EUROPEAN COMMISSION
Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS
Asset Management

- FEEDBACK STATEMENT –

SUMMARY OF RESPONSES TO UCITS DEPOSITARIES CONSULTATION PAPER

1. GENERAL REMARKS ON CONSULTATION PROCEDURE AND FEEDBACK

As announced by Commissioner McCreevy on 28th May,[1] the European Commission launched a wide-ranging public consultation on the UCITS depositary function in July 2009.

The Madoff fraud and the Lehman Brothers default revealed divergences in interpretation of the existence of UCITS depositary risks and liabilities, and a number of questions arose relating to the need to harmonise and strengthen UCITS requirements. The objective of the consultation paper was to gather evidence and experienced opinion in order to clarify and strengthen the regulation and supervision of UCITS depositaries, with a view to consolidate the level of protection of UCITS investors. It also aimed at playing an important role in identifying and shaping the European response to vulnerabilities emanating from the UCITS depositary sector.

The issues on which the Commission invited views and evidence included:

- **Depositary's duties:** The consultation invited views on whether depositary safe-keeping and supervisory duties should be better harmonised, and if so, how. It sought clarification on the depositary safe-keeping duties for each class of assets that are eligible for being held within a UCITS portfolio, and invited views on whether the existing list of supervisory duties should also be further clarified or extended.

- **Liability regime:** The consultation invited views on how to improve UCITS investor protection if a depositary performs its duties "improperly". To that end, an attempt was made through this consultation to identify when the risks associated with the safe keeping of assets might materialise, especially where assets are entrusted for safe-keeping through a network of sub-custodians. It also sought views on the form of liability regime which would allow investors to adequately mitigate any losses.

- **Organisational requirements:** The consultation invited views on the introduction of rules on organisation and conflicts of interest, based on existing EU rules.

- **Eligibility criteria and supervision:** The consultation asked whether and to what extent eligibility criteria and supervisory rules applicable to the UCITS depositary could be harmonised.

The consultation also covered issues not directly linked to the duties of depositaries but which are particularly relevant for ensuring an increased level of investor protection within the UCITS framework (for example on the valuation process).

The deadline for responses to this consultation paper was 15th September 2009. Seventy nine answers have been received: 86 % from organisations, including representative bodies from across the banking and securities sectors, asset managers and investors' representatives, 1% from citizens and 13% from public authorities. It should be noted, when drawing conclusions from this feedback statement, that the largest proportion of opinions stated, reflects the views of banking and securities industries (86 %) whilst investor organisations and associations represent a much smaller proportion, amounting to a mere 4% of the total opinions.
Responses to the consultation highlighted the following messages:

[1] Midday Express EXME09 published on 28th May 2009.

- **The appropriate starting point for any possible UCITS amendments and clarifications is the current UCITS Directive,[2] which has worked well over many years**. The proposed Directive on Alternative Investment Fund Managers (AIFM) should not be used as the *only* basis for reviewing the UCITS Directive;

- **There is a critical need to clarify depositary duties.** UCITS legislation was adopted in 1985 and depositary rules have remained mostly unchanged since then. However, circumstances have changed – assets eligible for inclusion in the UCITS portfolio are increasing in number, complexity and in addition, management of company's activities now extends cross border;

- Uncertainty regarding the liability regime does not necessarily arise from imprecision with regard to liability in the UCITS Directive, but rather from **imprecision with regard to proper performance of duties** and the fact that the Directive leaves it for national legislation to define the liability regime;

- **Maintaining investor confidence in the UCITS label is a high priority** and **a** UCITS depositary should be liable so as to mitigate investor's losses when it is negligent in performing its duties.

- There are special circumstances where the risk associated with the safekeeping of assets is not under the control of a UCITS depositary, and it is now essential to define if and how these risks can be acceptable for UCITS and UCITS investors. Focus should be on the appropriate management of these risks in a manner which is sustainable for industry and UCITS investors and would allow greater consistency within the EU collective investment regulatory framework, including with the proposal on alternative investment funds and managers.

- Finally, if additional rules such as organisational requirements are to be introduced, they should be aligned and be consistent with existing EU rules such as MiFID, where appropriate.

Responses to this consultation serve as a basis for an on-going review of the existing European regulatory principles by the European Commission. The goal is to clarify the regulation and supervision of UCITS depositaries; if a need is identified to strengthen this regulation, the Commission will consider the necessary proposals to achieve this strengthening.

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[2] Directive 2009/65/EC

2. OVERVIEW OF RESPONSES TO THE CONSULTATION

The consultation was launched on 3rd July 2009 and closed on 15th September 2009.

Responses were invited from all interested parties including representatives from the banking and securities industries, asset managers, legal service providers and investors. Seventy nine answers were received from a wide range of professional representatives, citizens and public authorities.

Figure 1 provides a general presentation of the spread of the responses received, from organisations, public authorities and citizens.

Figure 2 provides a more detailed presentation of the status of organisational respondents, broken down into four categories: asset managers, banking and securities industries, legal services and investor associations. Figure 3 lists the sixty eight answers received from organisations according to their nationality: sixty two responses were received from EU-domiciled organisations and six answers were received from non-EU domiciled organisations (US, Switzerland and Norway).

A list of all the organisations, citizens and public authorities, who have accepted for their answers to the consultation to be published, is attached in annex 1.

Figure 1:

Organisations	68	86%
Public Authorities	10	13%
Citizens	1	1%
Total Contributions	79	100%

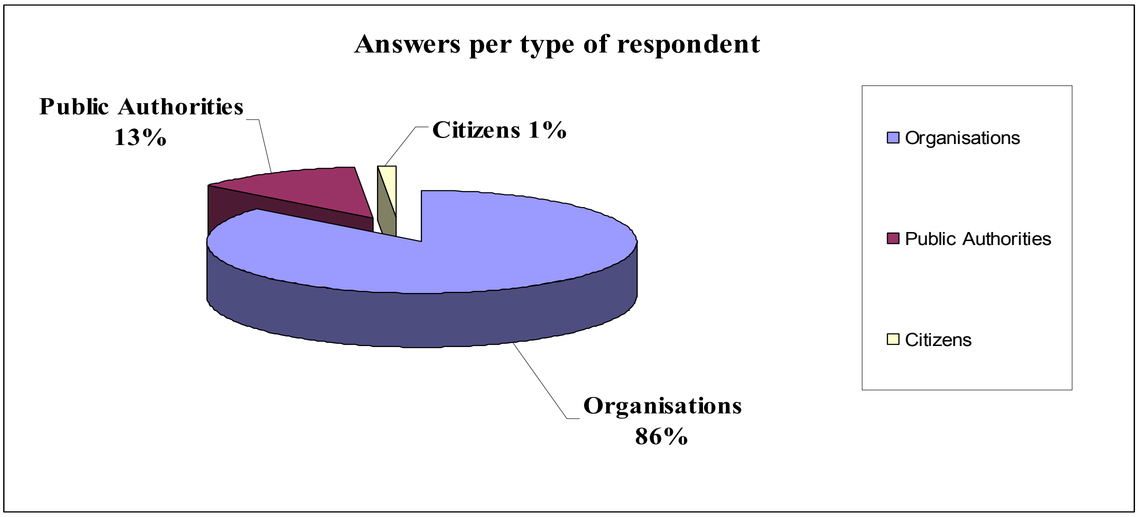


Figure 2:

For the purposes of this feedback statement, answers from respondents have been classified into four sub-groups: asset managers and their associations (including one asset management research centre), institutions and associations from the banking and securities industry, legal service practionners and investors associations.

