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Mr. Carlo Comporti
Secretary General

CESR the Committee of European
Securities Regulators
11-13 avenue de Friedland
75008 Paris
FRANCE

CESR Consultation Paper on UCITS Management Company Passport (CESR/08-748)

Dear Mr. Comporti,

BVI[1] is grateful for another opportunity being granted to the public to present its views on prospective regulatory approach to the EU management company passport. Once again, we would like to thank CESR for this tight involvement of the industry in its preparatory work. We are convinced that CESR accounting for industry's views will pay off in terms of practicability and efficiency of the final solution.

General remarks

In our view, CESR has achieved significant progress in its work on a viable company passport for UCITS managers. The consultation paper at hand demonstrates quite clearly that cross-border fund management is possible without endangering rights of investors or putting the effectiveness of supervision at risk. The recipe for this success has been the clear and definite assignment of legal requirements for UCITS and management companies and corresponding responsibilities of their respective supervisors. In this regard, we congratulate CESR to settling many differences of opinion within the short time limits of Commission's mandate. With a few further adjustments, we trust that CESR final advice will truly

[1] BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 92 members manage currently assets in excess of EUR 1.6 trillion both in mutual funds and mandates. For more information, please visit www.bvi.de.

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facilitate cross-border management of UCITS, bringing economies of scale to the benefit of both fund managers and investors.

We acknowledge that adoption of the EU management company passport will require further work in order to harmonise the regulatory environment for UCITS which should be best accomplished by applying the Lamfalussy procedure. However, the envisaged implementing measures should not be linked to the Level 2 provisions on notification and Key Investor Information on which work is already in progress. Given the accepted failure of the current simplified prospectus and severe distortions of competition in terms of the notification process, it is of utmost importance that these major components of the UCITS IV efficiency package be adopted as soon as possible.

Specific comments

While being in general supportive of CESR draft regulatory approach to the management company passport (MCP), we would like to render our opinion on issues specified below:

1. Scope of branches' activities (Box 1, para. 10 of the explanatory text)

We agree with CESR that branches must not be allowed to make use of the management company passport in order to avoid further complexity of supervision. In order to ensure this, however, it is not necessary to exclude branches from the entire scope of collective portfolio management activities as defined in Annex II of the UCITS Directive. It should still be allowable for branches to market fund units cross-border, presuming that the notification procedure for the UCITS has successfully taken place. Otherwise, UCITS branches would be discriminated against branches of MiFID firms which have the means to exercise orders of clients domiciled in different Member States.

2. Local point of contact in case of common funds (Box 3)

Do you agree with CESR's proposals in Box 3? *Do you agree that there is an interest for investors and the UCITS competent authority in having the functions indicated in Box 3 performed by an entity located in the same Member State as the UCITS?* *Do you believe that there is an interest for investors and the UCITS competent authority in having a legal address in the jurisdiction where the UCITS is located?* *Do you consider that the local point of contact should provide additional functions, and namely the maintenance of the unit-holder register?*

In principle, we deem CESR's proposal to establish a local point of contact for common funds in the UCITS home Member State appropriate. There is certainly some reason in the request to have a designated contact person at the fund domicile in order to provide a legal address and information for investors and the UCITS supervisor. In these terms, we greatly appreciate CESR's agreement to allow for the contact point function being assigned to the depositary which will in the most cases considerably reduce the operating expense of the MCP.

Nevertheless, we object to any substantive functions being assigned to the point of contact as well as to further requirements in terms of its legal quality.

As regards the particulars of CESR's draft advice in Box 3 paragraph 2, only functions 2 and 4 appear reasonable. Function 1 is of limited practical relevance as investors tend to serve complaints with their distributors. However, we do not see any need to attribute to the local point of contact the function of paying agent as suggested in indent 3 of paragraph 2. Management companies are in any case obliged to make arrangements for payments to unit holders, subscriptions and redemptions of units and to provide respective information to investors in the sales prospectus (cf. Annex I, Schedule A, No. 4 of the UCITS Directive). Even though the combination of paying agent and local contact point makes some sense in case of depositary, there is no valid argument for conferring that task to the local point of contact in other circumstances.

On that basis, we see no reason why the local contact point needs to be a financial institution, since none of the other functions requires a banking license. A lawyer, a branch or any other local representative chosen by the management company could provide the legal address which should be disclosed to investors. The local point of contact should not incur any liability and bear no capital requirements. In this context, we suggest moving the last sentence of paragraph 4 of the explanatory text to Box 3 as a new third paragraph: "*Member States may not make the establishment of a point of contact or the provision of that role subject to any requirement to provide endowment capital or to any other measure having equivalent effect*."

Finally, we strongly reject the notion of requesting the local point of contact to perform additional functions. As regards maintenance of the unit-holder register which is subject to national law, there is definitely no need to physically operate such register at the fund's domicile. Rather, prompt and easy access by the UCITS supervisor must be ensured in case a shareholder register is required under the local regime. This should be encompassed by the UCITS supervisor's right to request information directly from the management company as proposed by CESR in Box 9 paragraph 4 of the draft advice.

