European Fund and Asset Management Association

EFAMA[1] Response to CESR's Consultation Paper on UCITS Management Company Passport

General comments

EFAMA[2] is grateful for the opportunity to comment on the CESR Consultation paper on UCITS Management Company Passport. We fully recognize the challenges resulting from the strict time constraints imposed by the Commission's mandate and appreciate CESR's openness to all stakeholders which is demonstrated by the launch of this second consultation round within but a few weeks from the call for evidence.

The draft advice is a clear indication that supervisory cooperation, a pre-condition for a well-functioning single market, is possible and that a common approach can be found. EFAMA members would like to congratulate CESR for its excellent work and the practical and effective solutions proposed. We are confident that CESR's final advice will serve as a sound basis for the introduction of a real management company passport in the UCITS IV package under the current legislature.

EFAMA members broadly support the approach taken by CESR in its draft advice. Nevertheless, we would like to make the following suggestions for improving the concept and for making the passport work more smoothly and efficiently, without adding burdensome provisions which are not strictly needed for the purpose of investor protection or supervision.

[1] This paper reflects the views of a broad majority of EFAMA members; it does not present a unanimous view.

[2] **EFAMA** is the representative association for the European investment management industry. EFAMA represents through its 24 member associations and 42 corporate members about EUR14 trillion in assets under management of which EUR7.3 trillion managed by around 52,000 investment funds at end June 2008. For more information, please visit www.efama.org.

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Background

EFAMA members believe that CESR should recognise in its background note that the principle of a management company passport was already adopted by Directive 2001/107/EC. Although its wording had not in practice allowed the passport to operate effectively, it must be acknowledged that the objective of bringing freedom to provide services cross-border for asset management had already been supported by policy-makers in the past. Article 6 (1) of the UCITS Directive currently in force clearly states that the management company may carry out its activity "*either by the establishment of a branch or under the freedom to provide services*". The task for EU policy-makers now is not to introduce the management company passport, but to make it work.

Specific comments

Chapter 1: Definition of domicile

Box 1

Do you agree with CESR's proposals in Box 1?

EFAMA agrees with the proposals set out in Box 1.

Explanatory text to Box 1

Paragraph 3:

EFAMA members do not agree with the statement that "*it is relevant to ensure that the management company performs the relevant activity also in the Member State in which it was authorised. Namely, it is important that the management company be authorised to manage at least one UCITS in its home Member State*". Although we understand and agree that "cherry-picking" of regulatory systems should be avoided, we believe that the obligation of having one single fund managed in the management company's home Member State would neither be an adequate safeguard nor would it enhance the efficiency of the fund industry. According to CESR's own draft advice, management companies already authorised in a Member State other than that of the UCITS will in addition have to comply with the rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS (Box 5 paragraph 2) and they will have to demonstrate that the risk management process, conflicts of interest procedures and delegation arrangements are adequate for each specific type of UCITS (Box 8 paragraph 4). In case of non-compliance, the UCITS home supervisor may refuse the

management company (Box 8 paragraph 12). These provisions will ensure that management companies have enough "substance" to comply with the provisions of the UCITS Directive. Therefore, a formal authorisation for a management company to carry out activities in its home Members State should be sufficient as opposed to actually carrying out such activities.
Instead of imposing new requirements, EFAMA members believe that recital 8 of Directive 2001/107/EC contains the necessary instruments for avoiding regulatory arbitrage. We therefore fully support paragraph 4 of Box 1 which contains the main provision of recital 8 and would hence suggest the deletion of paragraph 3 of the explanatory text.

Paragraph 6:
EFAMA welcomes the reference made to article 19 of Directive 2003/41/EC which states that institutions for occupational retirement provision should not be restricted from appointing, for the management of an investment portfolio, investment managers established in another Member State and duly authorised for this activity in accordance with the UCITS Directive. This example demonstrates that to create a level playing field with the rest of financial service providers, the right of establishment and the freedom to provide services should be fully granted to the asset management industry also.

Paragraph 10:
EFAMA members suggest specifying the concrete activities of collective portfolio management that a branch should not be allowed to perform. Moreover, we recommend clarifying the wording of the parenthesis which could be construed as the setting up of a branch being a way of implementing the freedom to provide services. This is incorrect since the UCITS Directive makes a clear distinction between the freedom to provide services on the one hand and the right of establishment of a branch on the other.

Box 2

Do you agree with CESR's proposals in Box 2?
Do you consider that additional criteria should be set to define the domicile of contractual funds? Please provide details.

