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By email to: www.cesr-eu.org

Cc: Commission of the European Communities
Brussels

UCITS Registration

– an outdated relic from early harmonisation –

Dear Sirs,

FEAM RESPONSE TO CESR CONSULTATION PAPER
ON ITS GUIDELINES FOR SUPERVISORS
REGARDING THE NOTIFICATION PROCEDURE
ACCORDING TO SECTION VIII OF THE UCITS DIRECTIVE

FEAM

This response is made by the Forum of European Asset Managers, a lobby group of fifteen Pan-European asset management companies[1] who collectively manage over 5 trillion Euros worldwide, of which over 1.6 trillion Euros is managed in Europe. Our outlook is European rather than domestic. We want to realise the benefits of a single market both for our clients and for our companies.

[1] The members of FEAM are: Aberdeen Asset Management, Allianz Global Investors, AXA Investment Managers, ABN Amro Asset Management, Aegon Asset Management, Capital International, Fidelity International, Fortis Investment Management, Invesco, JP Morgan Fleming Asset Management, Merrill Lynch Investment Management, Pioneer Global Asset Management, State Street Global Advisors, Threadneedle Investments and UBS Global Asset Management

Working Group

This report was prepared by a FEAM working group, which began work prior to the CESR Consultation Paper of October 2005.

Initially FEAM had intended to issue a stand-alone report on UCITS registration, following on from earlier analysis, to look in more detail at issues of implementation and to advance, in particular, operational proposals for designing consistent standards for the registration requirements in the short term (i.e. without any modification to the current UCITS-Directive) that would not detract from the ultimate goal of a new regime. However, following the publication of the CESR Consultation Paper we decided to combine the work already done on this report with our formal response to the CESR Consultation Paper. We believe this to be appropriate as CESR invited comments on aspects of the problem beyond those dealt with in its Consultation Paper. In addition we are convinced that the report format enables us to address more effectively the proposals, which CESR seems to perceive as being outwith its own narrowly defined competence.

Yours faithfully,

Nicolas Moreau
Chairman of the Management Committee, FEAM
Chief Executive Officer, AXA Investment Managers

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Executive Summary

- **Progress on simplifying the existing UCITS registration requirements is long overdue. It should be pursued as a matter of urgency. But this should not detract from the goal of designing a new regime for cross-border distribution**
- **Any new framework will only be sustainable if it takes into consideration appropriate market structures, modern communication facilities, the most recent legal developments in related areas and experience in other regional markets, especially the US**
- **Due to the absence of meaningful benefits, we believe the cost of UCITS registration cannot be justified**
- **Regulators should thus be asked to demonstrate from actual experience how UCITS registration has helped to achieve its supervisory goals**
- **The UCITS passport should be taken literally; there should be no room for product-related re-assessment by host Member States**
- **Once authorised in its home Member State a UCITS should automatically be admitted for distribution in all Member States on completion of a simple and standard notification to the host Member State.**

General Assessment

In our response to the EU Commission's Green Paper on the Enhancement of the EU Framework for Investment Funds we highlighted the importance of establishing a practical working regime for passport notifications. Timely and meaningful delivery of this "priority action" will serve as a litmus test for the prospects of achieving satisfactory solutions to more complex topics dealt with in the Green Paper.

Our position on the need to modernise the registration process is fully in tune with the recommendations of the Asset Management Working Group published in May 2004, in particular that:

- the registration of UCITS should be simplified;
- *as a first step*, CESR, in cooperation with the Commission, should develop consistent standards for the registration requirements foreseen by the existing UCITS Directive. National authorities should commit themselves to *streamline the registration process*;
- as a second step, the UCITS Directive should be amended to replace the current registration requirement with a *simple notification process*. Instead of a registration per Host Member State in whose territory the marketing of the units of a UCITS is intended, *a UCITS should automatically be admitted for distribution in all Member States of the European Community, once it has been authorised in its Home Member State*.

We very much welcome CESR's efforts towards achieving what the Working Group described as a 'first step'. But despite some progress, our overall impression of the CESR Consultation Paper is that it only serves to emphasise the fact that even this first step will not be enough. The proposals will fall well short of enabling the market to exploit the full potential of the UCITS Directive and achieve the 'second step'.

