CONSULTATION PAPER ON THE UCITS DEPOSITARY FUNCTION

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

About the author:

Jerome Turquey, since 2004, initiated research on Corporate Social Responsibility and business ethics in Luxembourg, which was stopped by the employer, because these were not supported by the Luxembourg authorities. He continued his research in free lance to put forward the ethical deficiencies and the failures of governance in the Grand-Duchy of Luxembourg, with a goal to propose concrete solutions to prevent the reputational risk in this jurisdiction: Luxembourg deserves respect, but it is undeniable that its small size emphasizes the conflicts of interest and the related risks.
In 2006 he published (*Vus… Pas pris* ! Paris, Le Publieur, mai 2006) on the risks of the business in Luxembourg and presented his work in the framework of a university conference in 2007 ("Financial Institutions, Markets and Ethics: Mixed Approaches in the European Context", May 25-26, 2007, Florence, Italy) in a paper called « Ethics of the Luxembourg financial center: between myth and reality ». This paper was adapted to become a chapter of a book published this year ("The Lessons of Luxembourg's Financial Centre: Towards a Certification of Ethics for Financial Centres to Replace Current Assessments" In E. Paulet et al., *Financial Markets and the Banking Sector: Roles and Responsibilities in a Global World.* London, Pickering & Chatto, April 2009).
Jerome Turquey is part-time lecturer (university and business school) about financial and judiciary havens.

CONSULTATION PAPER ON THE UCITS DEPOSITARY FUNCTION

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Bene diagnoscitur, bene curatur

The European Commission circulated on 3 July 2009 a consultation paper on the UCITS depositary function and is expecting to receive opinions from stakeholders.

The information on the consultation paper on the UCITS depositary function was not circulated by ALFI, the Association of the Luxembourg Fund Industry, which is the first concerned in Luxembourg: the *Alfi News Digest* for July 2009 was created on 13 July 2009: it ignores the Consultation Paper on the depositary. Neither the keyword "depositary" nor the keyword "custodian" is quoted.

I am afraid such censorship on the issue demonstrates that professionals are upset because they fooled the investors and other stakeholders with a misleading communication on the so-called "faithful" transposition of the UCITS directive.

As Frank Wagener, Chairman of the Executive Board, Dexia-BIL S.A, said, "It is now the time for the banks to listen, whether from the public, from journalists, and from experts, and then to take the right actions to address the issues raised" (In *Luxembourg Banks Insights 2009* from KPMG)

So I feel strongly supported to state and demonstrate that the ALFI actually created and supported the conditions that opened the drift and unfortunately EFAMA, the European Fund and Asset Management Association, seems to be willing to hush up their responsibility because of a corporate spirit that is definitely not relevant in the current situation (Cf. EFAMA Annual Report 2008-09 page 19 the will to *put an end to reciprocal incrimination*).

Let's have a look at two documents that are available on the ALFI website, which admit the influence that the Luxembourg Investment Fund Industry has on the the way the regulator is doing its job (prudential regulatory environment and controls).

Let's have a look on what stated Rafik Fischer, Vice Chairman ALFI, in 2005: "*The relationship between the Luxembourg Commission de Surveillance du Secteur Financier Luxembourg (CSSF) and the Financial centre it supervises has always been described, **and rightly** so, as being **heavily influenced by a true common interest approach**. (...) **The Luxembourg Investment Fund Industry has regularly had a very close and direct say on the evolution of the Luxembourg prudential regulatory environment governing the collective Investment Industry**. (...) This influence has been exerted directly and indirectly by the **lobbying initiatives** taken on the level of the different professional associations, be it ALFI or ABBL , but also and more importantly, trough **a direct association with the Luxembourg Supervisory Authorities by means of a number of standing committees** (...) **It is in those Committees which have proven instrumental in** launching new legislative initiatives like the International Pension Funds or the SICAR (société d'investissement en capital à risque) and **providing pragmatic and timely solutions to the evolution of the industry***" (Cf. article "Shaping the Regulatory Environment", *Fundlook*, July 2005, page 6)

In other words, the ALFI admitted its influence on the CSSF (the Luxembourg regulator) and that it decides the Luxembourg prudential regulatory environment to be enforced for controls, sanctions….

