

INTERNATIONAL FINANCIAL DATA SERVICES

The Committee of European Securities Regulators
11 – 13 Avenue de Friedland
75008 Paris
FRANCE

15th October 2008

Submission via Website

Dear Sirs,

Call for Evidence on the Request for Advice to CESR:
The UCITS Asset Management Company Passport

Within the UK, International Financial Data Services ("IFDS") provides a range of services to the collective investment scheme and ISA Management industry via three FSA-regulated companies.

IFDS recognises the progress made by CESR on this issue, and is pleased to offer comment on the Consultation Paper. We were also grateful for the opportunity to hear directly from CESR at the Open Hearing of 13th October and consider the range of views expressed. Our response follows the approach of your paper, considering both the draft advice itself and the explanatory text accompanying each section, though we commence with some comment on the role of Local Liaison / Local Point of Contact.

IFDS was one of the firms whose earlier submission proposed the creation of this enhanced role, with the purpose of reducing the amount of regulatory overlap between competent authorities. Such a local liaison would have enabled each competent authority to focus on matters within their own jurisdiction, which seemed a suitable approach had a requirement for significant cross-jurisdictional oversight represented a barrier to the management company passport.

CESR's detailed consultation paper makes clear that EU regulators do not wish to permit such a barrier to exist and welcome the challenge of working together; the proposed advice is a model with cooperation at its heart (and Level 2 measures recommended to prevent undue delay to the underlying regulatory processes).

As such, we feel that the purpose behind the enhanced local liaison is essentially removed. We note that the draft advice retains the role, but seems unconvinced as to its purpose. Given the substance of the draft advice we conclude that the local point of contact should fulfil those liaison functions currently required within a jurisdiction into which a UCITS is passported for sale. These functions are already noted in Art. 45 and 47 of the UCITS Directive, though we recognise the need to redraft the wording in order to be applicable to funds managed from a different jurisdiction (rather than funds managed from its domicile being sold in another Member State).

We must clarify that the identification of a local point of contact must not be used as a means to limit or restrict the geographical location of any management company activity as set out in Annex II of the Directive. We know that the EU institutions recognise their duty to break down protectionist barriers where they serve no beneficial purpose, and we do not consider the case has been made that a local point of contact should be required under the Directive to undertake certain tasks that can presently be delegated freely in certain jurisdictions. It is one matter for EU-wide measures to remain silent in such cases, effectively permitting a given Member State to limit delegation applicable to its territory – this is their prerogative until the area is harmonised. However, we would be concerned if introduction of the management company passport was reliant upon enshrining within EU text a barrier to the provision of services to a management company.

Our purpose in proposing the local point of contact was liaison, not the performance of or responsibility for operational tasks (other than those indicated by Art 45 and 47). Responsibility for all such tasks must remain with the management company (whether acting locally, as a branch, or under the free provision of service), who should be enabled to delegate operational performance of any such tasks subject to effecting an appropriate risk management and oversight process. In this way the growth of trade and services across the EU can be facilitated.

In order to avoid misunderstandings and prevent any party from seeking to restrict the delegation or location of any Annex II function we suggest that CESR clarify that the position of local liaison is akin to that of facilities agent (re Articles 45 and 47). Funds currently passported into other EU jurisdictions must arrange for a facilities agent in the local jurisdiction and, on the strength of the detailed cooperation proposed between EU Member State competent authorities, we suggest that applying an equivalent version of the facilities agent would be sufficient (and uphold consistency between underlying UCITS structures). Such an approach would clarify the ability of management companies to delegate register maintenance functions, investment management, etc. to its chosen supplier – whether in the fund's domicile or elsewhere. We consider that the MiFID material regarding delegation provides a good structure: there is ability to delegate performance of any function to any location provided the delegating firm can evidence its ability to oversee the provision of the service. UK experience is that delegation of activities can be enabled with no increased risk to investors – and such experience includes situations where operational duties are performed outside the EU.

