



The Chairman

Ref.: CESR/08-866

Commissioner Charlie McCreevy  
European Commission  
Rue de la Loi 200  
B-1049 Bruxelles, Belgique

Paris, 31 October 2008

**Re: CESR's advice on the UCITS Management Company Passport**

Dear Mr McCreevy,

Please find enclosed CESR's response to the request for assistance on supervisory issues which would arise in the event that a UCITS fund was managed by a management company situated in another Member State. The response is divided into five chapters, reflecting the structure of the request for assistance.

Within the relatively short time frame available, CESR has not been able to carry out the traditional open consultations with stakeholders; however we have conducted a call for evidence (Ref. CESR/08-572), an open hearing and a short consultation of market participants (Ref. CESR/08-748). Despite our efforts, feedback from representatives of retail investors has been limited. Interventions during the public hearing and responses to the consultation were broadly supportive of the advice, on the basis that it represents a good balance between the additional freedoms granted to UCITS management companies, the need to ensure an appropriate level of investor protection and a fair allocation of responsibilities between the different competent authorities involved. As discussed when receiving the request for advice, the modalities for delivering the advice did not include the impact assessment on the introduction of the passport. A broad impact assessment on this topic, however, was carried out by the European Commission before drafting the exposure draft published in March 2007.

The advice is supported by a large majority of CESR members. However, a number of members (Ireland, Luxembourg, Poland, Slovakia and Slovenia) have expressed a general dissenting opinion on the advice as a whole and voted against it. These members feel that the advice would not put in place a sound supervisory framework that would allow the supervisory authority of the UCITS to perform its duties effectively, and that there may be an adverse impact on investor protection. More precisely, they are of the view that the recommendations could result in establishing "empty boxes" and that more substance is necessary to ensure of the legal existence of the UCITS. Moreover they believe that the proposed split of supervisory tasks and responsibilities does not envisage realistic measures to ensure that the UCITS competent authority will be able to effectively supervise the remote management company with respect to the matters which fall within its remit, and fear that this may affect the principle that the rules governing the constitution and functioning of a UCITS should be the same irrespective of whether it is managed by a domestic management company or by a foreign management company. They also consider that the local point of contact, as proposed in the advice, is not sufficient to help the UCITS competent authority to perform its supervisory tasks nor to ensure proper investor protection. Concerns were also expressed with respect to the possibility for the supervisory authority of the UCITS to exercise its enforcement powers, as described in Box 12, in practice.

Besides, whilst approving the general principles governing the advice, some members raised the following points. One member (Sweden) expressed a specific reservation in relation to Box 3, arguing that the use of the depositary as a point of contact could only be possible if it is allowed under national legislation and if it does not affect the independence of the depositary and its duties vis-à-vis the unit holders and the competent authorities. One member (the Czech Republic) expressed a specific reservation in relation to the general functioning of the passport framework, arguing that it would be too complicated to operate in practice and that it would raise costs. One member (Belgium) is of the opinion that the complexity of the proposed passport framework, inherent in cross-border activities implying various competent authorities with different



responsibilities, risks to hamper prompt and effective supervision in circumstances of crisis. Another member (Denmark) expressed the opinion that, beyond the issues addressed in the advice, there may be other issues in relation to investment companies managed by foreign management companies, which should be dealt with at the level of the Directive.

The advice includes several references to potential implementing measures to be adopted by the Commission at Level 2. CESR believes that the Level 1 and Level 2 measures in particular with respect to organisational requirements, risk management, conflicts of interests and conduct of business rules as referred to in Box 5 paragraph 7, constitutes a package and the Level 2 measures are necessary in order to allow a proper functioning of the passport. Therefore CESR requests that the work on the Level 2 measures starts as soon as possible and parallel work is conducted at Level 1 and Level 2 in order to allow the smooth introduction of the passport framework.

I would also like to emphasize that the attached CESR advice was designed on the basis of the principle according to which the rules governing the constitution and functioning of a UCITS should be the same irrespective of whether it is managed by a domestic management company or by a foreign management company via a branch or under the free provision of services, and that this principle should be preserved in implementing the management company passport.

Should you have any questions on the content of our response, please do not hesitate to contact me or Carlo Comporti, Secretary General of CESR.

Yours sincerely,

Eddy Wymeersch

c.c. Pervenche Beres – Chair ECON  
Jorgen Holmquist – Chair ESC