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Let's have a look on a flyer that was published in 2006. It is written "*All asset management activities must be approved by the Commission de Surveillance du Secteur Financier (CSSF), the financial services supervisory body which carries out an effective and* ***pragmatic supervision of the financial sector****.*"

What is a pragmatic supervision, knowing that the influence on the financial services supervisory body is admitted? Luxembourg is a strange regulated center where professionals decide what is to be done for controls, sanctions…

Luxembourg politicians and business leaders strongly communicated on the so-called faithful transposition of the UCITS directive especially after the jurisdiction was accused for its rules on the Depositary function:

- "***Based on clear and pragmatic legal rules that are fully compliant with the EU legal framework*** *as well as on the unique international experience built up over the past decades, the Grand-Duchy of Luxembourg will continue to undertake every effort to develop Luxembourg as the European hub for investment funds both for European and non-EU financial operators*." (Cf. article « The art of Communication », *Fundlook*, July-September 2004, page 3)

- "*Luxembourg law applicable to Luxembourg based depositary banks in their role of safe-keepers of investment funds' assets* ***reflects faithfully the provisions of the European Council Directive*** *85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities*" (CSSF, 2 January 2009)

- "*Minister Luc Frieden and then Prime Minister Jean-Claude Juncker unequivocally stated that* ***Luxembourg has faithfully transposed the UCITS Directive***" (ALFI before the EFAMA, 20 January 2009)

The word faithful means *true to the facts, to a standard, or to an original* (Merriam Webster, 5th meaning). There must not be any dropped requirement.
The word full means *complete especially in detail, number, or duration (*(Merriam Webster, 2nd meaning).

What is the truth about the full transposition?

As far as the UCITS depositary function is concerned, the working paper formulates 31 questions that are divided into 6 sections:

- Depositary's duties (questions 1 to 9)
- Responsibility regime (questions 10 to 19)
- Organisational requirements (questions 20 to 23)
- Eligible depositary institutions (questions 24 to 26)
- Supervision issues (question 27 to 29)
- Other investors protection issues (questions 30 to 31)

It is necessary to analyse how the directive was enforced, prior to improving the directive.

For every section of the working paper a discussion on the transposition, with a comparison between Luxembourg and Ireland whenever useful to tighten up the ship, will precede the answer to the questions.

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Depositary's duties (questions 1 to 9)

The development on the safekeeping duties in the working paper observes that "*According to Article 22 of the amended UCITS Directive: "a common fund's assets must be entrusted to a depositary for safe-keeping". The UCITS Directive does not define the meaning of "safe-keeping". At national level, approaches differ as to what exactly a depositary is expected to do when it is entrusted with the task of safe-keeping the funds assets*."

I am afraid the analysis prior to the questions does not tighten up the ship on the key issues.

As far as the Luxembourg (the jurisdiction that supposedly transposed faithfully the UCITS directive) legal and regulatory framework is concerned, it is not a question of divergence of interpretation, but a question of knowingly fallacious transposition.

Duties that were enforced in Luxembourg do not comply with the directive: in the implementation of the UCITS directive, Luxembourg clever pragmatic lawyers and professionals removed the safekeeping duties to only state limited supervisory duties, while the UCITS Directive is clearly stating both duties : safekeeping and supervisory duties.

Why was the word "safekeeping" removed in the law of transposition (Cf. article 17 of the Luxembourg Law of 20 December 2002) as is in one of the depositary's duties stated clearly in article 7 of the directive?

UCITS DIRECTIVE	LUXEMBOURG LAW OF 20 DECEMBER 2002 (Source: CSSF. In case of discrepancies between the French and the English text, the French text shall prevail)	IRISH LAW S.I. No. 78/1989: NB : "trustee" in relation to a UCITS means an institution referred to as a depository in the Directive
Article 7 1. A unit trust's assets must be entrusted to a depositary **for safekeeping**	Art. 17. (1) The custody of the assets of the common fund must be entrusted to a depositary.	37. (1) The assets of an investment company shall be entrusted to a trustee **for safe-keeping** in accordance with these Regulations.

