Luxembourg, October 15th, 2008

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(please refer to pages 51 & 52 for group presentation and biography of respondent)

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

(Ref: CESR/08-748)

Important Preliminary Remark

The introduction of a Management Company Passport (MCP) means that a UCITS authorised in one Member State could be managed remotely by a management company established in another Member State. Regulatory supervision would be split. The European Commission has reviewed this question carefully and after an unprecedented industry consultation elected to exclude the MCP from the UCITS IV proposal. A mandate has been given to CESR to come up with relevant advice before 1st of November this year.

Events of the past days and weeks have highlighted the overwhelming difficulties of crisis management among member states. Voices from all over the economic and political spectrum are asking for stricter regulation and supervision. This is truly not the time for tinkering with one of the last effectively working supervision models by rendering it more complex and more prone to error. UCITS as they stand now have largely proven to be a haven of peace in these troubles times and largely retained investor's confidence. This is not the time for regulatory experiments detrimental to an important financial industry sector.

Introducing a MCP might perhaps deliver advantages to the UCITS regime such as process improvements or the release of capital for selected industry players. However, these benefits must be viewed in the context of significant potential additional costs and clearly defined risks.

1. A MCP would increase legal and fiscal uncertainty. Permitting a management company and a UCITS to be located in two different Member States would give rise to legal uncertainty, notably as to the fund's domicile, to the fund's nationality, to its place of submission to tax and finally, to its regulatory regime. Supervision of the fund by regulators and oversight by the depositary and auditors would necessarily become more cumbersome and complex, increasing direct costs and weakening investor protection.

2. A distribution of supervisory responsibilities does not solve the problem. Some argue that split supervision can be managed via cooperation between supervisors. However, such coordination is lengthy, complex and cumbersome. The more actors intervene in the process, the higher the risks of error. What will happen when the first UCITS encounters serious troubles and risks suspension or failure? Who will take responsibility?

3. Weakening UCITS supervision via a MCP would be a disaster for the UCITS brand. UCITS are one of the best selling European export products. EFAMA reports that 90% of net sales in 2007 in “international” UCITS originated in Asia. Authorities in Hong Kong, Singapore, Taiwan, Chile and Dubai view UCITS as being well regulated and, as such, they have opened the doors for local distribution.

This trust, painstakingly built over the past decade, can be quickly lost. Fundamental changes to the product like a complex, untested supervisory regime would put into question one of the core elements of investor protection. Doors to foreign distribution could close. Furthermore the timing for weakening the UCITS brand is extremely unfortunate as the US and Chinese authorities are actively contemplating the creation of a retail investment fund capable of competing with UCITS on world markets.

4. The spectre of additional costs and risks must be thoroughly analyzed and corrective measures must be designed in an exhaustive, deliberate exercise, not in a precipitant manner.

UCITS product-centred regulation achieves a high level of investor protection. Moving away from a “product-centred” regulatory approach is not a simple exercise and necessarily alters and potentially weakens oversight integrity. Potential advantages from a "management company passport" are likely to be outweighed by added legal, fiscal and regulatory uncertainty and risk.

I nevertheless do fully support the five initial changes as suggested in the European Commission’s UCITS IV proposal: key investor information document, fund mergers, fund pooling, streamlined fund notifications, and regulatory coordination. These measures will improve the existing legal framework and benefit both investment fund stakeholders and investors alike.

The current UCITS draft directive without the MCP will provide significant operating and cost improvements while maintaining high investor protection. Provisions in the draft directive are independent of the Management Company Passport question. It is of vital importance to all parties associated with UCITS that these measures are passed into law as soon as possible. In a second step, a thorough, thoughtful and complete analysis must then be undertaken on examining the complex issues of the Management Company Passport.

Questions surrounding the viability of the MCP are complex and the stakes are enormous.

In these trying times, introducing the MCP is clearly not worth the risk !

General Remarks :

1.Based on all the experience accumulated over 20 years in the industry I am firmly convinced that the potential advantages are in all likelihood outweighed by the additional legal and regulatory costs and risks which such a management company passport would entail.

2.The management company passport entails complex questions and issues which require to be addressed with great care and attention. At a minimum, the spectre of additional costs and risks must be thoroughly analysed and corrective measures must be designed in an exhaustive and deliberate exercise and not in a precipitant manner. In addition, in enacting any further proposed amendment to

the UCITS IV framework, the due/appropriate legislative process must be fully observed. In this light, more time is needed to examine thoroughly and deliberately the legal, fiscal, and regulatory issues raised by the management company passport. Without such assurances that these risks can be mitigated, it is impossible to conclude that the "... current high level of investor protection provided by the UCITS framework can be maintained in the context of such cross-border management arrangements."([1])
It should be noted that at the outset this reservations in relation to the introduction of a management company passport are broadly shared by the European Commission.

3. In its *Request for assistance on UCITS Management Company Passport* addressed to the President of CESR on 16 July 2008, the European Commission recalled why new provisions in relation to the management company passport had not been introduced into the proposal for the UCITS IV directive. The Commission had certainly "given careful consideration" to this possibility. However, the overall work on the question and the discussions with the CESR group of experts in relation to collective investments in the summer of 2007 had revealed significant uncertainties and difficulties and had not allowed for fully satisfactory responses to be identified.

Moreover, the Impact Assessment attached to the proposal for the UCITS IV directive, carried out in accordance with the 2003 inter-institutional agreement, concluded as follows in that regard:

"The IA [Impact Assessment] therefore concludes that the type of provisions needed to provide a management company passport would entail extensive bureaucracy and administrative costs. They would not fully dispel the supervisory concerns and investor protection risks associated with cross-border fund management. They would provide neither a cost-effective basis to introduce the passport. Potential drawbacks are considered to outweigh the expected benefits. The Commission therefore proposes not to

[1] CESR Cover Sheet : "CALL FOR EVIDENCE ON THE REQUEST FOR ADVICE TO CESR ON THE UCITS ASSET MANAGEMENT COMPANY PASSPORT " 17 July 2008

change at this stage the provisions of the Directive in this regard but to maintain the status quo whereby fund managers undertake cross-border management through delegation-based solutions”2.

I do fully agree with the Commission’s reticence in this regard.

4. Changes to the regulatory framework should only be considered if the benefits of such changes clearly outweigh costs. The management company passport will undoubtedly increase costs and risks to the UCITS regime. A more thorough analysis than has been conducted to date needs to look not only at financial benefits but also at financial costs and the “costs” of additional risks. It should include the interests of all stakeholders (such as investors, depositories, auditors and supervisory authorities in Europe and beyond) and, most importantly, should include non-financial elements such as the negative impact of a loss of trust and, crucially, loss to the excellent global reputation of UCITS products in general.

5. The global reach of the UCITS brand extends far beyond Europe. The UCITS global brand is well known, perceived and accepted, particularly in Latin America, the Middle East and Asia. Two out of three UCITS distributed Hong Kong, for example, are domiciled in Luxembourg. The successful distribution in this jurisdiction is accompanied by the requirement to comply with numerous provisions of the competent authority in Hong Kong. It is not clear whether the Presidency working document on the Management Company Passport, has paid due attention to such requirements and whether an in-depth review has been conducted in this regard, in order not to avoid causing harm to the distribution process in important overseas markets for UCITS products such as Hong Kong.

2 Give title and page reference for Impact Assessment

6. In addition, the current turmoil in the global financial markets makes it a precarious time at which to be loosening regulatory compliance for financial products such as UCITS and exposing investors to increased risk. The global financial industry is currently witnessing a crisis in financial markets unknown since the great crash of 1929. Giants of the financial services landscape like Bear Stearns, Lehman Brothers, Merrill Lynch, AIG, Morgan Stanley, amongst others, have collapsed, have been bought up at exceedingly low share prices or were rescued. The same is true on this side of the Atlantic. Northern Rock, IKB, Fortis, Dexia, Unicredit, Hypo Real Estate, HBOS and so forth have been nationalised, bought up at unrealistically low prices or have needed to be rescued by State intervention. Voices from across the economic and political spectrum are asking for stricter regulation and supervision. This is truly not the time for tinkering with one of the last effectively working supervision models by rendering it more complex and more prone to errors.

