SJ/VH/CJ - n° 2246/Div.

Mr Carlo Comporti
Secretary General
Committee of European Securities Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, 22 August 2008

AFG RESPONSE TO CESR CALL FOR EVIDENCE ON THE REQUEST FOR ADVICE TO CESR ON THE UCITS ASSET MANAGEMENT COMPANY PASSPORT

Dear Mr Comporti,

The Association Française de la Gestion financière (AFG)[1] welcomes CESR's call for evidence on the request for advice to CESR on the UCITS Asset Management Company Passport.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements.

Our members include 405 management companies. They are entrepreneurial or belong to French or foreign banking or insurance groups.

AFG members are managing more than 2500 billion euros in the field of investment management, making in particular the French industry *the leader in Europe in terms of financial management location* for collective investments (with nearly 1500 billion euros managed from France, i.e. 22% of all EU investment funds assets under management), wherever the funds are domiciled in the EU, *and second at worldwide level after the US*. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes and products such as regulated hedge funds/funds of hedge funds as well as a significant part of private equity funds and real estate funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA) and of the European Federation for Retirement Provision (EFRP). AFG is also an active member of the International Investment Funds Association (IIFA).

General Comments

Before entering the specific dimensions of the topic identified by the European Commission and raised by CESR in its call for evidence, AFG wishes to express the views of its members regarding at least three important parameters to keep in mind when working on the Management Company Passport.

1. **The principle of a Management Company Passport has been already included in the existing UCITS Directive since 2001/2002 and ensures (in theory at least) a level playing field vis-à-vis the other financial services**:

   The mandate from the European Commission to CESR surprisingly does not mention it, but the existing UCITS Directive *already* provides for the principle of a Management Company Passport.

   Such a principle is enshrined in Article 6 of the existing Directive. Article 6 is entitled "*The right of establishment and the freedom to provide services*". At Article 6 paragraph 1, it states explicitly that a management company may carry, on foreign territories (within the EEA), the activity for which it has been authorised, either by the establishment of a branch or under the freedom to provide services.

   This is in line with the faculty currently offered to other financial services (e.g. MiFID ones) and ensuring such a level playing field with the rest of financial services is crucial for Management Companies.

2. **The approach to be followed by CESR should be to focus on a few improvements on "essential principles" which are needed for amending the drafting of the existing Directive at Level 1, possibly to be complemented afterwards by "technical details" at Level 2:**

   As a general approach, we agree with the European Commission that CESR should avoid both supervisory loopholes, which might harm investors' protection, and overlaps, which might create difficulties for regulators and the industry.

   CESR should start its work from what already exists in the Directive today (see above), and propose some focused drafting suggestions targeted at ensuring that the principle of the Management Company Passport becomes real, especially in the areas where CESR is more directly competent, i.e. the functions of authorisation and supervision by national regulators.

   As a complement, AFG would suggest CESR to identify in its advice what should be tackled afterwards, i.e. at Level 2 (implementing measures), in order to make a clear distinction between what could be considered by European institutions as "essential principles" (Level 1 principles in the Directive), which should be tackled during the current process of revision of the Level 1 Directive as compared to the so called "technical

details" (Level 2 implementing measures), which must be part of a forthcoming Level 2 mandate.

Regarding amending Level 1, we would suggest that it is amended on the 5 topics rightly identified by the European Commission, by introducing the essential principles for each of the 5 topics, and by letting the technical details managed afterwards at Level 2 on the basis on a Level 2 mandate (see our detailed comments in the "Specific Comments" part below).

In addition, regarding powers of regulators and cooperation between regulators, we consider that the current draft proposal of revision of the UCITS Directive proposed by the European Commission is indeed a significant step forward, through the new Chapter XII regarding the authorities responsible for authorisation and supervision - in particular the (new) Articles 93, 96, 100, 103, 104 and 105. We consider that it will limit the necessity of additional amendments to the few areas mentioned below in the "Specific Comments" section.

3. The issue of getting a real Management Company Passport is different from the debate "full passport" vs. "partial passport":

On the basis of the Exposure Draft issued by the European Commission in 2007, a public debate developed on the basis of an opposition between a "full" management company passport and a "partial" management company passport. In that latter case, it meant that some administrative functions would have to be performed in the country of legal domicile of the relevant UCITS in order to qualify it as being a UCITS legally domiciled in that country.

Beyond the fact that such a"partial" passport would be a significant step back from a Single Market perspective in some Member States as compared with the current situation, we have to notice that the existing Directive already recognises one and single passport, based on the three categories of functions which are referred to in Annex II of the Directive (i.e. "investment management" plus "administration" plus "marketing"), and complemented by the principle of passport in Article 6.

On the basis of the existing Directive, we therefore prefer to speak about a real Management Company Passport rather than about a "full" (or "partial") passport: we merely want to get the existing principle to become a reality.

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Specific Comments

*Q.: **Definition of domicile**: 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.*

We think that the domicile of the fund could be defined by the national legislation chosen by the relevant management company when setting up the fund. The relevant Level 1 provisions could be amended accordingly (based on the new numbering of Articles as provided by the European Commission in its official draft revision of the UCITS Directive issued in July 2008):

- one solution would be to mention only where the UCITS is authorised: see the official proposal by the European Commission, in Article 2 [formerly Article 1a], letter (e) [formerly paragraph 5]:

"*a "UCITS Member State" means the Member State in which the UCITS is authorised pursuant to Article 5;(…)";*

- another solution would be to add explicitly that the UCITS Member State is also defined by the relevant law applicable, starting from the draft initially and partly proposed by the Commission Exposure Draft in 2007:

"*a "UCITS Member State" means the Member State in which the UCITS is authorised pursuant to Article 5 and the law of which is applicable to the UCITS, as provided for in its instruments of incorporation or its fund rules*."