What Circular AML 91/75 states, emphasizes the issue: *The concept of custody used to describe the general mission of the depositary should be understood not in the sense of "safekeeping", but in the sense of "supervision",* as it confirms the drop of the safekeeping duties.

The working paper observes that *The UCITS Directive does not define the meaning of "safe-keeping"*. If the UCITS directive doesn't, the dictionary does. So it defines the meaning of supervision.

What circular AML 91/75 states about the supervision *("The depositary has discharged its duty of supervision when it is satisfied from the outset and during the whole of the duration of the contract that the third parties with which the assets of the UCI are on deposit are*

reputable and competent and have sufficient financial resources") is not an efficient supervision as it cannot ensure a critical watching and directing (See definition of supervision in the Merriam Webster dictionary)

As far as safekeeping is concerned, the Merriam Webster dictionary states the following definition
1 : the act or process of preserving in safety
2 **:** the state of being preserved in safety

Preserve means:
1: to keep safe from injury, harm, or destruction: protect
2 a: to keep alive, intact, or free from decay b: maintain
3 a: to keep or save from decomposition b: to can, pickle, or similarly prepare for future use
4: to keep up and reserve for personal or special use

Keep means:
(…)
4 a: to retain in one's possession or power <kept the money we found> b: to refrain from granting, giving, or allowing <kept the news back> c: to have in control <keep your temper>
(…)

The meaning of safekeeping is therefore clear enough in the dictionary: the act or process of retaining in one's possession in safety.

In other words, Luxembourg with its pragmatic lawyers and professionals not only dropped the duties of safekeeping that were clearly stated in the directive but allowed to discharge the duty of supervision in a way that did not comply with the common meaning of the word supervision.

That is the reason why the communication about the "faithful transposition" of the directive (see what stated the ALFI before the EFAMA late January 2009) is not acceptable as it is a huge breach in the confidence in UCITS funds, so is the recent EFAMA support to the jurisdiction in its annual Report 2008-2009.

The basic meaning of words was led astray.

Question 1) Do you agree that the safe-keeping (and administration) duties of depositaries should be clarified?

There is no actual need to clarify the basic safe-keeping (and administration) duties of depositaries as the basic definition of the word safekeeping in any dictionary is clear enough: the act or process of retaining in one's possession in safety.

The problem relating to the safekeeping duties actually comes from the drop of the word "safekeeping" in the transposition in the Luxembourg Law of 2002: the requirement for safekeeping (and the relating meaning as defined in any dictionary) was clearly and knowingly removed.

Safekeeping duties whatever they are therefore did not exist in the Luxembourg legal and regulatory framework as enforced.

The directive was not transposed faithfully.

The safe-keeping (and administration) duties of depositaries may be clarified at a lower level, for each class of assets eligible.

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Question 2) Do you agree these duties should be clarified for each class of assets eligible to the UCITS portfolio?

There may be differences between each class of assets eligible to the UCITS portfolio and the clarification is welcome.

Question 3) Are there any other appropriate approaches?

A possible approach could be to study how to introduce a depositary guarantor for safekeeping.

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?

Yes.

Question 5) Is there some specificity that may be applicable to the custody functions of a UCITS depositary that should be taken into account?

No

Question 6) Do you agree that the existing supervisory duties of the UCITS depositary should be clarified?

It is not exactly a question of clarification but of accuracy and proper use of words that have a basic definition that is clear enough but was not respected.
In Circular 91/75, Luxembourg replaced the word "safe-keeping" and its meaning by "supervision" with limited duties by stating: As regards the extent of the duty of supervision of the depositary, one can consider that the depositary has discharged its duty of supervision when it is satisfied from the outset and during the whole of the duration of the contract that the third parties with which the assets of the UCI are on deposit are reputable and competent and have sufficient financial resources

Question 7) If so, what clarification do you suggest?

It is needed to go back to the definition of the supervision.

Supervision means "critical watching and directing", which cannot be compatible wit the way it was rephrased in Luxembourg to discharge the depositary's duty of supervision should the assets be transferred to a third party.

Question 8) To what extent does the list of supervisory duties need to be extended?

