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30 March 2009

Mr. Carlo Comporti
Secretary General

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

Call for Evidence on Possible Implementing Measures Concerning the Future UCITS Directive

Dear Mr. Comporti,

BVI[1] greatly appreciates the possibility to comment on the Commission's request for technical advice on possible implementing measures to the UCITS Directive. The current call for evidence is just another example of CESR's commitment to closely involve market participants in the development of regulatory standards and we would like to seize this opportunity to endorse CESR in this notable attitude.

General remarks

The Commission's mandate entails on CESR a remarkably extensive work programme on level 2 implementing measures to the UCITS Directive, especially given the tight time frame for submitting the technical advice. In order to meet this challenge, we suggest focusing recommendations for level 2 measures on general principles and postponing discussions on detailed requirements to level 3 wherever possible. This is in our view the only feasible way to ensure that the deadline for national implementation of the UCITS IV regime is not compromised by potentially lengthy debates on singular issues not yet subject to a harmonised EU approach. The fund industry has long enough awaited the legislative changes and is eager to put

[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 of nearly EUR 1.5 trillion both in mutual funds and mandates. For more information, please visit www.bvi.de.

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them into action. Thus, CESR and the Commission should by all means seek to avoid the situation seen during the implementation of MiFID where national authorities have been left with barely a few months to implement extensive modifications to the securities legislation which has inevitably led to confusion and delays in the practical introduction of MiFID.

Provisions relating to the functioning of the management company passport as well as measures on key investor information should be considered clear priorities for the commencing CESR work at level 2. However, we perceive also a practical need for implementing measures with regard to the new notification procedure in order to warrant smooth and trouble-free cross-border distribution of UCITS.

Specific comments

Regarding the particulars of the Commission's mandate on technical advice, we would like to raise the following issues:

I. Level 2 measures relating to the management company passport (part I of the mandate)

1. Relevance of MiFID (section 1.1.)

In respect of implementing measures on organisation of the management company, conduct of business and risk management, MiFID level 2 provisions constitute an obvious starting point for further discussions. However, as MiFID standards have been designed for different activities, their appropriateness for regulation of collective investment management should not be taken for granted, but must be carefully assessed in each relevant case. Furthermore, MiFID should be considered a definite benchmark for the maximum harmonisation level in terms of the UCITS Directive in order to avoid competitive distortions between the securities sector and UCITS.

2. Procedures and arrangements for internal organisation (section 1.2.1.)

We do not think that organisational procedures and arrangements of the management company should be subject to different requirements depending on the nature of the UCITS managed as suggested by the Commission (cf. section 1.2.1, question a)). In our view, issues relating to electronic data processing, internal control mechanisms and prevention of conflicts of interest are relevant to the management company as a business entity and should be consequently governed by a set of common principles or rules.

3. Rules of conduct (section 1.2.2.)

Implementing measures for conduct of business by UCITS management companies must not go beyond the requirements applicable to MiFID firms. In particular, we urge CESR to shift discussions on potential regulatory guidance to churning, soft commissions, market timing, late trading etc. to the interpretative work at level 3 in order to avoid delays in level 2 legislation by lengthy debates on controversial issues.

4. Agreement between the management company and the UCITS depositary (section 1.2.3.)

Securing the flow of information necessary for the proper performance of tasks by the UCITS depositary represents an important element of the management company passport. However, as this point is also pivotal for the relationship between the management company and the depositary, the general conditions of expected information measures should be set out as clearly as possible by level 2 legislation in order to prevent disputes which might hamper smooth execution of the depositary function and to warrant adequate treatment of confidential or otherwise sensitive information.

On the issue of national law applicable to the agreement between the management company and the depositary, views of BVI members are slightly divided. While some favour regulatory specification of the applicable law in order to avoid respective negotiations in each particular case, others would like to retain the flexibility to contractually select a solution best suiting their business models and to allow for development of cost-efficient industry standards. From the viewpoint of investor protection, however, there is no perceivable need to legally stipulate the applicable law as the agreement between the management company and the depositary relates to the information flow between the two and does not affect any rights of individual investors.

5. Risk management (section 1.2.4.)

In light of the recent failures in the appraisal of risks by many financial institutions, we can understand the Commission's determination to provide for a "uniform and consistent approach to the whole risk management process for UCITS, spanning all the risks associated with portfolio positions and the contribution of these to the overall risk profile of the portfolio". The Risk Management Principles for UCITS recently agreed upon by CESR members[2], however, do already provide for a sound and practicable concept for risk management which both meets the ambitious objective of a comprehensive approach and at the same time respects different solutions approved under current national law.

[2] Risk management principles for UCITS of February 2009 (CESR/09-178)

Therefore, we would like to encourage CESR to devise its advice to the Commission on the basis of the adopted Principles and to include additional aspects only upon the Commission's explicit request. Especially regarding technical details of the risk management process such as methods for risk measurement or valuation rules for OTC derivatives, discussions should as far as possible be postponed to the standard setting work at level 3 in order to prevent fixing legislative provisions on issues being continuously influenced by market developments and financial innovation.

II. Level 2 provisions on Key Investor Information (part II of the mandate)

1. Legal form of the level 2 measures (section 2.1.)

In view of the objective reflected by level 1 provisions which is to ensure that KII is provided to investors in a common format and with a fully harmonised content[3], we deem it appropriate that implementing measures for KII take the legal form of EU regulation. In terms of its scope, however, a prospective regulation should be limited to detailed rules on content and format of KII and in particular, not interfere with civil law matters relevant to the KII regime such as requirements for provision of KII to investors.