While we recognise the argument that transition to “free provision of service” would be supported by the existence of a local point of contact, we would question the merits of including such a transitional matter within the amended Directive itself.

Should you wish to discuss any aspect of our response further please call me on 01268 444989. Alternatively please call Chris Selden, Head of Regulatory Business Development, on 01268 445725.

Yours sincerely,

Clive Shelton

Risk & Compliance Director

Box 1: Management company

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

IFDS agrees with the draft advice of Box 1. In terms of the explanatory text we consider paragraph 8 (ensuring clarity on the scope of authorisation of a management company) to be key, and appreciate the focus given to this point. Connected to this clarification must be the view expressed in paragraph 7 that management is a "sole activity". While UCITS makes clear that the function of management covers a variety of underlying operational activities (Annex II), it is important to the success of the management company passport that all such functions of the management company are equally recognised for "free provision of services" within any EU market. Accordingly, delegation of the operational performance of such regulatory functions must be supported by a standardised and open approach – which could see the EU-based responsible party delegate operational performance of tasks to a service provider in any jurisdiction, subject to appropriate controls (see comment on Box 3).

Box 2: UCITS

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

IFDS agrees with the draft advice in Box 2. We recognise that paragraph 3 appears to enable a UCITS competent authority to reject a management company, and wonder whether it would be beneficial to add an appropriate cross-reference to the subsequent material regarding approval of the management company (Box 8, paragraph 4).

Do you consider that additional criteria should be set to define the domicile of contractual funds?

While we do not consider it an essential element in defining the domicile of a given fund, consideration could be given to confirming that the fund's domicile will be the jurisdiction in which the fund will be subject to taxation arrangements.

Box 3: Local point of contact in case of common funds

Do you agree with CESR's proposals in Box 3?

IFDS generally agrees with the draft advice in Box 3. As noted above, given the extent of cooperation between competent authorities expressed in the draft advice, we consider that the local point of contact should only be required to provide the facilities already noted in Articles 45 and 47 of the UCITS Directive (in respect of funds marketed into other EU States).

Were the local point of contact required to perform, or be directly responsible for, management activities the value of the Passport would be undermined; the "sole activity" of management referred to in respect of Box 1 would be fractured. We consider that the success of the management company passport requires that all management company responsibilities recognised by Annex II UCITS must be equally treated, both in terms of domicile and the ability of the management company to passport and/or delegate performance. We therefore consider that retaining the distinct concept of local point of contact is no longer necessary, and that a facilities agent (similar to the service currently required when a UCITS is passported into another jurisdiction) should be sufficient.

Requiring any local point of contact to be itself subject to prudential regulation implies that for the firm to assume the additional responsibility of acting as local liaison would impact its regulatory capital. Given that the purpose of the Passport must be to enable multiple jurisdictions to recognise that a management company is capable of satisfying free provision of service, any duplication of regulatory costs as a result of that free provision of services would be counter-intuitive. If the position is retained within the advice, we would welcome clarification that a regulated entity fulfilling the role of local liaison would see no increase in its regulatory permissions, capital, fees, or levies (as such regulatory risks should already be appropriately mitigated in the prudential supervision and regulatory fees applicable to the management company itself).

Similarly, the requirements / obligations / expectations of the local liaison in respect of other items of the advice would need to be set out (particularly Boxes 8-11).

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?

Given the extent of regulatory cooperation set out in the advice, and the lack of requirements imposed on the local point of contact in respect of boxes 8-11, we conclude that the EU Regulators do not feel it a regulatory necessity to locate given functions with the local point of contact.

We perceive the local point of contact to be a variation of the existing “facilities agent” role, and it follows that the existence and identification of the local point of contact would be a requirement for UCITS seeking to operate across EU borders (whether as passported funds or through passported management company responsibilities). In respect of investors, in our opinion it is the *outcome* (rather than the mechanism) that is of primary interest: that the fund is properly authorised and operates to the same standards as a UCITS where all management functions are performed within a single domicile.

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?