There is no need to extend the list of supervisory duties but to ensure that the spirit of the supervision is abided by: Every supervisory duty must contribute to an effective critical watching and effective directing to be relevant.

Question 9) Do you agree that the 'only one depositary' requirement should be clarified?

Yes

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Responsibility regime (questions 10 to 19)

Investors may face a risk associated to the depositary function not only if the depositary fails to perform its duties ('improper performance') and if the depositary defaults, as it is stated in the working paper, but as well at the beginning if a requirement is not enforced so that the set of relating duties cannot exit, what could be called 'performance denial'.

UCITS DIRECTIVE	LUXEMBOURG LAW OF 20 DECEMBER 2002 (Source: CSSF. In case of discrepancies between the French and the English text, the French text shall prevail)	IRISH LAW S.I. No. 78/1989: NB : "trustee" in relation to a UCITS means an institution referred to as a depository in the Directive
Article 7 2. A depositary's liability **as referred to in Article 9** 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**	Art. 17. (4) The depositary's liability shall not be affected by the fact that it has entrusted all or some of the assets in its **custody** to a third party.	37. (2) A trustee's liability **as referred to in Regulation 43** shall not be affected by the fact that it has entrusted to a third party some or all of the assets in its **safekeeping**.
Article 9 A depositary shall, in accordance with the national law of the State in which the management company's registered office is situated, 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 either 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.		Liability of trustee. 43. The trustee shall be liable to the investment 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.

In the Luxembourg situation, the safe keeping duty was dropped in the law, so that there cannot be any performance in the scope of the safekeeping requirement.
As far as the delegation to a third party is concerned, what is stated in the Luxembourg law is worth analysing

It is interesting to see that the Luxembourg law of 2002 does not refer to the article relating to the depositary's liability when assets are entrusted to a third party. The Irish law does.

The reference that is dropped in Luxembourg states notably that a depositary *shall 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.*

The Luxembourg law of 2002 admits the custody duty where the directive and the Irish law use the word safekeeping.

Additionally, what is stated in the Luxembourg Circular AML 91/75 demonstrate the lack of responsibility of those - lawyers and other professionals - that formulate the way the depositary may discharge its duty of supervision: *when it is satisfied from the outset and during the whole of the duration of the contract that the third parties with which the assets of the UCI are on deposit are reputable and competent and have sufficient financial resources.*

This is not compatible with the supervision duties as stated in the directive and recalled in the working paper:

Article 22 of the UCITS Directive stipulates that a "Depositary shall:

- *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 law and the fund rules;*
- *ensure that the value of units is calculated in accordance with the law and the fund rules;*
- *carry out the instructions of the management company, unless they conflict with the law or the fund rules;*
- *ensure that in transactions involving a common fund's assets any consideration is remitted to it within the usual time limits;*
- *ensure that a common fund's income is applied in accordance with the law and the fund rules."*

Luxembourg was not allowed to discharge the depositary's liability to a third party as it is stated in the so called legal and regulatory rules.

Question 10) Do you think that the risks related to improper performance have been correctly identified?

Yes but the working paper ignores the situation where there cannot be any performance because the safekeeping requirement was dropped.

Question 11) Do you foresee other situations where a risk associated with improper performance of the depositary duties might materialise?

Yes

Question 12) Do you agree that safeguards against the risk associated with the 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?

Yes

Question 13) 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?

Yes

Question 14) What adjustments to the liability regime associated to the custody duties of the UCITS depositary would be appropriate and under what conditions?

There should be strong criminal and civil liability.

Question 15) Do you agree that the conditions upon which the UCITS depositary shall be able to delegate its duties to a third party should be clarified?

Yes despite it is currently clear enough: In no cases the depositary should be allowed to discharge its duties.

It is interesting to see that the Luxembourg law of 2002 does not refer to the article relating to the depositary's liability when assets are entrusted to a third party. This article states that the depositary *shall 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*

Question 16) Under which conditions should the depositary be allowed to delegate the performance of its duties to a third party?

In no way the depositary should be allowed to delegate the performance of its duties in the way it is stated in Luxembourg to discharge its duty of supervision by being satisfied from the outset and during the whole of the duration of the contract that the third parties with which the assets of the UCI are on deposit are reputable and competent and have sufficient financial resources (Cf. Circular AML 91/75).

