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Assogestioni's Response to the Report of the Expert Group on the Investment Fund Market Efficiency and the Report of the Alternative Investment Expert Group

Assogestioni is grateful for the opportunity granted by the European Commission to submit its comments and observations in respect of issues of fundamental relevance to the investment funds market, both at national and comunitary level.

We note that the reports suggest two high potential impact policy conclusions.

We strongly believe MiFID authorised investment firms should not be allowed to manage UCITS on the basis of their MiFID authorisation. Indeed, the activity specialization principle the UCITS Directive is based on has performed satisfactorily and has been one of the reason of the success and confidence UCITS have gained since their launch. We can't see any reason why we should get rid of it.

We are also deeply concerned with the recommendation that MiFID investment firms should be allowed to market hedge funds and similar products simply on the basis of the MiFID rules (service passport) without the need of additional regulation at the product level (as is the case of the UCITS passport). If this were the case, UCITS Directive would become useless and any kind of product, even the most "alternative" and less regulated, could easily access the mass market and compete against existing retail-oriented products.

In addition to the above remarks, we would like to submit in the Appendix, some specific considerations on the proposed actions contained in the reports.

Please do not hesitate to contact us should you require clarification or further comments on any of the discussed points.

Director General

Encl.



Appendix

A) Report of the Expert Group on the Investment Fund Market Efficiency

1. Authorisation procedure (initial and subsequent) for sale of UCITS in the home Member State. We agree with the harmonising scope of the proposal to model the discipline of the (initial and subsequent) authorisation of UCITS on the prospectus approval discipline contained in the Directive 2003/71/EC (the “Prospectus Directive”).

However, we note that better coordination is needed with reference to the suggested amendment of Article 4 of UCITS Directive in respect of Prospectus Directive. Indeed, while the latter provides for the authorisation of a single document (the prospectus), the former, as suggested in the report, would require the authorisation of both the “summary prospectus” and of the fund rules. Should these two documents be authorised by different CAs (as is the case in Italy), the time-to-market saving objective could be missed.

2. The Simplified Prospectus. In relation to the Experts’ recommendations on the simplified prospectus, we find that the proposal to “reposition” this document as a “summary” prospectus following the model of the summary note set in the Prospectus Directive, does not allow to identify its exact content (which is the same unwelcome effect of the provisions of schedule C in Annex 1 of the UCITS Directive).

We think that a true harmonisation of the prospectus’ content is necessary in order for this document to provide the same information in all Member States and therefore offer the same level of protection to all European investors. We believe that this can be realised only through a *detailed description* of the information that must be contained in it, regardless of the formal qualification of the prospectus as being “simplified” or “summary”.

3. Pooling. In our opinion the introduction of “entity pooling” requires further thoughts in relation to the type of activity exercised by the *feeder* manager participating in the so called “Master Feeder” structure. In consideration of the possibility in this structure for *feeders* to invest up to 100% of their assets into the *master* and for the master to manage all assets that have been transferred, it appears to be clear that in the event that all the feeders invest 100% of their assets into the master, the *feeder* manager would not exercise any proper management activity; the only proper manager would be the *master* manager. In the above scenario, we consider that *feeder* funds are tantamount to investment companies that designate a management company (art. 13a of the UCITS Directive): it would be therefore possible to apply to *feeder* managers less strict requirements than those that apply to other UCITS managers because they would exercise mere administrative functions.

Regarding “virtual pooling” the contractual relationship between the investing funds/accounts and the manager of the target pools should be better clarified



The management company passport. With specific reference to the proposal of clarifying the exact nature of the activities included in the concept of “collective portfolio management”, we highlight that the definition of “marketing” requires special attention especially in light of the MiFID Directive and the MiFID Level 2 measures (Directive 2006/73/EC and Regulation 1287/2006/EC). More precisely, clarification is needed on whether the activity of “marketing” is identifiable with the activity of “placement” or with the service of collection of orders.

We do not agree with the proposed amendment to enable MiFID authorised investment firms to exercise collective portfolio management. This extension would erase the legal activity’s reserve in place for collective portfolio management and determine an excessive liberalisation of the market, which is detrimental to the protective measures already created and tailored on the specific characteristics of the collective asset management for the safeguard of the retail investor who access this financial service.

