depositaries to merely verify that the management company has effectively produced the KII, in accordance with the prescribed format; and that this document has been transmitted to the competent authorities of the fund for approval.

QUESTION 8 (CESR CALL FOR EVIDENCE PAGE 21)

Specific conditions to be met when providing KII in a durable medium other than paper (Article 81(2)

CESR is invited to advise the Commission on the specific conditions which need to be met when providing KII in a durable medium other than on paper or by means of a website which does not constitute a durable medium.

Experience shows that in light of fast-changing IT standards, it can be quite a difficult task to find a technological format that can be expected to be sufficiently long-lasting for such purposes.

The FBF and AFTI strongly asks that a database is established at the level of CESR to store all KIIs of approved UCITS funds and ensure continued availability and accessibility of these documents. Central storage would furthermore give retail investors the possibility of easily gaining an overview of existing products and of making comparisons between them.

QUESTION 9 (CESR CALL FOR EVIDENCE PAGE 21)

Specific conditions when providing the prospectus in a durable medium (Article 75(4))

CESR is invited to advice the Commission on the specific conditions which need to be met when providing the prospectus in a durable medium other than on paper or by means of a website which does not constitute a durable medium.

See above response to Question 8.

QUESTION 10 (CESR CALL FOR EVIDENCE PAGE 23)

See following page

Merger of UCITS (Article 43(5))

- with regard to the content of the information letter:

1. With regard to the five kinds of information listed in Articles 43(3)(a) to (e) which the merging and the receiving UCITS have to provide to their investors, CESR is invited to advise the Commission:

a) which information should be considered useful and indispensable with regard to the background and the rationale of the proposed merger?

b) what could be other considerations than those already expressly mentioned in Article 43(3)(b)[3] that would be useful and indispensable with regard to the possible impact of the proposed merger?

c) which 'density' of information (amount of detail) CESR would consider useful and indispensable with regard to the considerations that should be part of the information letter in order to describe the possible impact of the merger on unit-holders?

d) what could be other specific rights than those already expressly mentioned in Article 43(3)(c)?

e) which relevant procedural aspects should be contained in the information letter?

2. With regard to Article 43(3)(e) which refers to the key investor information of the other[5] UCITS involved in the proposed mergers, CESR is invited to clarify whether the KII of the other UCITS should be an integral part of the information letter or a standalone document attached to the information letter containing the information referred to in Article 43(3)(a) to (d).

3. Bearing in mind that the competent authorities cannot oblige the merging and the receiving UCITS to provide other information to their unit-holders than those listed in Article 43(3), but that the merging and the receiving UCITS are free to add, on a voluntary basis, further information, CESR is invited to advise on the form in which the information letter and the additional information should be provided.

4. CESR is encouraged to provide the Commission with a draft EU standard information letter.

- with regard to the format of the information letter:

CESR is encouraged to specify the format of the information letter.

- with regard to the way to provide the information letter:

1. The new UCITS Directive does not in general harmonise the way documents and information need to be provided to investors and to competent authorities. Only some specific provisions (notably Article 81(1) for key investor information) harmonise this. The delegation clause in Article 43(5) gives the Commission the power (without obliging it) to harmonise the way the information letter needs to be provided. CESR is invited to consider the priority that should be given to this measure bearing in mind its usefulness in ensuring that investors actually become aware of the proposed merger and can easily read the information letter.

2. Article 43 does not expressly require any specific form for the information letter; it only requires such information to be provided to investors. However, by contrast to Article 81(1) the use of another durable medium than paper is not expressly permitted. CESR is requested to reflect whether the merging or receiving UCITS are obliged to use a specific form for providing the information letter and on any practical questions that need to be dealt with at level 2 in this regard.

With regard to the content of the information letter, the FBF and AFTI are of the opinion that the information stated in Articles 43.3.a adequately responds to the level of information unit-holders of both funds need to be provided with in order to make an advised judgement on the impact of the merger.

Therefore the FBF and AFTI are of the opinion that there is no need to include further details through implementing measures.

With regard to the format of the information letter, the FBF and AFTI are of the opinion that there is no need to propose a specific format. Some flexibility should be left in the formatting of the information as the rules between Member States are not harmonised. Furthermore it should avoid to create burdensome constraints for specific situations.

With regard to the way to provide the information letter, the FBF and AFTI consider that it should be part of the documents to be stored and made available on the database maintained by each regulator, as described in response to Question 8.

QUESTION 11 (CESR CALL FOR EVIDENCE PAGE 23)

The content of the agreement/internal conduct of business rules between feeder and master UCITS (article 60)

with regard to the content of the agreement

1. CESR is invited to advise the Commission on which elements need to be covered by the agreement between feeder and master UCITS and to clarify how certain issues need to be stipulated in order to satisfy the requirements under Article 60(1). While preparing its advice CESR should take account of certain specific circumstances (e.g. whether feeder and master UCITS are established in the same or in different Member States).