Question 17) Do you agree that the depositary should be subject to additional on-going?

Yes

Question 18) Do you share the Commission services approach to reviewing the ICSD, to allow UCITS to benefit from a compensation scheme where the depositary defaults?

Yes

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

Question 19) Do you agree that UCITS holders should also benefit from compensation if their custodian defaults and these assets are lost?

Yes

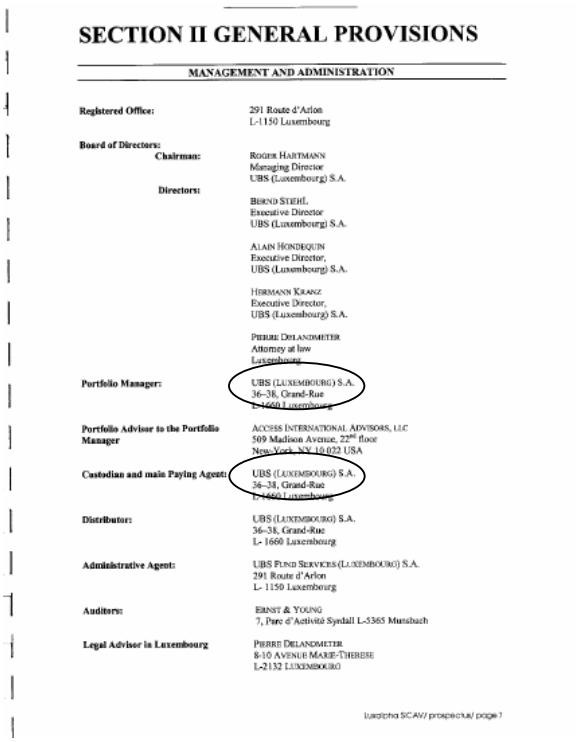
Organisational requirements (questions 20 to 23)

The working paper observes that "*on the rules applicable to conflicts of interest, the amended UCITS Directive only sets principles of separation and ethical independence between the fund manager and the depositary in particular, Article 25 of the amended 85/611/EEC UCITS Directive - which reproduces the existing Article 10 of Directive 85/611/EEC – provides that:* 'no single company shall act as both Management Company and depositary (…) 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'. *Depositaries may face situations where they can no longer ensure that they act solely and exclusively in the interest of unit-holders.*"

The so-called clear and pragmatic rules in Luxembourg do not require that no *single company shall act as both Management Company and depositary.*

UCITS DIRECTIVE	LUXEMBOURG LAW OF 20 DECEMBER 2002 (Source: CSSF. In case of discrepancies between the French and the English text, the French text shall prevail)	IRISH LAW S.I. No. 78/1989: NB : "trustee" in relation to a UCITS means an institution referred to as a depository in the Directive
Article 10 1. **No single company shall act as both management company and depositary.** 2. In the context of their respective roles the management company and the depositary must act independently and solely in the interest of the unit-holders.	Art. 20 In the context of their respective roles, the management company and the depositary must act independently and solely in the interest of the unit holders.	22. **No single company shall act as both management company and trustee** and in the context of their respective roles the management company and the trustee must act independently and solely in the interest of the unit-holders

UBS actually cumulated every role until November 2008 and especially the one of Management Company and the one of depositary, which is clearly prohibited by the directive, but authorised by the Luxembourg law. See prospectus dated February 2004 and March 2007:

