



CALL FOR EVIDENCE ON THE REQUEST FOR ADVICE TO CESR ON THE UCITS ASSET MANAGEMENT COMPANY PASSPORT FBF'S RESPONSE

EXECUTIVE SUMMARY

1. The French Banking Federation (FBF) is the professional body representing over 500 commercial, cooperative and mutual banks operating in France. It includes both French and foreign-based organizations.
2. The FBF has very closely followed the discussions engaged almost three years ago by the European Commission, the European Parliament and CESR about the necessity to reform the regulatory framework applicable to UCITS. In this context, the FBF has always favoured a rapid reform of the UCITS Directive in order to allow the fund mergers, the pooling (master-feeder structures), the notification procedure, the KID. Thus the FBF welcomed the publication of a proposal by the Commission.
3. Regarding the Asset management company passport, the FBF wishes to underline that implementation of such passport will have consequences not only on the activity of the asset management company but also on the depositaries, which participate to the investors' protection. It is then very important to take into account the situation of the depositary of the fund in the context of the fund located in one country and the asset management company in another country.

Before answering the specific questions, the FBF wishes to make three statements:

4. First statement:

The FBF firmly believes that every function of the management companies have to be discussed in relation with the responsibilities of the depositary and of the location of the fund.

Especially, the location of the fund shall be the reference for many questions in terms of supervision, more than the location of the management company or the location of the depositary.

5. Second statement:

To efficiently organize the supervision with a view of investor's protection, common rules should be applied on controls and on responsibilities of both management companies and depositaries. With such a common regulation in this respect, the supervision and the communication between the supervisors would be easier

6. Third statement:

The FBF believes that supervisors should also foster the convergence to common rules regarding the authorization procedures and on-going supervision. This trend could be initiated through enhanced cooperation mechanisms and further transparency on regulatory requirements at national levels. This information should notably be easily accessible to all market participants.

DETAILED COMMENTS

Question 1:

CESR is asked to advise on the elements that could be used to distinguish the home Member State of the management company, that of the UCITS fund and that of the depositary in situations where use is made of the management company passport. Particular consideration should be given to the case of UCITS funds established under contractual or trust law.

The FBF highlights that the criterion set up by the actual directive is the country of the registered office of the asset management company. This criterion is not linked to the fund itself.

With the management company passport, it will be possible to have two different Member States for the management company and for the fund. In the exposure draft published by the Commission in 2007, it was proposed to set up the criteria of the law applicable to the fund. The FBF supports such criteria which are linked to the fund and underlines that the law applicable to the fund must be designated through common criteria

Regarding the depositary, as its roles and responsibilities have not really been harmonised between the different Member States, the FBF estimates that it will always have to comply with the law applicable to the fund, for all the functions it performs (i.e oversight and asset keeping of assets). As long as the convergence to common rules has not been achieved, it would be preferable that CESR, at a level 2, locate the depositary in the fund domicile.

Question 2:

CESR is asked to review the current specification of provisions of UCITS law that are binding at the level of the management company and at the level of the fund and

depository, and advise on whether the envisaged allocation of responsibilities are sufficiently complete and effective to cater for situations where the management company and UCITS fund are in different Member States.

In particular, CESR is asked to identify and propose solutions to any identified gaps in supervision or overlapping responsibilities that might arise if the management company and fund/depository are located in different Member States.

CESR is asked to advise on whether formal structures (e.g. colleges of supervisors or MoUs) are needed to underpin cooperation between competent authorities responsible for management company and the UCITS fund.

The first message the FBF wishes to deliver is that the question of the supervision of the management company using a passport must be completely disconnected from the on-going discussions about the banking and financial supervision in a general context (i.e.: evolution of the level 3 Committees, lead supervisor inside a college of supervisor in the context of banking supervision).

The second message is that the supervisors have to agree on common rules or at least on identification of their common and different rules in order to simplify the supervision at the EU level.

The FBF highlights that the rules applicable in the home Member State of the fund shall apply to all functions listed in the Annex II of the Directive. Then a distinction shall be made between the license of the management company which has to be supervised by the regulator of the management company, and the functioning of the fund, which has to be supervised by the regulator of the fund.

It means that the activities of the management company which are dedicated to the functioning of the fund, such as controls, have to be supervised either by the regulator of the fund or by the regulator of the management company provided that common rules are implemented about the administrative functions dedicated to the control of the fund. These common rules could largely simplify the coordination between the supervisors.

Regarding the overlapping responsibilities between the management company and the depository, the FBF firmly believes that the management company must be responsible for all its functions, even those operated through a passport in the country where the fund is domiciled.

