

**EFAMA REPLY TO CESR'S CALL FOR EVIDENCE
ON MUTUAL RECOGNITION WITH NON-EU JURISDICTIONS**

Ref.: CESR/09-406b

EFAMA¹ welcomes CESR's call for evidence on mutual recognition with non-EU jurisdictions and the inclusion of investment firms and collective investment schemes in the scope of this consultation.

EFAMA's corporate members are globally active as investment firms offering their investment management and advisory services to collective investment schemes (CIS) and to investors. CIS managed or advised by our members are distributed both within the EU and in non-EU jurisdictions all over the world. The provision of the investment and advisory services and the distribution of the CIS by our members take the form of cross-border services, the establishment of subsidiaries or joint ventures with local partners.

Currently, members are experiencing significant obstacles in their cross-border activities. These obstacles include regulatory obstacles, tax obstacles and practical obstacles. They can effectively hinder the access to a relevant market, limit the choice of services and products which can be offered or the way in which they can be provided. A number of obstacles lead to high costs which are often ultimately borne by the CIS and the investors. We believe that these obstacles and related costs could be greatly reduced by mutual recognition agreements between the EU and important non-EU markets and therefore welcome this Call for Evidence.

In the context of the present Call for Evidence it should be pointed out that the draft Alternative Investment Fund Managers Directive (draft AIFM Directive) in its present form provides for agreements with non-EU countries as a condition for the cross-border distribution of third-country CIS and the delegation of administrative services for CIS as well as the cross-border distribution activity of foreign alternative investment fund managers in the EU. The international agreements foreseen in the draft AIFM Directive should be taken into account in the framework of the present Call for Evidence.

Several members mentioned that while they welcome the current CESR consultation they still see the need for action regarding the regulatory framework and mutual recognition of CIS within Europe. They would as a first priority wish to reach harmonisation of the regulatory framework

¹ EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 44 corporate members about EUR 11 trillion in assets under management of which EUR 6.1 trillion managed by around 54,000 investment funds at end 2008. For more information, please visit www.efama.org

for UCITS, including marketing material, within the EU. They also requested that priority be given to a mutual recognition of non-UCITS within Europe.

Our answers below are focused on parts of Section 1 of the Call for Evidence regarding investment firms (questions 1 to 4) and Section 3 regarding products including collective investment schemes (questions 16 to 22).

1. General Questions

Q1 Do you believe that other relevant topics should be added in the regulatory areas above? In the affirmative, please explain the reasons why the specific topic deserve attention together with costs and benefits of mutual recognition associated to the area of interest.

Some of our members suggested that the mutual recognition of asset managers should be added in the regulatory areas above. They have mentioned in particular the cross-border investment management and investment advisory services provided both to CIS and to investors. Mutual recognition would be beneficial for example in the context of recognition of non-EU asset managers (in particular Swiss or U.S. asset managers) regarding the management or delegated management of European CIS.

Conditions for a mutual recognition should be that the systems of supervision and their efficiency should be comparable and the regulations applicable to asset managers similar (as is currently the case for example for Switzerland and the U.S.).

Q2 Focusing on the above areas and topics, would you expect benefits of mutual recognition frameworks for your own business (e.g. in terms of cost savings and business opportunities). Please provide any evidence/data/market statistic to support your view and an indicative prioritisation of the major regulatory and market segments.

Mutual recognition with non-EU jurisdictions would facilitate management and delegated management of portfolios and CIS on a cross-border basis without the need of a local presence.

Q3 What rules and regulations could cause the most severe distortion of competition in the field of cross-border activity with respect to a system of mutual recognition? Are there other potential risks that could result from a system of mutual recognition between Europe and third-countries? Differentiate according to third country, where necessary.

One of the potential risks that could arise from a system of mutual recognition is an obligation to recognise jurisdictions that do not have high regulatory standards. Our members suggest to adopt a country-specific approach based on the equivalence and comparability of the systems of supervision and their efficiency. The regulations applicable to asset managers should also be considered and should be similar to the regulations in the EU.

