

Comments from Raiffeisen Capital Management on CESR's Call for Evidence regarding the UCITS Management Company Passport

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Date: 13. 8. 2008

Raiffeisen Capital Management ("RCM") as a corporate member of EFAMA, which is distributing its funds in 18 countries already, is grateful for the opportunity to comment on CESR's Call for Evidence regarding the UCITS Management Company Passport. We very much appreciate the efforts to include this important issue in the UCITS IV package.

In more detail, we would like to make the following comments:

UCITS Management Company Passport

A functioning Management Company Passport (MCP) would allow a fund manager to set up a fund - independent of its legal structure - in another jurisdiction than that where the Management Company is situated. The MCP is strategically crucial and one of the essential steps to create a real single market for investment funds and a goal of the Lisbon agenda. A MCP should include all back-office activities as well as all activities, for which the management company has been authorized and would therefore provide for significant cost savings and add legal certainty.

In the following, we would like to present solutions on possible uncertainties and difficulties revealed by the preparatory work on UCITS IV:

- **Elements to distinguish the home Member State of the management company**

From the Austrian point of view, the maintenance of the unit holder register is no suitable criteria for the definition of the home Member State of a management company. This is due to the fact that the Austrian legislator assigned the maintenance of the unit holder register to the depository.

- **Allocation of regulatory responsibilities between the authority of the management company and the (foreign) authority of the UCITS**

As hitherto, the management company should be supervised by its home Member State authority. This competent authority should be responsible for the authorization of the management company

(including capital adequacy and organizational requirements regarding the management company) and for all activities relating to UCITS funds located in the home Member State of the management company.

UCITS funds located in foreign countries should be supervised by the authority of the host Member State. This competent authority should be responsible for the authorization of the UCITS fund and for its ongoing supervision in compliance with the host Member State rules regarding e.g. organizational requirements, investment policy, obligations concerning information to be supplied to unit-holders or general obligations of the UCITS fund.

There could be an overlap in the supervision of the management company and the UCITS fund, in particular regarding the part of the organizational requirements, which apply for the management company itself as well as for the UCITS fund. This overlap has its reason in the nature of the management company's activities, which in some parts cannot be completely separated from the UCITS fund's activities (i.e. organization of risk management in general at the management company on the one hand and the risk management of a special UCITS fund on the other hand). For a sensible exercise of the supervisory activities, this overlap is both acceptable and necessary.

- **Necessary conditions to enable both authorities to monitor compliance with the relevant requirements, and to support effective cooperation between the respective competent authorities**

Before setting up an UCITS fund in the host Member State the competent authority of that State should have the power to contact the management company authority in the other State. Verifying the qualifications of the management company in relation to the risks embedded in the investment policy of the UCITS fund should be the aim of this contact.

Each of the authorities concerned could have the following powers in her area of responsibility:

- have access to any document in any form whatsoever and to receive a copy of it;
- demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- carry out on-site inspections;
- require existing telephone and existing data traffic records;
- require the cessation of any practice that is contrary to the provisions adopted in the implementation of the UCITS Directive;
- require management companies and UCITS fund auditors to provide information as well as adopt any type of measure to ensure that management companies and UCITS funds continue to comply with legal requirements.

The competent authority of the host Member State could be obliged to refer findings to the competent authority of the home Member State, where the competent authority of the host Member State has clear and demonstrable grounds for believing that a management company acting within its territory is in breach of the obligations arising from the provisions of the UCITS Directive which do not confer powers on the competent authority of the host Member State. These measures could have the same design as stated in Art. 62 para 1 of the MiFID Directive.

We do not think that further formal structures are needed to underpin the cooperation between the competent authorities.

- **Ability of the UCITS fund's competent authority to enforce its rules on UCITS fund managed abroad**

Member States should be obliged to ensure that appropriate administrative measures can be taken or administrative sanctions can be imposed against the persons responsible where the provisions adopted in the implementation of the UCITS Directive have not been complied with. Competent authorities should be obliged to render assistance to competent authorities of the other Member States. In particular, they should exchange information and cooperate in any investigation or supervisory activities.

We suggest that the way the UCITS fund's competent authority enforces its rules on the fund are construed the same way as it is stipulated in the MiFID Directive, Art. 62 para 2. At first, the authorities of the host Member State should have the power to require the management company concerned to put an end to its irregular situation. If the management company concerned should fail to take the necessary steps, the competent authorities of the host Member State should have the power to take all appropriate measures to ensure that the management company concerned puts an end to its irregular situation. The nature of those measures should be communicated to the competent authorities of the home Member State. If, despite the measures taken by the host Member State, the management company should persist in breaching the legal or regulatory provisions in force in the host Member State, the competent authority of the host Member State should have, after informing the competent authorities of the home Member State, the power to take appropriate measures to prevent or to penalise further irregularities and, in so far as necessary, to prevent that management company from initiating any further transactions within its territory.

Conclusions

We appreciate that CESR and the European Commission deal with the very important issue of the MCP as a necessary part of UCITS IV. The above mentioned measures are suitable to achieve the aim that investors in UCITS funds which are managed on a cross-border basis are not exposed to additional legal/operational risks or to a lower standard of supervision. As the passporting of banks, insurance

companies and investment firms works very satisfactorily



common

practice amongst these entities, we are convinced that raised concerns relating to management companies and funds can be resolved and that the experiences with the passporting of management companies are going to be as frictionless as with the already implemented passporting of the other participants of the financial market.

RCM thanks once again for the possibility to submit our view as to what CESR should advise to the European Commission. We trust that our contribution will be taken into account by CESR.

For further information or questions on this paper, please do not hesitate to contact:

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