BANKING AND SECURITIES INDUSTRY	41	60%
INVESTMENT MANAGEMENT	20	29%
INVESTORS REPRESENTATIVES	3	4%
LEGAL SERVICES	4	6%
TOTAL	68	100%

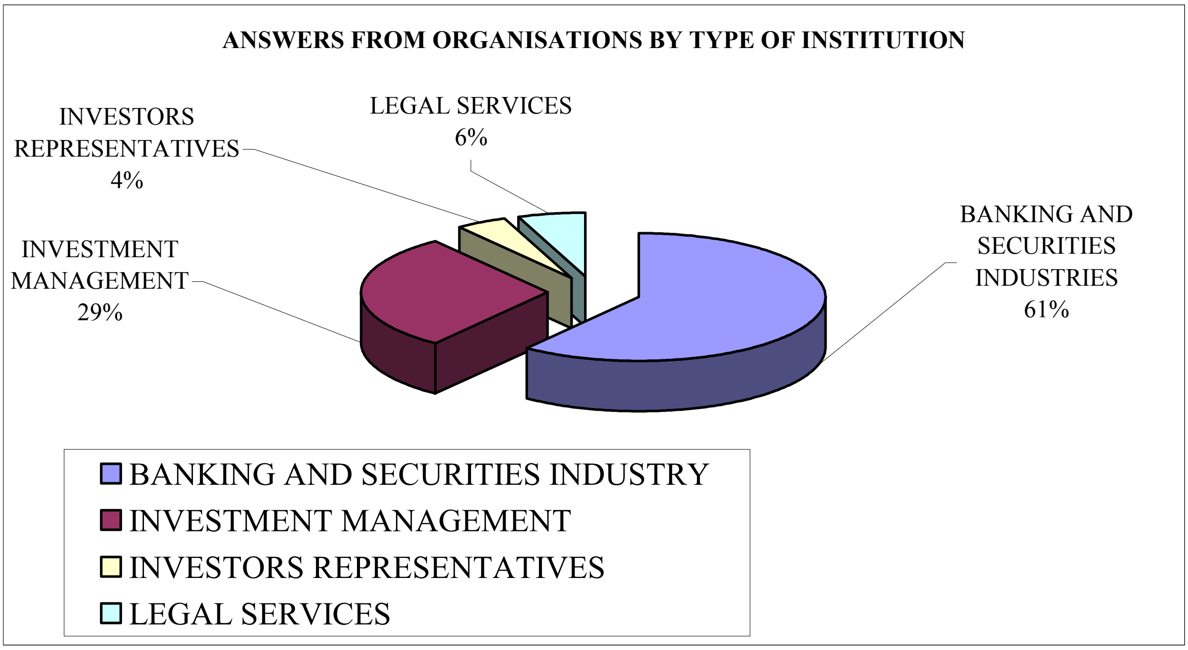
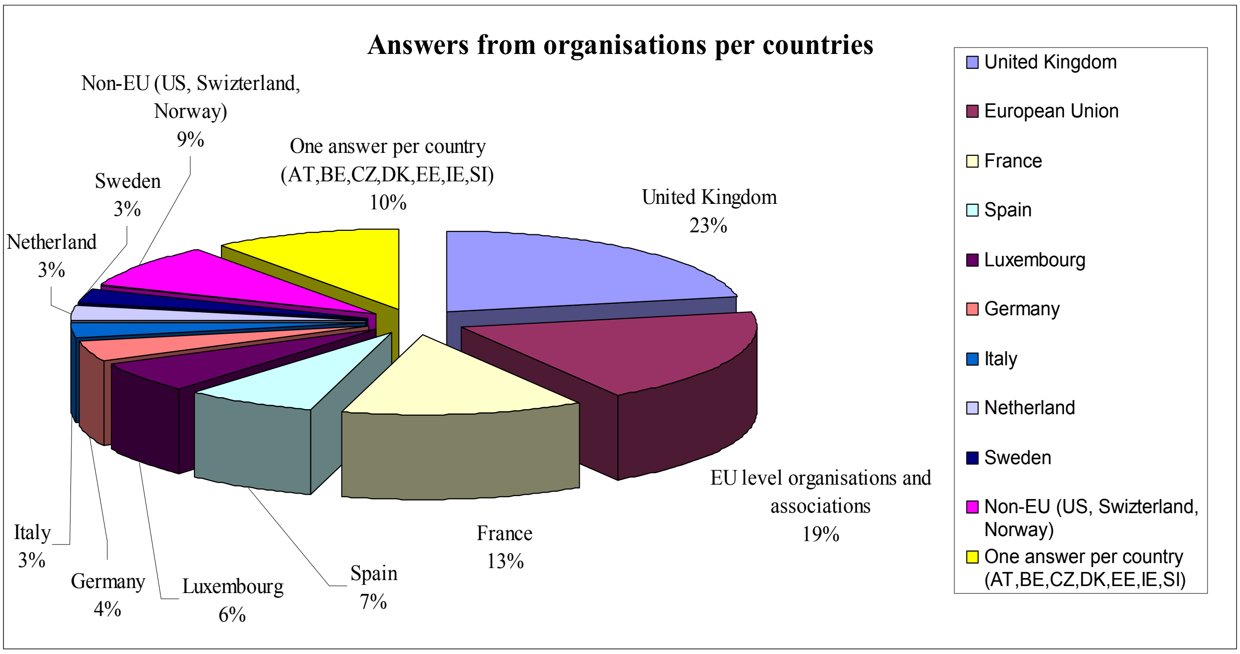


Figure 3:

List the sixty eight answers received from organisations according to their nationality.

United Kingdom	15	22%
EU level organisations and associations	13	20%
France	9	13%
Spain	5	7%
Luxembourg	4	6%
Germany	3	4%
Italy	2	3%
Netherland	2	3%
Sweden	2	3%

Non-EU (US, Swizterland, Norway)	6	9%
One answer per country (AT,BE,CZ,DK,EE,IE,SI)	7	10%
TOTAL	68	100%



3. DETAILED ANALYSIS OF RESPONSES

The feedback statement presents a broad summary of responses to each of the thirty one questions raised in the consultation paper. It should be noted, when drawing conclusions from this feedback statement, that the largest proportion of opinions stated, reflects the views of banking and securities industries (86 %) whilst investor organisations and associations represent a much smaller proportion, amounting to a mere 4% of the total opinions.

The tables provide a quick overview of the balance of respondent opinions. These opinions have been categorized into 'yes/no' categories of answers where possible. Some respondents have also provided qualitative commentaries to supplement or nuance their 'yes/no' answers. In such cases, the explanations have been grouped under a number of sub-headings ("*For one or more of the following reasons* :") to enable a more detailed analysis of the respondents' views.

