



Bundesverband Investment
und Asset Management e.V.

Contact
Dr. Magdalena Kuper
Tel.: 069/154090-263
Fax: 069/154090-163
magdalena.kuper@bvi.de

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Mr. Fabrice Demarigny
Secretary General
CESR The Committee of European
Securities Regulators
11 – 13 avenue de Friedland
75008 Paris
FRANCE

CESR's guidelines to simplify the notification procedure of UCITS – 2nd Consultation Paper

Dear Mr. Demarigny,

BVI¹ welcomes the opportunity to provide comments on the supervisory guidelines proposed by CESR aiming at simplifying the notification procedure set up under the UCITS Directive.

General Remarks

In the first place, we would like to thank CESR for taking the lead in streamlining the cross-border notification of UCITS. Having regard to the prevailing divergences in national rules and practices, we particularly appreciate the fact that further allowances in terms of common procedural standards have been made by the regulators. By admission of notification letters in English, facilitation of electronic filing of documents and approval of self-certification, just to name a few, CESR Members concede to industry's requests and demonstrate their commitment to render the cross-border distribution of UCITS a viable process.

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interests of the German investment fund and asset management industry. Its 82 members currently manage nearly 7,600 investment funds with assets under management close to € 1,200 bn. The units of these funds are held by some 15 million unit holders. Mandates for portfolio management services provided by our members comprise assets in excess of € 150 bn. For more information, please visit www.bvi.de.

Director General:
Stefan Seip
Managing Director:
Rüdiger H. Päsler
Rudolf Siebel
Eschenheimer Anlage 28
D-60318 Frankfurt am Main
Postfach 10 04 37
D-60004 Frankfurt am Main
Phone: +49.69.154090.0
Fax: +49.69.5971406
info@bvi.de
www.bvi.de



On the other hand, we are quite concerned about the leeway given to the national authorities when implementing the supervisory guidelines. According to Para. 9 of the Consultation Paper, CESR Members shall introduce the guidelines in their day-to-day regulatory practice solely on a voluntary basis. Moreover, a closer look at Annex III referring to national regulations reveals that many of the standards agreed in the guidelines might be suspended at national level, e.g. as concerns electronic submission of documents or notice of incompleteness. Taking into account the fact that some aspects of the guidelines, like application of the two-month-period to the notification of new sub-funds, are deliberately left to the discretion of particular Member States and that there is no general commitment to amend national provisions in order to facilitate proper implementation of the guidelines, we fear that the work conducted by CESR will remain mostly an academic exercise having no commensurable effect on simplification of the supervisory practice.

Therefore, we urge CESR once again to reconsider the options available to national supervisors within the scope of the guidelines and to reduce them to an absolute minimum. At the same time, it is essential to give the industry a founded prospect of evaluating the regulatory impact of CESR guidelines in order to duly assess accomplishment of the objectives set out in Para. 6 of the Consultation Paper and, if necessary, to prepare the ground for a substantial overhaul of the notification procedure. Accordingly, we request CESR to fix a specific review date in the final provisions which, in our view, should be no longer than two years since the commencement of the supervisory guidelines.

Specific Comments

As regards the detailed guidelines proposed by CESR, we would like to make the following comments:

1. General commitment and transitional period (Preamble)

We greatly appreciate the general commitment of CESR Members to adopt working procedures aiming at speeding up the notification process. However, it is of material importance that these activities do not generate twenty five different sets of rules endorsing divergent procedural standards and thus, rendering cross-border distribution of UCITS even more cumbersome. Therefore, a close cooperation among the regulators is needed in this respect in order to facilitate similar solutions and to enhance transparency and calculability of the notification procedure for the industry.

2. Notice of incompleteness (Guideline 4 Para. 3)

In our view, the wording of Guideline 4 Para. 3 falls short of its regulatory purpose. According to the statements made by CESR representatives at the Open Hearing, the intent of the quoted provision is to set a standard for con-

ducting a material assessment of notifications within the term of one month and notifying UCITS of any missing information necessary in order to conclude the examination and to approve the distribution in the host Member State. However, as it stands, Para. 3 only requires the supervising authorities to check the formal completeness of submitted documents. Hence, in order to alert regulators to the significance of the agreed procedure, we kindly request CESR to redraft the text of Para. 3 in accordance with the statements made at Open Hearing and to specify the commitment to swift material evaluation of notification requests.

