SJ - n° 2084/Div.

Mr Fabrice Demarigny
Secretary General
Committee of European Securities Regulators (CESR)
11-13, Avenue de Friedland
75008 Paris

Paris, 27 January 2006

AFG RESPONSE TO CESR CONSULTATION ON NOTIFICATION PROCEDURE

Dear Mr Demarigny,

The Association Française de la Gestion financière (AFG)[1] welcomes CESR's decision to consult publicly on possible improvements regarding the notification procedure in the context of the so-called 'product passport' as provided for by the UCITS Directive.

Before entering into our detailed comments which are also those of our European association EFAMA, we wish to make two general remarks.

[1] The Association Française de la Gestion financière (AFG)[1] represents the France-based investment management industry, both for collective and discretionary individual portfolio managements. Our members include around 400 management companies and investment companies. They are entrepreneurial or belong to French or foreign banking, insurance or asset management groups. AFG members are managing around 2000 billion euros in the field of investment management - making the French industry one of the leaders in Europe (for collective investment in particular, with more than 1100 billion euros i.e. 20% of EU investment funds assets under management) and the fourth at global level. In the field of collective investment, our industry includes – beside UCITS – the employee savings schemes funds and products such as regulated hedge funds and a significant part of private equity funds. AFG is of course an active member of the European Fund and Asset Management Association (EFAMA).

First, even though we consider that CESR got a really successful and quite unexpected consensus among its members, our impression is that CESR's consultative paper is mainly focused on the procedural steps which will most probably help improving the notification procedure. We congratulate CESR for fighting to achieve such an improvement, but we share CESR's opinion that going further would probably breach the legal framework as currently set by the UCITS Directive. AFG members would have wished regulators to go further, but we unfortunately share the view that it would require amending the UCITS Directive – which is clearly out of the scope of powers of CESR. AFG's opinion is that CESR should remind this constraint – as we do - to the European institutions (European Commission, European Parliament and Council). It would help to convince them to consider amending the UCITS Directive accordingly.

In particular, regarding the scope of powers which is still wide in the hands of the Host Member State, AFG considers that a fully harmonised simplified prospectus at European level would constitute a prerequisite to get a true European Single Market for funds. As long as the very same product gets a simplified prospectus of two pages in one Member State and eight pages in another one, with a different content (e.g. on Total Expense Ratios), real product passporting will be more than difficult.

Second, the current treatment of UCITS for passporting creates obviously an uneven level playing field between them and substitute products. At the moment, the fulfilment of all the conditions required by the UCITS Directive – although streamlined to some extent by CESR – implies delays in preparing the relevant documentation, paying local lawyers for advice, etc. In real practice, these delays and costs lead more and more investors (in particular institutional ones) to prefer investing in other types of financial instruments which can be, and indeed are, registered and cross-bordered across Europe in a couple of days – with the same content for the product as for the UCITS originally preferred.

For our detailed comments, please see below.

**
*

A. Procedure

Electronic submission should always be possible and in that case replace physical paper submission, not be an addition to it. CESR Members should dispose of sufficient IT resources and, if electronic filing systems are employed, they should be based on common standards to avoid a proliferation of incompatible systems. We agree with the White Paper's suggestion[2] that a common supervisory database should be created (similar to EDGAR in the US), allowing all CESR Members to access directly the latest regulatory filing information from any Member State, avoiding costly duplication of resources and waiting times.

I The two-month period

It should be stipulated that the notification period is two calendar months, in order to avoid different interpretations.

[2] Para. 3.2.3

In view of its limited competences, the host state regulator should only perform a formal verification of the documentation, not a material one. Moreover, as according to CESR's proposal the relevant information shall be provided in a standardized letter making a swift examination even more feasible, we believe that two calendar weeks (not one month) should be sufficient for the host State authority to check the information submitted for completeness and notify the UCITS about missing information. When the submission is deemed to be incomplete, the information already delivered should not be returned to the applicant.

The two-month period, however, should start immediately at delivery of the documentation (not after the notification is deemed to be complete) and two months should be the absolute maximum length of the waiting period, unless the submission is deemed incomplete and/or further information is required. In case the review is completed before expiration of the two-month period, the regulator should always notify the UCITS, which could then start marketing immediately. Such procedure should not be optional, and contrary national regulations should be amended accordingly.

A courier receipt (for physical document delivery) or other acceptable types of receipts (for electronic delivery, for example) will be deemed to be sufficient proof of delivery and of the starting date for the 2-month period.