We accept that CESR must work by consensus. But this should not be allowed to endanger the recommendations put forward by the Asset Management Working Group. This position paper proposes a more sustainable approach to bringing about effective cross-border UCITS distribution.

Though the creation of a truly pan-European system of simple notification (i.e. the second step) will require small modifications to the UCITS-Directive, the onus should be on the regulators to demonstrate what practical benefit derives from the current system. If, after 20 years' experience, no actual benefit can be demonstrated, the system should be abolished. Its existence alone does not justify keeping it.

Furthermore it would be wrong to start the analysis with proposals to streamline the registration process. Again, this would put too much emphasis on the current UCITS regulation, which has proven to be of questionable value. We need a consensus about the final goal before seeking to identify transitional solutions within the limits of the current UCITS Directive. Again, if there is consensus on the second step but agreement that it will delayed by the time needed to amend the UCITS Directive, there is no compelling reason not to exploit the full potential of the current EU legislation in force. From this perspective it is

unfortunate that CESR has not sought to outline this potential, restricting its advice instead to the formulation of common guidelines for its members. It is also not helpful for CESR to point at the fact that its "guidelines will not prejudice, in any case, the role of the Commission as guardian of the Treaties"[1].

The question is simply one of removing from the Directive a major hurdle to efficient cross-border distribution, namely the outdated need to register UCITS in other EU Member States prior to marketing them there. When originally passed, the UCITS Directive served as a model for the successful concept of a European Passport. Similar arrangements were subsequently adopted for credit institutions, insurance companies, investment firms and occupational pension schemes. However, these were all company passports *rather than* product passports as introduced by the UCITS Directive.

Inevitably there have been many legislative developments in EU capital markets regulation since. And, with the introduction of a company passport under UCITS III, it is now right to ask whether the concepts of the 1985 UCITS Directive are still fit for purpose.

Chapter 1: Previous Reports

1. The PWC/FEFSI Report

In November 2001 a joint PWC/FEFSI report concerning "Cross-border marketing of harmonised UCITS in Europe" highlighted the constraints associated with divergent registration procedures based on the UCITS Directive.

The report compiled the additional registration requirements in the then 15 Member States and compared them to those foreseen by the UCITS Directive. The requirements are complex and not always clear, forcing UCITS to use specialist advisers in the targeted countries. This adds significantly to the registration costs and often causes disproportionate delay for a UCITS waiting to be distributed cross-border.

This report highlights the lack of coordination of the additional registration requirements among Member States as a key barrier to a true single market for UCITS. The report thus recommended "a standardised form for registration to market a harmonised UCITS in another Member State." Though characterised as only "a first and comparatively easy step",

[1] cf. Introduction No. 11 of CESR Consultation Paper

in essence the report did not go beyond this recommendation and in particular was silent as to what this standardised form would look like.

2. The Heinemann Report

The Heinemann Report produced by ”ZEW-Zentrum für Europäische Wirtschaftsforschung” in May 2003 contrasted its vision of a ”Single European Market in Asset Management“ with the current reality. It revealed that national borders still matter and create substantial barriers. These it judged to be “anachronistic”.

It described the UCITS registration process as a ‘man-made’ obstacle to the Single Market and attached medium importance to dealing with it.

The Heinemann Report shared the view of the PWC/FEFSI Report that the UCITS registration process gave rise to *unnecessary* additional expenses. Asserting that it could not be justified on consumer protection grounds, the report assumed bureaucratic self-interest and protectionism to be the real driving forces behind this requirement.

As regards registration costs, the report confirmed that direct registration fees were not the problem, rather the significant indirect fees paid to local lawyers and accountants.

The report was not convinced that a harmonised registration process would offer substantial progress. It advocated a more straightforward solution of taking the European passport literally. Any UCITS should be immediately marketable throughout Europe once accepted as such in its domicile.

