ASSOGESTIONI
associazione del risparmio gestito

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CESR
11-13 Avenue de
Friedland
75008 Paris

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Your ref: CESR/08-748

Consultation paper on UCITS Management Company Passport

Assogestioni is grateful for the opportunity given by CESR to contribute in the consultation process on its advice concerning UCITS Management Company Passport.

Preliminary to our comments on single aspects covered by the abovementioned advice, we wish to express our appreciation and congratulate CESR for its work towards introducing an effective management company passport in the UCITS Directive. The suggestions made to the European Commission are, in general, coherent with the comments expressed by the investment management industry in the last consultation on this issue.

Although we support CESR's advice, we would like to make the following considerations and proposals on specific aspects.

BOX 1 – Management company

Explanatory text, paragraph 3. In the explanatory text of BOX 1, paragraph 3, CESR states that *"it is important that the management company be authorised to manage at least one UCITS in its home Member State"*. We invite CESR to consider carefully the opportunity of this requirement, which we consider unnecessary.

With reference to that issue, it is important to note that MiFID doesn't require an analogous obligation with reference to the investment firms' passport. In particular, Article 31, paragraph 1, of MiFID establishes that Member States shall ensure that any investment firm, authorised and supervised by competent authorities of another Member State, may freely perform investment services and/or activities as well as ancillary services within their territories, provided that such services and activities are covered by the authorisation. Furthermore, the same Article 31, paragraph 2 states that any investment firm wishing to provide services or activities within the

territory of another Member State for the first time, or which wishes to change the range of services or activities so provided, shall communicate the following information to the competent authorities of its home Member State: (a) the Member State in which it intends to operate; (b) a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to perform and whether it intends to use tied agents in the territory of the Member States in which it intends to provide services.

Therefore, it is clear that MIFID doesn't require an investment firm to provide at least one investment service in its home Member State, in order to allow it to provide investment services through the free provision of services. Recital 22 of MiFID only states, more generally, that Member States should require that an investment firm's head office must always be situated in its home Member State and *that it actually operates there*.

According to the above considerations, we deem that UCITS Directive shouldn't impose to management companies more requirements than those imposed by MiFID to investment firms.

Furthermore, we underline that even Recital 8 of Directive 2001/107/EC, expressly mentioned by CESR, doesn't require such obligation, just establishing that, in order to prevent supervisory arbitrage and to promote confidence in the effectiveness of supervision by the home Member State authorities, a requirement for authorisation of a UCITS should be that it should not be prevented in any legal way from being marketed in its home Member State. This does not affect the free decision, once the UCITS has been authorised, to choose the Member State(s) where the units of the UCITS are to be marketed in accordance with this Directive.

We believe that CESR should mention in its advice that the European Commission should regulate the UCITS management company passport only taking into account the rule set out in Recital 8 of Directive 2001/107/EC abovementioned. Otherwise, CESR could propose – in line with Recital 22 of MiFID – that the management company, which wants to manage a UCITS in a Member State different from its home Member State, should *operate* in its home Member State, even, for example, by managing non-UCITS.

Therefore, we deem appropriate that paragraph 3 of BOX 1 should be duly modified, according to the above considerations.

Explanatory text, paragraph 10. We deem that paragraph 10 of BOX 1 explanatory text needs to be clarified. In particular, the meaning of the abovementioned paragraph 10 should only be that a branch cannot provide collective portfolio management by the establishment of another branch in a third Member State or under the freedom to provide services in such State. This conclusion is also aligned to article 6 of current UCITS Directive which refers the above opportunity only to "management companies" and not to their branches.

BOX 2 – UCITS

We suggest to modify paragraph 1 of BOX 2 in order to take into account that, before the authorisation, the UCITS doesn't exist. In this perspective, BOX 2, paragraph 1 should state that *"The UCITS home Member State for common funds constituted under the law of contract or trust law should be the Member State in which the UCITS has received the authorisation"*.

BOX 3 – Local point of contact in case of common funds

We believe that, in CESR advice, the prevision of a "local point of contact" could be interpreted as a sort of substitute of the branch and, therefore, it could frustrate the nature and the aim of the management company passport.