Please note that some respondents have expressed more than one opinion in answer to a question. Therefore the cumulative total of answers to a question may exceed 100% of answers received.

QUESTION 1

Do you agree that safe-keeping (and administration) duties of depositaries should be clarified?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the safekeeping and the administration duties should be clarified and harmonized	77	**97%**	41	100%	18	90%	3	100%	4	100%	10	100%	1	100%

Nearly 100% of the respondents, including the banking and securities industry, investors and public authorities considered that there is a strong need to clarify the safe-keeping and administration duties of UCITS depositaries. The main reasons highlighted are as follows:

1) **The harmonisation of the depositary function is a key means for restoring investor confidence**

The depositary is an institution in which investors can place their trust for keeping their savings safe.

Some participants insisted that retail investors should never have to face losses as a result of failures in depositary safe-keeping; they should they have to worry about losses associated with the safekeeping of assets when they invest in UCITS. Investor should not face higher 'custody' risk when they invest in UCITS compared with when they invest in saving accounts. The fact that UCITS assets are kept safe was deemed to be essential in ensuring a high level of investor confidence in UCITS.

2) **There is a need to clarify and harmonise the depositary functions**

Respondents highlighted a crucial need to clarify UCITS depositary safekeeping and supervisory functions for the following reasons:

- UCITS legislation was adopted in 1985 and depositary rules have remained mostly unchanged since then. However, there are more and increasingly complex assets which are now eligible for inclusion in UCITS portfolios and management of company's activities can now be done cross border. New UCITS eligible assets are subject to detailed investment risk management rules which do not necessarily aim at addressing safe-keeping constraints and custody risks.

- Differences and inconsistencies in the application of UCITS depositary rules at national level create legal and technical uncertainties for the industry and are detrimental to the single market. Therefore, participants strongly encouraged a higher degree of harmonisation of technical rules, for example through implementing measures.

- There is a need for a consistent approach between the fund's depositary rules and other EU regulations, such as MiFID and/or banking regulation. Participants noted that it was often practically difficult to assess the consistency of EU rules and grasp their interaction with each other.

Some respondents also pointed out that the review of the depositary function should be distinguished from the causes of the financial crisis and the aftermath of the Madoff fraud. The UCITS depositary industry already works to high standards. Depositary institutions have played a crucial role in the European funds industry since 1985 and have contributed to the UCITS regulatory model becoming the global benchmark for sound fund regulation and the cornerstone of a fully integrated European fund market. Therefore, some participants considered that the Madoff fraud should not cause the EU legislator to overreact.

3) **There is a need to appropriately address the risks relating to custody of financial instruments**

UCITS investors should be aware and understand that they are not only exposed to investment risks but also to other risks such as liquidity, operational, and custody risks. As brought to light by the recent Madoff fraud, some investment strategies do imply custody constraints which are dealt with according to the level of risk that is considered to be acceptable for the fund. To that end, some participants underlined that once identified, the levels of custody risk acceptable for retail or more sophisticated investors could be different, and handled in different ways.

4) **Reviewing of the UCITS standards in line with the AIFM proposal**

A majority of participants insisted on the critical need for a consistent approach in dealing with depositaries across the EU regulatory framework - including UCITS and AIFM. There seems to be similarities for both UCITS and non-UCITS depositary functions as depositaries often faces similar technical constraints for example when they safe-keep a derivative contract or a security. Therefore, the technical findings of this consultation could also be applied to depositary arrangements in the AIFM Directive.

However, for some respondents the proposed AIFM Directive should not be used as the only basis for reviewing UCITS. The appropriate starting point for any possible UCITS amendments and clarifications should be the current UCITS Directive, which has worked well over many years. The reference to liability standards mentioned in the AIFM proposal was also felt to be inappropriate because the AIFM Directive proposal is a draft, currently under discussion within the Council and European Parliament and hence may still be amended. From a similar perspective, some participants expressed the view that they do not feel confident with the idea of extending AIFM provisions - that should primarily address professional funds depositaries - to UCITS.

QUESTIONS 2 & 3

Do you agree that these duties should be clarified for each class of assets eligible for UCITS portfolios? Are there any other appropriate approaches?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
No, there is no need to clarify the safekeeping duties per asset type	4	5%	1	2%	1	5%	0	0%	1	25%	1	10%	0	0%
Yes, the depositary duties should be differenciated according to the type of assets to be safekept. Safekeeping duties should include at least :	**69**	**87%**	38	93%	17	85%	3	100%	1	25%	9	90%	1	100%
(i) The Custody of the fund's securities	*50*	*63%*	*29*	*71%*	*13*	*65%*	*2*	*67%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
(ii) An oversight of the other eligible assets	*43*	*54%*	*26*	*63%*	*10*	*50%*	*1*	*33%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
No specific opinion expressed	6	8%	2	5%	2	10%	0	0%	2	50%	0	0%	0	0%

Article 22 of the UCITS Directive provides: "*The assets of a common fund shall be entrusted to a depositary for safe-keeping"*.[3]

Less than 10 % of respondents either did not express any opinion as to how safe-keeping should be clarified or disagreed with any further clarification of safe-keeping duties by asset type at EU level because they considered existing national regulations and industry guidelines to be explicit enough.

Over 3/4 of the other respondents, including investors' associations and representatives from the banking industry, agreed with the fact that the safe-keeping duties and administration duties of a UCITS depositary should be further clarified and clearly distinguished for each class of assets eligible for UCITS portfolios. This large majority of respondents generally defined safe-keeping as **an overall control that the depositary should have over UCITS assets**. The depositary should be in a position to know where and how the UCITS assets are held at all times.

Most respondents recognized a need to further define what exact duties a depositary is supposed to perform when it safe-keeps the funds assets - depending on the legal characteristics and safe-keeping constraints which are associated with the financial assets that are eligible for being held in a UCITS. According to the broad type of eligible asset, most participants summed up safe keeping constraints as follows:

[3] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

- Custody duties: It is a registration in the UCITS depositary's books that reflects the fund's right of ownership of the asset. According to some securities professionals, a depositary can *only* hold **registered securities** on its books (e.g. keep in custody) - the two most common being those in bearer form and those registered with a (International) Central Securities Depositary ((I)CSD). Most respondents, including securities organisations stressed that further reflection should determine the exact scope of the custody duties and what should be the nature of depositary custody duties relating to cash kept by the depositary on behalf of the UCITS.

- Monitoring duties: Other assets eligible for holding in a UCITS portfolio cannot be kept in custody by the UCITS depositary (they "*cannot be "physically" kept in custody by a depositary*"). In such cases, the depositary should keep an inventory (through a 'mirror record' or a 'position keeping' record) so as to have an exhaustive view over all the assets of the fund.[4] These assets include:

(1) Other forms of securities that cannot be keep in custody by the UCITS depositary – the ownership of these securities is determined through registration either in the issuer's book, with a registrar, or sometimes in the (I)CSD's book;

(2) Other forms of financial instrument[5] such as derivatives contracts,

(3) Other forms of eligible assets such as cash placed on deposit with one of the fund's counterparties.

