Monday, 16 January 2006

Mr Fabrice Demarigny
Secretary General of CESR
11-13, avenue de Friedland
75008 Paris
France

Dear Mr Demarigny

CESR's guidelines for supervisors regarding the notification procedure according to Section VIII of the UCITS Directive.

Barclays Capital welcomes the opportunity to comment on the draft guidelines prepared by CESR to enable the effective passporting of UCITS. Barclays Capital is the investment banking division of Barclays Bank PLC, the international financial services group. Barclays Capital's trade volume has grown five-fold since 2000 and the Firm is now present in 25 countries and has the global reach and distribution power to meet the needs of issuers and investors.

One of the areas in which we have expanded more recently is the structuring of funds, with, in particular, the incorporation of a UCITS platform in 2005. Our business plans have therefore had to rely on the legal framework in force, both in terms of eligible assets and for the passporting of this business. The latter mechanism was to provide an opportunity to grow within Europe and compete on an equal footing with local providers.

Unfortunately, we have to agree when CESR says that the "day-to-day operation of the notification procedure has in some instances been characterised by complication and uncertainty". Both from an industry and from a regulatory perspective, this must change.

- From a **business** perspective, the ability to passport our products incorporated in an EU country into another EU jurisdiction under a single set of requirements should be an opportunity to create synergies. Having to follow various sets of rules and formally seek approval from several regulators within the EU is time consuming, hence costly, in itself. This must be added to opportunity costs, resulting from not being able to do business straight away. Being able to "passport" businesses – whether full branches or specific products – should eliminate those costs, which have become unnecessary within the EU given that the standards applied are equally high and should be mutually relied upon.

- In order to ensure that consumers get the best quality products, **national regulators and EU institutions** have an interest to enhance competition, an objective that can only be achieved if barriers to entry into national EU jurisdictions are limited to a strict minimum. Firms competing freely must constantly improve the quality of the products they sell if they are to keep their customers, or indeed gain market share. Competition also encourages product providers to innovate, which benefits consumers. This is how market forces interact for the ultimate benefit of consumers.

We trust that EU authorities view an efficient functioning of the passporting process as essential to the building of an integrated EU market for financial services and CESR's intentions and efforts in that direction are encouraging.

We have seen the Investment Managers' Association's response to CESR's proposed guidelines and agree with its substance.

It has to be said that the difficulty to passport UCITS into certain EU countries is the result of the UCITS Directive being interpreted differently across the EU. In that respect, CESR's guidelines should be read in conjunction with the ongoing debate on eligible assets, to which we have contributed. A successful harmonisation of the implementation of the UCITS Directive on sensible grounds would provide both firms and the EU regulators with an opportunity to improve passporting and the integration of EU capital markets while allowing financial innovation to progress in all EU jurisdictions.

We have several examples of situations where the passporting of UCITS is proving to be a fully-fledged application process rather than a simple notification. In order to protect our business interest, we cannot disclose detailed information. However, we can reveal that we have notified several EU states of our intention to make use of our right to passport over the last few months. The EU countries in which we have sought to market our products have already in some cases taken over two months to consider our cases.

Some regulators have formally given no indication as to why they still did not allow us to make use of our passport after the standard two-month period. Other regulators have written to us to indicate that their interpretation of assets eligibility under the amended UCITS directive differed from the interpretation given by the countries in which we incorporated our product. While such a response is not acceptable on legal grounds, there is currently little that we can do in practice to prevent such behaviour from occurring. Neither can we choose to ignore it and start trading in those countries. Lastly, some regulators have now chosen to delay the validity of our passport on the grounds that there is an ongoing debate on eligible assets.

All this is absolutely unacceptable and goes well beyond the powers of national regulators as confirmed in CESR's consultation document, namely that "the host Member State authority's competences are confined to refusing the marketing of a foreign UCITS on its territory in case the marketing arrangements do not comply with the provisions referred to in Art. 44(1) and Art. 45 of the Directive".

We strongly encourage CESR to seek evidence within the industry in order to measure the extent of the problem before deciding on the remedy. We believe that the extent of the problem is far bigger that CESR members might suspect, hence the remedy to this clear case of market failure should reflect that. We firmly believe that once CESR has assessed the situation, it will want to make more radical proposals, which will require national laws to be amended.