3. FSAP- Review: The Asset Management Expert Group Report

In May 2004 the Final Report of the Asset Management Expert Group identified *simplified fund registration* as a top-priority issue for achieving a single market for asset management. It described the current registration process as creating “unnecessary administrative and operational barriers to cross-border business”. The report did not give detailed examples to illustrate this, nor did it elaborate on its recommendation to replace the existing registration requirement with a simple notification procedure. Moreover, it did not specify what a streamlined registration process (the “first step”) might look like.

In a section dealing with “Non Harmonized Funds” the report addressed a further aspect, also affecting UCITS registration. The Expert Group concluded that the scope for cross-

border distribution could be widened significantly through the development of a common regulatory framework for private placements. This lead to the Expert Group's additional recommendation to harmonise the rules for private placement for asset management products and at the same time produce a clear and uniform definition of the concept of private placement. Since respective private placement regulations – in other words, the definition of the terms "marketing" and "propose to market" – mark the line beyond which UCITS registration in a given Member State becomes necessary, the interdependency of the two issues is clear. The Expert Group's focus on non-harmonised funds prevented it from dealing with unintended barriers arising from the application of a restrictive private placement regime to the demand-driven availability of UCITS to investors in other EU Member States. If enabling access to certain information for such investors exposes the UCITS to the risk of being classified as "marketing" in accordance with Article 46 of the UCITS Directive,[2] it will tend to avoid such markets. This will prevent the emergence of truly "pan-European investors" as long as their numbers in a given Member State are not sufficient to justify a registration.

4. The INVESCO Report

The Invesco Report published in January 2005 did not go beyond the 2001 PWC/FEFSI report. Without going into detail it also advocated more consistent standards for fund registration. Its view was summarised in the following statement: *"A passport that still requires the holder to apply for a visa is of little use"*.

The report only ascribed a medium priority to the simplified UCITS registration. The basis for this assessment was not absolutely clear but seemed to be influenced by the focus of the report on cross-border mergers, which are more directly linked to the key shortcoming of UCITS, i.e. non-efficient fund sizes.

[2] „If a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first inform the competent authorities of that other Member State accordingly. It must simultaneously send the latter authorities:

- an attestation by the competent authorities to the effect that it fulfils the conditions imposed by the Directive,
- its fund rules or its instruments of incorporation,
- its full and simplified prospectuses,
- where appropriate, its latest annual report and any subsequent half-yearly report, and
- details of the arrangements made of the marketing of its units in that other Member State.

An investment company or a management company may begin to market its units in that other Member State two months after such communication, unless the authorities of the Member State concerned establish, in a reasoned decision before the expiry of that period of two months, that the arrangements made for the marketing of units do not comply with the provisions referred to in Article 44(1) and Article 45."

5. The IMA/EFAMA Report

The most recent report on UCITS registration was published by IMA and EFAMA in April 2005. This developed the arguments of the 2001 PWC/FEFSI report. Like its forerunner, the IMA/EFAMA report believe the best way forward would be to agree on a harmonised, simplified approach to registration, which would be implemented by guidelines that all CESR members were commited to implement.

Unfortunately this short-term proposal was not put in the context of what the end goal or ”optimal” regime should be. It may be true that amending the UCITS Directives would be a lengthy process, it remains questionable whether the consensus of both reports to concentrate soley on the first-step could really pave the way for legislative change and further simplification. The inherent risk of this approach is that compromises are sought on the basis of an outdated regulation rather than consensus on interpretations in line, as far as possible, with a state-of-the-art model for cross-border UCITS distribution. The CESR Consultation Paper best illustrated these shortcomings with its lowest common denominator approach, which *per se* is biased towards standardisation rather than simplification.

On the other hand the IMA/EFAMA report avoided the shortcomings of the PWC/FEFSI report. For the first time it addressed key elements of a simplified registration:

- *only the information required under Article 46 UCITS Directive should be filed with the competent host-country authority, if not waived as a standard registration requirement in favour of a requirement simply to have the information available on request;*
- *if so, no need to provide any details beyond a statement that a local distributor operating within the jurisdiction of the Host Member State will be responsible for marketing the fund in that Member State. In other cases only the submission of minimal essential information yet to be determined within CESR;*
- *host-country authorities should acknowledge whenever they are already in receipt of relevant information and not require further filing of such available information (e.g. information about the management company could be given by a simple reference to previous filings if unchanged);*
- *wider use of standardised electronic means of communication.*

In addition to the registration process, the report recommended simplification of the process of maintaining registration (UCITS would need only to notify changes and there would be no need for further approval). Translation requirements should be limited to the simplified prospectus.

