Verband der Auslandsbanken
in Deutschland e.V.
Association of Foreign Banks in Germany

INTERESSENVERTRETUNG
AUSLÄNDISCHER BANKEN,
KAPITALANLAGEGESELLSCHAFTEN,
FINANZDIENSTLEISTUNGSINSTITUTE
UND REPRÄSENTANZEN

REPRESENTATION OF INTERESTS
OF FOREIGN BANKS,
INVESTMENT MANAGEMENT COMPANIES,
FINANCIAL SERVICES INSTITUTIONS
AND REPRESENTATIVE OFFICES

The Committee of European Securities
Regulators
11-13 avenue de Friedland

75008 Paris

October 15, 2008\VA

Consultation Paper on UCITS Management Company Passport

Ref.: CESR/08-748

Dear Sir or Madam,

The Association of Foreign Banks in Germany is very pleased to have the opportunity to comment on your Consultation Paper on UCITS Management Company Passport (the "Consultation Paper").

We represent foreign-owned investment management companies located in Germany as well as those located abroad and distributing their fund units in Germany on a cross-border basis. In addition to this and due to our cross-sectoral approach, we also have banks acting as depositaries for UCITS among our members. Therefore, we observe the issue of the UCITS management company passport (the "MCP") from the viewpoint of both the management companies and the depositaries concerned.

I. Basic Remarks

We welcome CESR's approach outlined in the Consultation Paper. Given the detail of CESR's proposals and the pragmatic approach to implementation, relying to a large extent on level 2-measures, we think that it should be possible for the MCP to be introduced in the course of the UCITS IV-discussions. The necessary adjustments to the Directive itself could be dealt with rather quickly.

However, the number of issues which require discussion at level 2 is impressive. CESR should, in our view, prioritize the issues listed in Box 5 para. 7. Implementation measures

Verband der Auslandsbanken
in Deutschland e.V.
Savignystraße 55
60325 Frankfurt am Main

TELEFON: +49 69 97 58 50-0
TELEFAX: +49 69 97 58 50-10
EMAIL: verband@vab.de
INTERNET: www.vab.de

BANKVERBINDUNG:
SEB AG Frankfurt am Main
BLZ: 500 101 11
KONTO NR.: 1000742700

with regard to organisational and operating conditions to be complied with by management companies should be in force prior to or at the same time as the new Directive. A transitional period should be avoided. It would not be practical for management companies acting cross-border to apply two sets of requirements for delegation arrangements, risk management, the management of conflicts of interests and other relevant conduct of business rules. As long as the respective level 2 measures are not finalised, we think that management companies will abstain from managing UCITS on a cross-border basis, in order to avoid the "double rule book".

II. Detailed Comments to CESR's Questions

Box 1

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

Yes.

Box 2

Do you agree with CESR's proposals in Box 2?

Yes.

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?

The concept of a local point of contact is familiar to our Association members. When marketing non-UCITS funds on a cross-border basis in Germany, a representative has to be appointed according to Sec. 138 of the German Investment Act. The representative is charged with the legal in or out-of-court representation of the management company.

However, the practical experience shows that it is not necessary to charge the representative personally with (all) the investor communication. Investors may or may not choose to address him, while they are free to communicate with the management company itself if they want to. In fact, representatives acting for foreign management companies in Germany are involved in client communication to a very small extent. Clients

prefer to approach financial intermediaries and/or the management company directly in case of queries and/or complaints.

Therefore, on the basis of this experience, we do not see the necessity to require management companies acting cross-border to allocate more functions to their local representative than the mere point of contact function, in the sense that authorities and investors may use him (as an option) to communicate in a legally binding way with the foreign management company. But it should be left to the discretion of the management company, the investors or even the competent authorities to use other means of contact and/or communication.

