

1 June 2006

Mrs Lucie A. Matolínová  
The Committee of European Securities Regulators  
11-13 Avenue de Friedland  
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France

Dear Lucie

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

The case for the need to simplify the notification regime of UCITS or rather the 27 existing different host Member State regimes in the EEA has been made extremely clearly in the European discussion on asset management during the last few years. The current difficulties, costs and inefficiencies involved in the need to comply with a wide range of different requirements around Europe have been well documented within the Heinemann Report in 2003, the Asset Management Expert Group Report in 2004 and through the EFAMA/IMA report in 2005: "A Harmonised, Simplified Approach to UCITS Registration".

Simplification of the UCITS notification is one of the four priority actions indicated in the Commission Green Paper on investment funds July 2005. The vast majority of respondents to the Green Paper consultation raised the issue agreeing that notification needs to be simplified. The ESC members, the Finance Ministries, have also supported simplification. Furthermore the European Parliament has recently adopted an own-initiative report, the so-called *Klinz-report* on asset management, where it has strongly called for simplification of the notification procedure.

IMA welcomes the fact that CESR has taken this issue on its agenda and is consulting for the second time. But even though IMA is a strong supporter of CESR in the field of asset management, we have to say we are disappointed that CESR has not succeeded in making more progress. There are some improvements which we warmly welcome, but given the significant amount of feedback given to the first consultation, we are surprised to see that in many places CESR's proposals have changed very little. We fear the result of the draft guidelines if adopted and applied by the CESR members will fall short of facilitating a simplified and cost-efficient European regime for UCITS notification.

We welcome the fact that CESR has revised the objectives of the guidelines in point 6 of the introduction to include facilitating cross-border fund distribution, eliminating barriers to the single market, and reducing costs for investors and fund management

companies. But the proposed guidelines do not provide enough tools to achieve these objectives. Below please find our detailed comments.

### **General Commitment and transitional period**

IMA appreciates that CESR members have decided to adopt working procedures that will aim to speed up the notification process and enhance co-operation among themselves. We understand that some kind of transitional period is needed to implement the guidelines by CESR members. However, no clear deadline is set for this transitional period, nor is there a clear commitment to seek legislative changes and the IT and human resources that CESR says are necessary to implement the guidelines in practice.

We therefore find CESR members' commitment to implement the guidelines alarmingly weak, given the strength of the case for facilitating cross-border notification of UCITS which has been so clearly made not only by the European asset management industry but also the European institutions as explained above.

IMA welcomes the statement by the Chairman of the CESR Expert Group on Investment Management in the open hearing held in Paris on 23th May 2006, i.e. that CESR is strongly committed to monitor that its members really implement the guidelines, and that a first review will take place in a year's time. We would welcome the inclusion of this timetable within the guidelines along with the same deadline for the implementation of the guidelines by CESR members. CESR should set a more detailed timetable with interim milestones against which members' progress can be measured.

In our members' and their local legal representatives' experience, the problems relate many times not so much to the letter of the national law but to the actual interpretation of it. We therefore suggest that host authorities review their domestic legislation and identify where it would prevent the implementation of the CESR guidelines. Those countries which as a matter of law have problems in implementing the guidelines should identify themselves and present to the industry these binding national requirements.

### **Guideline 1**

IMA welcomes the proposal that the notification letter may be submitted to the host Member State authority in a language common in the sphere of finance at the international level. Following the terminology of Art. 19(2) of the Prospectus Directive 2003/71/EC the wording should rather be "*language common in the sphere of international finance*".

However, CESR's agreement on this issue is significantly watered down by the caveat: "if it is not contrary to the domestic legislation or regulations of the host Member State". In addition CESR notes 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".

The IMA considers this guideline too weak to achieve the intended simplification, because there is no clear commitment by CESR members to follow the guideline. This is hard to understand bearing in mind that English is the official working language of CESR and certainly the language used by many of the market participants. A UCITS notification is a communication from the UCITS to the host regulator, from one professional to another, where it would be only normal to use the language used by financial markets in Europe.

We suggest that host authorities review their domestic legislation and identify where it would prevent the implementation of Guideline 1. Those countries which require as a matter of law that communications be in the local language should identify themselves.

CESR's reference to administrative law refers to a legal concept with no basis: A UCITS notification is not an application to the host Authority. According to the wording of Art. 46 of the UCITS Directive it is information (UCITS "must inform") from the UCITS to the host regulator. Unless the host regulator reacts in two months to the information it has received the UCITS may start the marketing. So a UCITS notification is not an application to the host regulator but a communication. This approach should be used by the CESR members to find a pragmatic way around the national administrative law requirements to accept English as the language for the notification letter. Already many regulators have taken this pragmatic approach so it should be possible for others also.

