



Verband der Auslandsbanken
in Deutschland e.V.

Association of Foreign Banks in Germany

INTERESSENVERTRETUNG
AUSLÄNDISCHER BANKEN,
KAPITALANLAGEGESELLSCHAFTEN,
FINANZDIENSTLEISTUNGSINSTITUTE
UND REPRÄSENTANZEN

REPRESENTATION OF INTERESTS
OF FOREIGN BANKS,
INVESTMENT MANAGEMENT COMPANIES,
FINANCIAL SERVICES INSTITUTIONS
AND REPRESENTATIVE OFFICES

The Committee of European Securities
Regulators
11-13 avenue de Friedland

75008 Paris

22. August 2008\VA

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

Ref.: CESR/08-572

Dear Sir or Madam,

The Association of Foreign Banks in Germany is very pleased to have the opportunity to comment on your Call for Evidence on the Request for Advice to CESR on the UCITS Asset Management Company Passport.

We represent foreign-owned investment management companies located in Germany as well as those located abroad and distributing their fund units in Germany on a cross-border basis. In addition to this and due to our cross-sectoral approach, we have banks acting as depositaries for UCITS among our members. Therefore, we consider the issue of the UCITS management company passport (the "MCP") from the viewpoint of both the management companies and the depositaries concerned.

I. Background

First of all, our Association welcomes the efforts of the Commission and CESR to develop a regulatory framework in which the MCP can become reality. Our members are to a large majority operating internationally and/or on a cross-border basis, so we would welcome the flexibilization of the internal market for UCITS funds that the MCP will enhance.

Since the Directive 2001/107/EC entered into force in 2002 the MCP is, in theory, a reality. We did not and do not understand that Member states were reluctant to implement it in

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practice, and that until now no material efforts have been undertaken in this respect. Consequently, we appreciate very much that the Commission is considering action, and we would like to encourage CESR to make its best efforts to support the Commission.

This basic consideration implies that our Association strongly supports the MCP.¹

II. Challenges to a Passport regime and possible road map

However, we cannot ignore that there are certain obstacles for a MCP at the present stage. This is due to the fact that in spite of the UCITS Directive, certain fields of UCITS regulation are dominated by national law, providing for specific national rules which differ largely from one Member State to another. The most important areas of lacking harmonization we perceive are:

- **Fund administration:** There are differences between Member States in the area of basic features such as NAV calculation, accounting practices and the infrastructure requirements for the issue and/or redemption of fund units.
- **Supervisory function** and legal responsibility of the depositary with regard to the transactions to be carried out for or by the UCITS: Some Member States provide for a principle-based approach of oversight, while other Member States require the depositary to monitor every transaction in detail and to act in the investors' interests when necessary.
- **Risk management** of the UCITS (carried out by the UCITS itself or by a management company, in conjunction with the depositary oversight function).

The said differences lead to the assumption that, at present, there are certain obstacles to the principle of mutual recognition of supervision for management companies. It involves also that, due to the lack of harmonization, depositary functions must be carried out and supervised under the local law applicable to the UCITS. We conclude that, at the present stage of harmonization, it would not be possible that depositaries act cross-border, so they should be domiciled in the UCITS home Member State.

We would therefore propose a step-by-step approach to the MCP:

a) As a first step, an initial MCP regime could be introduced. We do not see any major obstacles for this. The asset management function could be performed by management companies in other jurisdictions than the UCITS home Member state, because investment limits and eligible assets are harmonized to a high degree. Provided that supervisory authorities exchange necessary information, a mutual recognition is possible. Though conduct of business rules and requirements for internal organisation are not yet

¹ In addition to this, there should be efforts in the long run to fully integrate the internal market for UCITS-related services. UCITS, management companies and depositaries should be free to choose their place of business and should be able to provide cross-border services. The UCITS passport (product passport) already exists, the MCP passport is currently discussed, the remaining depositary passport would be a project for the future.

harmonized in detail, this should not pose any problems. The example of the former ISD shows that even a principle-based approach to these rules is sufficient to achieve mutual recognition in the internal market.

As regards risk management of the UCITS carried out by its management company, the risk management processes are to a large extent IT-driven. It would involve high IT costs for a management company operating under one jurisdiction to build up IT infrastructure designed to conduct a risk management process compliant to the law of another jurisdiction. Therefore, further harmonization of risk management and risk management processes exceeding the level of harmonization currently available would be necessary in order to allow for a mutual recognition approach to supervision, so that the management company could use the same IT environment for the risk management for UCITS in different Member States; the risk management would be supervised by the management company's home Member State. We think that this kind of harmonization should be possible at level 3 under the Lamfalussy procedure.

