Notification procedure according to Section VIII of the UCITS Directive (CESR consultation paper 05-484)

The Dublin Funds Industry Association (DFIA) is the representative body of the international investment fund community, representing the custodian banks, administrators, managers, transfer agents and professional advisory firms involved in the international fund services industry in Ireland. Given that as at end of October 2005 there were 3,713 Irish domiciled funds, including sub-funds, with a Net Asset Value of €544 billion, (2,058 Irish domiciled UCITS funds, including sub-funds with a Net Asset Value of €431 billion), all developments in the European investment funds arena are of particular interest and relevance to the Irish industry. As such, we appreciate the opportunity to respond to CESR's Consultation Paper on the enhancement on the UCITS notification procedure.

General Comments

We welcome CESR's focus on the notification process and are encouraged by the comments at the public meeting on the 17th January that this consultation will herald a new paradigm for fund registration/notification in that a host regulators focus going forward, will be on the sale/marketing of the fund within their jurisdiction and not seek to review/comment on the authorisation of the fund.

In respect of the notification procedures as they currently stand, it is the experience of many of our members that they act as a significant impediment to UCITS acquiring timely registration, and have inhibited the establishment of a true single market for funds. Indeed, some members have noted that it is sometimes easier and quicker to register UCITS for sale in a non-EU jurisdiction than in some EU Member States. In this regard we would refer CESR to the EFAMA/IMA report - "A harmonised, simplified approach to UCITS registration" - which describes the unnecessary costs incurred in the current notification process. It should be stressed that such costs are normally borne by the funds and ultimately by investors. If the notification process is properly modernised then European investors should benefit from a greater choice of funds at reduced costs.

While we welcome the improvements proposed in this consultation, we feel it is important to express our disappointment that what is proposed by CESR still envisages a process and obligations well beyond the spirit of a notification process as outlined in the Directive. The proposals still have the potential to permit what could be a re-authorisation process in all but name and this could conspire to inhibit the development of a truly single European market. As long as that potential remains, it has been agreed that some will contrive to exploit it.

The fact that many Member States manage to process notifications and permit registrations within a matter of working days highlights the fact that the current process is capable of being applied in a responsible and efficient manner; and the fact that in a number of member States the same process can take many months is a testament to its vulnerability to abuse. No system can guarantee that those involved will not try and subvert it in some way. **So we would stress that the goodwill and cooperation of those responsible for carrying out the process will be crucial** as it is impossible, in our view, to design the potential for abuse out of the system. If that cooperation and goodwill is not forthcoming then UCITS need a swift and effective escalation and arbitration process to remove any unnecessary log jams.

Particular concern has been expressed that the local legal limitations referred to in the Consultation Paper may be used to frustrate the simplification and modernisation imposed. We feel that over and above any escalation process for funds to sue, that CESR should pro-actively check and test that adequate progress is being made towards dismantling such barriers to entry. It is believed that following this Consultation process, to ensure the CESR recommendations/guidelines are being appropriately applied that sample checking and/or a peer group review would ensure the recommendations/guidelines were being applied appropriately and in good faith.

The Consultation Paper states the aims of the suggested guidelines as "Avoiding uncertainty related to procedures and necessary documents for a UCITS which proposes to market its units in a Member State other than that in which it is situated." and "Avoiding uncertainty related to procedures and necessary documents for a UCITS which wants to maintain its authorisation for marketing in a Member State other than that in which it is situated." However, it has been argued that, it is not necessarily uncertainty that is the issue but unnecessary complexity and delay. We feel that it would be more beneficial for CESR to focus on guidelines that aim to make the process both simple and fast and provide an effective means of escalation if unnecessary delays do creep in. For example, we know of at least one case where a host state authority effectively blocked the admission of an Irish UCITS for over six months because of its intended use of credit derivatives. We are hopeful that the soon to be finalised agreement on the eligibility of assets will remove such frustrations going forward, but we are concerned that interpretation differences between Member States on such matters, as has been the case in the past, will remain and will continue to be a factor. It is therefore necessary that the notification process structurally as far as possible does not allow such interpretation differences to delay or block registration.

While the suggested mediation procedure appears designed to address this issue; there remains a number of open questions regarding the mediation mechanism e.g.:

- Is it possible for an applicant UCITS to trigger the mediation mechanism as a means of removing a block in the notification procedure? If not there remains a concern that UCITS will continue to be impacted by unnecessary delays.
- Can registration proceed even if a matter has been referred for mediation? If not the use of the mediation mechanism may become simply another tool for creating delay.
- Will affected funds be required to finance the mediation process? If so, this could be used as a barrier to entry by increasing cross-border registration costs for certain types of fund.
- How will the mediation process relate to the Level 2 advice that has been provided under the UCITS Directive? We would not wish to see any changes to that advice without due consultation, given the need for consistency and legal certainty.