The current situation on the markets is not only about investor protection, it is equally about (regaining) investor confidence. In such a climate, weakening UCITS supervision and rendering it more complex would be a disaster for the UCITS brand.

7. With regard to the comments made above, an approach requiring further consultation and analysis, is in line with the application of the prudence principle, a general principle of European law to which secondary legislation such as a directive is subject, meaning that in the context of situations of major risks, such as that being currently experienced on the financial markets, the final mid- and long-term outcome of which cannot accurately be estimated, priority must be accorded to proceeding with prudence in the legislative sphere .

8. The proposal for a management company passport would breach the European law principle of proportionality, having regard to (i) exposure to additional costs on the part of national regulators and the depositary; (ii) increased exposure to risk for investors; (iii) damage to the reputation of UCITS and (iv) the fact that an extended passport is not necessary in order to realise gains in efficiency. In this regard it is appropriate to have regard to the conclusion reached in the Impact Assessment:

"Finally, it appears necessary to assess the impact of this recommendation on the other proposed measures. In particular, whether this risks unbalancing the effectiveness of the resulting legislative package. The answer is negative. Part of the rationalization efforts aimed at by the MCP could be achieved by other means. First of all, a streamlined notification procedure will increase markets' openness and thus reduce the need to launch parallel fund ranges in different MS. A single fund range based in a single country (and therefore with a single MC) will be able to easily access investors in all MS. (This would particularly benefit smaller asset management groups.) Secondly, the possibility to merger funds across borders will reinforce this MC rationalization process. By allowing the merger (and liquidation) of a fund established in country A into a fund in country B, industry players will be able to concentrate their fund ranges in the most efficient fund domiciles thus allowing the dismantling of MC in the less efficient ones".

9. It follows also from CESR's consultation paper that it seems to be the intention of CESR that numerous crucial questions for harmonisation and hence further integration of the investment fund industry are due to be dealt with at Level 2 with a view to covering questions which are of a technical nature. Level 2 measures within the Lamfalussy process are not due to be perceived as harmonisation measures, and should they be seen to this end, then this approach chosen is not due to comply with the overall economy of the Lamfalussy process and with the nature of the executing provisions of level 1 framework directives. Indeed, level 2 implementing measures may not serve as completing the lack of substance of level 1 framework directives, but they should limit themselves to bring further clarifications and precisions on the provisions (and solely those provisions) as laid down by level 1 framework directives.]

10. In view of the interests at stake, it is a difficult exercise to examine and comment on the CESR consultation paper given that the French Presidency has already commenced discussions at Council level and comments with regard to working documents of the French Presidency have already been requested from the industry, even before the CESR consultation paper had been released. In this regard the timing of the Presidency's initiative is not appropriate to the proper taking of a position on this topic of fundamental importance to all stakeholders. Above all, such initiative is not in accordance with and fails to respect the Lamfalussy legislative process. In such process, where the European Commission retains the sole initiative for any legislative action in the EU and where the European Commission has formally requested advice from CESR, the governmental initiative of the current Presidency is not compatible with the Commission's role as holder of the monopoly on any legislative action in the EU, and does not respect the general economy of the Lamfalussy process.

11. The provision of management company services on a cross-border basis should not deprive UCITS of the local substance necessary for the product regulator (i.e. the UCITS home Member State authorities) to properly carry out their supervisory functions. There can realistically be no effective supervision by the regulatory authority of the UCITS domicile if there is no appropriate substance in the jurisdiction of the UCITS domicile. Substance requirements for management companies and self-managed UCITS were inserted precisely for this reason in the UCITS Directive by Directive 2001/107/EC.

Uncertainties as to which regulator is in charge of supervising the services provided to UCITS must be eliminated. Because UCITS regulation is and must remain a product centred regulation, the supervisory responsibility for all services provided to the UCITS must, as presently, remain entrusted to the UCITS home Member State authorities acting as “lead” regulator. In order to allow UCITS competent authorities to assume their supervisory responsibilities, appropriate substance of the UCITS product must remain under their jurisdiction of competence.

12. A management company passport solution may not be introduced if there remain any, even remote, issues and points of concern surrounding such an introduction that have not been successfully solved between all relevant stakeholders. Such outstanding point(s) of concern may be of a legal, regulatory and tax nature. Serious issues do remain with regard to appropriate substance due to remain in the UCITS Home Member State, in addition to concerns of a legal and tax nature.

13. Fiscal issues have not been considered at all in the CESR consultation paper. Such issues are nevertheless intrinsically linked to the definition of the UCITS domicile, its nationality and legal questions pertaining thereto; hence they must been resolved before any management company passport solution could become operational.

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Specific answers/comments to the questions raised for consultation in the various boxes

CHAPTER 1 - Definition of domicile

14. Box 1: Managament company

Questions for consultation:

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

Proposal 4 which aims at preventing all risk of *forum shopping* in the context of the management company is agreeable. It emphasizes that the obligation to carry on a significant part of its activities in the Member State of origin[3] is provided for in general for banking and financial operators benefiting from a European passport[4].

Taking into consideration the legitimate interests of the Member States of UCITS which could be managed by a management company of another Member State, former should also be involved in ensuring that such a principle is respected. It also emphasizes that, in application of Article 5(3)(c) of directive 85/611/CEE, a management company which came to exercise the largest part of its activities in another Member State should lose its approval.

There are also reservations, which it will be developed at a later point in relation to (i) the possibility given to the

3 Figurant uniquement au huitième considérant du préambule de la directive 2001/107/CE dans l'état actuel des choses.
4 Voir l'art. 11 § 2 de la directive 2006/48/CE relative aux établissements de crédit ; l'article 5 § 4 de la directive 2004/39/CE relative aux entreprises d'investissement.

management company to provide services in other Member States by means of the free provision of services[5] and also in relation to (ii) the right of the management company to choose if it carries on its activities in other Member States by means of a branch or by means of the free provision of services[6]. In fact, The management of a UCITS does not lend itself to the free provision of services[7]. In any event, the UCITS competent authority should be able to assess the adequacy of such a means of management as proposed having regard to the specificities of the UCIT or UCITs to be managed.

CESR itself considers that, in order to ensure a harmonious functioning of the system and to avoid an excess of complexity, the free provision of services by a management company should be excluded where it is directed towards a third Member State by means of a branch established in a Member State other than that of the management company[8]. This reserve expressed by CESR is revealing of the intrinsic inadequacy of the free provision of services in order to manage a UCITS. In fact, the exercise of the free provision of services by means of a branch amounts to a simple exercise of this freedom by the management company itself.

15. Box 2: UCITS

Questions for consultation:

Do you agree with CESR's proposals in Box 2?
Do you consider that additional criteria should be set to define the domicile of contractual funds? Please provide details.

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5 Voir le point 5 de la box 1.
6 N° 5.
7 Voir ci-dessous, points 6 et 7, relatifs au Box 3.
8 N° 10.

CESR proposals in Box 2 concern only UCITS of the contractual type, even though the issues relating to domicile and attachment to a Member State are crucial for all forms of UCITS, irrespective of the form in which they are constituted. In this regard it is important to note that, although it has been stated in the Call for evidence that particular consideration should be given to the case of UCITS funds established under contractual or trust law, attention should also be focussed on UCITS constituted by a company or self-managed UCITS. Serious legal issues remain relating to the nationality of the UCITS, and these issues will in all likelihood trigger serious concerns of a fiscal/tax nature that should be discussed and successfully resolved prior to contemplating the introduction of a management company passport.