Marketing delays result in considerable costs and – possibly – in a complete failure to launch the product, therefore in a loss of revenue. We believe therefore that CESR members should strive to shorten the notification process as much as possible, adopting efficiency benchmarks, committing adequate resources (in particular staff) and streamlining internal procedures. In addition, we strongly encourage CESR not to leave the adoption of best efforts procedures to the discretion of national authorities, but to coordinate the development of standards at European level in order to provide for a truly harmonised notification process.

We would also like to underline that accelerating the notification procedure and reducing related costs are important to advance the level playing field with substitute products, in particular certificates. Home State registration procedures should also be speeded up for the same reason, by means of adequate staffing levels, IT infrastructure and (just as importantly) efficient internal administrative procedures. We are conscious of the fact that UCITS are becoming ever more complex, but regulators should nonetheless dispose of sufficiently qualified staff to deal with registrations and notifications in a speedy fashion, and we believe that the – in most cases – rather high existing levels of registration fees should provide sufficient financial resources.

Any request for additional information should be made as early in the process as possible, in order to avoid last-minute requests that would lengthen the two-month period. We believe that four weeks should be sufficient for the host State regulator to review the file and make any additional requests by issuing a duly motivated communication.

We disagree with CESR's proposal to "stop the clock" during the two-month period after the issuance of a "duly motivated communication", and restart it when the information requested has been provided. This method would perpetuate the two-month period as a "minimum" review period. Instead, we believe that the notification period could extend beyond two months in case of requests for further information, but that marketing should be allowed to

start one week after the requested information has been provided (unless the host State regulator notifies the UCITS otherwise).[3]

With the model we suggest, the UCITS would have no reason to delay the submission of necessary additional information just to shorten the review period available to the host State authority (as CESR states in Para. 18), since we assume that regulators will strive to be as fast and efficient as possible, and any delay in submitting additional information would automatically delay the marketing start. In any case, even if the notification period goes beyond two months due to requests of additional information by the host State regulator, the two-month period should not be re-started.

We would appreciate a clarification of the statement in Para. 8 "*providing the necessary information regarding the management company in the 'product notification' makes a separate notification procedure regarding the management company unnecessary*", given the unfortunate absence of a real management company passport and the fact that there are no notification procedures regarding a locally established management company.

We also wish to point out that – although the Directive allows it – it is not current practice for UCITS to start marketing after the two-month period without supervisory approval (formal or informal), in conformity with regulators' expectations. In this respect we welcome Mr. Biancheri's statement at the Open Hearing that marketing is permitted at the end of the two-month period without specific supervisory approval – unless the UCITS is notified otherwise.

II Certification of documents

We appreciate CESR's proposal that only the simplified prospectus should be certified, as it would already result in a significant easing of requirements. However, we believe that even for the simplified prospectus a certification by the home State authority is unnecessary, and UCITS Directors or agents should be able to self-certify, that is certify that the documents presented are true copies of the latest simplified prospectus filed with the home state regulator. Since some CESR Members already accept the practice, it should be sufficient for all CESR Members.

The elimination of document certification will result in the easing of a big administrative burden for CESR Members. As an alternative to the certification of copies by regulators, a document could be transmitted directly from the home to the host regulator (the UCITS taking care only of the translation, if necessary), following the principle already used in MiFID and in the Prospectus Directive. However, a central database with the all documents filed with CESR Members (in electronic form) remains the ideal solution (see our comments regarding point A. Procedure), since it would bring maximum direct accessibility.

Should certifications still be required, we suggest they should not have expiry dates.

[3] For example, a request is filed by the UCITS on 7 July and on 12 August a request is made by the host State regulator for further information or documentation (be it through the issuance of a duly motivated communication by the host State regulator or not). On 26 August the requested information/documentation is furnished to the host State regulator. The two-month period in this case still expires on 7 September. In the same example, if the request for information/documentation is made on 25 August and the information is provided on 10 September, the two-month period is extended to 17 September, one week after the request is fulfilled (not to 26 September).

We fully agree with CESR's proposal to eliminate the Apostille requirement and hopes it is implemented as soon as possible.

III Translation

Translation requirements generate costs and delays. We believe therefore that a translation should be requested by the host state authority only for documents mentioned in the Directive.

No sworn translations should be required, as they don't necessarily provide any extra investor protection or better language quality, but lead to substantially higher costs and delays.

