



Dr W Klinz  
European Commission for Economic and Financial Affairs  
ASP 10 G 152  
Rue Wiertz  
Brussels

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Dear Dr Klinz

**Draft Report on Asset Management II**

I write with reference to the draft report issued on 17 July 2007 commenting on the European Parliament's intention of play a full role in designing a more integrated European market for investment funds.

I write on behalf of the Depository and Trustee Association (DATA) which represents all Depositaries and Trustees of UK-based authorised unit trusts and open-ended investment companies (OEICs), and are responsible for safeguarding approximately £456.5 billion of funds under management (as at July 2007). The member firms of DATA are:

- ABN AMRO Mellon Global Securities Services B.V.
- Bank of New York Trust and Depositary Company Limited
- Brown Brothers Harriman Investor Services Limited
- Citibank International Limited
- HSBC Bank plc
- J.P. Morgan Trustee and Depositary Company Limited
- The Royal Bank of Scotland plc
- State Street Trustees Limited

By way of introduction I would say that DATA supports the aim of a more integrated European market for investment funds. We believe that such an approach will bring a number of benefits including reduction of costs for investors arising from the economies of scale, enhanced competitiveness, greater scope for product development, a levelling of the playing field and ultimately create a healthy single market for investment funds which can better compete in the global market.

We have not specifically commented on all the items raised in this report but have discussed items which are particularly pertinent.

## UK Depositaries and Trustees

In order to further set the scene I thought it might be useful to clarify the status and responsibilities of UK Depositaries and Trustees ("Depositaries") of authorised funds (whether UCITS or non-UCITS).

The main overriding responsibility of Depositaries is to act in the best interests of unit or share holders of the fund. Other responsibilities attributable to the Depositary include:

- custody of and/or control over scheme property;
- the oversight of specified activities of the manager of the scheme to ensure that the scheme is managed in accordance with:
  - investment and borrowing powers (both regulatory restrictions and those documented in the investment objective and policy as disclosed in the scheme prospectus);
  - dealing requirements;
  - valuation and pricing requirements (NOTE: this is an oversight role and the responsibility for calculating the NAV remains with the manager, even where this activity is delegated to a third party provider) and;
  - accounting, income allocation and distribution requirements.

## Depositary Passport

We note that there have been numerous discussions over the past few years in various quarters as to the validity of the Depositary passport. We generally support the ultimate goal of a Depositary passport but like other parties have felt this does not have substantial immediate cost benefits and do consider that there are some significant steps that need to be taken to reach that point. As noted, latterly in the EUROFI report, and as you are aware, there is divergence between Member States as to the role of the Depositary. For example some Member States require the Depositary to perform such functions as the NAV calculation while in other Member States the Depositary oversees the manager or his agent performing this function. Typically we believe that notwithstanding this divergence the unit or share holders are protected. In that context we accordingly believe that there are other priorities such as the Management Company passport, registration of funds, mergers and pooling that have a priority more important than that of tackling the fuller harmonisation of Depositary responsibilities many expect are most likely required for a Depositary passport.

In the short to medium term however it may be worthwhile to recognise general principles that apply to Depositaries across Europe which are relevant and which do provide a regulatory anchor when taken in conjunction with increased cross-border regulatory co-operation enabling implementation of a full Management Company passport. This point is discussed further below.

We support the statement in paragraph 26 which calls for an analysis of the legal barriers to harmonisation of Depositary functions in the different Member States. We do however note that differing implementations of the depositaries role e.g. NAV calculation, does not necessarily diminish or increase the overall investor protection or act as an obstacle to a level playing field. We think that alongside the analysis of the legal barriers to harmonisation of Depositary functions that a similar analysis should be undertaken to cover administrative practices.

## Depositary Branches

DATA supports the Commission's proposals for increasing the cross-border activity of Depositary services by allowing for branches to be authorised in another Member State. We think this will be particularly valid where there are restrictions on who can perform custodial

functions within that Member State and would thus increase competition and remove regulatory barriers.

### Management Company Passport

Although the Management Company Passport is not specifically mentioned in the draft report we do believe that such a passport plays an integral part in the development of the single market. The comments below taken into account the statement in paragraph 27 of determining the interaction between the Management Company passport, the fund and regulator.

We obviously note that there is considerable discussion and debate regarding the implementation of a full or partial Management Company passport due to concerns over which parties could be held accountable in a situation of regulatory redress. We strongly believe that there are a number of provisions which are currently in place, or which could be introduced with relatively minimum impact, which would give comfort to the Commission if a full Management Company passport were to be introduced.