3. Deadline for requested information (Guideline 6 Para. 4)

The requirement for UCITS which receive a duly motivated communication to submit the requested documents “within the two-month period” contradicts the general approach proposed by CESR. To begin with, the two-month notification period shall be suspended at issuance of the communication, rendering the calculation of a proper submission date impracticable. Moreover, according to No. IV 4 of Annex III and the respective comments on page 13 of the Consultation Paper, Member States may define a deadline for the provision of additional information, which is considered appropriate if fixed at a term of six months and thus, clearly exceeds the regular notification period. Therefore, we prompt CESR to delete the cited phrase and to confine the wording of Guideline 6 Para. 4 to the following:

“The host Member State authority shall inform the UCITS as soon as possible in a written and duly motivated communication (which can be by email) that it considers that there are convincing arguments to believe that the requirements to make a reasoned decision are fulfilled, unless the host State authority receives the required information. Without prejudice to shorten the two months period according to guideline 5, the expiring of the two months period will be suspended by this communication to prevent the applicant from a reasoned decision.”

4. Certification of documents (Guideline 7)

We welcome CESR’s concession to self-certification of documents by the UCITS, but consider it more adequate to accept all certifications issued by “UCITS’ duly appointed representatives” rather than specifically its “authorised directors”.

5. Translation requirements (Guideline 8), Submission of modified documents (Guideline 12 Para. 2)

In our view, UCITS cannot be required to submit the modified documents “without delay” after their publication in the home Member State. According to Guideline 8, documents to be submitted by UCITS shall be translated into the official languages of each host Member State, which means that invest-



ment companies must be given sufficient time in order to conduct the translation procedure in a proper manner.

In this context, we would once again like to encourage CESR Members to approve of a broader use of international languages in the notification process. Not only would this step render major parts of the translation exercise unnecessary, allowing for a swift transfer of modified documents, but it could also diminish supervisory detriments in relation to investment products falling under the Prospectus Directive. At least, the use of English language should become EU-wide standard for informal correspondence with host State regulators as well as for submission of pre-printed forms such as notification letter and UCITS attestation, entailing a clear commitment from national authorities to aim at respective amendments of legal or regulatory provisions.

Moreover, we are disappointed by the lack of comments from CESR on the requirement of sworn translations, which don't provide any extra investor protection or better language quality, but lead to substantially higher costs for management companies. Hence, we urge CESR Members to waive this demand as an unreasonable aggravation of Article 47 of the UCITS Directive.

6. Publication of national regulations (Guideline 13)

Public disclosure of non-harmonised national requirements is an important step towards enhancement of the notification procedure. However, a mere reference to national provisions is not enough to satisfy the needs of cross-border operating UCITS. More practical assistance could be given by provision of internet links to the relevant model forms and documents as well as publication of the applicable provisions and supplementary information in full text, preferably as English versions.

7. Model attestation letter – management company passport (Annex I Para. 8)

We do not share CESR's view that elements of the management company passport must be taken into account by host State authorities when examining distribution requests based on marketing arrangements via a third party. In accordance with Article 4 Para. 3 of the UCITS Directive, the requirement of a UCITS-compliant management company is a necessary prerequisite for the UCITS' authorisation in its home Member State and thus, amount to an integral part of the product passport. Any further certification demands with regard to the management company challenge the accuracy of the UCITS passport and go clearly beyond the provisions of the UCITS Directive. Therefore, we request CESR to delete the reference to Article 6b Para. 5 from the model letter for UCITS attestation.

8. Model notification letter – national requirements (Annex II Part B)

Although we are highly in favour of standardizing the notification form for UCITS, we would like to point out that, in order to achieve a genuine simplification of the procedure, currently applicable national forms must be either declared void or, at least, strictly reduced to the requirements listed in Annex III. Otherwise, a standard notification letter would only add to the administrative burden of cross-border operating UCITS which were bound to submit two full notification forms instead of one for each host Member State.

9. National regulations (Annex III)

The regulations put at the disposal of national authorities are to some extent inconsistent with the supervisory guidelines specified in the Consultation Paper. In particular, this pertains to electronic submission of documents agreed in Guideline 1 Para. 3 and to notice of (in-)completeness to be issued within one month according to Guideline 4 Para. 3. These rules form material parts of the supervisory agreement and must in no case be undermined by contrary national provisions. Hence, we urge CESR to eliminate the “opting-out” options for national regulators and to set up clear EU-wide standards for application of the notification procedure.

Furthermore, we would like to reiterate our suggestions for a stronger regulatory commitment at national level to simplify the existing multitude of national provisions. In order to reduce obstacles to fund distribution deriving from inconsistent and overdrawn national requirements, CESR Members should dedicate utmost efforts to streamlining national marketing rules and developing a pragmatic approach to their assimilation.

We hope that our comments provide some assistance to CESR’s final work on the supervisory guidelines and remain at your disposal for any questions that may arise.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

A handwritten signature in blue ink, appearing to read 'Siebel', written in a cursive style.

Rudolf Siebel LL.M

A handwritten signature in black ink, appearing to read 'M. Kuper', written in a cursive style.

Dr. Magdalena Kuper