The UCITS Directive allows host State authorities to accept documents in a language other than the official local one (Art. 47). Given that the requirement to have all documents translated into the official languages of all host member states is a substantial hurdle for the pan-European distribution of investment funds, we see the need for a more ambitious commitment by CESR Members in this regard. The recently introduced Prospectus Directive strikes a good balance between the needs of investors and those of "producers" and distributors by allowing the use of a language "that is customary in the sphere of international finance", while requiring the translation of a summary into local languages. We regard this as a good model also for the notification procedure of UCITS, where it should be sufficient to have only the simplified prospectus translated into the official local language.

The publication on a website of any remaining translation requirements would be helpful.

Furthermore, we urge CESR Members to allow the use of a language that is customary in the sphere of international finance also for all correspondence with host State regulators and for documents such as the notification letter and the UCITS attestation.

IV Umbrella funds

Marketing of only part of the sub-funds

We fully support CESR's proposal (Para. 43): "CESR Members agree that if a UCITS intends to market actively only part of the sub-funds of an umbrella UCITS in the host State, only those sub-funds proposed to be marketed actively have to be notified."

The Consultation Paper does not address one of the most difficult problems currently encountered in marketing only part of an umbrella fund: the modifications required to the prospectuses and other documents to be filed. It is our opinion that no modification should be requested to the text of these documents to eliminate the sub-funds not marketed in the host state, as their existence in the prospectus is not equivalent to active marketing. Mention should obviously be made (preferably in a registration table separate from the prospectus) of the countries where each sub-fund is being marketed, or of all UCITS marketed in a specific country, so as to give a clear picture to investors of which funds are available to them. Expunging text and thus creating different national versions is not only costly, but it is also

unfair to some investors, who are denied information available to investors in other countries. We appreciate the fact that in section C (Modifications and ongoing process) CESR expresses the same opinion: “In CESR’s Members’ view it is important that the investors in the host State have the same information available as the investors in the home State”. Furthermore, it is plainly contrary to the Directive’s text as far as the simplified prospectus is concerned (Art. 28(3)): “The simplified prospectus can be used as a marketing tool designed to be used in all Member States *without alterations except translation*”.

Notification procedure to market new sub-funds

We agree with CESR that all sub-funds notified simultaneously should be included in one notification letter simultaneously, but no two-month period should apply as a rule (not as an option) to the notification of further sub-funds at a later stage (Para 45(2) and (3)), whether they were already included in the original notification or not, as long as the marketing arrangements are the same. The host state regulator’s competences are, after all, limited to the marketing arrangements, and if those are the same marketing permission cannot be refused, therefore making a two-month waiting period useless. Two months seem hardly necessary just to examine the translations, especially when it is not deemed to be the task of a host State authority to check the translation for consistency with the original (Para. 35).

Regarding the documentation to be provided, in the case of the notification of further sub-funds already included in the original prospectus, only the simplified prospectus (and translation) for the new sub-funds should be provided. In the case of new sub-funds added to the umbrella fund, besides the simplified prospectus for the new sub-funds also the pertinent changes to the full prospectus should be communicated to the host state regulator, together with translations.

We encourage CESR to develop a standard attestation for the notification of new sub-funds (preferably in languages that are customary in the sphere of international finance), since there are problems with the mutual acceptance of existing ones.

B. Content of the file

We appreciate CESR’s statement that “UCITS should not be obliged by the host State to send other documents and information than those mentioned in this chapter” (covering only Art. 46 requirements), but big obstacles to notification still remain, as national requirements under Art. 44(1) and 45 are excluded and no attempt is made by CESR to simplify procedures or achieve convergence of practices.

Although useful, the simple publication of national rules on the host State authority’s website does not go far enough, and CESR should actively work toward reducing the multitude of diverging national marketing requirements.

In detail, for point 1 no original attestation by the home State authority should be necessary. A copy with a self-certification (in a language that is customary in the sphere of international finance) by the UCITS Directors or agents should be sufficient (see also our comments under Certification of Documents).

Regarding point 6, it should be sufficient to notify that the UCITS is distributed through regulated agents (as is almost always the case), and give name and contact information for distributors and paying agent.

C. Modifications and on-going process

We would welcome a model attestation (preferably in languages that are customary in the sphere of international finance) from CESR in order to report modifications.

As already discussed under “Marketing of only part of the sub-funds”, CESR Members often require modifications (e.g. country-specific information) to the prospectuses and other documents to be filed, a practice contrary to the text in Para. 48. In view of that, and because of the delays experienced during the notification procedure in multiple states, different versions of the full prospectus could be applicable in different jurisdictions. These situations are not only to the disadvantage of investors, but they also cause administrative problems (and possibly extra costs) to the UCITS, which needs to implement special measures to compensate. We strongly encourage CESR to propose the elimination of such national “amendments”, and if any differing information is absolutely needed to comply with national regulation it should not be included in the prospectus but rather in a separate document, which could be easily updated.