Paragraph 1:

EFAMA understands the approach taken by CESR to define the domicile of a common fund constituted under the law of contract or trust law. We do, however, believe that a single definition that covers all types of UCITS would be more appropriate. Since the UCITS itself is already defined in article 1 (3) of the UCITS IV proposal as an undertaking that may be

constituted either under the law of contract, trust law or under statute, there seems to be no need to make a further distinction between common funds and corporate funds in the definition of the UCITS home Member State. Consequently, the definition of the UCITS home Member State proposed by the Commission in its UCITS IV proposal in article 2 (1), point (e) should be sufficient: *The UCITS home Member State [for funds constituted according to law, either under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies)] should be the Member State in which the UCITS is authorised pursuant to article 5.*

Box 3 / Explanatory text to 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 UCTS 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 our reply to CESR's call for evidence on the management company passport, EFAMA members stated that "there are no reasons for treating differently the matter of the management company passport when considering contractual type funds or investment companies". However, for the convenience of the fund supervisor, EFAMA did not object to designating a local point of contact for common funds provided that no capital requirements were imposed and that the choice of the type of contact point was left to the management company. From our perspective, such contact point should provide a legal address for receipt of all documents addressed to the UCITS and the management company by the UCITS competent authority and nothing more.

According to CESR's draft advice, such local point of contact will be entrusted with a list of different functions:

EFAMA does not see any reason why the local point of contact itself would have to carry out the activities of a paying agent. It should be sufficient that the management company of the common funds ensures (as mentioned in the prospectus as per Annex I, Schedule A, No. 4 of the UCITS Directive) that there is a paying agent that receives and transmits the orders, but it does not have to be the local point of contact in the UCITS fund domicile which delivers the service. Such a function would far exceed the idea of a "contact point".

There is, therefore, no reason why a contact point would have to be a financial institution since none of the other functions listed require a banking license. A lawyer, a branch in the meaning of article 6, the depositary or any other local representative chosen by the management company could provide the legal address which should be disclosed in the prospectus.
The local point of contact should not incur any liability and no capital requirements should be imposed. In this context, we strongly 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*."

As regards function 1, EFAMA members question its relevance since investors normally address their distributors. The assignment of functions 2 and 4, in contrast, seems reasonable.

Finally, we do not believe that the local point of contact should carry out any additional functions, not even the maintenance of the unit-holder register. EFAMA members are of the opinion that such maintenance is of limited value in terms of supervision and does not need to be kept in the fund domicile. The maintenance of a shareholder register is subject to national law and in many jurisdictions no register is maintained at all without negative consequences for investors. Moreover, in most cases, the registered shareholder is not identical to the beneficiary and hence the supervisor would not have access to the names of the underlying investors. If a shareholder register is nevertheless required, it needs to be ensured that the UCITS supervisor can request access to it the same way as it can, according to CESR's draft advice, directly contact the management company situated in a different Member State. The enforceability, not the actual location of the register, matters.

Box 4

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

Paragraph 6:
EFAMA agrees with CESR's proposals in Box 4, but in reference to paragraph 6 possible standard agreements between depositary and management company do not need to be harmonised in the interest of investors, who are already sufficiently protected by regulation, as well as by the fiduciary duty to protect the interests of UCITS investors that covers both parties. Agreements are helpful in clearly defining the responsibilities of management company and

depositary and further consideration should be given to the necessary contents of such agreements. Full harmonisation via Level 2 implementing measures is, however, not necessary and would unnecessarily restrict the freedom of both parties in negotiating the agreements.

In addition, we would like to ask for clarification as to the difference between the provision set out in this paragraph ("... implementing measures on the measures to be taken by the depositary in order to fulfil its duties in the case of UCITS managed by a management company established in another Member State") and paragraph 2 of Box 10 concerning the information flow between the depositary and the management company to perform their respective functions.

Chapter 2: Applicable law and allocation of supervisory responsibilities

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?

EFAMA broadly agrees with CESR's proposals, with the following comments and exceptions in relation to Box 5:

Paragraph 2:
It should be clarified that the list presented is exhaustive.

Paragraph 3:
EFAMA doubts that implementing measures to specify the scope and content of fund rules are necessary or – in view of the differences in civil and contractual law across Member States – even feasible. Furthermore, EFAMA invites CESR to consider carefully their necessity due to the high number of implementing measures under consideration.

Paragraph 7:
EFAMA agrees with CESR's proposals in paragraphs 2, 5 and 6 regarding applicable law for the management company. With regard to the second paragraph of paragraph 7, however, EFAMA strongly believes that it should be deleted, as it contradicts the principle of home Member State supervision in paragraph 6 and might delay the implementation of a true management company passport for several years. As management companies often manage UCITS in many different

Member States, complying with several sets of different regulations would be unduly burdensome, greatly increase costs, and potentially create legal uncertainty.

Paragraphs 7 and 9:
EFAMA would appreciate a clarification of what are the "*organisational requirements*" in paragraph 7 (first bullet point). Should they include delegation, paragraph 9 would seem superfluous.

