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The Committee of European Security Regulators (CESR)
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**Consultation on the Call for evidence on the request for advice to CESR on the UCITS
asset management company passport; Reference 08-572**

19 August 2008

Dear Ladies and Gentlemen,

It was with great interest that we have read your call for evidence on the subject of the UCITS management passport. We are pleased to have the opportunity to present our position on this important subject, especially on those issues which directly affect the Superfund Group of investment companies.

Point 3.1

CESR is asked to advise on the elements that could be used to distinguish the home Member State of the management company, that of the UCITS fund and that of the depositary in situations where use is made of the management company passport. Particular consideration should be given to the case of UCITS funds established under contractual or trust law.

In our opinion, the key distinguishing elements are threefold: the country of incorporation of the Management Company, the UCITS fund and the depositary. This kind of division must take into account the free provision of services via the set-up of branches (of the management company or of the depositary in another member state) or via the provisions of the MIFID Directive (i.e. the free provision of services in relation to advisory activities).

A clear distinction must be drawn between UCITS funds with a corporate structure and UCITS funds with a contractual structure. In the case of the former, the management company has its seat in the country where it is incorporated, and the UCITS fund in the home country of the corporate structure (SICAV etc.). The custodian bank should be situated in the same country as the UCITS fund. For UCITS funds with a contractual structure, the management company is situated in the home country where the management company is established. Although the contractual structure is not a legal person, it seems plausible that it could be established under the rules and legislation of a different country than the one of the management company. In this case, the competent authority would be the one of the chosen state and thus legislation. This would for example become valid if a French management company decides to create a FCP under Luxembourg legislation. The management company would be supervised by the AMF, and the FCP by the CSSF. The custodian bank should be situated in the same country as the UCITS.

A concrete example would be the following situation: The management company is situated in Austria, the UCITS fund in France. The depositary should be in France (i.e. either a French credit institution or a French branch of an EU incorporated credit institution). Another example is a management company in Austria which has set-up a branch in Luxembourg. The management company can be a management company of a Luxembourg fund, and the depositary will be either a Luxembourg credit institution or a Luxembourg branch of an EU incorporated credit institution.

Point 3.2

CESR is asked to review the current specification of provisions of UCITS law that are binding at the level of the management company and at the level of the fund and depositary, and advise on whether the envisaged allocation of responsibilities are sufficiently complete and effective to cater for situations where the management company and UCITS fund are in different Member States. In particular, CESR is asked to identify and propose solutions to any identified gaps in supervision or overlapping responsibilities that might arise if the management company and fund/depositary are located in different Member States. CESR is asked to advise on whether formal structures (e.g. colleges of supervisors or MoUs) are needed to underpin cooperation between competent authorities responsible for management company and the UCITS fund.

In our view, the current specification of provisions of UCITS law which are binding at the level of the management company and at the level of the fund and its depositary are sufficiently complete and effective to cater for situations where the management company and the UCITS fund are situated in different Member States. However, we are convinced that these provisions should be completed by specific provisions relating to cross-border cooperation between regulators and supervisors. We believe that these provisions should cover the following two key points: firstly, cross-border supervision of the management company (what needs to be transmitted to the UCITS supervisor by the management company), and secondly, specific cross-border enforcement points.

A useful starting point as regards cross-border cooperation between supervisors could be the Luxembourg “Long Form” report, which shows in detail the UCITS organizational structure and the interaction with the relevant actors involved (custodian bank, transfer and register agent etc.). This report could be drafted in English and sent to all regulators concerned by the UCITS structure.

As far as overlapping is concerned, the supervisory authority of the management company should be responsible for the supervision of the activities carried out by the management company.

Furthermore, we are of the opinion that the UCITS accounting records and registry of unit holders should remain under the supervision of the UCITS supervisory authority and should therefore be delegated to a service provider located in the UCITS country of incorporation. This could either be the custodian bank or a different specialized service provider. The activities of this service provider should however be controlled by the management company. This would imply that the management company shall be given the powers and authority to either conduct an on-site inspection or use any other means to effectively exercise its duties (e.g. third party audit etc.).

