

**EFAMA'S RESPONSE TO CESR'S GUIDELINES  
TO SIMPLIFY THE NOTIFICATION PROCEDURE OF UCITS  
2<sup>ND</sup> CONSULTATION PAPER**

**GENERAL COMMENTS**

EFAMA<sup>1</sup> welcomes the opportunity to reply to CESR's second Consultation Paper. Although still valid, we do not wish to repeat our general comments and prefer to focus on the specifics of the new Paper.

EFAMA acknowledges that the existing legal framework (both at EU and national level) in many cases constrains CESR's powers, and therefore urges the Commission to propose a new approach to cross-border fund marketing within the framework of the White Paper (as also called for by the European Parliament in the Klinz Report on asset management).

We highly appreciate the efforts made by CESR with the new title, the objectives of the guidelines, and in particular with the "General commitment" in the Preamble. The introduction and the Preamble contain much of what the industry wishes to see implemented to enhance the notification process. In this regard, the current Consultation Paper represents a marked improvement over the first version.

However, many of the guidelines that would represent an improvement over the current situation are worded as exhortations to CESR members, and binding commitments rarely go beyond the current status quo. Industry concerns have not been taken into consideration in most cases, and no best practice benchmarks have been set.

The Paper therefore still shows little ambition and even falls short of what is currently achievable under the UCITS Directive.

Although we want to believe that in practice the efforts by CESR members to implement these guidelines will go beyond binding requirements, we cannot assume that will always

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<sup>1</sup> EFAMA is the representative association for the European investment management industry. Formerly known as FEFSI, EFAMA represents through its 23 member associations and 40 corporate members about EUR 13 trillion in assets under management of which EUR 6.3 trillion managed by around 43,000 investment funds. For more information, please visit <http://www.efama.org/>.

be the case, and must therefore base our response on what the guidelines in this Paper actually require from CESR members.

In particular, where amendment of national regulations or improvements in human or IT resources are necessary, CESR understandably states that transitional periods will be required, but there is no open commitment to seeking such legislative changes<sup>2</sup> or lobbying for increased resources, and no maximum length is mentioned for the transitional periods. As mentioned at the 23 May Hearing, we also strongly encourage CESR to set a deadline to review the implementation of the new guidelines, to encourage compliance and convergence of practices. As part of that review, we suggest the publication of a list of national legislation/regulation that hinders the implementation of CESR's recommendations.

## **SPECIFIC COMMENTS ON CESR'S CONSULTATION PAPER**

### **A. Procedure**

#### **Guideline 1**

EFAMA welcomes the fact that the standardized notification letter may be submitted "in a language common in the sphere of finance", although this concession is significantly weakened by the limitation "if it is not contrary to the domestic legislation or regulations of the host Member State" (including the already mentioned footnote 10 which strengthens the impression of a lack of support for such provision).

As we already mentioned in our prior comments, electronic submission of documents should always be possible, and the statement that "CESR Members agree to facilitate electronic filing of documents" is quite vague, far from a real commitment.

Furthermore, standards for electronic filing should be harmonized through CESR, to avoid incompatibility. The final goal should be the creation of a common supervisory database, as suggested in the on Financial Services Policy (2005-2010) of 5 December 2005.

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<sup>2</sup> On the contrary, Footnote 1 on page 10 states that "Due to inter alia a complicated interaction between investment and administrative law/regulation in several Member States there is no general commitment to amend national legal/regulatory provisions" in relation to the use of a language common in the sphere of finance for the notification letter.

## **Guideline 2**

EFAMA fully agrees that the passport must be respected, but regrets that CESR has not been able to take into account the Commission's upcoming interpretative communication on marketing, for example to define what would constitute non-compliance with Art. 44(1) and 45.

See also our comments on the inadequacy of the proposed Mediation mechanism proposed by CESR.

## **The two-month period**

### **Guideline 3**

To avoid differences in interpretation, it should be clearly stipulated that the notification period is two calendar months. Although this is confirmed by the example in Para. 23, we would prefer to see it included in the guideline for legal certainty.

### **Guideline 4**

We still disagree with the current wording of the Guideline in two respects:

Regarding the starting date of the two-month period, we believe that it should start in any case at delivery of the documentation (not after the notification is deemed complete, therefore also in cases where the file is deemed incomplete).

