

20 July 2009

Mr. Lamberto Cardia
Chair of CESR Investment Management Group
The Committee of European Securities Regulators
11-13 Avenue de Friedland
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France

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Dear Mr. Cardia

Response to CESR consultation on level 2 measures related to the UCITS management company passport

Barclays Global Investors Ltd ("BGI Ltd") is a company incorporated in England & Wales and a member of the BGI Group. BGI is authorised and regulated by the Financial Services Authority in the United Kingdom and acts as the promoter, investment manager and distributor to the funds managed by Barclays Global Investors Ireland Limited ("BGII").

BGII was incorporated in Ireland in 1995 and is authorised as an UCITS Management Company by the Irish Financial Regulator. As at April 2009 BGII acts as manager of 16 umbrella collective investment schemes with over 201 sub-funds. These are a combination of UCITS and non-UCITS funds. It operates no other business. Assets-under-management in respect of BGII's UCITS funds are \$ 84bn, and in respect of non UCITS funds is \$ 19.5bn as at the same date.

BGII's funds are distributed primarily to institutional investors, mainly based in the European Union but also in other markets. For over ten years, the BGI Group has concentrated its European institutional investment fund business in Ireland and made less use of other jurisdictions. BGII is the manager of all of these Irish funds.

Since its establishment, BGII has operated a policy of continued product innovation, reflecting the investment BGI has made in researching and developing new investment techniques to enhance its product capabilities and increasing client demand for its products. We therefore welcome the opportunity of responding to CESR's consultation on level 2 measures related to the UCITS management company passport.

High Level Comments

BGI considers the Management Company passport an important step towards creating a single market in Europe for pooled investment vehicles and welcomes the proposals to apply (broadly speaking) MiFID-style standards to UCITS Management Companies.

We would take this opportunity to make the following observations on the technical advice.

1. BGI would like to see clarification on the application of the new rules to self-managed UCITS investment vehicles. As compared to UCITS Management Companies, these structures do not passport their services and do not provide services to the investment vehicle as a professional management company.

We would therefore ask CESR to give due consideration to the cost implications of self-managed UCITS investment vehicles having to comply with MiFID-style requirements, where applicable, as these additional costs would in all likelihood have to be borne by the investment vehicle itself with no obvious benefit to any party.

2. BGI notes that the technical advice does not deal with activities which are delegated to a Non EU service provider (i.e. a non-MiFID firm). BGI would seek further clarification on how the equivalence rules would be applied under UCITS IV and how they would need to be demonstrated / assessed.
3. BGI welcomes the standardisation which the Passport will bring to UCITS Management Companies across Europe and understands the need for the the organisation/structure and activities of the UCITS Management Company in the home country to be made readily open to the review of the Competent Authority of the UCITS domicile itself.

Clearly, the UCITS domicile competent authority needs to be able to inspect the systems and controls of the proposed UCITS Management Company and to be able to verify and satisfy itself that the Management Company is in compliance with the regulations of the Management Company's Competent Authority and of the UCITS itself.

This effectively means that a Management Company which avails of the passport (or wishes to avail of the passport) will need to organise itself and establish policies and procedures that brings it into compliance with the *aggregate* of the rules adopted by each Competent Authority it intends to passport into.

BGI would therefore urge CESR to consider in advance whether any of these local rules conflict each other in terms of what they require of the Management Company or when taken in aggregate impose a matrix of highly complex duties which may prove impractical to implement for the Management Company.

With the benefit of hindsight, it is apparent that MiFID was often unevenly and sometimes incompletely implemented across the EU's 27 nation-states. It is BGIs view that for the UCITS Management Company passport to be truly effective, the same uneven treatment must not be allowed to effect the implementation of the UCITS Directive's equivalent MiFID-style systems and controls. CESR should seek to harmonise in advance of each Competent Authority's rules and regulations surrounding any MiFID-style requirements around the UCITS product.

4. BGI sees the role performed by the Management Company as important from a number of perspectives. One is the additional checks and balances that the existence of a Management Company offers investors and Competent Authorities. Another is the

actual independence from the operational activities of the MiFID Investment Manager that Management Companies can offer in certain fund governance structures. A separate-entity Management Company is in a strong position to carry out independent due diligence and monitoring of its appointed Investment Manager by simple virtue of its entity-level independence.

The operating structure of the Management Company is such that delegation of specific tasks and functions to those third parties with relevant expertise is fundamental to increasing the efficiency of its conduct of business – as acknowledged in the Preamble to the UCITS IV Directive Level 1 text itself. In delegating these activities to carefully selected third parties the Management Company will arrange suitable mandates with appropriate third parties and then undertake an oversight and supervisory role via due diligence, monitoring and the management of the correct flow of information into the Management Company.

We note that this arrangement continues to be reflected in this level 2 consultation (Introduction, para. 10) and would simply observe that we are fully supportive of this stance.

BGI believes that any attempt to transfer strict liability for hitherto delegated activities back onto the Management Company would result in an additional cost burden at the Management Company without any visible benefits to investors, the Competent Authority or the Investment Manager. In the case of separate entity Management Companies it would also in all likelihood drive a consolidation of the UCITS Management Company into the MiFID Investment Management Company – thus removing a key existing element of control in the form of entity level independence.

We thus agree with CESR that the Management Company should be allowed to continue to deliver the required systems and controls – now including the MiFID-style obligations proposed in this consultation – via appropriate mandate with, and then thorough due diligence and comprehensive ongoing monitoring of carefully selected third parties. The clarification of duties under this current raft of UCITS IV level 2 consultations will naturally re-focus the obligations falling to each party but it will also require each party to re-examine and where appropriate strengthen the relationship between them.

5. One of the primary challenges of the European Investment Market is the diversity in the Tax legislation in member states around domicile of funds. The UCITS framework and the Directives may yet prove insufficient to satisfy tax authorities in various jurisdictions that their criteria for domicile are satisfied. There is therefore a possibility that the Management Company Passport will lead to a renewed focus on the various tax led issues around fund domicile and it would be a serious challenge for an investment manager to put its UCITS fund range at risk of re-domiciliation without absolute certainty on this point.

Differences within each member state's tax authorities in their treatment of fund domicile may yet hinder the success of the Management Company Passport. BGI would

ask whether CESR considered this and is there an initiative underway to remove the ambiguity?

Detailed Comments

Aside from these higher level issues around the general application of CESR's proposed MiFID-style systems and controls, BGI is largely happy with the details in the technical advice.

I would of course be happy to discuss any of our comments at your convenience.

Yours Sincerely

Barry O'Dwyer
Chief Operating Officer, BGI Ireland Limited