Additional criteria should be set to define the domicile of both contractual and company style funds.

The elements that could be used to distinguish the home Member State of the management company and that of the UCITS fund are those that mean that the substance of the UCITS is located in its own domicile. More specifically, these elements are those necessary for ensuring that, from a tax and legal perspective, the UCITS is considered as having one single domicile, which must be located in its home Member State (see further developments below in this regard). As those elements may differ between the various Member States, the most stringent approach should prevail so as to ensure that Member States recognise the tax and legal domicile of the UCITS. There should also be enough substance in the home Member State of the UCITS to permit effective supervision and oversight of the UCITS product. This also appears to be the objective pursued by the CESR consultation paper, although the expressed concerns with regard to appropriate and sufficient substance in the UCITS home member state have not been completely eliminated.

I would like to caution against the uncertainty that could be created as a result of over-reliance on the concept of fund registration as one of the determining factors of attachment to a given jurisdiction (such a concept is not consistent with elementary legal principles).

Legal principles and legal certainty dictate that emphasis should be placed rather on where the UCITS is authorised, not on where the application for authorisation is made or who is making the application. This appears to be a novel proposal which has not been subject to proper scrutiny and which on the fact of it appears not to be of relevance. In addition, it must be highlighted that the proposal contained in Box 2 refers to a request for authorisation and not authorisation itself. What must equally be avoided in this regard is forum shopping in the context of applications for authorisation, which should not be permitted to be introduced in parallel or en bloc to several authorities at the same time.

Moreover, which demand for authorisation is targeted exactly? Is it the pure submission of the request for authorisation, which is an administrative act? Should this demand be formulated in a specific format, which is not envisaged in the text as formulated presently? Could one imagine the possibility of a promoter submitting several demands in various jurisdictions? If this were the case it would also eventually mean that a fund could be authorised or even removed from the list of authorised vehicles in one Member State and be re-domiciled, and hence change nationality through a demand for authorisation in another jurisdiction without further consequence. This could actually lead to unprecedented arbitrage among jurisdictions and lead to a lack of trust among supervisory authorities. Finally, it should be noted that the text is imprecise as it is not necessarily the management company that proceeds to the demand for authorisation.

Furthermore, the proposed text does not address the situation of UCITS which do not have a management company (self-managed SICAVS). If such companies were subject to the criteria of the jurisdiction where the application for authorisation is made in order to determine their domicile, this would be in total contradiction of all European company and tax law provisions which define the domicile of companies in consideration of their centre of activity and place of decision-making.

Similarly, in the case of non-corporate funds, the nationality of such co-ownership structures is never determined with regard to an administrative demand for authorisation.

However, the importance of the location of the depositary in the Member State of the UCITS for the application of the law of that Member State to the UCITS must be emphasised.

A common fund constitutes in effect jointly-owned property. It is classically considered that such an arrangement is to be treated legally as subject to the laws of property or co-ownership. In private international law, the applicable law would be the lex rei sitae (law of the place where the property is located). If it is sought to be certain to have application of the law of the UCITS, as advocated by CESR, the property constituting the jointly-owned property should be located in the territory of that State, in order to avoid creating the risk of a conflict of laws. The same considerations should also apply if it is sought to apply the law of liquidation of the Member State of the UCITS, as also proposed by CESR.

Moreover, the place of establishment of the depositary of the UCITS is not necessarily sufficient to confer legal attachment to that Member State on a UCITS. At present, this attachment is the seat of the SICAV as derived from the management company for an FCP.

The important point is that from a legal point of view the domicile of the UCI cannot be called into question or requalified, with all the damaging taxation consequences for the fund’s home state which could follow. What is necessary is to have an effective solution which leaves no room for doubt on these uncertainties :

16.1. Legal uncertainties

The scope of the management company passport differs depending on the legal form of the UCITS concerned. If a management company located in Member State A is "designated" by a corporate-type UCITS (e.g. a SICAV) domiciled in Member State B, this appointment occurs by way of delegation. The SICAV still maintains its Board of Directors and other governing bodies, as the case may be, which will have a direct responsibility as regards the functioning of the SICAV, over and above the responsibilities entrusted to the management company.

In the example given above, designation of a foreign management company entails the transfer of actual day-to-day management functions out of the domicile of the SICAV into the domicile of the management company, whereby the Board of Directors of the SICAV is left with a mere supervisory role. In a similar manner to the situation described above regarding the tax uncertainties, there is a risk, pursuant to the national laws of the Member States in which the SICAV has been established, that the SICAV loses its nationality. In a worst-case scenario, the SICAV could be left with no nationality or with a double nationality. This can only be avoided if the legal system of the SICAV's home Member State is left the discretion to decide on establishing minimum rules of substance and governance to eliminate this uncertainty.

A contractual-type UCITS (like an FCP) has no legal personality. It is a pool of assets invested on behalf of the unit-holders. The management company is the legal representative empowered to set up the pool, to manage its assets and to take any other decision on behalf of the unit-holders. With the exception of the depositary appointed by the management company, no other body shares responsibilities such as those entrusted to the management company, as is the case in a corporate-type UCITS.

If a management company located in Member State A sets up an FCP to be domiciled in Member State B, under the proposed new system, the nationality of the FCP would be established only with reference to the governing laws applicable to the FCP (those of Member State B) as stipulated in the management regulations. This deviates from the current rules where the nationality of the FCP is determined by the registered office of its management company.

In a contractual-type UCITS, the laws of the home Member State of the UCITS should also govern the relationship between the UCITS, its investors and its management company to further reinforce the nationality of the UCITS.
More generally, whatever the legal form of the UCITS may be, the contractual relationship between the UCITS, the

depositary and the service providers entrusted with the "extended" core administrative functions should also be subject to the laws of the home Member State of the UCITS.

I am however concerned that the link to a specific jurisdiction consisting solely of stipulating that the laws of this jurisdiction govern the respective contractual relationship, may, in the absence of any other substance in that jurisdiction, not be sufficient to legally establish the nationality of the UCITS, in particular for contractual-type UCITS.

In any event, whatever the additional proposed safeguards may be, complex conflict of law issues - where private international law rules are not harmonised - may arise.

The nationality of the UCITS must not be challenged through a passport regime. Without additional safeguards, conflict of law issues may be virtually unmanageable and will not only seriously impair investor confidence, but also undermine the UCITS global brand.

16.2. Tax uncertainties

16.2.1. Direct taxes

The tax impact and risk related to a management company passport needs to be highlighted. Thus, by way of example, if a UCITS domiciled in Member State B is managed by a management company based in Member State A, the tax authorities of Member State A could consider that "mind and management" of the UCITS has been transferred to Member State A. The UCITS would then be taxed twice: in its own domicile and in the Member State of the domicile of its management company.

With regard to direct taxes, two situations have to be considered:

i) A corporate-type UCITS, e.g. a SICAV, designates a foreign management company.

   There is a risk that the place of the effective management and control of a SICAV domiciled in Member State B is deemed to be transferred to the jurisdiction where the head office of the management company is situated (Member State A). As a consequence, the SICAV could be considered as a tax resident of Member State A although it has not been incorporated there. Alternatively, it could be deemed to have created a permanent establishment in Member State A and be taxed on the profits allocated to the permanent establishment, while remaining subject to tax in Member State B.

ii) A contractual-type UCITS, e.g. an FCP, is set up in Member State B by a management company having its registered and head office in Member State A.

   There is a risk that the FCP is considered to be an "opaque" pool of assets (“patrimoine d'affectation” –“ Zweckvermögen” – “trust”) assimilated for the purpose of taxation to a corporate entity and additionally subject to tax in Member State A, even if the UCITS has no legal personality. The application of the laws of two different countries to the management company and the contractual-type fund could lead to serious fiscal problems and should thus be avoided.