Regarding the deadline to notify the UCITS in case of incompleteness, EFAMA believes that -- given its limited competences -- the host State regulator should only perform a formal verification of the documentation, not a material one. One month is therefore excessively long for the host State authority to check the information submitted for completeness, and two weeks should be sufficient.

From the Open Hearing on 23 May we understand that CESR actually intends the one-month period to be a deadline not just for a completeness check (in CESR's own words, a simple check whether all documents have been filed would be possible even in less than half an hour), but rather for a "material" or "substance" check. Within one month -- according to Mr. Biancheri's statement at the Hearing -- the host State regulator would not only determine whether any information was missing, but also complete a "material" check of the submissions (as is already the case in Germany, with 95% of the cases found to be compliant, according to Mr. Neumann). We strongly support CESR's intentions, but must point out that the current text of Guideline 4 does not support such interpretation. We therefore urge CESR to redraft the text in line with the statements at the Hearing and believe it should be possible to do so within the framework of the existing UCITS Directive.

EFAMA welcomes CESR's statement in Para. 13 that "if all the information and documents are complete and the latter contain all information, the two month period starts from the date of the receipt of the notification. If there is no communication after one month by the competent authority of the host Member State to the UCITS, it is assumed that the notification is complete since the date of the receipt by the host Member State authority." However, for legal certainty we would prefer to see it included in the text of the Guideline.

#### **Guideline 5**

We believe that CESR Members should clearly commit – as a rule – to notify the UCITS as soon as the notification has been checked before the end of the two-month period, so as to enable the UCITS to start marketing immediately. This would be possible in most cases after one month, if the file was complete and the "material" check has been completed as discussed at the Hearing.

#### **Guideline 6**

EFAMA still disagrees with CESR's mechanism to 'stop/restart-the-clock', which can result in a significant extension of the two-month period. We argue that the 'clock' should not stop during the time when new information or clarifications are requested. Instead, EFAMA believes 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).

Furthermore, we wish to point out that the dates mentioned in the example in Para. 23 are incorrect: according to Guideline 4, non-compliance with Art. 44(1) and 45 should be communicated by the host State authority to the UCITS not later than 7 August (one month later), not on 12 August.

#### **Guideline 7 – Certification of documents**

We applaud CESR's acceptance of a self-certification by the UCITS, but in this regard we would prefer that the wording refer to the "UCITS'duly appointed representatives" rather than to its "authorized directors" (the wording should also be modified in Guideline 10).

We are also glad that the use of the Hague Apostille will no longer be required, although that should also be mentioned in the text of the Guideline and not just in the explanatory text.

#### **Guideline 8 – Translations**

We appreciate the possibility to submit both the UCITS attestation and part of the notification letter in a language common in the sphere of international finance (the text of

the first sentence in Guideline 8 should be amended to include a reference to the notification letter and to Guideline 1).

However, EFAMA believes that the UCITS should be allowed to make use of the same possibility – as allowed by the Prospectus Directive – also for other documents such as the full prospectus and the financial reports, except for the simplified prospectus. It should be sufficient to translate only the simplified prospectus into the official local language, as it is the only document usually offered to investors, and to make the other documents available in English. It should be left to fund producers to choose which documents should be translated beyond the simplified prospectus, on the basis of commercial reasons – documents would certainly be translated if investors demanded them by in the local language.

We are disappointed by the lack of comment 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. We do not believe the requirement derives from Level 1 legislation, and urge CESR Members to agree to eliminate their need.

Furthermore, EFAMA urges 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.

## **Umbrella funds**

### **Guideline 9**

EFAMA fully agrees with this Guideline, but the Consultation Paper still fails to 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. In such cases CESR Members often require modifications to the prospectuses and other documents to be filed (usually involving the deletion of information relating to funds not marketed in the host Member State), causing administrative problems and extra costs to the UCITS.

We believe 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 and the fact can be clearly indicated to investors. Mention should be made (preferably in a 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.

Para. 38 of the Consultation text states the same principle: “In CESR’s Members’ view it is important that the investors in the host member State have the same information available as the investors in the home State”. Furthermore, it is 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*”.

We urge CESR to clearly state that host Member States may not request modifications to the documents filed.

### **Guideline 10**

Point 1 – We appreciate the fact that a similar treatment has been extended to the notification of umbrella funds in contractual and unit trust form.