3. Depositary (Box 4)

Do you agree with CESR's proposal in Box 4?
Do you consider that there is an interest for investor in harmonising the possible standard agreements to be used by depositary and management company?

While consenting to CESR's proposals in Box 4 paragraphs 1-5, we do not perceive the necessity to harmonise possible standard agreement between depositary and management company as suggested in paragraph 6. In order to meet potential concerns in terms of investor protection, principles on the mandatory content of such agreement might be adopted by regulation. In further detail, however, the agreement should account for different business models and thus, remain negotiable between the parties who are both bound by the fiduciary duty towards investors.

4. Applicable law and allocation of responsibilities in the case of free provision of services (Box 5)

Do you agree with CESR's proposals in Box 5?
Do you agree that further harmonisation in the areas indicated in Box 5 above will be beneficial for ensuring a level playing field and adequate investor protection in the European market?
Do you suggest other areas that would benefit from further harmonisation?

We agree with the content of Box 5 save the objections expressed below.

In general, we share CESR's view that further harmonisation in terms of organisational measures and conduct of business rules would benefit effective cross-border supervision and contribute to a smooth functioning of the MCP. However, the transitional solution proposed by CESR in paragraph 7 until the adoption of adequate harmonisation measures is not acceptable. For internationally active management companies, compliance with several national regimes in terms of organisational requirements, including risk management and conflict of interest rules, would be virtually impossible to accomplish. This would inevitably block the practical use of the MCP for potentially many years.

Beside the areas specified by CESR which already cover many important aspects of management companies' business, we do not see the need for further harmonisation. Rather, the question arises whether the extensive harmonisation efforts requested in the consultation paper are indeed necessary in order to facilitate cross-border UCITS management. While establishing common rules on the management companies' operations as suggested in paragraph 7 appears essential, there is prima facie no reason to harmonise scope and content of the fund rules. In view of the divergences

in national civil law regimes which have a significant impact on the current features of fund rules, we even doubt the feasibility of such initiative.

Moreover, we do not concur with CESR's suggestion in paragraph 9 to adopt implementing measures in terms of activities capable of delegation. As Article 5g of the UCITS Directive (future Article 13(1)) gives Members States the power to restrict delegation ("*If Member States permit management companies to delegate to third parties…*"), it might be very difficult to harmonise delegation rules, except in a very restrictive way.

5. UCITS authorisation (Box 8)

Do you agree with CESR's proposals in Box 8? *Do you agree with the role envisaged for the UCITS competent authority in the areas referred to above?*

We do not agree with the indefinite scope of control granted to the UCITS competent authorities in paragraph 4, second clause of indent (ii). Obviously, UCITS supervisor will not be able to assess the adequacy of a foreign management company's risk management, conflict of interest procedures and delegation arrangements as these operations are carried out under the law of another Member State. In the absence of other valid criteria for conducting such an "adequacy test", there is a real danger that the UCITS supervisor will review the said arrangements in light of its national rules, thus indirectly enforcing organisational standards of the UCITS domicile.

In general, it is highly questionable why the UCITS supervisor should be at all enabled to examine the management company's organisational arrangements which are subject to authorisation and supervision in the management company's home Member State. According to CESR's proposal in Box 8 paragraph 5, the adequacy of organisational arrangements shall be expressly certified by the management company's competent authority "taking into account the type of UCITS to be managed" and thus, forms an integral part of the EU passport. **Vesting the UCITS supervisor with the right to challenge findings made under the competence of another Member State would undermine the very core of the MCP, namely the mutual recognition of the management company's compliance with the UCITS regime, and must therefore not be accepted by CESR.**

Also with regard to the first clause of indent (ii), the latitude of judgement is not limited by any objective criteria, making the approval of the management company entirely dependant on the goodwill of UCITS competent authorities. Hence, we urge CESR to use more precise language and in particular, to specify the aspects upon which decision by the UCITS supervisor shall be made.

6. Auditors (Box 11)

Do you agree with CESR's proposals in Box 11?

We have certain reservations against the general ban on costs of auditors' ancillary activities being charged to the unit-holders. We understand CESR's endeavour not to allow for the invoice of additional cost items in case of cross-border managed UCITS. However, the use of MCP is supposed to create economies of scale which shall also bring ultimate cost benefits to investors, e.g. in terms of lower management fees. Thus, reimbursement of costs should be allowed in cases the auditors' activity pertains to a specific UCITS (as opposed to the management company) and thus, is directly attributable to the regulatory requirements of fund administration.

We hope that our comments will help CESR to reach an agreement on a viable regulatory framework for cross-border UCITS management. Please do not hesitate to contact us should you have any queries pertaining to our reply.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

Signed:
Stefan Seip

Signed:
Dr. Magdalena Kuper