We welcome the principle of facilitating electronic filing of documents. Indeed modern ways to deliver documents should be used more and more. However practical experiences of some of our members in certain Member States indicate a need for some caution: it is vital that the host authorities conduct adequate testing of these systems and arrange necessary back-up systems in case problems occur with the electronic filing. There should always also be the possibility of delivering documents via mail/courier services in case the electronic system is malfunctioning.

IMA invites CESR to develop common formats and templates for the electronic filing of UCITS notification. It is not reasonable to require UCITS managers to build up IT capabilities for 27 different electronic filing systems of CESR members. Many CESR members are currently considering increasing the use of electronic filing, so now would be the time to develop common formats before investments are made in many different systems.

## **Guideline 2**

IMA very much welcomes this guideline. In the last few years one of the main problems with the UCITS notification has been the host regulator disagreeing with the home regulator about the eligible assets of UCITS and therefore challenging the passport. The eligible assets exercise, i.e. the forthcoming Commission regulation and CESR Level 3 guidelines will hopefully clarify most of these issues. Differences of interpretation are still likely to arise as product development goes further in the future.

It is therefore crucially important that CESR members follow this guideline and do not challenge passports of incoming UCITS where the interpretation of the Directive differs between regulators. CESR must indeed develop other mechanisms to discuss

these issues among its members. A mediation mechanism is one example, but even more crucial is an open dialogue among CESR members on the products. Mediation takes place when the problem is already there and is likely to be difficult to correct, i.e. a UCITS has been authorised and notified cross-border, it has investors and capital.

So far CESR's agenda on investment management has been dominated by trying to solve the problems UCITS III caused for the markets, which the IMA very much welcomes. Going forward CESR should develop a more operational and open dialogue between its members to discuss interpretations and new products, aiming to solve the problems in advance. This operational cooperation should however not slow down product development of the UCITS industry in any way, and over formal structures are to be avoided. But even a small task force set up by the CESR Expert Group on Investment Management consisting of the representatives of the main jurisdictions discussing key developments would help to achieve more consistent interpretations and lessen the risk of contradictions. This kind of task force should be able to be convened very quickly when necessary.

### **Guideline 3**

IMA notes that it is indeed important that a maximum period be established so that the process cannot be indefinitely prolonged.

### **Guideline 4**

We do not find this guideline very clear or helpful to simplify the notification process. We believe that the proposal that the competent authority should take a month to indicate whether a notification is complete is too long, and that this should be capable of being achieved within an absolute maximum of a week (given that it relates to the existence of the documentation rather than its content or substance). It should not take one month to make sure all the relevant documents are attached to the notification. We find the proposed language "*as soon as possible and in any case within one month*" too weak to make a real difference. There needs to be a clear benchmark deadline to bring discipline to the process.

The impact of this guideline read together with Guideline 6 can be totally opposite to simplifying the procedure: according to the guideline the host regulator can decide after one month that the two month period has not even started yet. So the notification period could in practice be as follows:

1. one month to check completeness +
2. the time necessary for the UCITS to amend the material if found incomplete +
3. two months as described in the Directive +
4. possible additional time as a result of suspension i.e. "stopping the clock" in accordance with Guideline 6 = **4-5 months**

It is very hard to see what in this example represents simplifying the current notification process.

We believe that in the absence of an indication within one week of delivery of a notification (that date evidenced by delivery receipt or other proof of delivery) that a

notification is incomplete, the two month period should be deemed to have started as from the date of delivery of the documentation.

IMA welcomes the statement by the Chairman of the CESR Expert Group on Investment Management in the open hearing held in Paris on 23th May 2006, i.e. that in most cases CESR members already do the substance check in the one month period mentioned, like in Germany 95 % of the notifications. Since this is not clear from the text of Guideline 4, we would welcome the inclusion in the guidelines of a commitment “in normal circumstances to do also the substantial check of the notification during this one month period”.

An important clarification has been made in the explanatory text in paragraph 13, i.e. the principle of “silence means consent”. If the host authority does not react in two months after receiving the notification, the UCITS can start marketing. In our view this text should be included in Guideline 4 slightly amended as follows: “If there is no communication by the host State authority to the UCITS after two months of the delivery of the notification to the host authority, the UCITS can start marketing.”

#### **Guideline 5**

IMA fully supports the shortening of the two-month period. The ratio legis of Art. 46(2) can only have been to say that if the UCITS has not heard anything from the host regulator in two months, it may nevertheless start the marketing without having to wait anymore. The purpose of this requirement has clearly been to preserve the right of the UCITS to start marketing in the absence of any reaction by the host regulator, but the implementation in some Member States has departed from the original purpose. The jurisdictions that for some reason have implemented this as an obligatory waiting period should change their regulations to reflect this guideline.