Q4 How could possible risks be mitigated?

Please refer to question 3.

2. Questions regarding Products including collective investment schemes

Q16 Do you consider the topic of collective investment schemes to be of primary relevance? Do you believe that other relevant topics should be considered and analysed first in the “products” regulatory area? Please provide reasons.

The topic of CIS is of primary relevance for EFAMA’s members. Our members agree that the regulatory obstacles hindering a smooth cross-border distribution of CIS should be analysed as a first priority.

In this context it should again be mentioned that the draft AIFM Directive provides for the conclusion of agreements between EU member states and non-EU countries regarding the cross-border activities of alternative investment fund managers, the cross-border distribution of alternative investment funds and the exchange of information in tax matters. The present consultation should therefore take into account the relevant developments regarding the draft AIFM directive. Some members think that there is an overly protectionist approach in the draft AIFM directive.

Several of our members pointed out that apart from the relevant regulatory obstacles, tax obstacles and practical obstacles for cross-border CIS distribution should be considered.

Q17 In what third countries do European asset management companies distribute shares in collective investment schemes? Please provide information on the (estimated) volume of distributed shares in collective investment schemes, distinguishing between different types of collective investment schemes (UCITS, non-harmonised investment funds) as well as different types of investors (wholesale, retail).

Within Europe, the European asset management companies distribute their CIS mainly in Switzerland, but also in Norway and Liechtenstein.

A recent EFAMA survey showed that Asia remains the most important market outside of Europe for the cross-border sales of UCITS, followed by Latin America. Our members confirmed the importance of Asia (in particular Singapore, Hong Kong and Taiwan) and Latin America (in particular Chile and Peru), also for their other CIS.

Our members have pointed out that Switzerland and Asia are potential growth areas but currently present significant obstacles for CIS distribution. The importance of Switzerland is further accentuated because the global distribution platforms of the large Swiss banks are deemed key in order to secure distribution to international investors. Access to these platforms is usually only given after the authorisation of a foreign CIS in Switzerland.

Some of our members again underlined the significance of the U.S. market and asked for mutual recognition agreements between the U.S. and the EU both for CIS and for services to be provided by investment firms (asset management and advisory services).

Q18 What are the most significant obstacles for the European asset management industry in respect to efficient cross-border marketing of collective investment schemes in third countries? What are the (estimated) costs caused by these obstacles? Please distinguish between countries.

Based on practical experience in marketing CIS to third countries our members have mentioned various significant obstacles:

1. Differing Regulatory Rules and Tax treatments

The greatest obstacles have been regulatory rules in non-EU countries differing from the EU regulation and differing tax treatments.

The members mentioned in particular differing regulatory regimes regarding:

- Content and disclosure in the offering documents (e.g. prospectus).
- Content and disclosure in marketing materials as well as approval procedures for marketing materials.
- Form and content of shareholder communications.
- Portfolio investment guidelines and restrictions.
- Reporting requirements (including tax, financial and statistical reporting).
- Anti-money laundering rules.

When accessing a non-EU market with a product the above-mentioned regulatory requirements lead to a high level of additional cost including local legal counsel, translation costs and internal company resources. Further costs are incurred to ensure that the CIS complies with the third country's requirements on an ongoing basis and for each update of the afore-mentioned documents and materials.

Additionally, several third country regulators have required that documentation and materials be submitted for pre-approval before their use and in case of each modification. This further increases the costs for local legal counsel and internal company resources. It also lengthens the time required for changes to documentation (including prospectus changes) and use of documentation in the markets.

The various costs are in most cases borne by the CIS and ultimately by the investors.

2. Required information and documentation

Another important obstacle for members in several non-EU countries were important requests for additional information and documentation such as official documentation, legal opinions on the law applicable to the CIS, information regarding investment advisors, investment managers, administrative agents etc. The compilation of such documents, their attestation and translation can be very costly in terms of internal resources and legal advisor and translator costs.