As a consequence, it should be clarified that the local point shall have, first of all, a very light structure; in this perspective, the local point could simply be a lawyer, the depositary, or any other local representative, chosen by the management company. Secondly, the local point should only perform a small amount of functions and, namely, the following: (i) provide a legal address for receipt of all documents sent to the UCITS and the management company by the UCITS competent authorities, and (ii) make information available at the request of the public or the UCITS competent authority (as set out in BOX 3, paragraph 2, points 2 and 4).

According to the above considerations, a local point shouldn't be a financial institution or a paying agent and, therefore, it should not be subject to capital requirements. The local point shouldn't incur in any liability towards unit-holders.

BOX 5 – Applicable law and allocation of responsibilities in the case of free provision of services

Paragraph 2. For reasons of legal certainty, we deem appropriate to clearly state that the list of rules applicable to the UCITS, that management company should comply with, is exhaustive.

Paragraph 3. We believe that CESR should carefully consider the opportunity to harmonise the scope and content of the fund rules. This harmonisation could be very difficult, especially considering the variety of legislation governing this topic and the differences between Member States in this respect. Furthermore, we believe that the UCITS management company passport does not need such harmonisation, given that it would not be relevant for its right functioning.

Paragraphs 7 and 9. Preliminary, we would like to point out that, in order to achieve a maximum harmonization among Member States, the word "including" should be deleted from the first part of paragraph 7.

We deem appropriate that the European Commission should adopt implementing measures specifying the organizational and operating conditions to be complied

with by management companies in the performance of the activity of collective portfolio management, taking into account the relevant dispositions of MiFID.

In some Member States (*i.e.* Italy), management companies are already obliged to respect all organizational requirements set out in MiFID, not only when they provide investment services, but also when they provide the activity of collective portfolio management. Therefore, in order to simplify the rules that management companies have to comply with, it is important to avoid a multiplication of different regulations. Otherwise, when a management company provides, at the same time, investment services and the activity of collective portfolio management, it would be subject to two different regulations, that could affect its operational costs.

In this perspective, according to Article 13 of MiFID, paragraph 7 of BOX 5 should establish that the abovementioned Commission's implementing measures should exclusively pertain to: (i) organizational requirement; (ii) risk management; (iii) conduct of business rules. In fact, pursuant to Article 13, rules concerning "organizational requirements" should include also rules concerning, among others, conflicts of interests and outsourcing. Therefore, paragraph 7, point 3 should be deleted.

With regard to the second part of paragraph 7, we would like to point out that CESR's advice would entail that, until adequate harmonization measures are taken at level 2, a management company would be subject to the different and potentially conflicting regulations of each of the Member States where it manages a UCITS. Therefore, in order to avoid such situation, the second part of paragraph 7 should be deleted.

We also deem important that every reference to "delegation arrangements" should be replaced with "outsourcing of critical or important operational functions or of management functions". In this perspective, the meaning of "critical or important operational functions" could be aligned to Article 13 of Directive 2006/73/EC; the meaning of "management functions" could be inferred from Article 5g of current UCITS Directive.

Therefore, paragraph 9 of BOX 5 should establish that Commission should adopt implementing measures specifying the conditions under which a management company can outsource to a third party critical or important operational functions or management functions.

Explanatory text, paragraph 7. In order to coordinate the modifications suggested on BOX 3, the words "financial institution" should be deleted.

BOX 6 – Applicable law and allocation of responsibilities in the case of establishment of a branch

Paragraph 3. With regard to the second sentence of paragraph 3 of BOX 6, please see our comments on paragraph 3 of BOX 5.

BOX 8 – UCITS authorisation

Paragraph 4, point (ii). With regard to the approval of the choice of the management company by the authority of the UCITS home Member State, we believe that the provision under point (ii) could allow such authority to exercise a direct supervision on the management company organizational and operating structure; in this case, there would be a duplication of controls, given that the management company is already supervised by its home Member State competent authority with reference to the above issues.

Paragraph 7, fifth indent. In order to coordinate the modifications suggested on BOX 3, the words "financial institution" should be deleted.

BOX 10 – Information flow between management company, UCITS and depositary

Explanatory text, paragraphs 1 and 6. In order to coordinate the modifications suggested on BOX 3, the words "financial institution" should be deleted.

Explanatory text, paragraph 3. Due to the fact that UCITS has no legal personality, we believe that reference to the UCITS in paragraph 3 should be deleted.

Your sincerely,

The Director General