From an international tax law standpoint, there is a growing concern raised by foreign tax administrations regarding the substance of entities enjoying a particular tax treatment or claiming benefits in general. If the management company based outside of the domicile of the UCITS may exercise control over it, it is likely that the UCITS would be subject to foreign tax on its profits.

Foreign tax authorities have challenged substance issues in several recent cases. One example is the Indofood case (see the UK Revenue guidance paper (Draft Guidance on HMRC's interpretation of the Indofood decision (http://www.hmrc.gov.uk/)) ([9]). A second example is the new German rules on anti-treaty shopping (Section 50d (3) EStG (Income Tax Act) and the "Jahressteuergesetz" 2007 (Annual Act 2007).

The substance requirements vary from one country to another but nevertheless have certain common features. Apart from regular board meetings held in the country where these entities are supposed to be resident, these entities must be provided with sufficient "business substance".

Even the mere likelihood of an additional tax charged in Member State A on the assets of the UCITS domiciled in Member State B would have a significant negative impact on investor confidence in the UCITS product. It is not inconceivable that the auditor, in some cases, will need to qualify its conclusions even in the event of the mere likelihood of uncertainty on the tax aspects of a UCITS.

[9] Indofood International Finance Limited v JPMorgan Chase Bank, London Branch, case n. HC05C00335 decided by the English High Court of Justice on 7 October 2005 and by the English Court of Appeal on 2 March 2006. In this case the UK courts were called to decide whether the interposal of a Dutch BV as an intermediate vehicle between Mauritius and Indonesia (so that Indofood would benefit from the application of the Dutch Double Tax Treaties with Indonesia and Mauritius) precluded the application of the referred Tax Treaties. In the referred case law the English Court took on an international construction of the meaning of "beneficial owner" under the context of double tax treaties and further clarified the meaning of conduit companies with a view to denying the benefit of double taxation relief to an applicant that can be characterized as "treaty shopping" using a conduit company (the Dutch vehicle).

In addition, diverging views from the tax authorities in the various Member States are likely to create more distortions and arbitrage situations which will ultimately be detrimental to investors.

16.2.2. Indirect taxes

From a VAT perspective, even if progress has been made through the European Court of Justice case law, the VAT exemption that applies to the services rendered by the management company is still applied very differently from one Member State to the next. Those differences can be observed as regards two dimensions: (1) the qualifying entities (UCITS) and (2) the qualifying management services. These two dimensions are still interpreted differently in the different Member States. Those differences might significantly distort the competition between UCITS established and managed in different jurisdictions, to the prejudice of the investors.

For instance, in some circumstances, a management company and a fund established in two different Member States could avoid all VAT costs (the management company established in Member State A could recover in full its input VAT paid to its suppliers and the Fund as recipient established in Member State B could benefit from a VAT exemption on the services received from the management company).

In contrast, in other circumstances, a management company and a fund established in two different Member states may be obliged to pay VAT twice; once where the management company is established (as no right of deduction of the input VAT would be recognised to the management company in Member State B) and once where the Fund, as recipient, is established (as the services received from the management company could not benefit from any VAT exemption in Member State A).

Direct and VAT tax issues need to be carefully examined and clarified in order to minimise additional risks and cost to be born by investors. More time is needed to consider the full tax implications of a management company passport and to eliminate any uncertainties that might negatively impact investment volumes in UCITS and the reputation of the UCITS global brand.

Finally, I do respectfully disagrees with the statement of the EU Commission in its impact assessment saying that the danger of overlapping tax jurisdictions would be limited in scope, and where a residual risk remains it would be up to the national tax authorities to align their taxation policy with the regulatory approach (presented in the exposure draft). Such risk is not to be perceived as minimal, as for the time being it remains to be seen how the tax authorities of the 27 Member States ([10]) would respond to such considerations. This alone would create tax risk, which could constitute a major risk for the UCITS product and brand.

It follows from proposal 3 of CESR that it accords the same status to the depositary and the management company in the procedure for approval of the UCITS. The UCITS competent authority should approve the choice of those two components of the UCITS.

17. Box 3: Local point of contact in case of common

[10] Mathematically speaking, there are 351 separate bilateral pairs of tax authorities among the 27 EU Member States (N x (N-1)/2). Therefore, tax issues surrounding the management company passport are necessarily complicated by the sheer magnitude of potential bilateral relationships.

funds

Questions for consultation:

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 UCTS 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?

I do agree in broad terms with the proposals made in Box 3, but would like to draw attention to the fact that such point of contact in the case of common funds is due to add further complexities to the work of the competent authorities and I am not convinced that there is any real interest for investors.

Yes, I am of the view that not only is there an interest in having a legal address in the jurisdiction where the fund is located, but that such legal address should not be derived from the fact that a funds management company is situated in a jurisdiction other than the fund itself, but that such legal address - and certainty to this end - must be foreseen out of the legal and fiscal concerns linked to the UCITS. Please refer to the detailed comments in this regard made with regard to Box 2.

Several items listed under administration of Annex II b) are considered to be owned by the UCITS, and not by the management company and as such may simply not be located or carried out in an jurisdiction other than that of the home country of the UCITS. In particular, complexities could arise concerning the maintenance of the unit-holder register, where conflicts may exist between laws in multiple jurisdictions (e.g. laws on data protection issues).

Yes, the local point of contact should be able to provide additional functions such as the maintenance of the unit-holder register.

But such local point of contact cannot be a substitute for a lack of substance and thus the necessary means to supervise in the fund's home country.

More generally, the management of a UCITS, whether or not it is constituted by means of a company, involves a series of permanent services to the owners of shares in the UCITS and to investors. In fact, as follows from Annex II to directive 85/611/CEE, the management of a UCITS, in addition to the investment management, involves the marketing and the administration of the UCITS.

This latter involves at least the following functions:

- Legal and fund management accounting services ;
- Customer enquiries ;
- Valuation and pricing (including tax returns) ;
- Regulatory compliance monitoring ;
- Maintenance of unit-holder register ;
- Distribution of income ;
- Unit issues and redemptions ;
- Contract settlements (including certificate dispatch) ;
- Record keeping.

These activities must be carried out **on a continuous basis**, taking account of the fact in particular that UCITS are open vehicles to which one can subscribe and ask for redemption or reimbursement of shares at any moment in time.

In so far as, according to CESR, the "point de contact" should carry out such activities in the Member State of the UCITS, this would involve the exercise of the freedom of establishment. "The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons" [11].

More precisely, the "point of contact" would be a branch. Article 1a(7) of directive 85/611/CEE defines this as a "place of business which is a part of the management company, which has no legal personality and which provides the services for which the management company has been authorized". This concept implies the presence of three conditions, which will be fulfilled where:

- The secondary entity with be endowed with a permanent mandate ;
- It has to be subject to the management and control of the head office ;
- It can be held to engage the legal responsibility of the head office[12].

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11 CJCE, 30 novembre 1995, Gebhard, C-55/94, Rec. p. I-4165, point 25 ; CJCE, 11 décembre 2003, Schnitzer, C-215/01, Rec. p. I-14847, point 28.

12 Communication interprétative de la Commission, Liberté de prestation de services et intérêt général dans la Deuxième directive bancaire, 20 juin 1997, p. 13; la Cour, quant à elle, a jugé que « … la notion de succursale, d'agence ou de tout autre établissement implique un centre d'opérations qui se manifeste d'une façon durable vers l'extérieur comme le prolongement d'une maison mère, pourvu d'une direction et matériellement équipé de façon à pouvoir négocier des affaires avec des tiers, de telle façon que ceux-ci, tout en sachant qu'un lien de droit éventuel s'établira avec la maison mère dont le siège est à l'étranger, sont dispensés de s'adresser directement à celle-ci, et peuvent conclure des affaires au centre d'opérations qui en constitue le prolongement» (CJCE, 22 novembre 1978, Somafer, Rec. p. 2183).