Regarding the coordination between the supervisors, there are three reasons why the FBF believes that the implementation of MoUs could be more adequate than a college of supervisors:

- Firstly, MoUs are more flexible and such flexibility is useful in the context of the cross border circulation of funds;
- Secondly, the setting-up of a college of supervisors will unavoidably lead to a discussion about the settlement of inconsistent positions between supervisors and the opportunity to organize a global “lead supervisor” rule. The FBF estimates that the reform of the UCITS directive shall not lead to such discussion which is sensitive in Europe regarding the banking supervision and the roles of different supervisors;
- Thirdly, it seems very simple to organize supervision around the principle of investor’s protection through a MoU by giving a right to settle inconsistencies to the supervisor of the fund. It means a “lead supervision” given to the supervisor of the fund on the supervisor of the management company.

Nevertheless, the FBF considers as a precondition that the MoUs must be published by CESR and freely accessible by all actors.

Question 3:

CESR is requested to advise on the need for and design of mechanism or process which will allow for checking that qualifications of the management company (authorized in another Member State) are commensurate with the demands/risks embedded in the investment policy of the UCITS fund.

CESR is asked to advise on any duly motivated circumstances under which a management company could be refused permission to manage/set up a fund in another Member State.

The FBF wishes to underline that the qualifications of the management company is a key element of the investor's protection in the context of the European passport.

It is necessary to ensure that the investor could have an interlocutor to speak with in the country where the fund is domiciled in case of problem. Especially, this interlocutor shall monitor and validate that controls and compliance rules have been correctly applied, in accordance with the fund domicile rules. In this context, it is a necessity to ensure that the asset management company has the competences to perform these functions in the country where the fund is domiciled if they are passported.

Another element to be taken into account is the actual constraints defined by each regulator for the management companies under its supervision regarding certain types of UCITS.

For example, in France, the AMF imposes some specific guarantees to French management companies which produce UCITS invested in some derivative instruments or for UCITS dedicated to income savings. With a passport but no common rules on the competences that the management companies have to show for certain UCITS types, a Bulgarian management company could commercialize for example UCITS invested in derivatives in France without applying the specific rules of the AMF.

This is not only a question of investor's protection but also of distortion in competition between the actors.

Then the FBF proposes to impose to the management companies which will use a passport to show their qualifications and to be responsible *vis à vis* the supervisor of the fund for all its functions, especially the valuation process and the unit holder's register.

Question 4:

CESR is asked to advise on the conditions (e.g. in terms of direct or indirect access to or control of certain functions or processes) needed to ensure that the supervisor of the UCITS and the supervisor of its management company have sufficient means and information to discharge their duties effectively.

CESR is asked to advise on the obligations of information and conduct of business that the management company owes to the UCITS fund and depositary (and vice versa).

CESR is asked to advise on the mechanisms or procedures that should be envisaged to ensure the timely and effective exchange of information between a UCITS supervisor and a supervisor of a management company (or vice versa).

The FBF supports the exposure draft published by the Commission in March 2007 in this respect, which was quite precise about the way the supervisors have to share information about the funds. In this document the Commission wrote that: *“Several national regulators have expressed concerns relating to the split supervision scenario that could follow from the MCP. Potential supervisory gaps are therefore addressed by four types of possible adjustments aiming to strengthen effectiveness of supervision and cross-border cooperation.. These are measures aiming to a) ensure equivalence of powers, b) develop the existing exchange of information mechanisms, c) reinforce the instruments at the disposal of regulators (such as on the spot verifications) and d) add emergency powers (where the protection of investors is at risk). The design of these measures has been inspired by MiFID. Compliance costs for national authorities should be quite limited. »*

In addition the FBF estimates that the management company shall always have to answer to any question asked by both regulators or by the depositary of the fund (internal controls, risk procedures, compliance).

Question 5:

CESR is asked to advise on any mechanisms or information flows that are needed to ensure that the respective competent authorities are duly and quickly informed of any breach of the rules governing the management of the fund; and the conditions under which effective enforcement action can be undertaken.

CESR is invited to advise on the need for and form of any additional measures to facilitate effective enforcement action by authorities responsible for a contractual form UCITS fund when the management company is established in another Member State.

The first way to answer is that the MoUs between the supervisors shall operate efficiently and be easily and freely accessible by all actors.

Secondly, in case of problem, escalation processes shall be clearly defined on the basis of common rules. If there is an inconsistency between two regulators, or if a management company estimates that a regulator goes beyond its rights, it should be possible to refer to CESR.

Thirdly, if there is an inconsistency between the management company and the actors located in the country where the fund is domiciled, the possibility that two different courts could be competent shall be avoided. Then the FBF proposes in this context to designate by principle the court of the country where the fund is domiciled.