#### **Guideline 6**

As explained under our response to Guideline 4, we are very concerned that the system CESR is creating for notification is vulnerable to abusive behaviour. Our members have experiences of receiving the request for additional information on the 59<sup>th</sup> day after submitting the notification.

We fully agree that both the notifier and the relevant competent authority need to provide necessary information as quickly as possible and should not introduce unfair delays. We do not believe, however, that a request for further information from the regulator, and the provision of that information within a reasonable timeframe by the notifier, should routinely cause the “clock to stop”. A commitment on the part of the regulator, for example, to raise any material issues within one month of receipt of the notification should provide sufficient time for the notifier to supply the information and for that still to be processed within the timeframe of two months or less. If there has to be some delay because the notifier is unable to provide the information within a reasonable timeframe and the two months is exceeded, we believe that marketing should be permitted within two weeks of the information being provided unless the host competent authority indicates otherwise. A request for further information should clearly not be a reason for starting the two-month period again. Formal proceedings should be a last resort when more informal requests have failed to produce the right response.

#### **Guideline 7**

IMA very much welcomes CESR's agreement that the self-certification of documents by the UCITS is sufficient for the notification procedure. This is an important improvement. To avoid inconsistent and too burdensome implementation of the guideline we suggest that the term used throughout the guidelines should be "A self-certification by the duly appointed representatives of the UCITS or its management company". This language is needed to take into account the different legal structures in which UCITS operate.

We welcome the agreement not to require the use of the Hague Apostille for certification of documentation and we would ask that this agreement have immediate effect.

#### **Guideline 8**

We urge regulators not to require sworn translation since this adds to cost and time delays without improving or guaranteeing the quality.

Taken into account also CESR's own statement in paragraph 29 of the first consultation paper that the simplified prospectus is the most essential document regarding the fund for the investor, we would urge as many regulators as possible only to require translation of the simplified prospectus, with other documentation acceptable in English. This would reflect the practice used under the Prospectus Directive. Given the responsibility of the host Member State, if any other translation is to be required, we believe that it should only be of material relating the marketing of the fund.

Given the large number of comments on this issue in the first consultation we are disappointed to CESR's unambitious approach. We believe CESR should promote the above as a best practice instead of just noting that the Directive allows host regulator to approve the use of another language.

It should also be considered that in legal terms Art. 47 about the language requirements refer to actual marketing of the UCITS in the host State and not the notification phase. Translating relevant material to the language of the investors whilst actually marketing is something any UCITS would do, if it wants to get investors. But this is something different from the notification procedure between the UCITS and the host regulator under Art. 46.

We have also one drafting comment for the sake of clarification. The end of paragraph 1 should be amended to be in line with Guideline 1: "...except for the UCITS attestation and notification letter (see also guidelines 1 and 11)."

#### **Guideline 9**

We welcome the agreement that where a UCITS intends to market actively only some of the sub-funds in an umbrella fund, only those sub-funds have to be notified. We note, however, that difficulties have arisen over a requirement imposed in some cases that references to sub-funds which are not so notified be removed from the prospectus. We believe that this is inappropriate and such practice should not

continue. This contravenes the requirement that information should be available to all investors equally. All sub-funds should be included within the prospectus. We accept that information should be available as to which funds are marketed where, but do not believe that this information should have to be included within the formal prospectus. It could be included in a separate table which would be available to regulators and investors alike. Similarly, local marketing information should be capable of being provided separately.

#### **Guideline 10**

We are surprised that this guideline does not reflect the significant number of comments made in the first consultation. We therefore reiterate: Given the responsibility of the host Member State for marketing arrangements, we believe that where the marketing arrangements remain the same, the two-month period for approval of the marketing arrangements should not apply either where an existing sub-fund which was included in the original notification is notified, or where a new sub-fund is added and where the marketing arrangements are the same. Relevant changes to the prospectus, where they occur, should be notified to the relevant authorities, but not subject to any further requirements (e.g. re-certification of UCITS status should not be required). We believe that it is vitally important that this practice be the same throughout Europe and that there should not be differences of approach among different Member States.

We find the proposed language “*necessary time for the check by the host authority should be significantly less than the regular two-month period*” too weak to make a real difference. There needs to be a clear benchmark deadline to bring discipline to the process.

IMA welcomes the proposal in point 35 that simplified procedures should be where possible applied to also contractual funds or unit trusts where their notifications include repetitive information.

#### **Guideline 11**

IMA welcomes CESR’s proposal to accept copies of the attestation instead of requiring the use of originals only, and also the acceptance of English as the language for the attestation. We also welcome point 37 giving examples of which kind of additional documents the host regulators are not allowed to request. We are however concerned about the end of the point starting “*However, if documents are appropriate to streamline the notification process, they might be requested by the host State regulator...*” CESR must not leave this kind of issue open for different interpretations in the national level. When approving the final CESR guidelines they should be a common format for the procedure and documents. This sentence should therefore be deleted.