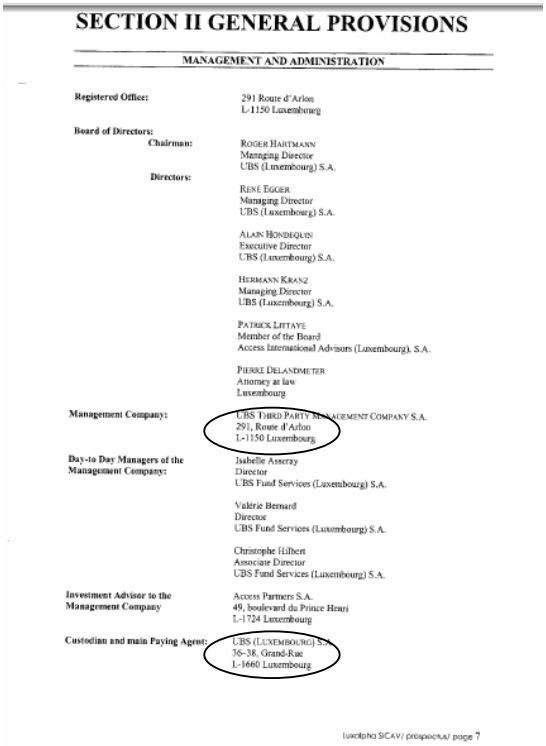


SECTION II GENERAL PROVISIONS

MANAGEMENT AND ADMINISTRATION

Registered Office:	291 Route d'Arlon L-1150 Luxembourg
Board of Directors:	
Chairman:	ROGER HARTMANN Managing Director UBS (Luxembourg) S.A.
Directors:	BERND STEHL Executive Director UBS (Luxembourg) S.A. ALAIN HONDEQUIN Executive Director, UBS (Luxembourg) S.A. HERMANN KRANZ Executive Director, UBS (Luxembourg) S.A. PIERRE DELANDMETER Attorney at law Luxembourg
Portfolio Manager:	UBS (LUXEMBOURG) S.A. 36-38, Grand-Rue L-1660 Luxembourg
Portfolio Advisor to the Portfolio Manager	ACCESS INTERNATIONAL ADVISORS, LLC 509 Madison Avenue, 22nd floor New York, NY 10 022 USA
Custodian and main Paying Agent:	UBS (LUXEMBOURG) S.A. 36-38, Grand-Rue L-1660 Luxembourg
Distributor:	UBS (LUXEMBOURG) S.A. 36-38, Grand-Rue L- 1660 Luxembourg
Administrative Agent:	UBS FUND SERVICES (LUXEMBOURG) S.A. 291 Route d'Arlon L- 1150 Luxembourg
Auditors:	ERNST & YOUNG 7, Parc d'Activité Syrdall L-5365 Munsbach
Legal Advisor in Luxembourg	PIERRE DELANDMETER 8-10 AVENUE MARIE-THERESE L-2132 LUXEMBOURG

luxalpha SICAV/ prospectus/ page 7



SECTION II GENERAL PROVISIONS

MANAGEMENT AND ADMINISTRATION

Registered Office:	291 Route d'Arlon L-1150 Luxembourg
Board of Directors:	
Chairman:	ROGER HARTMANN Managing Director UBS (Luxembourg) S.A.
Directors:	RENÉ EGGER Managing Director UBS (Luxembourg) S.A. ALAIN HONDEQUIN Executive Director UBS (Luxembourg) S.A. HERMANN KRANZ Managing Director UBS (Luxembourg) S.A. PATRICK LITTAYE Member of the Board Access International Advisors (Luxembourg), S.A. PIERRE DELANDMETER Attorney at law Luxembourg
Management Company:	UBS THIRD PARTY MANAGEMENT COMPANY S.A. 291, Route d'Arlon L-1150 Luxembourg
Day-to Day Managers of the Management Company:	Isabelle Asseray Director UBS Fund Services (Luxembourg) S.A. Valérie Bernard Director UBS Fund Services (Luxembourg) S.A. Christophe Hilbert Associate Director UBS Fund Services (Luxembourg) S.A.
Investment Advisor to the Management Company	Access Partners S.A. 49, boulevard du Prince Henri L-1724 Luxembourg
Custodian and main Paying Agent:	UBS (LUXEMBOURG) S.A. 36-38, Grand-Rue L-1660 Luxembourg

luxalpha SICAV/ prospectus/ page 7

The critical requirement to prevent conflicts of interest that "No single company shall act as both management company and depositary" that is explicitly stated in the UCITS Directive was definitely dropped in Luxembourg despite a communication on the faithful transposition of the UCITS directive.
NB: the French translation for Custodian is Depositary in UBS French documents.

Question 20) Do you agree that the general organisation requirements that are applicable to a UCITS depositary should be clarified?