A key area which would facilitate a full Management Company passport and also in time, potentially, offer ultimate harmonisation of Depositary responsibilities is the enhancement of regulatory co-operation between the individual Member State regulators. We believe regulatory co-operation should include an obligation on the host state regulator where the fund is domiciled to pass on to the home state regulator of the passporting Management Company any concerns they or the Depositary may have with regards to the conduct of the management company in relation to the operation of the fund. Ideally the home state regulator would be required to take appropriate action on receipt of such information. We believe that this is imperative if cross-border distribution or structural issues are to be handled appropriately and is relevant whatever the exact responsibilities of the Depositary. Such harmonisation could provide comfort to the Commission and the European Parliament in directly providing a regulatory anchor in a situation where there is a Depositary passport, a Management Company passport and relevant interaction with the regulators.

Within the current regimes across the Member States we believe that there are sufficient regulatory and contractual provisions to allow implementation of a full Management Company passport if all parties engage with this issue appropriately. There are some key points to make:

- greater regulatory co-operation between Member States is a fundamental requirement.
- As it currently stands, both the fund and the Depositary are authorised and regulated in the same jurisdiction and no Management Company cross-border or otherwise can operate outside their sanction given their respective interactions with the fund.
- The Depositary in all Member States as required by Article 7 of the UCITS Directive, has a general duty of oversight and has a responsibility to act in the interests of unitholders.

While the interpretation and thus implementation of these exact requirements in Article 7 in individual Member States may vary the over-arching principles required of the Depositary remain. As such the Depositary has responsibilities as a regulated body and as an overseer of a regulated fund, to the regulator in their home state.

We do not see how the appointment of an administrator outside of the fund's home state would lessen contractual, legal or regulatory responsibility to the Depositary or local supervisory authority. The Management Company, after all, only maintains their right to operate a particular fund at the ultimate discretion of the regulator of the fund and the Depositary.

To expand, where the Management Company is passported and launches a fund in another jurisdiction, as a regulated entity in their home state it remains answerable to that regulator and would also be accountable to the Depositary of the fund. The host state regulator also remains responsible for the fund. It is envisaged where such arrangements were in place that the Depositary would ensure that the contractual arrangements with the Management Company allow for any regulatory redress to be sought and any recompense to the fund made. We believe that these existing sanctions which are in place across the European Union would be a deterrent to any inappropriate or unlawful actions by the Management Company.

We believe that the appointment of an administrator outside of the fund's home state is similar to operational structures which are currently in place across Europe. For example, there are a number of Management Companies domiciled in the UK which delegate the fund administration activities to firms domiciled in other Member States, such as Dublin. We would note that in these circumstances, while the Management Company has delegated the activity, the regulatory control and responsibility remains with that Management Company and the Depositary. These arrangements are managed successfully and involve monitoring and contractual control between the Management Company, Depositary and fund administrator. If an individual breach arose the fund's home state regulator and Depositary are well positioned to deal with that matter. The manager also retains authorisation in its home state and potential sanction against it is retained by the home state regulator should that be necessary.

#### Real Estate Funds and Funds of Hedge Funds

We do in principle agree with the extension of the UCITS Directive to incorporate open-ended real estate funds (OREF) and funds of hedge funds (FoHF). We consider that before any further deliberations are given to OREFs that the views of the expert group is taken into account and should not be pre-empted.

The UK Financial Services Authority is currently in the process of implementing a regulatory regime for FoHF. This regime will provide high-level principles as to the responsibilities of the manager and Depositary when acting for such funds and the determination of the eligibility of the individual hedge funds.

We would recommend that paragraph 2 of the draft advice is deleted as this appears to be contradictory to paragraph 3.

#### Taxation of Cross-Border Fund Mergers

We would welcome the introduction of a level playing field on tax for cross-border mergers as this is in the best interest of unitholders and fair competition between jurisdictions.

In summation we believe that:

- the aim of a more integrated European market for investment funds is welcomed
- the introduction of branching Depositary services would be beneficial in those Member States that restrict the domicile of the custodian;
- a full Management Company passport is achievable with regulatory co-operation and the Depositary domiciled in the same jurisdiction of the fund acting as a regulatory anchor and;
- the UCITS Directive should be extended to include OREFs and FoHF.

We would be very happy to arrange a meeting to discuss these views further at your convenience.

Yours sincerely

John Cargill  
DATA Chairman