Box 3 of CESR confirms therefore that the management of a UCITS of another Member State requires a presence and a permanent activity in that other Member State, which related to the freedom of establishment and not to the freedom to provide services.

As against that, I am reticent about the suggestion of CESR that the functions to be discharged by the "point of contact" can be assumed by the depositary. The reciprocal independence between the management company and the depositary is one of the core concepts at the heart of the UCITS directive. On the one hand, Article 10(1) of the directive provides that the functions of management company and depositary cannot be exercised by the same company, which appears to be ignored by CESR's proposal. On the other hand, in the exercise of their respective functions, the management company and the depositary must act in an independent manner and exclusively in the interests of the unit holders (paragraph 2). The independence of the depositary and his function of control of the management company would be distorted if the depositary could carry out part of the activities of the management company.

18. Box 4: Depositary

Questions for consultation:

Do you agree with CESR's proposals in Box 4?

Do you consider that there is an interest for investor in harmonising the possible standard agreements to be used by depositary and management company?

In the first place, I would like to recall that the depositary is an essential guarantee against all abuse of trust or other misappropriation by the management company. In its communication of 2004, the European Commission correctly underlined that the intervention of the depositary probably explained why Europe has not to date known any problems with misappropriation of funds by a manager since 1985, in contrast the United States which does not have this system of counterbalance to the manager. The UCITS directive invested in the depositary certain controls over the activity of the management company. It has financial obligations towards investors. It constitutes a “vital prudential safeguard for savers who invest in UCITS”[13].

In any case, in so far as the system of balance and separation of powers between the management company and the depositary is crucial for the proper functioning of UCITS, the relations between those bodies cannot be regulated by Level II measures, as is proposed by CESR[14].

CHAPTER 2 - Applicable law and allocation of supervisory responsibilities

19. Box 5: Applicable law and allocation of responsibilities in case of free provision of services

Questions for consultation:

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 filed and adequate investor protection in the European market?

13 Communication de la Commission au Conseil et au Parlement européen, « La réglementation relative aux dépositaires d’OPCVM ... », précitée, point 1.
14 Voir le point 6 de la Box 4 et le n° 6 qui suit.

Do you suggest other areas that would benefit from further harmonisation?

As a very preliminary and general statement, I do think that the objectives stated in the CESR advice in box 5 are to be understood as paving the way for proposing a possible split of supervisory attributions and allocation of responsibilities between the respective competent authorities of the management company home member state and of the UCITS home member state.

In order for the supervisory authorities of the UCITS' home member State to properly carry out their tasks and assume their responsibilities as foreseen in box 5, it is absolutely necessary that at least appropriate and sufficient substance remains in the UCITS home member state.

It is therefore the UCITS' home Member State authorities who must be responsible for approving the UCITS' features and ensuring its proper and efficient permanent supervision.

I do reiterate my reservations in relation to the possibility of a UCITS being managed from abroad in the context of a simple provision of services.

I do welcome the non-exhaustive list of matters relating to the law and the control of the authority of the Member State of the UCITS. The detailed character of this list is testament to the fact that the foreign management company is undeniably subject to the law of the UCITS Member State. The UCITS is a complex structure in which the management company is one if the composite elements. As a consequence, this latter would not be able to ignore the rules applicable to the UCITS which it manages. The centre of gravity of the structure is the UCITS, to which the management company provides services, necessary to the overall service provision to investors. I therefore welcome the taking of position in principle by CESR, as expressed at paragraph 2 to Box 5, according to which the rules governing the constitution and the functioning of a UCITS must be the same irrespective of whether it is managed par a domestic or foreign management company, on pain of misleading investors.

Two principles can be derived from this declaration: that of the obligation not to have any impact on the constitution/setting up and the functioning of the UCITS arising from the location of the management company abroad and, in corollary, the obligation placed on this part of the UCITS to assume any external negative consequences flowing from such a choice. It is neither up to the UCITS, nor to the investors nor to the depositary, nor to the controlling authority of the UCITS to assume the negative consequences of such an option, either in terms of risk or the cost of additional charges or inconveniences.

I would like to add to the list of topics related to the constitution and the functioning of the UCITS the following elements that not only should be complied with under the rules of the UCITS home Member State (cf. point 4 of box 5) but must be complied with in the UCITS member state:

- Choice of the UCITS auditor and audit functions with regard to the UCITS,
- experience of the management company's conducting officers with regard to the UCITS investment policies
- at best: risk management procedures employed by/for the UCITS.
  I would like to underline that the risk management procedures are actually related to the constitution and the functioning of the UCITS itself and should be subject to control by the UCITS home Member State.

- at least: clear rules under the remit of the UCITS home member state how the risk monitoring independent of the investment management function should be organised and enforced.

  Should risk management not come under the remit of the UCITS competent authority, then the concept of risk management is not due to also include risk monitoring. At least risk monitoring should come under the rules of the UCITS home member state, and should include at least the setting of risk limits that are appropriate to the risk profile of the fund, the independent calculation of the risk exposure, the reporting and the escalation of breaches of limits and the monitoring of actions taken to bring UCITS back within those limits.

A similar approach (list of items/activities performed by a management company) with regard to the management company should be foreseen. For the time being the CESR advice deals with the management company only under the auspices of the legal domicile of the management company, but not with regard to a clear allocation of supervisory attributions and responsibilities of the management company's competent authority, whereas for the UCITS competent authority, the consultation paper lists a whole range of functions due to fall under the competence of the fund's competent authority. The envisaged split of competences and allocation of responsibilities between different competent authorities could achieve more clarity if the same approach would be used with regard to the tasks and functions due to be fulfilled by the management company's competent authorities. Such approach might help to avoid uncertainties, overlapping or gaps at the level of competent authorities.

On delegation of certain key functions of the management company, please refer comments on Box 8.

The UCITS competent authority should not limit itself to asking on the spot the management company for further information necessary to ensure compliance with the rules for which it is responsible. The overall allocation of attributions and responsibilities should be as clear as possible, in order to avoid unnecessary requests for information that may not serve the interests of either the management company, or of the UCITS. The splitting of functions foreseen in box 1 and box 5 (and 6) remains a cause for concern, if read in conjunction with box 8. The current approach for splitting supervisory attributions is not sufficiently clear in order to allow supervisory authorities to properly fulfil their duties, hence this organisational split may be difficult to carry out in practice. Furthermore, in practice it may only function with additional costs.

Subject to the comments as raised under point 9 here above, implementing measures should not only specify the activities which can be delegated, but also to whom such activities may be delegated.

The management of a UCITS implies a permanent activity towards the Member State of the UCITS. That is the reason for the parallel with the rule of division of legislative competencies and administrative relating to the rules of conduct of investment companies acting under free provision of services, mentioned in paragraph 6 of Box 5 (application of the law of the Member State of origin of the management company) is stripped of meaning. If a parallel is to be drawn with the MIFID directive it is with the rules applicable to the branch. These rules accord the essential role to the law and the authority of the state of origin.

I am therefore in agreement with the proposal of CESR, expressed in paragraph 5 after Box 5, that the authority of the UCITS Member State should assess the adequacy of the organizational rules of the Member State of origin of the management company in order to manage the UCITS in question.

Such a proposition is even more important given the degree of harmonization of the rules on the matter is much weaker in the context of the UCITS directive than in the MIFID[15] directive.

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

Questions for consultation:

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

Cf. comments under box 5.

In any case, in so far as the system of balance and separation of powers between the management company and the depositary is crucial for the proper functioning of UCITS, the relations between those bodies cannot be regulated by Level II measures, as is proposed by CESR[16].

