Guernsey Financial Services Commission

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103 Rue de Grenelle
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FRANCE

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Please use our reference on all correspondence

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Dear Sirs

Consultation Paper: ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive in relation to supervision and third countries.

The Guernsey Financial Services Commission ("the Commission") welcomes the opportunity to respond to the consultation paper issued by the European Securities and Markets Authority on 23 August 2011 regarding possible implementing measures of the Alternative Investment Fund Managers Directive ("AIFMD") in relation to supervision and third countries.

The Commission is the regulatory body for the finance sector in the Bailiwick of Guernsey, including the regulation and supervision of collective investment schemes, both open and closed ended. Under Guernsey's Protection of Investors legislation all collective investment schemes, whether open or closed-ended, must be either authorised or registered by the Commission under that Law and accordingly must comply with the relevant rules applicable to the appropriate class of collective investment scheme. In addition any service provider established in the Bailiwick including, but not limited to, firms acting as fund administrators, fund custodians or fund managers must be licensed and regulated by the Commission.

As at 30 June there were 256 open-ended collective investment schemes (comprising 1,659 individual investment portfolios), authorised by or registered with the Commission with a total net asset value of £59 billion. Approximately 30% of these schemes invested in EU member states. In addition there were 609 authorised or registered closed-ended investment funds with a total net asset value of £122.3 billion, of which just over 50% invested in EU member states.

The Commission is an ordinary member of the International Organization of Securities Commissions ("IOSCO") and is a signatory to the IOSCO Multilateral Memorandum of Understanding ("MMoU").

Detailed information relating to the Commission and the regulatory regime within the Bailiwick can be found on the Commission's website www.gfsc.gg.

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Delegation

Q1. Do you agree with the above proposal? If not, please give reasons.

The Commission does not currently agree with the proposal as set out in the consultation paper as we consider that the proposal is not sufficiently clear to allow us to make a complete assessment as to the actual approach that is to be taken in considering whether a third country's regulatory regime is considered "equivalent" with that applicable within the EU.

Point 5 of Box 1 of the consultation paper states that:

"The third country undertaking should be deemed to satisfy the requirement under Article 20(1)(c) when it is authorised or registered for the purpose of asset management based on local criteria which are equivalent to those established under EU legislation and is effectively supervised by an independent competent authority".

Section 10 of the Explanatory text on page 9 of the consultation paper goes on to state that:

"As far as the equivalence assessment of the legislation is concerned, this should be made by comparing the eligibility criteria and the on-going operating conditions locally applicable to the thirds country undertakings against the corresponding requirements applicable in the EU for the access to the business and the performance of the relevant functions. Please refer to Box 67 of ESMA's draft advice on the implementing measures under Parts I to III of the Commission's request".

The Commission cannot see that there is any clear explanation as what is, or will be, considered within the scope of any equivalence assessment.

Box 67 referred to in the consultation paper sets out types of institutions that should be considered to be authorised or registered for asset management and subject to supervision but does not appear to provide any guidance or clarification as to what is required in assessing equivalence. Section 35 of IV.IX Possible Implementing Measures on Delegation (page 131 of the Consultation Paper: ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive of July 2011) indicates that ESMA is working on issues relating to third countries and will bring forward proposals for consultation later this year. However, we cannot see what definitive proposals have been made as there is insufficient detail to enable a proper assessment to be made.

The Commission is concerned that the proposals as drafted do not confirm what specific approach is to be taken when assessing equivalence. For example, is it intended that third countries will be assessed in detail by comparison between their national legislation and regulations against the specific requirements, not only of the AIFMD, but also what are considered to be the relevant requirements (rather than all) of other relevant EU Directives including for example, MiFID, the Capital Requirements Directive and UCITs? Or is it intended that the specific contents of national legislation will not be subject for a full "line by line" comparison with relevant EU legislation, rather the focus will be on the outcomes of the legislation/regulation to consider that investors falling with the scope of the third country are not worse off or disadvantaged compared to where they would be within the EU? There is also a concern that, in the absence of the specific approach to be adopted, individual member states may have the ability to establish their own approach to equivalence which would not lead to a "level playing field".