The proposals designed to improve the administrative efficiency of the notification process have been widely welcomed, in particular the idea of a standard notification letter (subject to some caveats about its integration with Member States requirements). However, if regulators are going to translate the standard into the host state's official language, we recommend that the standard English text be printed underneath the local language text to expedite processing. The opportunity to file notifications electronically is also most welcomed. This proposal will be a very positive development provided that host states do not also require the filing of original physical documents to support the electronic file. It is unclear how the electronic

filing proposals might work within the context of certification of certain documents, and further clarification in this regard would be welcomed.

Specific responses

The Two Month Period

Q1: Is the starting of the two-month period dealt with in a practicable way in your view?

Management companies

From a number of perspectives the provision of information on the management company seems unnecessary. Firstly, any Host State can check publicly available records to establish the authorisation status of the management company, and secondly we see no legitimate basis for a Host State to object to a UCITS because of possible issues with the management company. We also note that this would represent an additional burden for those UCITS with a management company compared to those UCITS which are self-managed.

Starting the two-month period

In practice under these proposals we believe that it will not be possible to be sure that the two-month period has begun for several weeks. We would prefer that there be general agreement as to what constitutes delivery, perhaps through accepting either a recognised courier's receipt or confirmation of delivery at the regulator's required address or a recognised e-mail verification of delivery. The only issue thereafter would be whether the notification was complete, which issue is provided for under CESR's proposals. We welcome the comments at the open hearing that a complete notification is one where the required documents are provided rather than any comment on the content of such documents.

Given the relatively simple and standardised character of the notification and the availability of modern communication methods it should not be an imposition for regulators to be required to indicate any issues of incompleteness within two weeks.

Question 2

Shortening the two-month period

As noted above a number of authorities are already meeting response standards more stringent than those suggested and it has been mentioned that the considerable variations are related to policy and attitude rather than legislative or regulatory issues.

Managing the two-month period

We agree that all involved should strive to work in good faith and to carry out their responsibilities under the proposed procedures with best possible speed.

The use of the term "duly motivated communication" has caused intrigue. It implies that some communications may be, or may have been, improperly or unduly motivated. In such a

case there should be a clear route for escalation by the applicant and at present it is unclear what this should be.

Certification of documents

Q3: Respondents are asked to provide their view on the practicability of the proposed approach.

It has been strongly argued that the directors of the UCITS, or its management company, are by definition fit and proper persons to warrant that the documents filed are the latest true copies of the documents that were filed with the home state authority.

Some Host State authorities only accept documents that bear an original imprint of the home state authority's stamp or mark of authenticity. Ideally this rather archaic practice should be removed in favour of a self-certification, which can easily be evaluated and checked if necessary by the Host Member State. If this cannot be achieved in one fell swoop, then we would suggest that only the most important documents would need to be certified as part of the filing.

Home Member States can assist by making available documents such as the latest approved simplified prospectus for locally domiciled UCITS available on their website to avoid the need for costly certification. Support for such a development is evidenced by the suggestion and agreement of a modest filing fee if it were to speed the process up.

If Host Member States are to insist on the bureaucratic formality of certification for certain documents then it would be helpful if the specific requirements were published on that authority's website.

We look forward to the replacement of the Hague-Apostille certification with more practical measures (e.g., self-certification) as soon as possible. The cost and management effort involved in this onerous practice is entirely unjustified.

Q4: Do you consider the suggested approach as appropriate?

Translation

If foreign language versions of documents are literal translations of the original language then the chance of a misunderstanding is too high. The requirement should be that the translation is a true and fair representation of the substance of the original. The directors of the fund retain responsibility for the contents of a prospectus, regardless of the language in which it is expressed, and so, to avoid interfering in the constitutional arrangements of the home state domicile, the local translation obligation should be couched as an obligation to communicate the prospectus in language that is fair, clear and not misleading.

As the Simplified Prospectus would be the main marketing document of a fund and given that CESR recognises "it is neither the task of the competent host State authority nor would it be possible to check whether the translations are consistent with the original versions" we would suggest that only a translation of the Simplified Prospectus should be required by the host State authority as part of their notification process, and a translated version of other

documents could be provided upon request, rather than as part of the notification process. This would assist the authorisation timeframes, support a prompt review of documents and ensure host State regulators could focus on the main marketing document. This suggested approach would be consistent with the rational behind paragraph 45 (2) in that a host regulator may not wish to review a registration for a sub-fund, where the sub-fund is not yet intended to be sold in that jurisdiction. Similarly, with regard to the translation of documents we do not understand why, for example, a full translation of a Prospectus would be required, when it is very possible that such a document would never be read or requested by an investor. We propose that a translation would be submitted, if and when requested by an investor.

Umbrella funds

Q5: Do you consider the suggested approach as appropriate?

Generally our members would prefer all member states to adopt a consistent approach and note that this has been an area of some confusion in the past, notably in the context of the transitional provisions under UCITS III.