QUESTION 4

Do you agree to a common horizontal and functional approach of the custody duties on the listed financial instruments, to be applied to UCITS depositaries?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, Custody issues are highly transversal issues	**54**	**68%**	30	73%	12	60%	2	67%	1	25%	8	80%	1	100%
No, introducing to much uniformity at any EU level may create further problems.	2	3%	0	0%	1	5%	0	0%	0	0%	1	10%	0	0%
No opinion, the concept of "common horizontal approach" is unclear.	23	29%	11	27%	7	35%	1	33%	3	75%	1	10%	0	0%

A majority of participants considered that the custody duties of UCITS depositaries should be consistent with the MiFID Directive (2004/39/EC)[6] and highlighted a crucial need to harmonise the interaction of EU safe-keeping regulations. At the present time an

[4] Most respondents, including UCITS depositaries, believed that it is essential in order to enable the UCITS depositary to perform its supervisory duties in an appropriate way.

[5] As defined in Section C of annex I of the Mifid Directive 2004/39/EC.

[6] Mifid Directive (2004/39/EC) Annex I. Section B:"***Ancillary services:*** *(1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management."*

institution which safe-keeps financial instruments can be subject to different sets of rules - depending on whether the safe-keeping applies to an investment service (provisions of Directives 2004/39/EEC 2005/34/EC and 2006/73/EC) or to collective investment services (provisions of Directive 2009/65/EC). Similarly, most participants urged the Commission to be consistent when clarifying the rules applicable to safe-keeping of assets for UCITS and alternative funds, even if the scope of duties may vary.

QUESTION 5

Is there some specificity that may be applicable to the custody functions of a UCITS depositary that should be taken into account?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, some elements are specific to the custody of UCITS assets shall be taken into consideration.	**48**	**61%**	28	68%	9	45%	2	67%	1	25%	8	80%	0	0%
No, they are no specific elements to take into consideration.	7	9%	3	7%	3	15%	0	0%	0	0%	0	0%	1	100%
No opinion expressed	24	30%	10	24%	8	40%	1	33%	3	75%	2	20%	0	0%

The following elements have been stressed:

- UCITS depositaries are subject to specific administrative constraints (including in relation to corporate actions and tax duties). Therefore technical clarifications over administration duties would be welcome.

- Special considerations should be taken for the safe-keeping of the fund's liquidity (cash held by the depositary on behalf of the UCITS). Some professionals consider that this liquidity should be held by the depositary in a regular cash account. This approach implies that as soon as liquidity is transferred into collateral or deposited in another institution, it falls outside the scope of the depositaries custody duties. Uncertainties also remain where a depositary finances a fund's overdraft (e.g. when the funds' account is temporarily in cash debit).

QUESTIONS 6, 7& 8

Do you agree that the existing supervisory duties of the UCITS depositary should be clarified? If so, what clarification do you suggest? To what extent does the list of supervisory duties need to be extended?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITY INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the list of the supervisory duties needs to be clarified	**53**	**67%**	31	76%	14	70%	3	100%	1	25%	4	40%	0	0%
No, the list of the supervisory duties is clear enough	13	16%	4	10%	1	5%	0	0%	1	25%	6	60%	1	100%
No opinion expressed	13	16%	6	15%	5	25%	0	0%	2	50%	0	0%	0	0%
But the list of the supervisory does not need to be extended	***39***	***49%***	*27*	*66%*	*6*	*30%*	*0*	*0%*	*1*	*25%*	*4*	*40%*	*1*	*100%*

Article 25.2 and article 22 of the UCITS Directive state: *"(...) In the context of their respective roles, the management company and the depositary shall act independently and solely in the interest of the unit-holders."*

" (...) 3. A depositary shall:

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units effected on behalf of a common fund or by a management company are carried out in accordance with the applicable national law and the fund rules;

(b) ensure that the value of units is calculated in accordance with the applicable national law and the fund rules;

(c) carry out the instructions of the management company, unless they conflict with the applicable national law or the fund rules;

(d) ensure that in transactions involving a common fund's assets any consideration is remitted to it within the usual time limits;

(e) ensure that a common fund's income is applied in accordance with the applicable national law and the fund rules (...) ".[7]

A majority of participants felt that the current list of supervisory duties mentioned in article 22 of the UCITS directive is satisfactory and does not need to be extended. However, an even larger majority of respondents considered that this list should nonetheless be clarified. They underlined a need to harmonise and reach a common understanding as to supervisory duties. Amongst the elements to be harmonised at EU level, respondents made the following comments:

- Depositary supervisory duties should not constitute unnecessary duplication of work already accomplished by the asset manager. Supervisory duties should vary according to the complexity and risk levels attached to the fund and should only consist of **"independent" compliance controls**.

- Even if there is global consensus on the list of supervisory duties, there are however substantial differences in national transposition of these provisions. Some respondents reported that the supervision of a UCITS covers the verification that the investment decisions made by the management company are in compliance with the fund regulation and the fund prospectus, whilst for others supervision merely consists in checking the investment limits applicable to the fund following the execution and reporting of trades.

- Existing national differences on **the depositary's supervisory duties relating to the calculation of net asset values** should be removed;

- There is a need to clarify the role of the depositary in the subscription and redemption process;

[7] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

- The wording used in the UCITS Directive should be more explicit. The use of expressions such as "**shall ensure**" seem not to be interpreted in the same way across Members States and respondents believe that the UCITS Directive should use more straightforward wording;

- The UCITS Directive should also be clear as to the **Ex Post** control duties that should be performed**.**

QUESTION 9

Do you agree that the 'only one depositary' requirement should be clarified?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITY INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	**55**	**70%**	31	76%	12	60%	2	67%	0	0%	9	90%	1	100%
No	6	8%	2	5%	2	10%	1	33%	0	0%	1	10%	0	0%
No opinion expressed	18	23%	8	20%	6	30%	0	0%	4	100%	0	0%	0	0%

Some respondents pointed out that the existing text does not expressly mention that a fund may only have *one* depositary and most participants recommended a clarification on this point.

The existence of a single depositary for safe-keeping is perceived by most professionals as the only way to guarantee that the depositary has an exhaustive and complete overview of the fund's assets (e.g. one depositary for an umbrella structure or an individual fund). This was believed to be a key element to ensure investor protection.

Nonetheless, most participants, including from the securities industry or investors representatives, were in support of an express recognition allowing a UCITS depositary to delegate its safe-keeping to multiple local sub-custodians. To that end, the requirement of a single depositary should not be an obstacle for widespread use of sub-custodians, which are necessary when taking the global character of UCITS into consideration and the impossibility for depositaries to have representations in all countries. Most participants believed that a clarifying legal statement in this respect would be useful to remove any uncertainty.

QUESTION 10 & 11

Do you think that the risks related to improper performance have been correctly identified? Do you foresee other situations where a risk associated with improper performance of the depositary duties might materialise?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the main risks associated with the depositary function has been broadly identified in the consultation paper.	**49**	**62%**	25	61%	12	60%	1	33%	2	50%	8	80%	1	100%
But other substancial risks should be taken into consideration, especialy in the case where custody of the assets are delegated to a third entity	*29*	*37%*	*24*	*56%*	*2*	*11%*	*1*	*33%*	*0*	*0%*	*2*	*22%*	*0*	*0%*

Even though a majority of respondents believed that the main risks associated with the depositary function have been broadly identified in the consultation paper, some respondents raised other risks inherent to the depositary function requiring due consideration in order to clarify the liability regime applicable to the UCITS depositary:

(1) Risk associated with the safe keeping duties

● **Risk associated with the custody of the funds assets:** the risks associated with assets held directly in custody on the depositary's books seemed to respondents to be correctly identified.[8] In such cases for most respondents, introducing a segregation requirement at EU level would greatly contribute to secure safe-keeping of assets. Securities could only be lost in cases of improper performance or negligence when performing the custody duties and in the case of fraud.