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

3. Article 60(1) does not lay down whether and how master and feeder UCITS may choose the applicable law regarding their agreement.[10] *Given that the competent authorities of the feeder UCITS has to check the agreement, CESR is invited to advise on any restrictions regarding the choice of the applicable law.*

- with regard to the content of the internal conduct of business rules

1. If the feeder and the master UCITS are managed by the same management company, they can replace the agreement by internal conduct of business rules.

a) given the specific circumstances of both master and feeder UCITS being managed by the same management company, CESR is invited to recommend any useful or indispensable modifications of the content of the internal conduct of business rules compared of an agreement,

b) CESR is encouraged to provide the Commission with a draft of internal conduct of

business rules.

FBF and AFTI support the introduction of a template agreement to cover this point, but considers that the same template should be used for domestic **and** cross-border master-feeder structures.

The FBF and AFTI suggest to refer to existing template agreements and sees some merits in the format in use in France.

QUESTION 12 (CESR CALL FOR EVIDENCE PAGE 28)

Article 60(6) regarding the appropriate measures to avoid market timing

1. CESR is invited to advise on measures needed to avoid "market timing" or other arbitrage opportunities.

2. While preparing its advice CESR is invited to consider a need to take into account different circumstances for master and feeder UCITS listed at a stock exchange or for whom a platform for secondary trading exists on the one side and for master and feeder UCITS whose units can only be subscribed as well as specific circumstances of certain Member States or certain markets.

FBF and AFTI consider that measures to avoid market timing or other arbitrage opportunities are to be defined by management companies of both funds. In this respect they have to put in place appropriate internal procedures and include some information in the prospectus of both funds if required.

QUESTION 13 (CESR CALL FOR EVIDENCE PAGE 30)

Article 60(6) regarding the procedures for approvals in case of liquidation, merger or division of the master UCITS

- regarding a liquidation of the master UCITS

CESR is invited to advise the Commission on the elements of the procedure for approvals referred to in Article 60(4)(a) and (b) (approval of the investment of at least 85 % of the assets of the feeder UCITS in units of another master UCITS or approval of the amendment of fund rules or instruments of incorporation in order to enable the feeder UCITS to convert into a UCITS which is not a feeder UCITS). While preparing its advice CESR is encouraged to reflect particularly on the following elements:

a) time frames in which the feeder UCITS may use one of the options mentioned in points (a) or (b) of subparagraph 1,
b) conditions which should be applied in such circumstances,
c) time periods for granting[20] approval,

d) additional time period for cases in which the competent authorities refused the feeder UCITS' application for approval under Article 60(4)(a) and (b),
e) need for specific rules on the exchange of information between competent authorities with regard to the liquidation of the master UCITS if the feeder and the master UCITS are established in different Member States.

- regarding a merger or division of the master UCITS

CESR is invited to advise the Commission on the elements of the procedure for approvals referred to in Article 60(5)(a) to (c). While preparing its advice CESR is encouraged to reflect particularly on the following issues:

a) time frames in which the feeder UCITS may use one of the options mentioned in points (a) to (c),
b) conditions which should be applied in such circumstances,
c) possible ways to ensure protection of the feeder UCITS' investors and provide certainty for the master UCITS by requiring that the approval procedure for the alternative measures under Article 60(5)(b) and (c) be completed sufficiently in advance of the time period pursuant to the last sentence of Article 45(1) in order to allow the feeder UCITS to request free of charge redemption of its units before the merger takes effect,
d) time periods for requesting and granting[21] approval,
e) additional time period for cases in which the competent authorities refused the feeder UCITS' application for approval under Article 60(5)(a) to (c),
f) elements which competent authorities have to check and conditions under which they have to grant approval if the feeder UCITS applies for approval in order to stay invested in the master UCITS or to become a feeder UCITS of another UCITS resulting from the merger or division,
g) need for specific rules regarding the exchange of information between competent authorities

Depositaries will not have to undertake specific actions in regard to such operations in addition to those already applied for any UCITS fund.

QUESTION 14 (CESR CALL FOR EVIDENCE PAGE 32)

Article 61(3) regarding the agreement between depositaries

1. CESR is invited to advise the Commission:

a) on the useful and indispensable elements to be covered by the agreement between the depositaries of the feeder and the master UCITS and, if appropriate, the way they should be stipulated in order to satisfy the requirements under Article 61(1), b) on a need to take account of specific circumstances (e.g. whether the depositaries of the feeder and the master UCITS are established in the same or in different Member States).

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

3. Article 61(1) does not lay down whether and how the depositaries of the master and the feeder UCITS may choose the applicable law for the agreement. Given that the competent authorities of the feeder UCITS have to check the agreement, CESR is invited to reflect on any restrictions regarding the choice of the applicable law.