21. Box 7: Cooperation between competent authorities

Questions for consultation:

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

Based on the detailed examples hereafter, one can easily conclude that dual supervision will have a significant impact

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15 Voir n° 7, sous Box 5.
16 Voir le point 6 de la Box 4 et le n° 6 qui suit.

on the efficiency of the approval process. Any impact of this type is clearly in contradiction with the aim of the UCITS IV efficiency package to facilitate the processes (notably through the revised notification procedure for cross-border registration).

Consider the following examples:

- Article 5 (a) b) of the Directive requires that the persons who effectively conduct the business of the management company must be of sufficiently good repute and must be sufficiently experienced with regard to the type of UCITS managed by the management company.

  Assuming that the assessment of whether such persons are adequately experienced with regard to a specific type of UCITS to be authorised by its home regulator can only be made by the latter in light of the specific characteristics of the UCITS concerned, it will not be sufficient for such persons to have been previously authorised by the home regulator of the management company at the time of the latter's authorisation. The procedure enabling the supervisory authority in the home country of the UCITS to ascertain that the relevant persons have adequate experience will take time and imply a duplication of the assessment initially made by the home regulator of the management company.

- A similar situation arises with regard to the authorisation of a risk-management process employed by the management company for the UCITS which it manages. It is not sufficient for the home regulator of the management company to approve this risk-management process at the time of authorisation of the management company. The home regulator of the UCITS will need to make its own assessment of whether the risk-management process is appropriate in light of the characteristics of the specific UCITS for which it has to grant authorisation.

The possibility of the management company delegating its investment-management functions also raises complicated prudential supervisory issues. This can be illustrated by the following example:

A management company set up in Member State A manages a corporate-type UCITS domiciled in Member State B. The management company has, as permitted by Article 5g of the UCITS Directive, delegated the investment management functions to another company in Member State C. The UCITS is distributed in certain EU Member States, and say, in Hong Kong and Japan.

- The delegation by the management company based in Member State A to the asset manager in Member State C will need to be approved by the regulator of either Member State A or B or both. The relationship between the management company and the asset manager may be governed by the laws and regulations of either of their respective countries, unless the UCITS' rules clearly indicate that the rules of the UCITS' domicile, i.e. Member State B, are applicable. In this example neither company is based in Member State B.

- The situation will be even more complicated if the asset manager is domiciled in a non-EU country, and it is accepted by the regulator in Member State A (management company regulator) and not by the regulator in Member State B (UCITS regulator). This conflicting situation could arise if, as required by Article 5g(d) of the UCITS Directive, there is cooperation between the regulator of Member State A and the regulator of country C but not between the regulator of Member State B and the regulator of country C. The resolution of such an issue will cause delay, add cost to the process and may create a conflict situation between regulators.

- Continuing the example, the foreign regulators, the Hong Kong Securities and Futures Commission (SFC) and the Japanese Ministry of Finance (MOF) would need to deal with regulators of two different countries with, potentially, different languages and rules. Their main concern is clarity over the rules that prevail. This will add inefficiency and cost to the process and, more importantly, may create incomprehension and uncertainty in the minds of the foreign regulators in the UCITS' importing countries.

- The foregoing example highlights the need for the UCITS' rules to clearly define the roles and responsibilities of each regulator.

Because the UCITS regulation is and must remain a product regulation, the supervisory responsibility for all services provided to the UCITS must remain entrusted to the UCITS' home Member State authorities acting as "lead" regulator. Even an enhanced cooperation regime between competent authorities cannot be a substitute for a lack of substance and thus represent the necessary means to supervise in the fund's home country.

In relation to any overlap in responsibilities of the authorities in the UCITS' home Member State and those in the management company's home Member State which may result from box 1, 5 and 6, it must be ensured that these issues are resolved to the full satisfaction of the authorities in the UCITS' home Member State, acting as "lead" regulator and having the overall responsibility for ensuring investor protection.

CHAPTER 3 - Authorisation procedure for UCITS fund whose management company is established in another Member State

22. Box 8: UCITS authorisation

Questions for consultation:

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?

In the event the principle of a passport for management companies is opted for on European level, I do agree with CESR's advice providing that the competent authority of the UCITS home Member State may authorise a UCITS only if it has approved the fund rules, the choice of the management company and the choice of the depositary, and that the UCITS competent authority cannot require UCITS to be managed by management companies having their registered office in the Member State. I also do agree that the UCITS should not be prevented from being marketed in its home Member State.

Paragraph 4 of Box 8 leaves it to the responsibility of the management company's Member State to control the measures taken by the management company, amongst other matters in terms of internal organisation in order to comply with rules and obligations regarding the functioning of UCITS managed by this company. This actually results in entrusting a national administrative authority with the control of the compliance by an entity under its supervision of other Member States' legal provisions. Such splitting between administrative and legislative powers is contrary to international public law principles.

Par. 4 and 5 of Box 8 relating to the approval of the management company's choice is based purely on the "satisfaction" of the UCITS home Member State authorities that the management company is duly authorized, is able to comply with the provisions which fall within its own remit of competence and that its choice does not prevent the effective exercise of the supervisory functions.

From a practical and regulatory point of view, one can wonder how the supervisory authority of the country of domicile of the fund could indeed exercise its duties efficiently as regards any aspect of the fund's functioning if it has no concrete residual power at all, which would be the case here. An attestation by the competent authority of the management company certifying that this company fulfils the conditions imposed by the Directive is a minimum requirement in this context but would not compensate for a lack of appropriate substance on central administration activities which would result from the passport. This leads me to stress once again that such substance is key in order not only to confer responsibilities on the fund's competent authorities, but above all to allow them to assume responsibilities without ambiguity.

As to the other documents that have to be filed for the authorisation of the UCITS, paragraph 7 includes a report on the risk management process, with respect to the specific type of UCITS for which the authorisation is requested. I would like to underline that, along with the maintenance of shareholder/unit holder register and the audit functions with regard to the UCITS, the risk management procedures are actually related to the constitution and the functioning of the UCITS itself and should be subject to control by the UCITS home Member State. A possible split of supervisory attributions between the competent authorities of the Management Company and the competent authorities of the UCITS in this area would bring additional complexities that an MCP regime is highly likely to create. CESR's approach is likely to raise contradictory views that may cause strong concerns, particularly if things start to turn sour. Such splitting of functions is therefore a cause for concern.

As to the description to the relationship between the management company and the depositary, it must be underlined that such relationship may vary according to the form taken by the fund (common fund or SICAV). The text of the advice is not clear as to the contents and to what extent this type of information must be detailed.

Furthermore, only the information given by the management company on delegation arrangements is not sufficient in my view. It should be also be made very clear that if the delegation of certain key functions of the management company was to be totally liberalised, as provided for example in MIFID, it is not two authorities which will have to be co-ordinated but three; one in charge of the management company, one in charge of the fund and one in charge of the fund central administration. This complexity will hardly be manageable by the regulators involved. This means that the competent authorities of the fund must, as a lead regulator, be empowered to impose their views and requests. It is useful to note that if such a regime does work in the context of the banking industry it is precisely because there is indeed appropriate substance in all jurisdictions, hence allowing cooperation between competent authorities.

Once again one can wonder how the competent authority in the fund’s domicile can assume any responsibility as to the consequences of the management company’s delegation of tasks if the decision to allow such delegation stays only with the competent authorities of the management company itself. Such delegation pertains more to the functioning of the fund (and to the funds assets under management) than to the management activities. It must be underlined that in some countries deposit guarantee schemes may cover securities positions as well, which would imply that the guarantee provided by a specific scheme could have to be granted even in case of default on the part of a foreign management company. It would be unthinkable therefore to accept such financial responsibilities without retaining any control in the domicile of the fund, especially in cases where the delegated tasks are entrusted to an entity located in a jurisdiction which does not benefit from an equivalent level of supervision. Such a condition would also be essential in order to preserve the reputation of the UCITS brand worldwide and not to jeopardise its image with competent authorities from non EU countries. I would like to advocate therefore an automatic consultation between the supervisory authorities of both the fund and the management company (and not only on a case by case basis as seems to be implied in CESR’s advice), in addition to, as the case may be, the drafting of execution measures as to the conditions under which the management company may proceed to a delegation of its tasks.