● **Risk associated with the sub-custody of the funds assets:** Financial markets and UCITS have now become global in nature, and the use of global or local custodians is now a reality which often goes beyond the choice of the fund's depositary. In most countries, securities registered with a local Central Security Depositary must be held in custody locally by a custodian that is affiliated to the local Central Security Depositary. No institutions can today ensure a worldwide physical presence and depositaries must rely on a network of local custodians in order to settle a fund's transactions and deal with post-market processes. Therefore, safe-keeping of UCITS assets requires the use of a network of sub-custodians.

Given these circumstances, respondents stressed that depositaries face unavoidable operational and legal constraints associated with local rules applying to the custody of securities:

- There are, for example, cases where a fund is investing in certain jurisdictions (for example in emerging markets). Investments in emerging market can imply that it is the fund's strategy to deliberately take on the additional risks that arise

[8] It is however worth mentioning that the depositary may also face risks related to operational and settlement issues.

due to the poor local post-market infrastructure (for example, there may be no segregation requirements and insolvency protection rules may not exist) or high political uncertainties (for example, nationalisation of assets). These risks could lead to the loss of the fund's assets;

- There can also be, for example, cases where local rules do not impose any segregation requirements so as to protect the fund's assets from being lost;

- Sometimes, even if assets are duly segregated, insolvency rules do not allow for the assets to be *immediately* identified, isolated and returned to their beneficial owner. There is therefore a risk, if the sub-custodian goes bankrupt, that the fund's assets will only be identified, isolated and returned to their owners, once insolvency proceedings are completed. This can take months or even years.

These examples highlight the fact that once assets are transferred to sub-custody, there can be circumstances where, even if the depositary performs its due diligence properly, the assets cannot immediately be returned to their owners.

● **Risk associated with monitored assets:** the depositary may experience difficulties in getting access to accurate and up-to-date information in a timely manner (for example the confirmation of derivative transactions), which may ultimately prevent the depositary from performing its safekeeping duties and appropriately monitoring the inventory of the assets.

(2) Risk associated with the supervisory duties

Most professionals stressed that the liability of the depositary towards the fund's investors can only be established through national standards of "improper performance" - if a causal link between the supervisory failure and the loss incurred by the investors can be established.

QUESTION 12

Do you agree that safeguards against the risk associated with improper performance of depositary duties, such as requiring that UCITS assets be segregated from the depositary's and sub-custodian's assets, should be introduced?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, introducing additional requirements to secure assets holding are strongly encouraged	**59**	**75%**	33	80%	12	60%	2	67%	2	50%	9	90%	1	100%
No, safeguards should be dealt with at national and industry level	2	3%	0	0%	1	5%	0	0%	0	0%	1	10%	0	0%
No opinion expressed	18	23%	8	20%	7	35%	1	33%	2	50%	0	0%	0	0%

- For a large majority of respondents, introducing a segregation requirement at EU level would greatly contribute to secure safe-keeping of assets. Segregation requirements are designed to enhance investor protection and a large majority of participants not only agreed but are also strongly in favour of the introduction of general segregation requirements for UCITS safe-keeping rules at EU level, with implementing measures to complement such requirements.

- However, respondents felt that a segregation of assets cannot provide for a total ring-fence in the context of insolvency.

- Respondents also believed that additional requirements, such as preventing depositaries and sub-custodians from re-using assets they keep safe could also be introduced to further secure the funds asset holdings at sub-custody level.

QUESTIONS 13 & 14

Do you agree there should be a general clarification of the liability regime applicable to the UCITS depositary in cases of improper performance of custody duties? What adjustments to the liability regime associated with custody duties of the UCITS depositary would be appropriate and under what conditions?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
The provisions contained in the Directive already aims at a high standards.The existing reference to the unjustifiable failure and improper performance should remain and the liability regime needs to be based on evidence of failure to perform.	56	71%	26	63%	16	80%	3	100%	3	75%	8	80%	0	0%
Nevertheless a more 'harmonised regime' of liability is a desirable outcome...	46	58%	24	59%	8	40%	3	100%	2	50%	8	80%	1	100%
... And it is a priority to maintain (retail) investors' confidence in the UCITS label, in all circumstances, including in circumstances where a 'custody' risk may materialise.	21	27%	9	22%	7	35%	2	67%	0	0%	3	30%	0	0%

- As a preliminary remark, it should be noted that the reference to liability standards mentioned in the proposal for the AIFM Directive was felt to be inappropriate because the proposal for the AIFM Directive is a draft, designed to address the specific issues faced by non-UCITS funds. They insisted on the fact that the appropriate starting point for any possible UCITS amendments and clarifications should be the current UCITS Directive, which has worked well over many years. According to Article 24 of the UCITS Directive: "*A depositary shall, in accordance with the national law of the UCITS home Member State, be liable to the management company and the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations or its improper performance of them. (...) Liability to unit-holders may be invoked directly or indirectly through the management company, depending on the legal nature of the relationship between the depositary, the management company and the unit-holders*." For many respondents, the existing high level wording of the UCITS Directive should not be modified. Uncertainty regarding the liability regime arises mainly from the Directive's imprecision with regard to proper performance of depositary duties, rather than imprecision on liability.

- The reference to "performance" in the definition of liability should be clarified. For a majority of respondents, it was deemed necessary to keep a liability regime based on "negligence" or "improper performance" of well-defined safe-keeping and supervisory duties. The duties of the depositary need first to be clarified if an effective liability regime is to be developed and the liability regime should be based on evidence of failure to perform.

- Most representatives of the securities and banking industry also considered it important to maintain the existing wording relating to **'unjustifiable failure'** as there are always existing risks which may materialise under unforeseeable circumstances – for example where assets are lost or become unavailable – even if due diligence has been correctly performed. Many of them warned that strengthening liability regime of the UCITS depositary in such circumstances could have substantial negative impact on the industry:

  - There are no other investment products which fully protect investors from risks of criminal fraud or delays in the release of securities as a result of insolvency procedures, (although there may be some limited protection via capped deposit guarantee schemes or other insurance schemes);

  - Imposing a stricter liability standard on depositaries is very likely to result in higher costs being borne by final investors; however this would not remove the 'custody' risks that may be inherent within some UCITS investment strategies - where a fund is invested in an emerging market, for example;

  - An immediate mitigation of the investor's losses would put UCITS depositaries in the position of delivering a function that is similar to that of being "insurers," and would also create some exposure to market risks related to the value of assets that may be returned to the depositary, but at a later stage;

  - Immediate mitigation would also require that industry allocate substantial capital against potential losses, to an extent that would not be sustainable;

  - A depositary may not meet its liability to repay lost assets to investors and default. Introducing a strict liability regime, may increase the risk of depositary default and may introduce additional systemic risk to the banking system.