No. They are clear enough but were not respected in Luxembourg.

Question 21) If so, to what extent?

N/A

Question 22) Do you agree that requirements on conflicts of interest applicable to UCITS depositaries should be clarified?

No. They are clear enough but were not respected in Luxembourg.

Question 23) If so, to what extent?

N/A

Eligible depositary institutions (questions 24 to 26)

As far as eligible depositary institutions are concerned the Luxembourg law of 2002 requires that the depositary must be a credit institution within the meaning of the Law of 5th April 1993 concerning the financial sector, as amended (Cf. article 7 of the law).
Neither the Luxembourg law nor the Irish law requires the depositary meet the commitments inherent in that function, as stated in the directive.

Question 24) Do you agree that there is a need for clarifying the type of institutions that should be eligible to act as UCITS depositaries?

No

Question 25) Do you agree that only institutions subject to the CDR should be eligible to act as UCITS depositaries?

CDR is misleading as the acronym means Chinese Depositary Receipt. I guess that it stands for the Capital Requirements Directive in the question.
Yes

Question 26) If not, which types of institutions should be eligible to act as UCITS depositaries, and why?

N/A

Supervision issues (question 27 to 29)

Audit methods must be reviewed as it seems that red flags were ignored in Luxembourg. Additionally Managements of the auditor and of the audited should be independent: it was surprising to see that Management of UBS joined his auditor (Cf. press release dated 15 November 2007: “Roger Hartmann joins Ernst & Young Luxembourg”.)

As far as the regulator is concerned, it seems that the Luxembourg law of 2002 goes beyond the directive: it requires that the directors of the depositary must be of sufficiently good repute and be sufficiently experienced, also in relation to the UCITS concerned. To that end, the identity of the directors and of every person succeeding them in office must be communicated forthwith to the regulator.
But sanctions must be dissuasive enough: the financial stake of sanctions is too little in Luxembourg (EUR 12.500). This is the consequence of the very close and direct say on the evolution of the Luxembourg prudential regulatory environment governing the collective Investment Industry, which was admitted by Rafik Fischer, Vice Chairman ALFI, in 2005 (Cf. article "Shaping the Regulatory Environment", *Fundlook,* , July 2005, page 6)

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?

Yes. But truly independent auditors, which is a problem in a small jurisdiction like Luxembourg where the conflict of interest is standard.

Question 28) Do you agree that UCITS depositaries should be subject to a specific 'depositary' approval by national regulators?

Yes. But independent regulator, which is a problem in a small jurisdiction like Luxembourg where the business influence the regulator.

Question 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?

Yes.
As far as the EU passport for UCITS depositaries is concerned, it would depend on the scope of such passport.

Other investors protection issues (questions 30 to 31)

An independant valuation would be welcome.

Question 30) 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?

Yes.

Question 31) If so, what should be the applicable conditions for an entity to be eligible to act as an UCITS Valuator?

The key issue is independence, true independence.
We have seen that in a jurisdiction like Luxembourg there are conflicts of interest.
The UCITS valuator could be a foreign legal person assigned by a new special body to be created under the Commission's responsibility. Unfortunately one cannot rely on the European fund industry to manage that as the EFAMA seems much more business-oriented than client-oriented, by refusing

- To admit that the European UCITS password from Luxembourg was corrupted i.e. is altered from the original version of the Directive and
- To support the relevant actions to be done: the support to Luxembourg in order to hush up the issue demonstrates that "soft law" does not work as for all these professionals there is only one rule: business over ethics.

Opinion from Jérôme Turquey
Consultant in Business Ethics and Reputational Risk
Version 1 – 20 July 2009

In a nutshell, the current leaders of the European investment funds industry cannot be trusted by investors as the base of the investment funds industry is confidence, and the base of confidence is the truth.

I want to lay emphasis on the fact that what will be observed for the so-called "faithful" transposition of the UCITS directive would be true as well for AML, tax evasion, corruption and any other sensitive question in this secrecy jurisdiction where professionals (bankers, lawyers, auditors…) decide of law and regulation, and especially controls, sanctions…

Quod erat demonstrandum.