I do agree with paragraph 11 of Box 8 stating that the UCITS competent authority should have the power to require the management company to provide information and documents relating to assess the compliance with the rules falling within its remit, as well as paragraph 14 regarding the need for the approval by the UCITS competent authority of the replacement of the management company or depositary.

I disagree with CESR as to the need for a consultation with the management company competent authority in case of a refusal of the choice of the management company by the UCITS home authority and would suggest replacing this consultation procedure with a simple notification that the UCITS competent authority should address to the competent authorities of the management company.

Paragraph 13 relating to the measures for an orderly management/liquidation of the UCITS is not clear in its formulation: which authority is meant by “competent authority”?

Finally, I disagree with CESR when stating that the Commission should establish implementing rules designed to detail the authorisation procedure of the UCITS and of the choice of a management company authorised in another Member State. Such rules and any related rules with regard to a split of supervisory duties and allocation of supervisory responsibilities should be laid down at Level 1. Level 2 implementing rules with regard to detailed content, timeframe and ways to provide information to the UCITS competent authority about the management company and the detailed program of operation referred top under § 8 of Box 8 may receive support from the industry.

As to paragraph 16 relating to implementing rules dealing with cases in which disagreement occur between competent authorities and possible mediation, the procedures mentioned should in my view be addressed as early as

Level 1 of the legislation process, since a conciliation mechanism between authorities is of paramount importance in order to avoid a legal gap in the event of conflict.

Finally, the description of how the management company intends to comply with requirements falling within the remit of competence of the UCITS competent authority is a rather vague concept. It ought to be up to the competent authority of the fund to set the appropriate standards with regard thereto, and not to simply inform as to how the management company intends to comply with such requirements.

Disagreements between the UCITS authority and that of the management company in relation to the ability of the latter to manage UCITS of the first Member State should not/cannot be the subject of simple Level II measures, given how they relate to an essential element in relation to the supervision of UCITS. Provisions in the underlying directive are accordingly required[17].

17 CJCE, Köster, 25/70, Rec. p. 1161, point 6 ; 27 octobre 1992, Commission/Allemagne, C-240/90, Rec. p. I-5383, point 42.

CHAPTER 4 -
On-going supervision of the management of the fund

23. Box 9: Information flow to the competent authorities

Questions for consultation:

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

As a general remark I would like to stress that the measures proposed by CESR are so complex, numerous and time consuming that their implementation might actually result in more work and thus more costs for the fund industry players than is the case today.

The CESR advice suggests, in paragraph 3 of Box 9, that the Commission establishs implementing rules for the setting up of databases containing information to be shared by competent authorities to reduce the burden on the management company and UCITS, and rules on the format and content of the reporting obligations of these entities. One can ask the question as to how the sharing of information and the compliance with reporting obligations will be carried out in the meantime. This could be a source of concern.

Paragraph 4 states that the UCITS competent authority may request information directly from the management company only where it is necessary to verify compliance with the rules which fall within its competence as set out in Box 5 and in Box 6. In my view the UCITS competent authority should always be allowed to request information directly from the management company as is currently the case. If this were not a general principle the UCITS could not function in an efficient and secure manner. CESR actually recognises in the explanatory text of Box 10 (information flow between the management company, the UCITS and the depositary) the need for all entities involved in the running of a fund to provide and receive the information which is necessary to enable each of them to perform their specific duties in accordance with the Directive.

As regards on-the-spot verifications or investigations in the management company's home Member State (paragraph 5), CESR suggests to allow, amongst other matters, auditors or experts of the UCITS/management company to carry out such verifications at the expenses of the management company. One could question the independent character of such controls if performed by the auditor/expert of only the management company. Furthermore, it is also proposed that such verifications or investigations be subject to the "overall control" of the management company home Member State. I do not understand the exact meaning of the words "overall control". Does this mean only the procedure according to which the verifications should be carried out (as seems to indicate the second last paragraph of page 24) or does this confer more general powers of appreciation on the part of the foreign authorities for example in the verification process, its appreciation or its outcome, unacceptable in my view ?

With regard to the request for co-operation in carrying out an investigation or on-the-spot verification, the advice lists among the grounds for refusal of such co-operation the fact that the investigation/on-the-spot verification might adversely affect the sovereignty, security or public policy of the Member State addressed. How are these concepts defined? Is there not a risk that these reasons be systematically used by some authorities to avoid any verification on their territory?

Finally, as regards paragraph 10, I do agree with CESR that in the event a passport regime for the management company is established, the Commission should elaborate implementing measures on the co-operation arrangements necessary to give effect to the obligations pertaining to them.

The wording of the advice in this regard is, despite its inspiration by other financial directives, inadequate to the extent that it is not clear enough as to the exact responsibilities and powers of the UCITS competent authority and of the Management Company competent authority.

This raises the question as to when the authority of the management company will find it necessary, in order to exercise control over it, to proceed to investigations with the depositary. It is not appropriate to invert the roles. It is up to the depositary to control the management company.

24. Box 10: Information flow between management company, UCITS and depositary

Questions for consultation:

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

I do agree with CESR that adequate arrangements should be established in the event a management company passport is established to ensure the flow of information between the management company, the UCITS and the depositary. However, given the extremely important character of this information flow for the efficiency of the functioning of the fund, but also for reasons of investor protection, it would be deemed necessary to adopt already at this stage rather detailed measures on Level 1 rather than to provide for a general obligation for all parties to sign an arrangement and to delegate the Commission to adopt detailed implementing measures later.

Once again, the principles outlined in CESR's advice in terms of information flow seem to be easy to apply in theory, but could prove more difficult to concretise in real life. I agree for example that the depositary should have access to the books and records held by the management company, but the question arises as to how this will be achieved in practice and in technical terms?

The flows of information between the management company, the UCITS and the depositary are crucial for the proper functioning of the UCITS in order to protect the interests of investors.

The present proposals from CESR are insufficient and do not meet the requirements of the request for advice/mandate which was addressed to it by the Commission, namely the request to establish an overall series of practical and operational measures guaranteeing a harmonious functioning of UCITS without aggravating risks for investors.

25. Box 11: Auditors

Questions for consultation:

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

Independent auditors play an important and integral part in the overall supervision and oversight of a UCITS. In addition to auditing the accounting information given in the annual report and financial statements of a UCITS, auditors are also required by many regulators in their respective jurisdictions to carry out additional work, such as compliance with anti-money laundering rules, codes of good conduct, service organisation reviews, IT security, etc. Auditors work very closely with regulators and have clear reporting duties in the event that serious weaknesses in internal controls or breaches of regulations are uncovered.

Auditors not only audit financial statements but, as long as it could have a material impact on year-end financial statements, also check that the NAV calculations during the year are accurate. In some countries, when there has been a NAV calculation error, auditors must review the compensation process and ensure that it has been applied in accordance with the legislation applicable to the UCITS. The amount of compensation can itself have a significant impact on the financial statements.

The auditor of the UCITS has to perform its duties in relation to the UCITS separately from the auditing of the financial statements of the management company. If the audit of the management company were to be performed by a separate audit firm from the one responsible for the audit of the UCITS and acting under the regulations of a different country than the domicile of the UCITS, as would be more likely to happen in the case of the introduction of the management company passport, both auditors would necessarily have to cooperate, and additional risks may be inherent in a more complex audit process with additional potential conflict situations as conditions for auditing UCITS and Management companies do vary among member states, notwithstanding the existence of an information-sharing agreement as suggested by CESR. These risks may be numerous: there could be, for example, differing eligibility requirements.