We believe the supervisory authority of the UCITS fund should be responsible for the supervision of the UCITS fund, as well as for investor protection. The creation of a formal College of Supervisors is an effective addition to the current supervisory system, but should in our view be limited to the solution of issues arising from the legal and regulatory provisions of the UCITS law (see above: specific provisions relating to cooperation between supervisors).

Point 3.3

CESR is requested to advise on the need for and design of mechanism or process which will allow for checking that qualifications of the management company (authorised in another Member State) are commensurate with the demands/risks embedded in the investment policy of the UCITS fund.

CESR is asked to advise on any duly motivated circumstances under which a management company could be refused permission to manage/set up a fund in another Member State.

To begin with, we firmly believe in the need for the management company to provide evidence that its infrastructure (material as well as human), its organization, the know-how and risk management tools are sufficiently well developed to cope with the possible specifications of the investment policy of the fund. Furthermore, we think that cross-border recognition of the management company passport will prove sufficient and successful to address the adequate level of qualification of the management company in relation to the investment policy of the UCITS fund. This could be reached by establishing a mechanism by which the UCITS supervisor requests the management company supervisor to confirm that the management company's infrastructure and internal processes are satisfactory with respect to the risks and investment policies of the UCITS fund.

The supervisory authority of the UCITS fund may refuse the management company to manage or set up a fund if it can prove certain lacks of the management company, especially in terms of adequate infrastructure and internal risk management processes. To avoid conflicts of certain requirements between supervisors, cross-border recognition should be enforced by law. Any arising dispute could be solved at the level of the College of Supervisors.

Point 3.4

CESR is asked to advise on the conditions (e.g. in terms of direct or indirect access to or control of certain functions or processes) needed to ensure that the supervisor of the UCITS and the supervisor of its management company have sufficient means and information to discharge their duties effectively.

CESR is asked to advise on the obligations of information and conduct of business that the management company owes to the UCITS fund and depositary (and vice versa).

CESR is asked to advise on the mechanisms or procedures that should be envisaged to ensure the timely and effective exchange of information between a UCITS supervisor and a supervisor of a management company (or vice versa).

We consider the Long Form report for each UCITS fund, as implemented in Luxembourg, an indeed useful tool to ensure ongoing and effective cross-border supervision.

We also believe that the management company needs to be informed extensively by the custodian bank and the fund and/or the parties to whom certain functions have been delegated (i.e. fund accounting, TA). This information duties cover reports, online access to systems or any other tool and channel of information. In other words, the management company needs to know at each point what is going on within the fund and has to make sure it receives the necessary pieces of information.

Therefore, the supervisory authority of the management company has indirect access also to the activities and figures of the fund.

As regards information requests by supervisory authorities, we believe that the following processes do indeed make sense: Any request of the supervisory authority of the management company concerning the activities or other elements of the fund should be addressed to the management company. A copy of the request should be forwarded to the supervisory authority of the fund, and vice versa.

A supervising body (e.g. of the management company or the UCITS) should in our view be in the position to possibly request from another supervisor (e.g. of the UCITS or of the management company) details about certain points, or the launch of specific on-site inspections. Obviously, this request must be duly grounded by the requesting supervisor.

Point 3.5

CESR is asked to advise on any mechanisms or information flows that are needed to ensure that the respective competent authorities are duly and quickly informed of any breach of the rules governing the management of the fund; and the conditions under which effective enforcement action can be undertaken.

CESR is invited to advise on the need for and form of any additional measures to facilitate effective enforcement action by authorities responsible for a contractual form UCITS fund when the management company is established in another Member State.

In our opinion, the entity or entities in charge of monitoring the rules governing the management of the fund need to inform the management company about each breach of these rules. If the respective breach entails an obligation in the country of the fund to inform the supervisory authority of the fund, the same information is to be transmitted to the supervisory authority of the management company.

The supervisory authority of the management company will, if applicable, enforce the management company to indemnify the fund or the investors as requested by the supervisory authority of the fund.

I would be indeed delighted to continue the exchange of views with you. Please feel free to contact me anytime on questions that may occur or if I may be of any further assistance.

Sincerely yours,

Markus Weigl