4. **The depositary.** We support the proposal for the harmonisation of the depositary’s functions, with specific focus on those that represent its typical activities. However, we think that a uniform discipline of conflicts of interest in the event of affiliation and of the depositary’s liability as a separate regime to the one that applies to the manager, is equally required. The latter harmonisation is especially relevant in light of the fact that it represents the primary condition to the creation of a passport for the depositary.

B) Report of the Alternative Investment Expert Group

1. **Alternative investments: hedge funds.** We can not agree with the Experts’ proposals in respect of the distribution of hedge funds because they are based on the following misunderstanding: they confuse the passport of the service with the passport of the product.

The MiFID discipline contains provisions aimed at harmonising investment services rather than the products that are the objects of these services. The enabling of cross border marketing of non harmonised products merely on the basis of the fact that their placing follows MiFID rules would result in a quick, smooth and uncontrolled injection on the market of products in respect of which there are no protection requirements for the retail investor.

In light of the above considerations and with reference to the recommendation for an harmonised discipline on the cross-border offer of hedge funds, and more in general of the so called “niche products” which do not have any limits to their investment policy, we believe that this discipline ought to include some minimum requirements in respect of the “functioning scheme of hedge funds”. On the basis of the fact hedge funds are a form of collective portfolio management, this scheme ought to be in line with the one established for harmonised products by the UCITS Directive and provide for:

- (i) the presence of a management company subject to the same requirements of a UCITS management company;



- (ii) the presence of a depository (which might be established in a different Member State than that of the fund, as suggested in the Report) as the guarantor of the separation between the manager's assets and fund's assets;
- (iii) wider and more specific disclosure levels in relation to the risks associated to hedge funds and the strategies pursued by the manager than those generally required for UCITS with a non-speculative content;
- (iv) the discipline of the relationship with the prime broker;
- (v) the case of "insolvency" of the hedge fund i.e. when the fund's separate assets are not sufficient to guarantee liabilities towards third parties assumed in its name by the fund manager. This is a particularly delicate point also for the policy maker (evidenced from the absence of any reference in all the UCITS Directives) but it has the attitude to become the key issue of an hypothetic European passport. This is even more so if wide access to leverage will be allowed to the "Comunitary" speculative fund manager.

Regulations based on the above principles would leave Member States still free to define the characteristics of "niche" products, but it would also result in an harmonised structure that can guarantee full protection to investors.

Finally, we believe that the operational modes of private placement should be harmonised. First guidance for a uniform discipline comes from the Prospectus Directive, which on the one hand exempts the issuer from the obligation to public the prospectus when the offer is made exclusively to the professional investor and on the other hand, provides for the important corrective rule that any subsequent marketing of these instruments shall be considered as a "separate offer" which must be done according to the public offering rules.

2. The issue of indices on hedge funds. We firmly support the report's recommendation that UCITS investment in derivatives based on hedge fund indices be deferred until concerns regarding the structure, reliability and performance of such indices are resolved.

Indeed, we note that (investable) hedge fund indices include only hedge funds open to new subscription, i.e. the most liquid tier of the market. However better performing hedge funds are often closed to new subscriptions, having reached their capacity limit thanks to their superior performances. As a consequence, the use of derivatives on such indices does not seem the most cost efficient way of gaining exposure to hedge funds.

3. The issue of the look through approach. We fully share the experts' considerations on investing opportunities for institutional investors. We also agree that general rules as the "prudent man rule" or diversification criteria should find application as they are the most adequate for sophisticated investors and the hedge funds world's heterogeneity.

With reference to hedge funds investing opportunities for banks, we think that the industry's lack of transparency imposes huge limits on banks' capital requirements



and represents a *de facto* obstacle to the possibility to invest in these products. We further observe that the adoption of due diligence criteria may be more appropriate than a portfolio look through approach. In particular in cases of diversified products or portfolios, the process of risk selection and monitoring could represent the reference points to the discipline without need to make hedge funds fall in different product categories (as for example shares).