You will appreciate that, for a third country, these are significant issues as the conclusion may require the jurisdiction to undertake a full and detailed comparison of its national regime against that

applicable in the EU potentially covering a number of directives. The Commission requests that ESMA, within the advice to the European Commission, provides sufficient clarity to this issue to ensure that expectations and regulatory requirements within the AIFMD are clear and there is no scope for ambiguity and/or misunderstanding. The Commission also requests that ESMA should play sufficient part in the overall process to ensure that a "level playing field" is ensured when considering third country equivalence.

The Commission considers that an "outcomes" approach is appropriate when considering the regime applicable in a third country such that the overall conclusion confirms that investor protection is not compromised. It is recognised that it would be necessary to provide guidance and confirmation as to the matters that ESMA consider should fall within an "outcomes" assessment.

The IOSCO Objectives and Principles of Securities Regulation already set out a broad general framework for the regulation of securities, including the regulation of (i) securities markets, (ii) the intermediaries that operate in those markets, (iii) the issuers of securities, and (iv) the sale of interests in, and the management and operation of, collective investment schemes.

The objectives of that framework are:

(1) To protect investors.
(2) To ensure fair, efficient, and transparent markets.
(3) To reduce systemic risk.

The IOSCO Principles and underlying Methodology have a key role in promoting a sound global financial regulatory system. They are used by the World Bank/International Monetary Fund ("IMF") when undertaking Financial Sector Assessment Programs evaluations and by countries doing self assessments. The Bailiwick of Guernsey has itself been subject to scrutiny by the IMF on its compliance with IOSCO principles. The IOSCO methodology provides guidance to assessors and assessed countries on how to assess the level of implementation of the IOSCO principles in a certain country. There is therefore already an established credible framework in place that is understood by global securities regulators that could be used as the foundation for any assessment programme and which would ensure consistency, rather than having another model that regulators have to work with.

It is appreciated that assessments of "equivalence" are likely to take much time and resource to undertake and the Commission requests that guidance be issued at an early date as to the information that will be required to be submitted by a third country to assist in the process as well as some indication as to when assessments may begin and how long each assessment is reasonably expected to take to complete.

Q2 In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation.

The Commission supports, in principle, the suggestion set out above. As stated above the Commission is already a signatory to the IOSCO MMoU of May 2002. In addition, the Commission complies with the provisions of the IOSCO Technical Committee Principles for Supervisory Co-operation when entering into formal memoranda of understanding and already co-operates with other regulatory authorities utilising the various means referred to in that document. The IOSCO documents referred to in the consultation paper already form the foundation of ongoing co-operation between securities regulators and it is considered that they provide a sufficient basis on which to proceed.

The issues upon which the Commission is unclear in respect of the proposed basis relate to the provisions at 4d) and 4e) of Box 1 of the consultation paper in respect of the breach of regulations and more importantly "enforcement actions can be performed in cases of breach of regulations". It is unclear whether the issue relates to identified breaches of EU regulations or equivalent breaches in third countries. The Commission assumes that the latter is correct as it does not understand how EU regulatory requirements can be imposed outside the scope of the EU itself.

The Commission supports the proposal set out in section 8 by which the co-operation arrangements (based upon the two IOSCO documents referred to in the question) could take the form of a multilateral memorandum of understanding centrally negotiated by ESMA which would obviate the need that third country regulators conclude different bilateral co-operation arrangements and would ensure a level playing field. This proposal is considered to be the most practical way to ensure co-operation between EU and third country authorities on a fully consistent basis and ensures that individual arrangements cannot replace the agreed co-operation arrangements applicable to other jurisdictions. The Commission considers that it is important that ESMA has the power to bind member states to such a multilateral approach, so strengthening the overall consistency of approach undertaken.

Depositaries

Q3 Do you agree with the above proposal? If not, please give reasons.

In respect of the definition of "equivalence", our comments to Q1 above are valid. It is unclear if it is expected that third country depositaries will have to comply fully under its national regulatory obligations with the EU regime or whether the national regime's outcomes will suffice.