Therefore it is important that the information pertaining to the fund and the people involved in the fund auditing process are based in the country of the fund in order to ensure a smooth audit.

Moreover, if only a portion of the administrative functions (as described in Annex II to the UCITS Directive) were to be performed by the management company in its home country rather than in the UCITS' home country, the audit process would become less efficient, necessarily increasing its costs as well as the risk of error, not to mention an additional workload and responsibility for the competent authorities who should ask for information and documents from the respective auditors of the UCITS and of the management company to monitor compliance with the rules which fall within their competence.

Even periodical travelling to the management company's home country or delegation to a local auditor can by no means ensure an ongoing proper supervision as is presently performed by the auditor.

CHAPTER 5 -

Dealing with breaches of rules governing the management of the fund

26: Box 12:

Questions for consultation:

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

I do agree with CESR's conclusion that in the case of UCITS managed through branches or under the freedom to provide services the UCITS competent authority should be able to impose directly appropriate administrative sanctions and measures for violation of the rules which fall within its exclusive remit. I also agrees that if the conditions under which the choice of the management company was approved are no longer fulfilled and if the interests of unit-holders are prejudiced or the management company has seriously and/or systematically infringed the provisions adopted pursuant to the Directive, the UCITS competent authority should have the power, as a last resort measure, to withdraw the approval of such choice, and to require the management company to suspend the issue or redemption of units in the interest of the unit-holders or of the public. The same is true with the conclusion expressed in paragraph 3 of the explanatory text of Box 12 that there are violations of laws that refer to rules falling within the exclusive competence of the UCITS competent authority that need to be enforced directly and cannot be subject to an evaluation by the management company (e.g violation of the provisions on disclosure). However, securing sufficient supervision and enforcement tools will be at best difficult, if not impossible in practice, even in the event a mechanism which recognizes the right for an authority to impose sanctions for violations of rules falling within its remit upon entities established abroad.

I am in serious doubt as to whether the authority of the UCITS can take effective measures as regards the management company in the absence of a branch of such management company in the Member State of the UCITS.

One should question the possibility/feasability for the authority of the Member State of the UCITS to impose sanctions of a financial nature on a foreign management company, as proposed by CESR at paragraph 3 of Box 12.

Box 13:

Questions for consultation:

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

At the outset, the question as to whether an investor can sue a foreign management company before the courts of the Member States of the UCITS is not an question of national law but is dealt with in accordance with EC Regulation 2001/44/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation').

In this regard, two provisions of the Brussels I Regulation appear at first sight to be able to provide the basis for introducing an action on the part of the investors before the courts of the Member State of the UCITS against the management company. On the one hand, Article 5(5) of Regulation 2001/44/EC provides that a person domiciled in a Member State may, in another Member State, be sued as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated. The same rule applies in matters relating to a contract, in the courts for the place of performance of the obligation in question (Article 5(1).

However, an analytical approach of the text (obligation by obligation) in conformity with the jurisprudence of the European Court of Justice, open the door to several point of contest on the subject. As a consequence, only the competence based on the existence of a secondary establishment of the management company in the Member

State of the UCITS (Article 5(5) provides a reliable solution for investors. It is an argument which provides further support for imposing the requirement of having a branch in the Member State of the UCITS.

CESR suggests that Member States promote the setting-up or development of efficient out-of-court complaints and redress procedures for the settlement of consumer disputes concerning management of UCITS. Once again the envisaged measures are not clearly detailed and the concrete result of such advice might take a while before being recognisable.

As regards the suggestion that unit-holders should receive appropriate information before they invest concerning the existence of any out-of-court complaint and redress mechanism, my view is that this would be useful but it would also put an additional burden in terms of disclosure and could entail legal risks in some situations.

KBL European Private Bankers S.A. (KBL)

KBL European Private Bankers S.A. (KBL) is the driving force behind European Private Banking within the KBC Group, a multi-channel, independent bancassurance group with 12 million customers and 50.000 employees, listed on EuroNext and in Luxembourg, a member of the Bel 20 and one of the highest stock market capitalisations in Europe,.

As the Private Banking competence centre within the KBC Group and supported by a network of "pure - play" private banks in Germany, Belgium, France, Luxembourg, Monaco, the Netherlands, the United Kingdom and Switzerland, **KBL European Private Bankers** offers solutions adapted to the private banking needs of a large client base across Europe wishing to entrust the management of its wealth to a well-known banker practicing an original management model. This original model is based on one hand on the entrepreneurial spirit of local managers who enjoy a great degree of latitude in commercial development and on the other hand offers each entity solid support in the group, thanks both to skill-sharing and to a range of services supplied by KBL in Luxembourg via the Hub Service Centre.

Key Figures per end 2007:

Assets under management	EUR 54,5 billion
of which private clients	*EUR 41 billion*
Equity	EUR 1,7 billion
Net profit	EUR 208,3 million
Solvency ratio (Tier 1)	12,7%
Solvency ratio	21,1%
Workforce	3500 employees of which 1200 in Luxembourg

Beyond the pure Private Banking activity, KBL, being based in Luxembourg, Europe’s n°1 and the world’s n°2 investment fund centre, focuses also on the full range of **specific services required by undertakings for Collective Investment** and other institutional investors. As such KBL services the full range of the group-sponsored Luxembourg domiciled investment funds as well as an important number of third party funds entailing that with more than 800 funds and fund assets of over € 50 billion under custody and administration, KBL ranks among the largest players in the Luxembourg investment fund industry.

Rafik FISCHER

Directeur – Head of Global Investor Services, KBL European Private Bankers (S.A.)

Master in Law from the Université de Liège (c.l.) and Post-Graduate of the Diplomatic Academy of Vienna

Since 1989	**KBL European Private Bankers (S.A.)**
2007 – today	Head of Global Investor Services in charge of the entire range of services and products targeted towards the professional and institutional investors as well as the coordination and purvey of product and service distribution to and through the whole of the KBL EPB-Group network
2001 – 2007	Chief Operations Officer entrusted with the management responsibilities dealing with the entire Operations entities of Kredietbank Luxembourg.
1997 - 2001	Head of UCI and Global Custody Division
1991 – 1997	Head of the UCI Consulting/Marketing Department.
1989 – 1991	Senior Manager in the UCI Consulting Department.

Since 2002	Director of **Kredietrust,** the Asset Management Company of KBL
Since 2007	**Chairman of the Board** of Directors of EFA (European Fund Administration), a leading Luxembourg specialist service provider to the investment fund industry, largely owned by Kredietbank Luxembourg**.**

In addition Mr. Fischer is representing KBL and KBC on the boards of all their Luxembourg-based Investment Funds, as well as sitting on the boards of a number of reputable third party investment funds established in Luxembourg.

Other :

2004 - today	Luxembourg Representative at the Expert Consultative Working Group on Investment Management of CESR, the Committee of European Securities Regulators.
2004 – today	Director of ABBL, The Luxembourg Banks' and Bankers' Association
2004 - today	Director of AGDL, The Luxembourg Bank Deposit Guarantee Association
2001 - today	Director and member of the Audit Committee of CETREL, the electronic payment and cash clearing institution for the Luxembourg Financial Centre.

1999 - today	Nomination by the Secretary of Finance to the Committee for the Development of the Luxembourg Financial Centre.
1998 - today	by appointment of the Luxembourg Council of Ministers, **Member of the Board of Directors of the Luxembourg Supervisory Authority for the Financial Sector, the Commission de Surveillance du Sector Financier (C.S.S.F.)**, member of the CSSF Investment Fund Committee (since 1994), CSSF Pension Fund Committee (since 1997), CSSF Prudential Regulatory Committee (since 1998).
1995 - today	Director and Former Chairman (1998 -2001) and Vice-Chairman (2001-2007) of ALFI, the Luxembourg Investment Fund Association.