Probably a mix of these two solutions could also be a solution.

*Q.: **Applicable law and allocation of supervisory responsibilities**: 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 depositary, 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/depositary 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.

Regarding the so called "Product passport", i.e. the cross-border notification of UCITS when marketed in a host Member State, the principle and its application in practice functioned to a large extent (even if improvements are still needed), on the basis of the current allocation of provisions regarding respectively the management company, the fund and the depositary: *in that context of the Product Passport, such an allocation was considered as sufficient for "importing" regulators, and in practice it did not generate significant accidents.*

The example of the Product Passport shows that in fact cross-border topics and their positive management are largely relying on trust between national regulators. *We don't see why the level of trust between regulators would be lower regarding the Management Company Passport as compared to the Product Passport, bearing in mind that the principle of the*

Management Company Passport is already enshrined in Article 6 of the existing UCITS Directive.

Therefore the current Directive seems generally clear enough on allocation of responsibilities, and furthermore the draft issued by the European Commission in July 2008 reinforced provisions on powers and cooperation between regulators.

However, we are not opposed to the introduction of formal structures – through multilateral agreements under the auspices of CESR, or even through bilateral agreements – if it appears useful to strengthen the relationship between regulators.

Maybe it could be added that the regulator in charge of agreeing the fund would be responsible for checking the compliance of the funds' rules (e.g. eligible assets, ratios) and that the regulator in charge of agreeing the management company would be responsible of agreeing and monitoring the organisation and functioning of the management company as such.

*Q.: **Authorisation procedure for UCITS fund whose management company is established in another Member State:** 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 (authorised 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.

As already mentioned right above, it is mainly an issue of trust among regulators.

The principle of requiring duly motivated circumstances under which a management company could be refused permission to manage/set up a fund in another Member State should be introduced at Level 1, with Level 2 implementing measures to give precisions on these circumstances in detail. Delivering the detailed circumstances at Level 1 would harm the current European inter-institutional agreement regarding the split between the "essential principles" set up at Level 1 as compared to the "technical details" provided at Level 2.

In any case, a possible refusal should automatically require CESR to render arbitrage (starting from what is already provided for in other existing and implemented Directives, such as in Article 16 of the Market Abuse Directive for instance). It has to be noticed that the draft revision of the UCITS Directive in July 2008 already proposes a similar arbitrage or mediation mechanism for CESR, in Articles 96 paragraph 7 and Article 103 paragraph 4 letter (b), with potentially Level 2 implementing measures associated.

*Q.: **On-going supervision of the management of the fund:** 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 principle of requiring that the supervisor of the UCITS and the supervisor of its management company have sufficient means and information to discharge their duties effectively should be introduced at Level 1, at it is clearly in the responsibility of Member States to provide such means and information to their national regulators. In addition, a similar requirement has already been introduced in other Lamfalussy Directives. If such a requirement is introduced at Level 1, it will set a responsibility for each Member State - which will be at legal risk if it does give such means in particular.

However, the precisions on these means and information in detail must be given at Level 2. Delivering the details at Level 1 would harm the current European inter-institutional agreement regarding the split between the "essential principles" set up at Level 1 as compared to the "technical details" provided at Level 2.

Regarding the relationship between the management company and the depositary, information requirements and rules of conduct should be set up through contractual agreements.

Regarding information exchange processes, their principle should be set up at Level 1 but the technical modalities should be dealt at Level 2, as it was done for the other Lamfalussy Directives.

*Q.: **Dealing with breaches of rules governing the management of the fund:** CESR is asked t 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 principle of requiring that the respective competent authorities are duly and quickly informed of any breach of the rules governing the management of the fund must be introduced at Level 1 – as it already exists in a similar way in other Lamfalussy Directives.
Level 1 should also include the principle of effective enforcement actions by the authorities responsible for a contractual form UCITS fund when the management company is established in another Member State.

As a complement, the relevant practical modalities should be set up at Level 2.

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Conclusion:

1. Beyond the advice which is going to be submitted by CESR to the European Commission in the coming weeks, we want to recall that already today Article 6 paragraph 2 of the existing UCITS Directive prevents (in theory) Member States from making the cross-border establishment of a branch or the cross-border provision of the Management Company Passport subject to any authorisation requirement, to any requirement to provide endowment capital or to any other measure having equivalent effect.

2. However, Article 3 of the existing UCITS Directive requires in practice – in a contradictory way – to set up the management company/investment company in the country of domicile of the fund. This is why the management company passport has not become reality yet.

3. **We think therefore that, beyond the reinforcement of cross-border cooperation between CESR members, repealing Article 3 would allow for getting a real Management Company Passport: the main improvement at Level 1 would be to delete the requirement of Article 3.**

4. **In parallel to amending the Level 1 Directive accordingly, we would suggest that as soon as possible after the submission of CESR's current advice to the European Commission, the European Commission delivers a Level 2 mandate to CESR in order to provide for the "technical details" which will be introduced later on at Level 2 in 2009 after the final adoption of the revised Level 1 Directive.** For instance that regarding the Simplified Prospectus, CESR was asked by the European Commission to work on it at Level 2 as soon as 2007, i.e. before the official proposal for revision of the Simplified Prospectus in the Level 1 Directive was even introduced.

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We thank CESR very much for taking into consideration our comments and remain at your disposal for any further questions. Please feel free to contact myself at 01 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), our Head of International Affairs Stéphane Janin at 00 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or his deputy Catherine Jasserand at 00 33 1 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)
Pierre Bollon