Again these costs are in most cases borne by the CIS and ultimately by the investors.

4. Distribution landscape

Some members also pointed out that access to the local markets often requires local partners for the distribution or even require local products (China, Taiwan, India). Therefore many asset managers have in the past bought local partners or developed joint ventures with local partners.

Other members informed us that for international distribution of CIS via the global platforms of the Swiss banks a notification of the CIS in Switzerland is required which is burdensome to obtain.

Q19 What kind of products (UCITS, non-harmonised investment funds) should be covered by a mutual recognition agreement between EU and third countries? In terms of non-harmonised investment funds, please describe what kind of funds should be included in respective considerations (regarding investment policy, degree of regulation/supervision, right of redemption). Please distinguish between countries.

A large majority of our members indicate that the mutual recognition should first be sought for UCITS funds.

One of our members believes that mutual recognition should first be granted not only to UCITS but to all CIS with a high level of transparency. Key criteria could be that (i) the fund is regulated by a government entity, (ii) invests primarily in listed securities and (iii) does not engage in leverage or short selling. In Europe UCITS and some other CIS fulfil these criteria. For the U.S., the mutual recognition should be granted to mutual funds regulated under the U.S. Investment Company Act.

In a second stage, mutual recognition agreements should be concluded for other CIS falling under the scope of the draft AIFM directive and taking into account the requirements of this directive. In this regard our members mentioned particularly agreements regarding hedge funds, real estate funds and private equity funds.

It was also pointed out that in case of exclusive placement to institutional investors or in the professional market a more flexible approach to mutual recognition should be aimed for.

Q20 What decisive benefits and effective gains would a mutual recognition agreement between EU and third countries bring for the EU asset management industry? Please distinguish between countries.

Mutual recognition agreements reducing most of the obstacles mentioned under the answer to question 18 would facilitate the market access to non-European markets for European asset managers. The various costs entailed by the above-mentioned obstacles would thus be largely reduced or eliminated.

Furthermore, the facilitated access will lead to increased fund sales and fund sizes for the European CIS and to higher assets under management in Europe. As important parts of the costs of asset managers are fixed costs, increased fund sizes will proportionally reduce the costs for each CIS and its investors.

Q21 What kind of asset management companies would benefit from a mutual recognition agreement between EU and third countries (small and medium sized companies, bigger companies)? What size is the share of those asset management companies in the European asset management market? Please distinguish between countries.

Mutual recognition agreements would be beneficial to all asset management companies independently of their size.

However, small and medium sized asset managers are expected to benefit proportionally more than larger asset managers. They will be able to access markets in some jurisdictions which they can currently not afford due to the additional costs because of the various obstacles. For the markets in which they are present they should experience a greater relative benefit due to the current fixed cost nature of producing country specific materials.

Q22 Are there other potential risks that could result from a system of mutual recognition between EU and third countries? How could possible risks be mitigated? Please distinguish between countries.

Some members pointed out that mutual recognition of CIS from third countries who have less strict rules will bring risks regarding investor protection when these funds compete with the strictly regulated European funds.

It will therefore be important to ensure that systems of mutual recognition shall be developed carefully, on a country specific approach and only after careful assessment. Mutual recognition with countries with highly sophisticated financial systems with competent and sophisticated regulators and equivalent rules applicable to asset managers and CIS should not bring important risks. Examples mentioned were Switzerland, Japan and the U.S.

One of our members mentioned as potential risk from mutual recognition the liability issues among the EU and third countries as well as any liabilities towards “third parties” (supervised

entities, investors and other market participants). This member suggested an investigation through a mapping exercise on civil liability, supervisory and sanctioning powers of respectively the EU and third countries prior to the process of mutual recognition. It also suggested a similar mapping exercise within the EU to map the respective supervisory and sanctioning powers of the EU supervisors in order to harmonise EU regulatory landscape of UCITS and non-harmonised CIS.

We remain at your complete disposal for any clarification you should wish regarding our answers.

Peter De Proft
Director General

4 September 2009

[09-4077]