Point 2 – The two-month period should not apply either in case of the addition of new sub-funds to an existing umbrella, or in case of a decision to start marketing already existing sub-funds belonging to an umbrella that was previously partially notified (as per guideline 9). We do not understand why the second case – previously mentioned in the first round of Consultation – has disappeared from the guideline text.

CESR concedes that the time necessary should be significantly less than two-months since most of the notification material is likely to be already familiar to the host State authority. In particular, it is unlikely that the sub-funds will “have different own characteristics”, as the marketing arrangements are likely to be the same for all funds, and they will be already known to the host State regulator. 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. Nonetheless, there is still no firm commitment from CESR to reduce the time necessary to check the notification.

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.

Concerning Para. 3, we believe the text of the guideline should be modified to eliminate the statement “Basically, the whole umbrella should have one full prospectus...”. There is at least one country (Belgium) where separate full prospectuses are available for each sub-fund (as permitted by the national regulator), and CESR should not imply that such system is unacceptable because it complicates the notification procedure (there are arguments in favor of a full prospectus for each sub-fund, as a more efficient system both for the investor and for the fund producer). Para 3 should read as follows: “..., the

following procedure applies: if the notifying UCITS **provides separate full prospectuses** for each sub-fund, the **UCITS' duly appointed representatives** must ... ” (here a modification in the language is also necessary, just like in Guideline 7).

EFAMA also believes that the development of a standard attestation of new sub-funds would help streamline the filing procedure.

## **B. Content of the file**

### **Guideline 11**

EFAMA appreciates CESR's efforts in Para. 34 of the explanatory text, where CESR lists some documents that host State authorities are not allowed to request. However, it is also stated that “if documents are appropriate to streamline the notification process, they might be requested”, and this paragraph seems to leave the door wide open to State regulators' documentation requests and will hardly reduce national requirements.

Regarding point 5 of the Guideline, we would like to express a similar concern to the one we expressed on Para. 3 of Guideline 10: CESR here requires the submission for umbrella funds of annual reports and subsequent semi-annual reports “comprising the whole umbrella”. Also in this case we believe that for umbrellas funds where separate annual and semi-annual reports are produced, it should be possible to submit only those for the specific sub-fund(s) being notified. We therefore suggest modifying the text as follows:

“...for umbrella funds annual reports and subsequent half yearly reports **either** comprising the whole umbrella **or for each individual sub-fund** should be submitted.”

Regarding point 6 of the Guideline, 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**

### **Guideline 12**

The requirement to submit the documents “without delay” after they have been made available to the home Member State regulator might be problematic, given the delays that filings often incur in the home State and the time needed for translations.

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.

EFAMA would welcome a model attestation (preferably in a language that is customary in the sphere of international finance) from CESR in order to report modifications

#### **D. National marketing rules and other specific national regulation**

##### **Guideline 13**

We reiterate our disappointment with CESR's approach and its lack of commitment towards simplification. Listings of national requirements on several websites might be helpful, but they are not sufficient. 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. In this respect, we hope that CESR Members will start such a review after the publication of the Commission's communication on marketing.

Furthermore, the supporting documentation requirements should also be harmonized, in order to really simplify the notification procedure.

##### **Annex I**

In the Model Attestation 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 (points 13 and 14). In any case, from now on it is likely that a copy of the original attestation would be submitted by the UCITS, together with a self-certification by the UCITS, and that could not possibly include such information. Point 21 should also be deleted for the same reason. The latest version of the fund rules/instruments of incorporation will be part of the notification documentation in any case.

Once again, we do not understand CESR's reference to a "management company passport" and a "management company notification procedure". "Since a UCITS-compliant management company is a necessary prerequisite for the UCITS authorization in the home Member State, no further certification regarding the management company should be necessary in this context.

##### **Annex II**

As we already stated in our prior reply, the mention "Duration of the company" should be either eliminated or clarified.

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

### **Annex III**

This Annex 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 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

### **Issues not mentioned by CESR**

We urge CESR once again to address the wide disparity of costs (and possible discrimination of foreign UCITS vs. national ones), as well as the lack of harmonisation for maintaining registration and de-registration.

The treatment of share classes (and the fact that they are not accepted in some countries) was also disregarded by CESR. EFAMA believes that there should be consistency in their treatment, and that they should not be considered comparable to sub-funds. The introduction of a new share class should be treated as an update to the prospectus not requiring a new notification, in line with the position that CESR already took in the Transitional Guidelines for UCITS III.