

Monday, 29 May 2006

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

Dear Mr Demarigny

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

Barclays welcomes the opportunity to comment on the draft guidelines prepared by CESR to enable the effective passporting of UCITS. This response includes comments from various parts of the Barclays Group, in particular Barclays Capital and Barclays Global Investors, which are the non retail divisions of Barclays, and Barclays Wealth Management.

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, but, unfortunately, we have so far encountered great difficulties.

For three decades, **Barclays Global Investors** ("BGI") has been active in the investment world. From the introduction of the world's first index fund in 1971, to iShares (exchange-traded funds), BGI has pioneered change and led investment innovation. Today, from its headquarters in San Francisco and its offices world-wide, BGI manages more than £881 billion in assets (December 2005) for individual and institutional investors across the globe. With a full service office in London and an additional client service and business development office in Amsterdam, BGI Europe provides a full range of quantitative products and services for UK and continental European clients as well as providing the base for servicing clients in the Middle East.

Barclays Wealth Management is one of the leading wealth managers in the UK with £78.3bn assets under management (December 2005). Barclays Wealth Management serves retail, affluent, high net worth personal and corporate clients, primarily in the UK and continental Europe, providing private banking, offshore banking, stockbroking, financial planning and asset management services.

We will not reiterate all the messages that we delivered in our response to the CESR's previous round of consultation. However, most of them still apply given the total absence of commitment to facilitate, or recommend, amendment to national legislations. Without any such commitment, we suspect that necessary amendments will not be made, or will be made, but not within a reasonable period of time following the publication of CESR's guidelines. We suggest that CESR seek commitment from its members to amend national legislation and this to be achieved within a timeframe which could, for instance, be set to coincide with the implementation of the Product Directive by February 2007. Without such commitment from its members, we doubt the resulting effectiveness of the proposed framework of the recommendations.

Standardised forms and list of documents to be submitted

We support CESR's proposal to allow for the use of the internet for the purpose of submitting registration documents and of following up the registration during the course of the two-month period. The internet should be used instead of, rather than in addition to, other media.

To have a standard list of documents to be submitted along with the application made public on regulators' websites is a good idea. However, it is not completely clear to us whether CESR is allowing national regulators to request further documents, in addition to CESR's standard list, and we urge CESR to clarify that competent authorities should not request for any additional documents. Allowing national regulators to request documents in addition to CESR's standard list, or indeed in addition to the list that will be published on the regulators' websites, would completely defeat the purpose of what CESR is trying to achieve.

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 indicate that they have this possibility.

Further to the hearing in Paris last week, we understand that CESR intends to allow UCITS to be marketed in host member states if the latter have not objected to the notification from an administrative perspective (cf next section below). We should be grateful if CESR made this clear in its final guidelines as we did not understand this at all from reading the consultation paper. A one-month notification period (instead of two months) would be acceptable. It would obviously be in-keeping with our below comment regarding the need for any "motivated communication" to be issued within one month.

Interruption of the two-month period

CESR rightly draws a line between administrative verification – i.e. whether there are any documents missing from a registration application – and questions on the substance of the registration.

We believe that the former should consist in **a simple verification that all the requested documents have been submitted**. This is a simple check against the list that CESR suggests and that should be on national regulators' websites, and, therefore, should not take one month to be performed. Rather, we reiterate the suggestion that two weeks should be largely sufficient.

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. One way of preventing this from happening is to allow for the two-month period to start on the day the submission is made by the firm – rather than on the day the submission is deemed to be "complete" from an administrative perspective by the regulator. This would provide the regulator with an incentive to let firms know of any missing document as soon as possible.

As far as the latter is concerned, we still believe that having a **"motivated communication process"** in place is better than the local regulator being able to issue a "reasoned decision" straight away. However, we believe that the way this "motivated communication" is to be handled will not facilitate the processing of a passport registration, for at least two reasons:

- A one-month period should be largely sufficient for the regulator of the host member state to issue its "motivated communication". If the host member state is given two full months to come back to a firm with a "motivated communication" there is a risk that member states will wait until the last minute to share their views with firms, hence delay the process against firms' business interests and the integration of European markets.

- In line with the IMA / EFAMA, we believe that marketing should be allowed to start one week after the additional information has been provided. “Stopping the clock” completely is not in the interest of firms and would give national regulators the opportunity to effectively stall the whole process, as this is currently happening with respect to our passport notification in certain member states.

Lastly, we believe that it would be useful to repeat that only requirements regarding **marketing arrangements and advertising based on Art. 44 and 45** grant powers for host Member State competent authorities to send a firm a “motivated communication”. Currently, notifications are being held up because the UCITS in question does not comply with the local interpretation of the UCITS directive, especially on the question of eligible assets. This is absolutely illegal and should be made very clear. Member states opposing the use of their passports by UCITS incorporated in other member states sometimes do so because under their own interpretation of the directive they would not allow local providers to incorporate similar UCITS. Thus protecting local markets is absolutely against the letter and the spirit of EU law, even beyond the UCITS directive. CESR’s guidelines should therefore seek to urgently address this issue. We understand that this may require legislative action by the host states to amend national legal/regulatory provisions, and this, we believe, should be part of the scope of this exercise to simplify the cross-border notification procedure.

To draw further on this question of marketing material, we believe that so long as there are national requirements regarding marketing arrangements and advertising based on Art. 44 and 45, which grant powers for host Member State competent authorities to set additional requirements, there will continue to be difficulties in the notification process that this consultation is attempting to address. This is because member states have a different understanding of what falls under the scope of Art. 44 and 45. We believe that host member states will continue to use these requirements to prolong the notification process, making it difficult for UCITS to be marketed in their jurisdiction. CESR acknowledges that a harmonized definition of the terms “marketing” and “proposes to market” has not been dealt with so far, because the interpretation of these definitions is pending with the EU Commission. However, so long as these differing national requirements remain, the notification process cannot be truly claimed to be simplified.

Certification

We support CESR’s proposals not to require the use of the Hague-Apostille for the certification of documents and allow for the certification of the documents by the UCITS itself.

Translation

We welcome CESR’s proposal for member states to agree on a single language, common to the world of finance. However, it should be made clear which language this should be, regardless of national legislations. Unless this is made clear, we highly suspect that the relevant guideline will never be applied.

We suggest that firms be required to translate into the local language the simplified prospectus only.

Umbrella funds & sub-funds

Since Member States should not be entitled to comment on the investment limits or the UCITS passport of the sub-fund, their review should be limited to the marketing arrangement for the offer of the UCITS. Once the marketing arrangements have been reviewed and agreed during the first notification, a simple statement from the UCITS that the new sub-fund operates within the same marketing arrangement of the existing sub-funds should be sufficient information to start the offer of the new sub-fund, without having to trigger the application of a new two-month period.

Grandfathering arrangements

Lastly, we would like to bring to CESR’s attention the issue resulting from the fact that some host state authorities are unwilling to accept notifications for a grandfathered UCITS I, i.e. a UCITS compliant with the requirements laid down in the directive 85/611/EEC prior to its amendments by the directive

2001/611/EEC. We believe this should be addressed, particularly, as the model attestation at question 15 covers confirmation that the UCITS I is a grandfathered UCITS. UCITS I should have the possibility to be registered without any delay.

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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Barclays Capital