As a result, a majority of participants considered 'unconditional' liability not to be appropriate; any regulatory changes introduced to the depositary framework should be proportionate to the benefits derived.

- **Nonetheless, maintaining retail investor's confidence in the UCITS label is a priority.**

Any regulatory attempt to review the existing provisions must be done in a sustainable manner - both for industry and investors. To reconcile the priorities of asset management professionals and investors, some participants encouraged the Commission to focus on appropriate management of all identified risks (in particular the risks associated with local sub-custody of a fund's assets) rather than proceeding with a reallocation which would be an artificial attempt to remove the risk. A global management risk process could include an in-depth analysis of local custody risk and insolvency rules, to determine under what circumstances assets could be lost or would no longer be immediately available to funds and how likely these circumstances would be to materialise.

Once such risks are identified, some respondents also considered that it would be essential to define what level of risk should be considered as acceptable for UCITS investors. In that respect, for some participants a distinction needs to be made between the level of protection offered to UCITS investors and that for other non-harmonised collective investment vehicles, such as alternative investments funds, which generally target sophisticated investors that have chosen to invest in un-harmonised products.

Some respondents also came forward with alternative propositions to reconcile a high level of UCITS investor protection with asset management and securities industry constraints:

- Unconditional liability but with a well defined scope - for example, where assets remain in custody and sub-custody with companies affiliated with the UCITS depositary;

- Introducing due diligence measures for insurance or indemnification arrangements in sub-custody contracts to ensure that the fund would be adequately protected against the risk of loss;[9]

- An assessment of investment strategies and eligible assets to identify at what point the custody risk would become unacceptable for UCITS investors;

- Introducing side pockets to isolate assets that are temporarily unavailable to the fund (but which would ultimately be returned to the fund, for example once insolvency proceedings are complete), should the custody risk materialise.

Finally, some participants considered that an inversion of the burden of proof would enhance investor protection because it would oblige depositaries to be more transparent on their use of sub-custodian networks. Without such an inversion, management companies and investors lack the necessary expertise to investigate the network of providers appointed by their depositary. However, others disagreed with placing the burden of proof on the depositary in that it may add unnecessary legal uncertainties for the depositary business. The appropriate principles relating to the burden of proof will depend on the nature of the depositary's obligations and so such burdens should not be imposed without an underlying clarification of the nature of the duties to be performed. In the absence of such preliminary work, the reversal of burden of the proof is perceived to be "unconditional performance" in disguise.

QUESTIONS 15 to 17

Do you agree that the conditions under which the UCITS depositary shall be able to delegate its duties to a third party should be clarified? Under which conditions should the depositary be allowed to delegate the performance of its duties to a third party? Do you agree that the depositary should be subject to additional ongoing due diligence requirements when delegating the performance of its duties to a third party?

[9] Please refer to Rules 17f-5 of the US investment company Act.

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, the conditions upon which the depositary shall delegate its activities, should be clarifed.	**65**	**82%**	32	78%	18	90%	2	67%	2	50%	10	100%	1	100%
(Including : depositaries should do due diligence on an ongoing base)	*53*	*67%*	*28*	*68%*	*13*	*65%*	*1*	*33%*	*1*	*25%*	*9*	*90%*	*1*	*100%*
No, it is not necessary since it is already clarified at national level or through industry guidelines.	4	5%	3	7%	0	0%	1	33%	0	0%	0	0%	0	0%
No specific opinon	10	13%	6	15%	2	10%	0	0%	2	50%	0	0%	0	0%

Article 22 of the UCITS directive provides: "*A depositary's liability as referred to in Article 24 shall not be affected by the fact that it has entrusted to a third party all or some of the assets in its safe-keeping".*[10] Most participants were indeed of the opinion that the delegation of depositary duties should not affect the depositary's liability.

However, there is also a crucial need to clarify and strengthen the conditions under which a UCITS depositary may delegate its custody functions and to harmonise on-going due diligence. For instance some respondents insisted on the need to introduce segregation requirements - at the level of the sub-custodian. In addition the need to prevent the right of re-use of the transferred assets was raised.

The initial and ongoing (or 'periodic') due diligence should, in so far as possible, be consistent with existing EU and US[11] requirements.

The conditions described in the Commission Consultation paper were believed to be acceptable, though some other criteria were also mentioned:

- **Criteria relating to the scope of activity to delegate:** With regard to delegation, the UCITS Directive should expressly provide that *only* safe-keeping duties can be delegated. Additional criteria that define under what circumstances delegation is allowed[12] should be incorporated into the Directive. Some respondents thought that delegation should be subject to risk analysis, in line with the rules applicable to segregation and insolvency. Any sub-custody risk should be measured accordingly and included as an additional element to the risk profile of the funds, in the Directive.

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[10] A similar provision for the depositary obligations for Investment Company can be found under article 32 of the UCITS Directive.

[11] Please refer to Rules 17f-5 of the US investment company Act.

[12]). J. De Larosière report, 25th February 2009:"*The Madoff case has illustrated the importance of better controlling the quality of processes and functions in the case of funds, funds of funds and delegations of responsibilities. Several measures seem appropriate:*
- delegation of investment management functions should only take place after proper due diligence and continuous monitoring by the "delegator"; - an independent depository should be appointed, preferably a third party; - The depository institution, as custodians, should remain responsible for safe-keeping duties of all the funds assets at all times, in order to be able to perform effectively its compliance-control functions. Delegation of depository functions to a third party should therefore be forbidden. Nevertheless, the depositary institution may have to use sub-custodians to safe-keep foreign assets. Sub-custodians must be completely independent of the fund or the manager. The depositary must continue to perform effective duties as is presently requested. The quality of this duties should be the object of supervision; - Delegation practices to institutions outside of the EU should not be used to pervert EU legislation (UCITS provides strict "Chinese walls" between asset management functions and depositary-safe-keeping functions. This segregation should be respected whatever the delegation model is used. "

- **Criteria relating to the type of entity to appoint as a UCITS' sub custodian:** this list should define the type of eligible institutions and take into account criteria such as reputation, organisation, expertise, financial resources and supervisory requirements.[13]

QUESTIONS 18 & 19

Do you share the Commission services approach to reviewing the ICSD, to allow UCITS to benefit from a compensation scheme where the depositary defaults?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	5	6%	1	2%	0	0%	2	67%	0	0%	1	10%	1	100%
No, UCITS should not be entitled to the ICSD compenstation scheme; It is an issue to be adressed within the review of the	**74**	**94%**	40	98%	20	100%	1	33%	4	100%	9	90%	0	0%
No, UCITS should not be entitle to ICSD compenstaion scheme	**48**	**61%**	26	63%	11	55%	0	0%	2	50%	9	90%	0	0%
No opinion, it is is an issue to be adressed within the ISCD review consultation	26	33%	14	34%	9	45%	1	33%	2	50%	0	0%	0	0%