Paragraph 9:
EFAMA does not see the need for implementing measures specifically regarding activities which can be delegated. As article 5g of the Directive (future article 13(1)) gives Members States the power to prohibit delegation ("*If Member States permit management companies to delegate to third parties…*"), which creates an uneven level playing field under the Directive, harmonisation of delegation requirements is meaningless.

Box 6
Do you agree with CESR's proposals in Box 6?

Paragraph 3:
EFAMA agrees with CESR's proposals. However, with regard to the second sentence of paragraph 3 (relating to implementing measures on the scope and content of fund rules), please see our comments on paragraph 3 of Box 5. We also do not understand why the paragraph needs to be repeated in Box 6.

Box 7
Do you agree with CESR's proposals in Box 7?

Paragraph 3:
EFAMA agrees, but we would suggest that the wording of paragraph 3 should read "*The Commission … **should** adopt …*", as Level 2 implementing measures are necessary in this regard.

Chapter 3: Authorisation procedure for UCITS fund whose management company is established in another Member State

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?

EFAMA agrees with most of CESR's proposals in Box 8, particularly with paragraph 10 that provides for the possibility for the UCITS competent authority to ask directly the management company for clarification and information.

Paragraph 4 (iii):
However, EFAMA believes that the language in indent (iii) of paragraph 4 is too broad and unclear, potentially giving the UCITS competent authority unrestricted freedom in the approval of the management company. We would suggest deleting the indent.

Paragraph 7, fifth indent:
Furthermore, in paragraph 7, fifth indent, the reference to a financial institution should be deleted, in keeping with our comments to Box 3. The language should read: "*the address in the UCITS home Member State of the point of contact …*".

Chapter 4: On-going supervision of the management of the fund

Box 9

Do you agree with CESR's proposals in Box9?

EFAMA agrees with CESR's proposal except for the following.

Paragraph 2:
Although EFAMA members agree that the management company's competent authority should have access to the reports that are to be submitted to the UCITS competent authority, we warn against any double-reporting requirements that would be extremely burdensome for the industry. Additional reporting should be minimised and it should be sufficient to grant access to the management company supervisor.

Moreover, we suggest moving the following sentence from paragraph 1 of the explanatory text to paragraph 2 of Box 9: "*Those reports which are solely addressed to competent authorities should be made available in a language which is common in the sphere of international finance.*"

Paragraph 5, indent 1:
EFAMA members share the view that the UCITS competent authority should be able to request the co-operation of the management company's competent authority for on-the-spot verification or investigation in the management company's home Member State. Inspections are one of the most natural tasks of supervisory authorities and should only be delegated to third parties such as auditors or other experts in limited cases.

Box 10
Do you agree with CESR's proposals in Box10?

EFAMA agrees with CESR's proposal, but would like to repeat the comment made under paragraph 6 of Box 4:

Paragraph 2:
We would like to ask for clarification as to the difference between the provision set out in paragraph 6 of Box 4 ("... implementing measures on the measures to be taken by the depositary in order to fulfil its duties in the case of UCITS managed by a management company established in another Member State") and this paragraph concerning the information flow between the depositary and the management company in general.

Explanatory text to Box 10

Paragraphs 1 and 6:
The reference to the "*financial institution*" acting as UCITS point of contact should be deleted (see our comments in Box 3).

Paragraph 3:
We do not understand the reference to the "*UCITS*", which should be deleted. The local contact point certainly does not need to receive such information. However, we fully agree that the management company should provide the information mentioned to the depositary.

Paragraph 5:
EFAMA does not think it is appropriate to regulate these operational flows, but if CESR deems it necessary, any measures should be at high level, allowing for the different existing operating models in the various domiciles.

The current CESR wording does not reflect the actual market situation: neither the UCITS nor the depositary have direct knowledge of subscription and redemption flows in most cases (CSDs and transfer agents are usually involved), and therefore no general obligation to provide information should be imposed on them (the information is already provided directly by the entity with direct access to the information).

The depositary is at the end of the information flow and where it does not at the same time act as a Transfer Agent (the common situation), it would not have any information to share on subscription/redemption. Furthermore, the reference to the UCITS should not be interpreted as the local contact point, as EFAMA does not believe that the contact point should perform the functions of a paying agent (see our comments on Box 3).

Box 11
Do you agree with CESR's proposals in Box11?

EFAMA agrees with CESR's proposal.

Chapter 5: Dealing with breaches of rules governing the management of the fund

Box 12
Do you agree with CESR's proposals in Box12?

EFAMA agrees with CESR's proposal.

Box 13

Do you agree with CESR's proposals in Box13?

EFAMA agrees with CESR's proposal.

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