As depositaries and management companies work closely together, it must be ensured that they act on a comparable accounting basis. Therefore, accounting principles and NAV calculation should be reviewed, and harmonised to the necessary degree. Our Association members being depositaries show concern that, given existing national differences in accounting/NAV calculation, the workflow on a cross-border basis between depositaries domiciled in the UCITS home Member State and management companies acting cross-border could seriously be impeded, and this could give rise to supervisory concern. Due to the short consultation period, we were not able to assess this in more detail, but we would suggest that CESR undertakes some research with respect to this issue.

b) Nevertheless, once that the said degree of harmonization is achieved, we would advise not to stop the integration of the internal market at this point. If fund administration functions were harmonized to a larger extent, this could enable an integrated MCP, providing for fund administration to be conducted in and under the law of the home Member State of the management company.

Once this was done, the depositary passport would be the natural next step after a MCP is operable. However, we do not think that the depositary passport could be done within the short time left for the UCITS IV legislation process.

c) The following table summarizes further tasks of harmonization that would be necessary for applying the principle of mutual recognition to the supervision of specific functions and tasks of management companies and depositaries. It shows also the tasks relevant for a MCP to be implemented, that are or should be harmonized to a degree that full mutual recognition of supervision should not pose any problems.

Task	Areas and degree of harmonization for mutual recognition	Appropriate procedure under the Lamfalussy approach
Investment (=asset) management	• Internal organisation of the management company (MC) (high level principles) • Conduct of business rules (high level principles) • Eligible assets and investment limits • Risk management • Fund administration: accounting and NAV calculation	Level 1 (already done) Level 1 (already done) Levels 1 and 2 (done) Level 3 (under discussion) Level 1 and/or 2
Fund administration	• Infrastructure for the issue and/or redemption of fund units	Level 2 and/or 3
Depository functions	• Safekeeping • Supervision of the asset management conducted by the management company • Degree of direct legal responsibility vis-à-vis end investors	Level 1 Level 3 Level 1

III. Questions raised in the Call of Evidence

On the basis of what is set out above, we would like to answer the questions raised in the Call for Evidence as follows:

3.1. Definition of domicile

For all the entities concerned, the law governing the incorporation or (in the case of a UCITS in the contractual form) the fund rules is decisive.

Under a MCP the management company and the UCITS have different home Member States. However, as long as there is no depository passport, the depository would have to be domiciled in the UCITS home Member state.

We do not think that the fact of management company and depository being in different Member states and being governed by different national supervisory regimes is problematic, if two pre-requisites are met. First, the relevant tasks of the management company must be sufficiently harmonized, so the depository and the management company would work together in a very similar way no matter in which Member State they are localised, respectively. Second, the depository oversight on the management company's risk management should be limited to a high level oversight. The reason for this is that risk management is IT driven. Should the oversight function of depositories require in-depth analysis of portfolio characteristics (a task that we see as a natural duty of the management company), it would be difficult and costly for depositories working with management companies from different jurisdictions, because they presumably could not use the same IT resources.

3.2. Applicable law and allocation of supervisory responsibilities

The European Passport's underlying principle is mutual recognition. Therefore, it is evident that the supervision tasks are allocated to the authorities of the respective home Member State of UCITS, management company and depositary.

There should be no double supervision and/or double licensing requirements. They could be avoided by achieving the necessary degree of harmonization (cf. II.).

3.3. Authorisation procedure for "cross-border" UCITS funds

The authorisation procedure for such UCITS should focus on the law applicable for UCITS in the UCITS home Member State (fund incorporation, fund rules and prospectus) and, as the depositary would be located in the same Member State, the license of the depositary.

The authorisation of the management company should not be subject to the authorisation procedure for the fund because the management company's licence is passported on the basis of mutual recognition, and the notification procedure provides for enough information for the UCITS home Member State authorities.

3.4. On-going supervision of the management of the fund

The management of the fund is conducted by the management company. Therefore the management company home Member State should be responsible for the supervision, mutually recognised by the UCITS home Member State.

The rules governing the fund management have to be sufficiently harmonised (cf. II.). The management company's home authority has to ensure that the records are kept in an orderly manner and that it is properly informed about the fund rules. It should not be necessary for the management company home authority to consider the law of the UCITS home Member State.

3.5. Dealing with breaches of rules governing the management of the fund

The home state authority of the management company should be in charge of preventing such breaches. In case of a material/ irreparable breach of the law, it should inform the UCITS home state authorities in order to stop the issue of fund units and/or revoke the authorisation of the fund.

In case of any further queries, please do not hesitate to contact us.

Best regards,

gez. Wolfgang Vahldiek

gez. Sabine Kimmich