Do you agree that UCITS holders should also benefit from compensation if their custodian defaults and these assets are lost?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, all investors in financial instruments should be entitled to mitigate their losses under the ISCD.	11	14%	5	12%	1	5%	2	67%	1	25%	1	10%	1	100%
No, that should not necessarely be the case and it is anyway a issue to be dealt with by the ISCD review consultation.	**68**	**86%**	36	88%	19	95%	1	33%	3	75%	9	90%	0	0%
No opinion expressed. This is a specific issue whcih shall be dealt with within the	*31*	*39%*	*17*	*41%*	*8*	*40%*	*0*	*0%*	*0*	*0%*	*6*	*60%*	*0*	*0%*
No opinion expressed. This is a specific issue whcih shall be dealt with within the ISCD review consultation	*37*	*47%*	*19*	*46%*	*11*	*55%*	*1*	*33%*	*3*	*75%*	*3*	*30%*	*0*	*0%*

Nearly one third of respondents considered that these are not issues to be addressed within a UCITS depositary review and believe that these issues should be best dealt with within the Directive 97/9/EC (ICSD) review process. The other two thirds of those who expressed opinions argued that the extension of the ICSD would be neither necessary nor relevant, for a variety of reasons:

- The purpose of ICSD is to mitigate investor loss once a firm has gone bankrupt. A review of the ICSD to allow UCITS to benefit from a compensation scheme where a depositary defaults was perceived as inappropriate for addressing issues relating to a firm's liability.

[13] Special criteria should also be introduced when securities are registered with an (I) Central Securities Depositary.

- The purpose of the ICSD is to cover the risk associated with investment services. Those risks are of a different nature to the risk associated with collective investment services.

- The ICSD's objectives are to offer protection to retail investors. Even though they invest on behalf of retail investors, UCITS are themselves professional investors when they trade on the market.

- The level of UCITS losses to be mitigated through the ICSD would be very marginal where a segregation principle has been introduced. Furthermore, the level of compensation offered through the ICSD (a few thousand euros) would be disproportionate to the average value of a UCITS portfolio (122 million euros in average[14]). Furthermore, the cost of organising such compensation for UCITS funds would exceed the level of profit investors could derive.

QUESTIONS 20 to 23

Do you agree that the general organisation requirements that are applicable to a UCITS depositary should be clarified? If so, to what extent? Do you agree that requirements on conflicts of interest applicable to UCITS depositaries should be clarified? if so, to what extent ?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, a clarification on the general organisational requirements is encouraged.	**34**	**43%**	12	29%	8	40%	3	100%	2	50%	9	90%	0	0%
No, general organisational requirements do not need to be clarified at EU level.	28	35%	21	51%	5	25%	0	0%	0	0%	1	10%	1	100%
No opinion expressed	17	22%	9	22%	6	30%	0	0%	2	50%	0	0%	0	0%
Yes, *Requirements relating to conflict of interest should be clarified, particularly when the asset manager and depositary and asset manager belong to the the same*	***48***	***61%***	*23*	*56%*	*11*	*55%*	*2*	*67%*	*4*	*100%*	*8*	*80%*	*0*	*0%*

Some participants considered that existing organisational requirements at national level or in industry guidelines are clear enough. However, if organisational requirements were to be harmonised, they should be aligned and consistent with existing MiFID organisational requirements, where appropriate. With regard to conflicts of interest, a majority of participants considered that these rules should be clarified where the asset manager and the depositary belong to the same group. Moreover, respondents believed that transparency for final investors should be enhanced.

QUESTIONS 24 to 26

Do you agree that there is a need for clarifying the type of institutions that should be eligible to act as UCITS depositaries?

[14] Source : Efama Fact book 2008

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, harmonisation of the eligibility criteria is encouraged.	**52**	**66%**	29	71%	11	55%	2	67%	3	75%	7	70%	0	0%
No, existing criteria in the UCITS Directive are clear enough and no further harmonisation is needed.	12	15%	2	5%	5	25%	0	0%	1	25%	3	30%	1	100%
No opinion expressed	16	20%	10	24%	4	20%	1	33%	1	25%	0	0%	0	0%

Do you agree that only institutions subject to the CRD should be eligible to act as UCITS depositaries? If not, which types of institutions should be eligible to act as UCITS depositaries, and why?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
No opinion	16	20%	9	22%	5	25%	1	33%	1	25%	0	0%	0	0%
Yes, Only CRD institutions should be eligible.	**39**	**49%**	23	56%	7	35%	1	33%	0	0%	7	70%	1	100%
Including : Only Credit institution (and non EU credit institutions branches) should be eligible.	*17*	*22%*	*9*	*22%*	*4*	*20%*	*0*	*0%*	*0*	*0%*	*4*	*40%*	*0*	*0%*
No, it is necessary to establish a larger list of eligible entities according to the risk and liabilities associated with the depositary activities.	24	30%	9	22%	8	40%	1	33%	3	75%	3	30%	0	0%

Article 23 of the UCITS Directive provides: "*(...) A depositary shall be an institution which is subject to prudential regulation and on-going supervision. It shall also furnish sufficient financial and professional guarantees to be able effectively to pursue its business as depositary and meet the commitments inherent in that function. (....) Member States shall determine which of the categories of institutions referred to in paragraph 2 shall be eligible to be depositaries. (...)* "

A majority of participants considered that the status of the UCITS depositary should be clarified and harmonised.

Institutions subject to the Capital Requirements Directive 2006/48/EC (which includes credit institutions and investment firms) are generally considered as being the most suitable entities to fulfil UCITS depositary requirements, in light of their sound organisation and expertise in investment services and safe-keeping. These institutions are also subject to strong EU mechanisms that protect clients' interests in case of default. Some participants even insisted that the existing annex of the CRD should be clarified with regard to the necessary capital requirements associated with depositary activities (which include safe-keeping but also supervisory duties). A minority also expressed the view that harmonisation of the eligibility criteria of the UCITS depositary should only be undertaken so long as credit institution are made eligible, as is already the case in some Member States. However, many participants also expressed diverging views on the latter. Introducing restrictions based on CRD eligibility criteria could significantly reduce the number of depositaries and thus reduce managers' and investors' choices, leading to an unnecessary market concentration. They believed that the appropriate approach would be to define criteria based on the operational risk and liability constraints associated with depositary activities.

QUESTION 27

Do you agree that additional auditing requirements should be imposed, such as an annual certification of the depositary's accounts by independent auditors?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, depositary should be subject to proper auditing requirements	20	25%	6	15%	6	30%	2	67%	0	0%	5	50%	1	100%
No, depositary are already subejct to autiding requirement	**39**	**49%**	25	61%	7	35%	0	0%	2	50%	5	50%	0	0%
No opinion expressed	20	25%	10	24%	7	35%	1	33%	2	50%	0	0%	0	0%

The respondents indicated that most EU depositaries are already subject to annual audit (such as SAS 70) according to banking or investment services regulations. Introducing additional requirements was perceived as an unnecessary and costly measure.

However, it is important to stress that for most participants the certification not only of the depositary's own assets but also of the assets held on behalf of its clients, would ascertain the actual existence of assets. This was perceived to be a key element in the prevention of fraud. This certification could be required at the sub-custodian level and referred to in the accounting documents of the funds. Some respondents also mentioned that additional eligibility criteria could be introduced – for example systematic replacement of auditors at regular intervals.