Standardised forms and list of documents to be submitted

We agree with CESR that the use of standardised forms is a good starting point, and the forms CESR is proposing seem to do the trick. The downside of CESR's proposals throughout the consultation document is that the guidance will not be legally binding. However, the positive aspect to CESR's guidance not being enshrined in a directive text is that it should be easy to modify the forms (or any other part of the guidance) if practice requires it. Once CESR's guidance goes "live", we recommend that CESR should keep an eye on application and effectiveness, with a view to tighten its policy when necessary.

The use of electronic media that CESR is proposing for submission and communication purposes is also welcome.

The counting of the two-month period

Start of the period

As far as the starting of the two-month period is concerned, we believe that some further measures should be proposed to avoid a state waiting for a full month before letting a firm know that the submission was incomplete. If the clock starts from the moment a host state competent authority receives the initial notification, the host state competent authority will have an incentive to let us know of any document missing from the notification as soon as possible, instead of waiting until the end of the one month period.

We also suggest that CESR makes it mandatory for host states competent authorities to notify firms of all missing documents at the same time. We want to avoid a situation where a host state competent authority waits for a full month to let us know that one document is missing from our application, and then waits for another month to say that another document was in fact also missing from the initial application.

What we are proposing would not be detrimental to host member states. They will have enough time to perform their duties in the remaining period because:

- A member state can easily see if a document is missing, without needing to review the substance of the notification;
- The use of electronic media should prevent any delay in communication between the host member state and the firm.

As you note in the first sentence of paragraph 24, the UCITS has a natural business incentive to submit the missing documents as soon as possible. This is because firms and local regulators do not have symmetrical interests, in the shorter term at least. Therefore, we do not consider the conditions set out in paragraph 12 to be necessary.

We take CESR's point that the guidance should not "allow the UCITS to shorten the review period available to the host state authority by delaying the submission" of any missing documents. However, we do not see this happening in practice as the UCITS has an incentive not only to be marketed as soon as possible, but also to do so on sound and certain legal ground. There would be nothing worse for the UCITS than having its reputation put in jeopardy by the fact that the host competent authority argues that it has had no time to properly verify that everything was in place.

We welcome CESR's decision to firmly put the onus on the host competent authority to notify the UCITS of any missing document.

Shortening of the period

We strongly welcome the possibility to shorten the two-month period. However, we believe that CESR's guidance should provide host member states with an incentive to do so. Perhaps CESR's wording should encourage competent authorities to shorten the period, rather than merely indicating that they have that possibility.

"Duly motivated communication"

We welcome CESR's decision to put the onus on the host state regulator to notify firms of non-conformity with Art. 44(1) and 45, and we also support CESR's proposal for a gradual approach to be adopted by host competent authorities. While the "reasoned decision" simply requires firms to start the notification process all over again, at least the introduction of a "duly motivated communication" gives firms a chance to rectify the documentation and continue the notification process.

However, we also agree with the IMA's arguments regarding the counting of the two months once the host competent authority has sent a duly motivated communication to a firm. Stopping the clock might not be necessary, for the reason we have highlighted above when commenting on the start of the two-month period.

Certification

CESR's proposals are not adding any burden to the current process, so we do not object.

We strongly support CESR's proposals in paragraph 33: as you suggest, member states should not require the use of the Hague-Apostille for the certification of documents.

Translation

We do not object to CESR's proposals and support paragraph 34 in so far as the proposal contained therein clarifies that member states with several official languages should not require firms to have the documentation translated in those languages, but, instead, accept a notification with translation in one of those languages.

Umbrella funds

We do not object to CESR's proposals with respect to marketing.

We also agree with CESR's proposals on notification, however, CESR should not explicitly make compliance with this guidance optional, lest few member states should make use of the simplified procedures proposed.

We would be happy to discuss any of the above points, or any other aspect of the current passporting processes, with a view to improving financial integration within the EU and moving toward healthier markets.

Yours sincerely

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Compliance
Barclays Capital