Therefore, we do not agree with the first and third indent of para. 2 of Box 3. The local point of contact should not be legally in charge to maintain relations with unit-holders, it should just be an option for unit holders to contact him in case they do not want to use other communication means (e.g. an investor telephone hotline, web site or financial intermediaries) and/or in the case of law suits. In our view, the representative function is clearly not a transfer agent function, either. Management companies should be free to have the functions enumerated in the third indent of para. 2 of Box 3 performed by other means than by the local point of contact.

In our view, it is also not desirable to require to allocate the maintenance of the unit-holder register and/or other functions than mentioned in Box 3 to the local point of contact. It should be left to the discretion of the management companies, where and by whom the necessary functions are performed.

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?

In general, we agree with CESR's proposal. However, we think that it could be even detrimental to investor's interests to harmonise the agreements used by depositary and management company. Once a standard agreement is used by them, the particularities of the individual co-operation agreement are left unmanaged. If ever an investor suffers financial loss for this reason, both management company and depositary may argue that the binding regulatory requirements were met and that they were not legally responsible for shortcomings of the harmonised standard agreement.

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 harmonization?

We agree with CESR's analysis and proposals. We would not recommend adding other areas of possible harmonization to the issues already defined by CESR.

We would welcome if the areas of harmonization dealt with in para. 7 of Box 5 could be prioritized as we think that a transitional period requiring management companies acting cross-border to apply both the rule books of their home Member State and of the UCITS home Member State would not be practicable (cf. I.).

Box 6

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

Yes.

Box 7

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

Yes. However, implementing measures in the area of authority cooperation should take into account that in the most cases of day-to-day supervision both the management company and the depositary need quick and direct response from authorities to carry out their daily regulatory duties. Decisions by colleges of supervisors might turn out to be too time consuming in these cases.

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?

The requirements with regard to information to be filed to the UCITS competent authority in Box 8 para. 7 seem too bureaucratic. It should be possible to simplify the procedure on the grounds that the ability of a management company to manage a UCITS of the respective type is certified by the management company home authority. The principle of mutual recognition should be maintained; this should not pose any problems on the basis that the requirements for risk management, delegation arrangements, conflicts of interests

and the relationship between management company and depositary are to be further harmonized at level 2. Consequently, we think that these issues may be deleted in para. 7 in Box 8, relying on the fact that the attestation of the management company home authority according to para. 5 of Box 8 already addresses them.

Box 9

Do you agree with CESR's proposals in Box 9?

Yes.

Box 10

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

Consistent with our response relating to Box 3, we think that the role of the local point of contact is over-emphasised in Box 10 and the respective explanatory text.

First of all, the local point of contact should be a local ***management company*** point of contact, not a UCITS point of contact. The UCITS in the contract form does not have a legal personality, so its legal address is identical with the management company. A UCITS in the company form is by itself a legal person, consequently already having a legal address, and an additional supplementary legal address would be redundant.

As regards the role that would be advisable for the local point of contact (cf. our remarks to Box 3), an ongoing information flow to the local point of contact is not necessary. Our experience shows that investors tend not to use the local point of contact for information purposes, but rather address financial intermediaries and/or the management company itself. Management companies should be free to provide additional contact facilities for their investors. Therefore, we think that in practice, the information duties of local points of contact can be performed on a case-by-case basis when investors or authorities consult the point of contact. There is no need for an ongoing information flow.

Third, the explanatory text under Box 10 does not sufficiently take into account that in practice, UCITS managed by a management company are either not legal persons but contracts/trusts or mere special purpose companies. We therefore do not understand why emphasis is put on the management company providing information ***to the UCITS*** on the investment activities carried out (para. 3 of the explanatory text). The respective wording should be deleted, so that the focus would be on information to be provided to the depositary.

Box 11

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

Yes.

Box 12

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

Yes.

Box 13

Do you agree with CESR's proposals in Box 13?

Yes.

In case of any further queries, please do not hesitate to contact us.

Best regards,

gez. Wolfgang Vahldiek gez. Sabine Kimmich