QUESTION 28

Do you agree that UCITS depositaries should be subject to a specific 'depositary' approval by national regulators?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	**40**	**51%**	20	49%	7	35%	2	67%	2	50%	8	80%	1	100%
No	18	23%	11	27%	6	30%	0	0%	0	0%	1	10%	0	0%
No opinion expressed	21	27%	10	24%	7	35%	1	33%	2	50%	1	10%	0	0%

According to the CESR mapping, there is currently an uneven approach to supervision of UCITS depositaries across Europe. This includes situations where in some Member States, a specific authorisation is already granted by competent authorities to credit institutions or other eligible institutions to act as UCITS depositaries.

For a majority of participants, specific approval should be granted by the national competent authorities to UCITS depositaries, in addition to the licence for providing custody duties.

QUESTIONS 29

Do you believe that there is need to promote further harmonisation of the supervision and cooperation by European regulators of depositary activities? What are your views on the creation of an EU passport for UCITS depositaries?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes	**47**	**59%**	25	61%	11	55%	2	67%	1	25%	7	70%	1	100%
No	4	5%	0	0%	2	10%	0	0%	0	0%	2	20%	0	0%
No opinion expressed	28	35%	16	39%	7	35%	1	33%	3	75%	1	10%	0	0%
However a Depositary Passport would only be feasible if the activities of UCITS depositaries were further harmonised	*42*	*53%*	*21*	*51%*	*10*	*50%*	*2*	*67%*	*1*	*25%*	*8*	*80%*	*0*	*0%*

A large majority of respondents viewed the harmonisation of the supervision of depositaries by national authorities and the harmonisation of the national supervisor's administrative powers, as necessary. Full harmonisation of the rules applicable in the supervision of the UCITS depositaries is indeed crucial to the positive development of the European single market.

A majority of respondents, including the banking and securities industry and investors considered that harmonisation of the status, role and liability regime of UCITS depositaries should be an unconditional pre-requisite for a UCITS depositary passport.

QUESTIONS 30 & 31

As far as the UCITS portfolio and UCITS units or shares are concerned, do you agree that their value should be assessed by an independent valuator? If so, what should be the applicable conditions for an entity to be eligible to act as an UCITS Valuator?

	TOTAL		ORGANISATIONS								PUBLIC AUTH. (10)		CITIZENS (1)	
			BANKING & SECURITIES INDUSTRY (41)		MANAGEMENT INDUSTRY (20)		INVESTORS REP.(3)		LEGAL SERVICES (4)					
Yes, It will provide more comfort to investors as far as the valuation process is concerned.	14	18%	10	24%	2	10%	1	33%	0	0%	0	0%	1	100%
No, it will not necesseraly increase the level of investor protection.	**46**	**58%**	20	49%	13	65%	1	33%	2	50%	10	100%	0	0%
No Opinion expressed	**19**	**24%**	11	27%	5	25%	1	33%	2	50%	0	0%	0	0%

Some respondents stressed that, for off shore hedge funds, most industry guidelines already require that an independent administrator has to be appointed to valuate the funds' units. However, the ultimate decision on value of assets remains with the asset manager.

As far as UCITS are concerned, some respondents took the view that independent valuators should be appointed in cases where this would provide additional comfort to investors. Should the valuation fall under the responsibility of an independent valuator, such an entity should be appropriately regulated (with proper capital and supervisory requirements). It was reiterated that ultimate decisions on value should still remain with the asset manager.

On the other hand, a third of respondents expressed a strong disagreement with such a requirement, feeling that independent UCITS valuation would not necessarily improve investor protection. Issues relating to the valuation process would remain the same irrespective of whether the manager or another legally independent entity performed the valuation. Hard to value assets would remain difficult to value. The valuator's independence would not necessarily ensure his competence and so would not guarantee more accurate pricing.

Moreover, stakeholders mentioned that an integral part of the manager's role is to be expert in asset pricing and so delegation of such a task to a third party would be inconsistent and duplicate his core business. Therefore, most respondents felt the existing model to be appropriate and so no further modification would be required.

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Annex 1.

- List of the public authorities that have participated in the consultation. Most Ministries of Finance have made a single contribution to the consultation also on behalf of their market regulator and their prudential supervisor.

Czech Republic	Central Bank
Czech Republic	Finance Ministry
European Union	CESR
Finland	Finance Ministry
France	Finance Ministry
Germany	Finance Ministry
Ireland	Financial regulator
Luxembourg	Financial regulator
Netherlands	Financial regulator
United Kingdom	Finance Ministry

- List of the citizens which have participated in the consultation.

Jerome TURQUEY	Consultant

- List of the organisations which have participated in the consultation.

ABBL-ALFI-Luxembourg Bankers association
ABI-Italian Banking Association
ADEPO
Advisory panel of the CNMV
Af2i.
AFG - Association Française de Gestion
AFTI & AMAFI-Association Française des Professionnels des Titres
AIMA - Alternative Investment Management Association
AMCHAM EU - American Chamber of Commerce to the European Union
Association of Foreign Banks in Germany
Association of Global Custodian
Association of Investment Companies
ASSOGESTIONI- Associazione del risparmio gestito
AXA Investment Manager
BANCO SANTANDER
BGIL-Barclays Global Investors
BLACKROCK
BNP Paribas Securities Services
BNY Mellon
BVCA Regulatory Committee
BVI- Bundesverband Investment und Asset Management e.V.
CACEIS
ČESKÁ SPOŘITELNA, a.s
CITCO Bank Nederland N.V.
Citigroup International Plc (Luxembourg Branch)
City of London Law Society Regulatory Committee (The)

CLEARSTREAM International
Danish Shareholders Associations
DATA - Depositary and Trustee Association
Deutsche Bank AG, London
DUFAS -Dutch Fund & Asset Management Association
EACB-European Association of Co-operative Banks
EAPB-European Association of Public Banks (EAPB)
EBF- European Banking federation
ECSDA
EDHEC
EFAMA
EFRP - European Federation for Retirement Provision
ESBG - European Savings Banks Group aisbl
ESSF-SIFMA Securities Industry and Financial Markets Association
ETDF - European Trustee & Depositary Forum
EUROCLEAR S.A
EUROSHAREHOLDERS
EVCA - European Private Equity & Equity Capital Venture
FBF - Fédération Bancaire Française
FIDELITY INTERNATIONAL
FINUSE
IFIA - Irish Funds Industry Association
IMA - Investment Manager Association
INTESASANPAOLO S.p.A.
INVERSEGUROS
ISSA - International Securities Services Association
JP MORGAN Trust and Fiduciary Services
Law Society of England and Wales (The)
Legal & General Investment Management Limited
Matheson Ormsby Prentice
NFU - Nordiska Finansanställdas Union
RBC - Dexia Investor Services
SKAGEN Funds International
SOCIETE GENERALE
STATE STREET CORPORATION
SWEDBANK AS
Swedish Bankers Association
UBS AG
WKO - Austrian federal Economic Chamber
ZBS - Bank Association of Slovenia
ZKA - ZENTRALER KREDITAUSSCHUSS
One organisation has submitted a contribution on a confidential basis