Q4 Do you have an alternative proposal on the equivalence criteria to be used instead of those suggested in point b above?

No, the criteria are not sufficiently detailed or defined to be able to provide alternatives.

Supervision

Q5 Do you agree with the above proposal? If not, please give reasons.

Due to uncertainties relating to a number of issues within this section the Commission cannot currently provide a definitive response.

Point 2 of Box 3 states that "The third country competent authority should assist the EU competent authorities where it is necessary to enforce EU legislation and national implementing legislation breached by the entity established in the third country". This would appear to imply that a third country competent authority would either proceed in its own jurisdiction with an action for a breach of EU legislation and national implementing legislation or would be assisting the EU competent authorities in proceeding with an action in the relevant EU member state. In either case the Commission cannot see the validity or legal basis upon which a non EU entity can be pursued for any breach of EU legislation when they themselves are not domiciled or operating within the EU. A third country competent authority cannot operate outside the scope and remit of its national legislation and it is unclear whether it is expected that EU legislation be transposed into third country national legislation.

The Commission has always co-operated with its international regulatory counterparts when requests for such co-operation fall within the scope of its national legislation. That legislation has been

assessed in the context of the relevant IOSCO Principles relating to co-operation between regulatory authorities. In addition, as stated above the Commission is a signatory to the IOSCO MMoU.

The Commission supports the proposal set out in section 5 by which the co-operation arrangements would be established by ESMA which would obviate the need that third country regulators conclude different bilateral co-operation arrangements and would ensure a level playing field. This proposal is considered to be the most practical way to ensure co-operation between EU and third country authorities on a fully consistent basis and ensures that individual arrangements cannot replace the agreed co-operation arrangements applicable to other jurisdictions. The Commission considers that it is important that ESMA has the power to bind member states to such a multilateral approach, so strengthening the overall consistency of approach undertaken. Section 12 states that the written agreements necessary for the purposes of co-operation under the Directive may be based on a template established by ESMA at EU level which implies that there may be an alternative option, which is not disclosed. As stated above the Commission supports an ESMA established arrangements.

Section 6 refers to an "ad hoc" clause relating to the transfer of information received from a third country to, inter alia, other EU competent authorities. The Commission requests that the phrase "ad hoc" be clarified.

The final sentence of section 8 (systemic risk issues) refers to the draft arrangement needing to be adapted to the specific situation taking into account the information deemed to be necessary for EU supervisory purposes. It is unclear whether this will result in "non-standard" text being used in all arrangements, on the basis that individual EU competent authorities will take account of "specific situations" or whether ESMA will oversee this requirement.

Q6 In particular, do you support the suggestion to use as a basis for the co-operation arrangements to be signed at EU level the IOSCO Multilateral Memorandum of Understanding of May 2002 and the IOSCO Technical Committee Principles for Supervisory Co-operation.

Please refer to the response at Question 2 above.

Marketing by nonEU AIFM of AIF into the EU (prior to a passport)

Q7 Do you agree with the above proposal? If not, please give reasons.

Yes, however we would recommend that the "necessary safeguards" mentioned in part 2 of Box 4 are subject to full and early consultation at a later stage.

Co-operation between EU competent authorities

Q8 Do you agree with the above proposal? If not, please give reasons.

The Commission has no comment to make in respect of this question.

Member state of reference

Q9 Do you have any suggestions on possible further criteria to identify the Member State of reference?

The Commission has no comment to make in respect of this question.

Q10 Do you think that any implementing measures are necessary in the context of Member State of reference given the relatively comprehensive framework in the AIFMD itself?

The Commission has no comment to make in respect of this question.

Q11 Do you agree with the proposed time period for competent authorities identified as potential authorities of reference to contact each other and ESMA?

The Commission considers that the time period by which all the relevant EU competent authorities should exchange their views and take a decision on the identification of the Member State of reference should be as short as possible in order to reduce any delays. However, the period of one week is considered ambitious and would consider that a time period of two weeks is more appropriate.

Please do not hesitate to contact me if you have any questions or require any further information relating to this submission.

Yours faithfully