At this stage the roles and responsibilities of depositaries will remain different from one Member State to another. This point must be taken into account in the definition of the agreement between depositaries of both funds.

Moreover the FBF and AFTI consider that principles retained for the format and the content of this agreement should be the same for domestic and cross-border master-feeder structures.

In terms of elements to be covered by the agreement, the FBF and AFTI suggest to include the following points:

- documents to be transmitted by the depositary of the master fund to the depositary of the feeder fund: both depositaries should agree conjointly on the necessity to identify such documents. In case of specific requirement, they should agree on the corresponding way of transmission;
- information 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;
- liability of the depositary of the master fund : a specific paragraph should be included in the agreement to specify that the liabilility of the depositary of the master fund should be limited to the cases where the depositary of the feeder fund suffer a damage due to the non-application of this agreement. .

As mentioned in Article 60.1., the feeder fund or when applicable, the management company of the feeder fund, will be in charge of communicating to the depositary of the feeder fund any information about the master fund and required for the completion of the duties of the depositary of the feeder fund. In these conditions the elements contained in the agreement between depositaries should respect this principle and not create any unjustified obligations for depositaries of both funds. In any case depositaries should not have to comply with obligations which are not part of their legislation.

In terms of format, this agreement should therefore remain flexible enough to compensate for the lack of harmonisation between the different legislative frameworks and depositaries should have the possibility to define on a bilateral basis the most appropriate ways and means to exercise their respective duties.

Regarding issue of the applicable law for this agreement FBF and AFTI recommend to apply the following rules:

- the choice of the applicable law shall not prevent the depositary of the feeder fund to perform all controls its own regulation requests in this case.
- if the depositary of the master fund does not respect the conditions of the agreement, the law of the feeder fund should prevail.

QUESTION 15 (CESR CALL FOR EVIDENCE PAGE 33)

Article 61(3) regarding the irregularities the depositary of the master UCITS has to report

1. When carrying out its tasks, the depositary of the master UCITS may not only detect irregularities in the master UCITS' business that are directly related to the afore-mentioned tasks of the depositary (e.g. detect that the valuation is not in line with the law or fund rules), but by chance the depositary may become aware of other irregularities in the course of carrying out its tasks.[23]
CESR is invited to advise the Commission on whether also those irregularities that the depositary detected in the course of carrying out its tasks should be relevant in this context.

2. CESR is invited to provide the Commission with a list of irregularities the depositary of a UCITS may detect and to categorize these irregularities.

2. FBF and AFTI are of the opinion that irregularities with regard to the master fund may deem to have a negative impact on the feeder fund only if the following inclusive conditions are met :

- the depositary of the master fund has informed the master fund, or where applicable, the management company of the master fund about the corresponding incident and about the need to take some corrective actions,
- the master fund, or where applicable the management company, has not undertaken any appropriate remedy in a reasonable delay.

When these conditions are met the depositary of the master fund should report to its home Member State regulator and to the depositary of the feeder fund.

The FBF and AFTI consider that such information should only be limited to irregularities on the NAV calculation with a potential/ significant impact on the valuation of the feeder fund.

QUESTION 16 (CESR CALL FOR EVIDENCE PAGE 34)

Article 62(4) regarding the agreement between auditors

FBF and AFTI do not have any specific comment concerning this point.

QUESTION 17 (CESR CALL FOR EVIDENCE PAGE 35)

Article 64(4) regarding the format and the way to provide information on a conversion into a feeder UCITS or on a change of the master UCITS

with regard to the format of the information letter:

CESR is invited to specify the format of the information letter.

- with regard to the way to provide the information letter:

1. The new UCITS Directive does not, in general, harmonise the way documents and information need to be provided to investors and to competent authorities. Only some specific provisions (notably Article 81(1) for key investor information) harmonise this. The delegation clause in Article 64(4) gives the Commission the power (without obliging it) to harmonise the way the information letter needs to be provided. CESR is invited to consider the priority that should be given to this measure bearing in mind its usefulness in ensuring that investors actually become aware of the conversion or change of the master UCITS.

2. Article 64(1) does not expressly require any specific form for the information letter; it only requires such information to be provided to investors. However, by contrast to Article 81(1) the use of a durable medium other than paper is not expressly permitted. CESR is invited to reflect whether the feeder UCITS should be obliged to use a specific form for providing the information letter and on any practical questions which need to be dealt with at level 2 in this respect.

As long as roles and responsibilities of depositaries have not been harmonised between the EU Member States, the role of each depositary of the feeder fund in any event impacting the master and/or the feeder fund should be the one defined its own local regulation and comply with these corresponding duties only.

Concerning the way to provide the information letter, the FBF and AFTI consider that it should be part of the documents to be stored in the database maintained by each regulator, as described in response to Question 8.

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