2. Cross-references and signposts to other documents (section 2.1.)

The new clause in Article 78 para. 3 of the UCITS Directive requesting that the "essential elements (of KII) shall be understandable by the investor without any reference to other documents" bears certain potential for misapprehension. In particular, it must not be interpreted as an implication that the information provided in the KII is complete or exhaustive with regard to the presented aspects of the investment. The concept of KII as a "single document of limited length presenting the information in a specified order"[4] does by its very nature require a compromise between the extensiveness of information and its brief and simple presentation to investors. Thus, the term "understandable" in this context should be referred only to the perspicuity of the provided information, not to its comprehensiveness. In order to avoid liability risks which might discourage fund managers from following the "short and simple" approach with regard to KII, it would be very helpful if CESR could take a clear stance in this respect in its recommendations to the Commission.

[3] Cf. Article 78 para. 5 and 6, recital 59 to the UCITS Directive.
[4] Cf. Recital 59 to the UCITS Directive.

Cross-references to other documents or signposts to other sources of information such as websites should be permitted on a facultative basis as long as they do not impair the tangibility of information presented in KII.

III. Technical advice on fund mergers, master-feeder structures and notification procedure (part III of the mandate)

1. Priorities for further regulatory work

Even though we welcome the Commission's commitment to equip fund managers with a comprehensive set of rules on the new aspects of the UCITS Directive, we deem it too ambitious to make extensive use of all implementing powers within the short timeframe for national implementation. Hence, we would like to encourage CESR to consider dealing with the measures envisaged under part III of the Commission's mandate mostly by agreement on supervisory guidelines and common standards at level 3. Only with regard to the notification procedure for cross-border distribution, we perceive a practical need for implementing measures to complement the level 1 provisions. Past experience has shown that only legally binding rules will prevent protectionist attitude of some supervisors and save the industry from cumbersome national requirements.

In this context, we would like to point out that with regard to cross-border mergers, severe difficulties in practical implementation are to be expected from detrimental tax treatment at national level. Therefore, it should be a top priority for the Commission to work on abolishment of these drawbacks, at least by means of an EU recommendation.

2. Master-feeder funds: law applicable to the agreement between master and feeder UCITS (section 3.2.1.)

The choice of applicable law should be subject to decision by the master and feeder UCITS and should be stipulated in the agreement. There is no reason to limit the freedom of choice for the contractual parties as the agreement pertains to no rights of individual investors.

3. Master-feeder funds: measures to avoid market timing (section 3.2.2.)

Secondary trading of fund units is not always initiated or approved by the management company. In Germany, plenty of funds are traded on secondary platforms without the consent or even knowledge of their respective managers who consequently have no influence on the trading conditions (so-called Freiverkehr). CESR should bear these

circumstances in mind when considering whether secondary trading of UCITS should require different approach to arrangements for avoidance of market timing.

4. Master-feeder funds: Law applicable to the agreement between depositaries and auditors respectively (sections 3.2.4. and 3.2.6.)

The choice of applicable law should be subject to autonomous decision by the parties to a contract, cf. our comments under I 4 and III 2.

5. Notification procedure: Information on national law to be published by UCITS host Member State (section 3.3.1.)

In our view, the publication requirement in Article 91 para. 3 of the UCITS Directive should cover information on all national provisions relevant to the marketing of UCITS which are subject to supervision by the host state authorities. This pertains in particular to administrative law standards for marketing applicable at national level.

Market participants should be able to rely on accuracy and completeness of the disclosed information. In this respect, we suggest that supervisory authorities should commit to not imposing sanctions for breaches of provisions in case these are missing from the electronically accessible list of rules relevant to the UCITS marketing. Instead, supervisors might issue a warning to the respective company and request ensuring compliance with national law within a specific period of time. Of course, the electronic information on nationally specific rules should be complemented accordingly.

6. Notification procedure: Facilitation of access to legal documents of UCITS (section 3.3.2.)

We are in favour of establishing a centralised database at the level of CESR which should store all documents relevant to UCITS notification and provide access to supervisory authorities. Such a database, even though certainly not trivial in its technical set-up, would avoid multiple storages of files and simplify information search for national supervisors who would need to access one single source and follow one single procedure. Moreover, such an approach might also lessen the operational burden for UCITS managers as it would enable them to notify any amendments to the notification documents to the UCITS home supervisor who should be responsible for immediate filing with the central database. Under such scenario, UCITS host state supervisors would obtain a centralised access to the updated documents which should release UCITS from the direct notification duty under Article 93 para. 7, 3rd sentence of the UCITS Directive.

7. Notification procedure: standard model of the notification letter and the attestation (section 3.3.3.)

In order to ensure smooth functioning of the notification procedure and to decrease the operating expense for fund managers, we deem it necessary to provide for legally binding standards at level 2 regarding form and content of the notification letter and the attestation, preferably designed as standardised model documents. The particulars should be based on respective recommendations by CESR in its guidelines of June 2006[5] which have proved appropriate in the practical application.

We hope that our views are of help for CESR's continuing work on possible implementing measures to the UCITS Directive and remain available for any questions or further discussions on the subject at hand.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

Signed:
Stefan Seip

Signed:
Dr. Magdalena Kuper

[5] CESR guidelines to simplify the notification procedure of UCITS dd. June 2006 (CESR/06-120b).