We believe that only the home State authority has the right to approve modifications to the prospectus, and the home State regulator could subsequently notify host State authorities directly (as directed by the UCITS), avoiding the problem of certification and of time limits that are impossible to respect. The UCITS should only provide, if need arises, a translation to the host State authority of the modified/added text, and the updated prospectus could be distributed to investors immediately after home State approval, even when new funds are added to the prospectus (an updated registration table would indicate that they are not marketed in the host State).

Regarding modifications to other filed documents, CESR should at least agree on common time limits which take into account (if necessary) approval times by the home State regulator. Ideally, however, there should be no time limits for their notification to the host State authority.

No new certification of UCITS conformity should be required by the host State regulator when new sub-funds are notified, since the UCITS status of the umbrella is not affected. Furthermore, no certification of UCITS conformity should be required by the host State regulator if the prospectus of the fund has been amended, since the home State regulator will in no case approve an amendment of a UCITS that results in non-conformity with the Directive.

D. National marketing rules

We refer to our prior comments regarding the disappointment with the result of CESR's work which is in fact due to the lack of power entrusted to it by the Directive. Even if the notification procedure requirements deriving from the Directive are successfully streamlined, considerable obstacles will remain to the cross-border marketing of UCITS due to national marketing rules, which often put foreign UCITS at a disadvantage vs. national ones and can even lead to failure to market (in case quick access to the market is essential).

The idea of listing on a website all national marketing rules and other specific regulations is helpful but not sufficient, as it does not provide a solution. What is needed is a thorough review of the current accumulation of regulations, in order to eliminate all those not providing any added investor protection and those contrary to the wording and/or the spirit of the Directive. Furthermore, the supporting documentation requirements should also be harmonized, in order to really simplify the notification procedure. Please see further comments pertaining to Annex III.

As examples of national regulations hindering cross-border distribution we would like to mention in particular those regarding nominee structures and the non-acceptance of share classes, but we remain at CESR's disposal to provide further examples and details.

Moreover, we do not believe that a Register of unit-holders should be required under national marketing rules, as it currently is the case in some Member States, as this function can be fulfilled without the creation of a monopolistic entity.

Additional issues not mentioned in the Consultation Paper

The wide disparity of costs (and possible discrimination of foreign UCITS vs. national ones) should be addressed by CESR, as well as the lack of harmonisation for maintaining registration and de-registration.

Besides the solution provided for umbrella funds, we also urge CESR to provide for a simplified procedure for the simultaneous notification of several contractual funds (from the same management company and with the same marketing arrangements). The attestation as well as the notification letter could include several contractual funds that are to be marketed in the host country, and cross-references could be made to certain documents. Obviously, the relevant fund-specific attachments (such as prospectuses) would be enclosed for each fund.

Annexes

In **Annex I** point 8 should be replaced by a self-certification by the UCITS or its management company. In any case, the home State authority can only certify to facts in its knowledge, and that would exclude for example which sub-funds are to be marketed in the host Member State.

Annex II: In part A, CESR should clarify the meaning of "duration of the company" or remove it from the text.

In Part B (Point 14) the reference to "CESR's guidelines" should be deleted, as the information provided should conform only to the requirements set by the Directive and by national regulation.

Annex III: Should be modified according to our previous comments, particularly under National marketing rules.

Point III: The following information (to be provided to investors in an extra marketing document) should be sufficient to satisfy the national marketing requirements:

- Telephone and e-mail contact details for local office (if relevant) or for representative in relevant country.
- Local Paying Agent / Information Agent contact details
- List of sub funds marketed in that specific country
- Details of how to make an initial subscription (including minimum investment limits)
- Details of how to make subsequent subscriptions (including minimum investment limits)
- Details of how to redeem shares (including minimum investment limits)
- Details of where the statutory documentation is available.
- Where fund prices may be obtained

**
*

If you wish to discuss the contents of this letter with us, please contact myself on 00 33 1 44 94 94 14 (e-mail: p.bollon@afg.asso.fr), our Head of International Affairs Stéphane Janin on 00 33 1 44 94 94 04 (e-mail: s.janin@afg.asso.fr) or his deputy Catherine Jasserand on 00 33 1 44 94 96 58 (e-mail: c.jasserand@afg.asso.fr).

Yours sincerely,

(signed)

Pierre Bollon