The essence of the management company passport is to enable firms who wish to operate from a single management company location to do so. Where a firm seeking to employ the management company passport considers its clients will expect or require a contact address in their own jurisdiction, the firm must consider the merits of the issue within its business plan. If investors seek a local address with which to transact, then the market will support such outcomes – which in itself should not require regulation to restrict the business model. However, we do recognise the argument that the requirements of Articles 45 and 47 of the UCITS Directive should apply equally to UCITS operated by a management company domiciled in a different EU Member State.

Regulators, by contrast, have responsibility to ensure that products offered within their respective jurisdictions are subject to appropriate controls. We note that boxes 8-11 of the draft advice contain minimal obligations on the local point of contact, indicating that competent authorities do not consider a local legal address to be a requirement for any regulatory outcome.

Do you consider that the local point of contact should provide additional functions, and namely the maintenance of the unitholder register?

We see no justification for such a regulatory requirement. To impose such a restriction undermines the concept of the “sole activity” of UCITS management (as register maintenance is identified by UCITS as a management function). We recognise that the local point of contact / facilities agent might in some circumstances be able to *offer* such a service to the management company (provided the Management Company has established appropriate controls and facilities to support such delegation), but the value of the management company passport for the EU-wide industry is the increased ability to maximise economies of scale and functional expertise.

It seems logical that a firm seeking to exercise its management company passport will be acting as manager in respect of funds in at least two jurisdictions (unless a management company chooses to passport its abilities before launching a local fund). Requiring the register maintenance functions to be performed by the local point of contact for any given UCITS would prevent that management company from integrating this part of its “sole activity”. Currently a management company residing in the same Member State as the UCITS is able to outsource performance of such functions to a capable service provider – and the operational performance of certain underlying tasks might well be located in other jurisdictions, or outside the EU itself. We do not accept that the introduction of a management company passport to enable the sole activity of managing a UCITS should result in a limitation of the existing ability to select an appropriate outsourced service provider, or the potential to arrange performance of such tasks from offshore locations under appropriate control and oversight.

It must further be expected that a firm operating under a management company passport will have common investors across the specialised funds domiciled in each jurisdiction, and that providing integrated reporting and documentation to those investors is a benefit of the passport. Requiring that the local point of contact *perform* registration maintenance functions would prevent such a benefit.

Box 4: Depositary

We offer no detailed comments on Box 4. The outcome appears appropriate, and we recognise the need for depositary organisations to comment on the detail.

Box 5: Applicable law and allocation of responsibilities in the case of free provision of services Do you agree with CESR's proposals in Box 5?

We are largely in agreement with the proposals in Box 5 – particularly the jurisdictional distinction set out in paragraph 5 (and effected throughout).

We support CESR's proposal that the Commission establish Level 2 implementing measures to increase harmonisation (paragraph 7), though note in respect of paragraph 9 our view that the management company must be able to delegate operational performance of any management company function (including to offshore locations and/or other EU Member States). The firm retains regulatory responsibility, and the regulatory structure supporting free provision of service will ensure that appropriate oversight is in place. To prohibit the management company from delegating certain functions would see the Commission introduce a far more restrictive regime for UCITS than was recently introduced under MiFID (which permits delegation to any location, though with some additional controls where portfolio management is delegated outside the EU).

As a firm keen to offer our expertise to other jurisdictions, we welcome CESR's proposal that each competent authority should publish clear and unambiguous information regarding any applicable non-harmonised laws, regulations, and administrative provisions relating to UCITS in that jurisdiction (paragraph 10).

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?

Where differences in the implementation of delegation provisions have been identified they should be resolved, and if Level 2 measures as noted in paragraph 10 are a viable solution to this problem they should be investigated. However, we would emphasise that the goal for such implementing measures should be to remove barriers rather than to restrict or prohibit delegation that has already been deemed acceptable in certain EU Member States.

We therefore suggest that paragraph 12 reflect that the goal of such Level 2 measures is to *enable* industry to adopt a broad range of delegation, in a manner similar to MiFID, rather than to restrict or limit outsourcing. It is vital that introduction of the management company passport does not impose costs on UCITS structures not themselves operated by a manager under the free provision of services.