We would also welcome an explicit statement in the Guideline that a notification including the material set out here is de facto a complete notification and that therefore a host regulator may not claim such an application incomplete under Guideline 4.

## **Guideline 12**

We fully agree with the conclusion that the same information should be available to all investors of a UCITS. In particular this means that a host State should not be capable of demanding a "national" version of documentation (e.g. the prospectus/simplified prospectus) which has been approved by the home Member State - the only competent authority who can require and approve changes should be the home State (cf. the difficulty with the requirement in some jurisdictions to exclude from the prospectus sub-funds which are not marketed in that jurisdiction). Further approval should not be required from the host Member State unless there is some change to the marketing arrangements, and the modifications should be capable of being informed to investors immediately. We invite CESR to expressly clarify that technical modifications to the documentation such as for example changing addresses or NAV-calculation timetables and adding new share classes will not trigger a new two-month period. It is in the immediate interest of the investors that they are informed of these issues without any delay.

Regarding share classes CESR has already taken the view in the transitional guidelines for UCITS III (Ref. CESR/04-434b, Question A.III.1) that share classes were not to be considered comparable to sub-funds, i.e. adding new share classes did not trigger a need to convert to UCITS III by the set deadline unlike adding new sub-funds. Therefore in consistency with this position CESR should state that adding new share classes does not either trigger a need for a new notification.

We note the EFAMA/IMA proposal in the paper "A Harmonised, simplified approach to UCITS Registration": "CESR members should look closely at the absence of ongoing registration requirements in the Directive compared to the variety of processes that have built up over time and seek to put in place a common process. The process should seek to allow UCITS which are already registered merely to file changes with host Member States without the need for further approval or delay".

## **Guideline 13**

This guideline is totally unchanged from the first consultation despite comments presented by respondents. In order to achieve the desired result of simplification and streamlining, we would again urge Member States to keep to a minimum the additional information they require from funds. We appreciate the proposal to indicate where such rules can be found, but in the majority of cases the UCITS will not be marketing their own units – they will be marketed by local distributors. While we accept that indicating where local marketing rules can be found might help, we believe that it is important for competent authorities to make very clear specifically what additional information they may require and why. We believe that it is important to maintain a clear sense of proportionality in this, and for regulators to keep to a minimum the differences in these requirements. It would be helpful if additional information requirements were recorded in a single website (CESR's). This would have the advantage both of having the necessary information in one place and of allowing regulators to compare requirements, and see where national differences can be ironed out.

We repeat the suggestion in the EFAMA/IMA document on simplification of registration that Member States agree a standardized format for submission of



marketing information and supporting material, and are disappointed to see the lack of proposals in this area.

We would also note that we do not believe that details of risk management processes can be considered to be within the responsibility of the host Member State, and should not therefore have to be included within the notification documentation.

As a drafting suggestion, we propose to change the wording on the fourth line “CESR Members are also expected to publish any amendment...” and on the seventh line “CESR Members are expected to inform CESR on any amendment...” This language should be changed to be more binding, i.e. “CESR Members will...”

#### **Q9./Q10. Additional comments**

We note that there is no discussion in the consultation paper of the diversity of fees applicable for registration, a point which was covered by EFAMA and IMA in their joint report on notification problems.

We also note that while Switzerland is not a member of the EU, it seeks to implement the requirements of the UCITS Directive, and many EU funds seek to market there. Such notification is frequently problematic. We believe that it would be helpful if CESR were to draw the Swiss authorities into its discussions in order to cover the major markets within Europe. We understand this is not possible “inside” CESR formally since Switzerland is neither member of the EU or EEA. This does, however, not prevent CESR from creating an active pragmatic regulatory dialogue with Switzerland in the field of investment management in order to facilitate cross-border marketing of UCITS also to Switzerland.

#### **Q11. Model attestation**

We believe that the attestation should be limited to information which the Member State can reasonably be expected to know, and new documents should not be required for each notification. The reference to sub-funds to be marketed in the host Member State should, therefore, be removed. We also believe that point 21 should be removed since the latest version of the fund rules/instrument of incorporation will have to be attached, self-certified by the UCITS as stated in Guideline 7. We note that there have been difficulties in some countries with expiry dates for attestations – we do not think any expiry dates should apply.

#### **Q12. Model notification letter**

We do not understand the reference to the duration of a management company and do not see why the scope of the activities of the management company in the host Member State is relevant.

#### **Q13. National marketing rules**

We have made suggestions above about the need to simplify and standardise national requirements. We believe that it is important for CESR members to be committed to having national differences only where absolutely necessary, and in

particular limit the additional documentation included under Annex III to an absolute minimum. We also think that the national options should be kept to a minimum.

If you want to discuss any of the points raised in our response please do not hesitate to contact me.

Best regards

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