Marketing of only some of the sub-funds

We believe that too broad a definition of marketing will introduce unnecessary process' and procedures for funds seeking registration. We welcome the Commissions consideration of the term "marketing" and believe it to be an essential feature of the notification process and as such it will be necessary that appropriate time be afforded the industry to comment on the Commissions findings/recommendations. It is suggested that this could be facilitated through the anticipated 2nd Consultation in April.

Prospectuses and the financial reports and accounts encompass the entire UCITS and have been through formal processes of adoption and or audit. It is submitted that it could be preferable to provide full versions of these documents than attempt to provide partial versions, which may not have been subject to such official oversight. In practice we believe investors are capable of differentiating between what sub funds are available to them and all funds that might be mentioned in the official documents of the fund. There is not a consistent approach to this issue between jurisdictions, or even over time in single jurisdictions, and we believe the full prospectus route is both cheaper and more effective.

Accordingly it would be important that an affirmative statement be provided that making available a full prospectus and financial reports and accounts does not constitute marketing of all the funds contained therein.

Notification procedure for new sub-funds

It is submitted that it would be more efficient to process the notification of several sub-funds of a UCITS under cover of a single notification letter.

It has been noted that some Member States' apply the two-month rule to new share classes of a sub-fund and this seems to be contrary to the requirements of UCITS.

Q6: Do you consider the suggested approach as appropriate?

Content of the file

We believe host state regulators should be able to rely upon attested copies provided by the UCITS' authorised directors as a true copy of the original in their possession. This will, if nothing else, remove an immense burden from Home State regulators. At the very least, we would ask that a copy attestation granted by the competent home Member State authority should be sufficient. The request for a valid "original" attestation adds considerable burden to Home State regulators, particularly where you might have a large umbrella fund with many sub-funds marketed in a number of jurisdictions.

Q7: Do you consider the suggested approach as appropriate?

Modifications and on-going process

Due to the notification process it is inevitable that there be short-term timing differences between the offering documents available in different states. However, where the timing differential is of the order of nine or ten months then there is a danger of inequitable treatment of investors based purely upon the irrelevant factor of where the investor resides and the speed with which their Home State regulator operates/responds. It has been highlighted that this is a key concern and highlights why the notification process requires radical consideration.

It has been highlighted that paragraph 47 (3) suggests that instruments of incorporation must be "indicated" by the notifying UCITS where paragraph 49 suggests the higher standard that amendments to the instruments of incorporation must be "certified" by the notifying UCITS. We assume that this is an oversight and that the reference to "certified" in paragraph 49. should be amended to "indicated".

Q8: Do you agree with the proposals concerning the publication of the information or do you prefer another procedure and if, which one?

National marketing rules and other specific national regulations

Regulation EC Nr 2560/2001, European Communities (Cross Border Payments in Euro) Regulations 2001 permits cross-border payments to be made through the European banking system as easily as domestic payments and at no additional cost enabling UCITS to meet their payment obligations under the terms of the Directive without the need to retain local paying agents. However, some Member States continue to require UCITS to appoint local paying agents. To the extent that any rationale existed for such arrangements historically, it would appear now to be no longer relevant.

We feel it would be helpful, to avoid scope creep regarding what constitutes marketing and in the absence of a Commission recommendation in this regard, if each Member State was required to agree its requirements under its national marketing rules with CESR.

Several Member States do not specify how the NAV is to be published and a number now recognise that publication (at some considerable cost) in many national papers is unnecessary

and can be replaced with an obligation to publish on an identified website. It is believed that this better reflects the current environment, technological developments, and would benefit investors by providing 24-hour access to NAV prices.

Q9: Do you feel that an issue in this consultation paper should be dealt with in more detail or that other aspects of an issue already contained in the consultation paper should also have been treated?

CESR's paper (in contrast to the Commission Green Paper on Asset Management) does not fully understand the careful accretion of obligations that in aggregate represent an attack on the single market for UCITS. The slowing of delivery to market of a fund will (and some might say is intended to) inhibit its ability to compete with domestic funds, and increasingly products from other financial services sectors such as structured products and insurance products. The challenges of the notification process have been seen as a significant handicap to cross-border players.

Q10: Should some additional issues related to the notification procedure have been dealt with in this consultation paper, and if yes, which?

Please see above.

Q11: Is the model attestation practicable in your view?

Provided the attestation is limited to the facts that the home state authority can know, it forms a basis for a useful document.

Q12: Is the model notification letter practicable in your view?

Provided Member States' requirements for supporting documents are made uniform, this document can form a useful tool. If not, its incompatibility with such requirements will negate its usefulness.

It would be helpful if the letter prompted identification of the main contact point at firms and obliged the regulators to use this.

Q13: What would you suggest CESR to do regarding the national requirements to simplify the notification procedure?

CESR when developing its requirements should follow the lead of those regulators whose processes are regarded as efficient. Against this it is important that CESR be prepared to act in the absence of reform.

DFIA
24th January 2006