Additional comments re Box 5 text:

We support the comment in paragraph 3 of the Explanatory Text that the format and content of the unitholder register be subject to the law of the UCITS home Member State. While recognising that the text states this to be without prejudice to the location where the register is maintained, we consider the comment illustrates how a capable service provider should be able to provide an appropriate service to UCITS located in other jurisdictions. We do not consider a restriction on the location of registration functions to be justifiable.

Box 6: Applicable law and allocation of responsibilities in the case of establishment of a branch

We offer no detailed comments on Box 6.

Box 7: Co-operation between competent authorities
Do you agree with CESR's proposals in Box 7?

Regulators must be comfortable that they have the necessary tools available to supervise remote management companies, though the goal must be to remove duplication or ambiguity as regards supervision. It therefore seems appropriate to provide at Level 1 for the extent of mutuality proposed by CESR, pending further work on integration. Discussion of Level 2 measures would reveal the extent to which such Level 1 power needed to be exercised.

Box 8: UCITS authorisation
Do you agree with CESR's proposals in Box 8?

We are substantially in agreement with the proposals in Box 8. We offer the following comments with a view to clarification:

- Paragraph 4 might be slightly reworded "...should approve the choice of management company upon being satisfied that..."
- Paragraph 4(iii) does not appear to have context. As the overall Box 8 text (including Explanatory text) seeks to minimise the conditions by which a UCITS competent authority can reject a chosen management company, the implications and benefits of this sub-paragraph seem unclear.
- The requirements under paragraphs 5 and 6 of Box 8 for attestation to be received and forwarded could represent a delay in the authorisation process. We support the call in paragraph 15 for timeframes to be established by the Commission, and suggest that the attestation process be included within such timeframes.
- We note there is no comment within Box 8 regarding the status of the local point of contact. Given the extensive co-operation proposed between competent authorities, we consider that the absence of any obligations or expectations on that party within this section indicates that the role is not required. If the local point of contact role is retained (whether as a facilities agent or a more detailed role) then its obligations and actions in respect of Box 8 must be clarified: communication channels; support for inspection and issue resolution; retaining the UCITS' authorised status; etc. We suggest that comment is required – either to clarify such processes or to confirm that no such engagement is necessary (which would call into question the need for the local point of contact).
- Turning to the Explanatory text, we find paragraph 7 to be unclear. It suggests that, as the management company is at all times subject to domestic supervision, which would include ensuring that its risk management process remains applicable to the attestation it holds, the UCITS competent authority would not therefore require to perform any ongoing review of the risk management process. We suggest this paragraph be redrafted to clarify its intention.

Box 9: Information flow to the competent authorities
Do you agree with CESR's proposals in Box 9?

We were pleased to note that CESR's draft advice on this section is based around extensive co-operation between competent authorities, as there had previously been concerns about whether such effective co-operation could be facilitated at this time. Duplication of reporting requirements should be avoided and, with the relevant competent authorities liaising directly with each other, the merit of this local point of contact role seems reduced. Any requirements on the local point of contact arising in respect of box 9 should be clarified (particularly in respect of paragraph 7).

Box 10: Information flow between management company, UCITS, and depositary
Do you agree with CESR's proposals in Box 10?

While we generally agree with the points made, we question the meaning of paragraph 6 of the explanatory text. This paragraph makes references to the local liaison having "...duties to unitholders." As noted above, the liaison function should not have any operational responsibilities or obligations other than those currently applied to a facilities agent for a passported UCITS. Its function was to be liaison between jurisdictions – a function that seems redundant in the light of the extensive regulatory cooperation set out in the advice as a whole.

Box 11: Auditors

We offer no comments on Box 11.

Boxes 12 and 13: *Untitled*

Again CESR requires no contribution from the local point of contact, due to the extent of cooperation between competent authorities. The necessity for the role is therefore unclear.

Box 13: *Untitled*

We offer no comments on Box 13.