



September 23 rd , 2011

ESMA Consultation Paper on Possible Implementing Measures of the AIFMD in relation to supervision and third countries

AFTI–FBF Contribution

Response to be addressed to submitted online via ESMA's website (www.esma.europa.eu)

Deadline for sending the response: 23 September 2011

I- PRESENTATION OF THE ASSOCIATIONS

L'Association Française des Professionnels des Titres ("AFTI") is the French association representing the post-trade industry.

All 100 members of AFTI are players in the securities market and back office functions: banks, investment firms, market infrastructures, issuers, in France and more generally in Europe.

The French Banking Federation ("FBF") represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorised as banks and doing business in France, *i.e.* more than 500 commercial, cooperative and mutual banks. They employ 500,000 people in France and around the world, and serve 48 million customers.

In its submission, the response of AFTI-FBF (hereafter "The Associations") to the ESMA consultation will focus on the depositary issues, with additional comments on the delegation.

II- KEY MESSAGES

The Associations have already answered the principles stated in the ESMA consultation of 13th September on possible implementing measures under AIFMD and welcome the opportunity to contribute to the ESMA Consultation Paper on possible implementing measures of the AIFMD in relation to supervision and third countries.

- The Associations agree with ESMA that the implementing measures should provide a high level of comfort as regards investor protection and 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 provides depositary services for financial instruments distributed in the EU .
- 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 to 16) – "Duties and liabilities applicable to a European depositary".
- The Associations are of the opinion that the 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. It is their view that this level can be reached trough adequate and applicable regulations.

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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.

THE ASSOCIATIONS CONTRIBUTION

The Associations agree 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.

THE ASSOCIATIONS CONTRIBUTION

The Associations agree with most of the criteria listed in the above proposal as long as the proposal ensures 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).

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 comfort of safety and of investor protection.

In addition to the comments to question 3 above, the Associations have the following comments on Box 2 (please refer to each sub-paragraph):

- 1.(a): Agree
- 1.(b): Criterion b should clarify (please see explanatory text 6) that the local framework should be equivalent to criteria applicable in **the EU regulation (as in c), d) & e)**
- 1.(c): Agree
- 1.(d) :Agree
- 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 refer to Article 21 (15)

Therefore the Associations recommend the following amendments:

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.~~

Q4: Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?

THE ASSOCIATIONS CONTRIBUTION

No further comments.