Chapter 2: Cost Benefit Analysis

So far all previous reports have focussed on the costs of UCITS registration as the main argument for revision. They all cover in a more or less comprehensive way the facts and figures of regulatory and other registration related costs, so there is no need to elaborate on this further here.

When compared to the normal costs of market entry in other regulated industries, the costs in the case of UCITS might not at first appear overly onerous. But such a sentiment would be misleading for a number of reasons:

A.) This sentiment is based on assessing the cost as a proportion of assets under management. But the key characteristic of a fund is to enhance performance not necessarily to grow assets. Without good performance the product can become commercially vulnerable. So the effect of these costs on performance is the correct measure. Though small funds will definitely suffer more from fixed costs that are not related to fund volumes, the performance impact of registration fees can be significant even for bigger funds.

B.) Regulatory costs need to be justified by actual benefits achieved by the underlying regulation. In other words, the appropriateness of regulatory costs can only be assessed *relative* to the benefits aimed at and achieved (or not).

C.) Only the Heinemann report and the IMA/EFAMA report considered this perspective. Whereas both reports did not identify consumer protection benefits, the IMA/EFAMA report acknowledged the *possibility* of operational benefits for host-state regulators in knowing what non-domestic funds were being marketed in their domestic market.

The CESR Consultation Paper alludes, albeit indirectly, to the benefits perceived by CESR members. According to Section A. II No. 27 and 28, host-state regulators want to have evidence that the document they have on file is always the latest version. It is, however, unclear the extent to which CESR members are also concerned with the correctness of the documents' translation into one of the official languages of the host state. On the one hand this was confirmed to be the second benefit of the notification procedure by CESR in the 17 January 2006 Open Hearing. But on the other hand, the Consultation Paper itself makes clear that "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."[3] Finally, although not explicitly mentioned in the CESR Consultation Paper, one might assume that home-state authorities may be interested to know in which other Member States the UCITS they had approved are distributed.[4]

D.) The most reliable source for identifying the real benefits of the registration procedure is the UCITS Directive itself. But, at first glance, it is silent on the benefits intended by its relevant Article 46. From the interpretation of its wording and taking into account the administrative discretion offered to host-country authorities there seem to be three levels of comfort for host-country authorities from a UCITS registration:

(1) to know which UCITS will be marketed in their respective Member State;
(2) the ability to have confidence in their status as UCITS;
(3) to ensure that the marketing arrangements comply with local regulations, including the availability of facilities for payments and redemptions.

Accordingly the registration process consists of three parts:

- Part 1 is a *notification* procedure for intended cross-border distribution of a UCITS without any room for regulatory action by the competent host-country authorities. They shall only receive (i) the fund rules or instruments of incorporation, (ii) the full and simplified prospectus and (iii) where appropriate, the latest annual and subsequent half-yearly report in order to be informed about those UCITS that are available in their respective Member State.
  The UCITS Directive does not authorise host-country authorities for more than the simple receipt of this information.
  It is also worth noting that the latest documentation is explicitly only required for the annual and subsequent half-yearly report. This wording of the UCITS Directive already indicates that it does not see any need to check that all other documents are up-to-date as well. This also means that there is no room for such certification by home-state authorities.
  Consequently Article 46 of the UCITS Directive is silent on the need to certify the latest version of all documents and stipulates a home-country attestation only for the UCITS status as such.
  A consistent reading of Article 46 of the UCITS Directive therefore leads to the understanding that the delivery requirement does not refer to versions in other languages but simply to the relevant documents as approved by the home-country authorities at the time of notification to the host country authorities.
  This reading of the UCITS directive is also supported by the fact that Article 47(II) requires the submission of translated documents to host-country authorities only after marketing started and does not stipulate this to be a registration requirement under Article 46 of the UCITS Directive. Finally only an interpretation which regards the translation requirement solely as a

[3] Cf. Section A. III No. 35 of CESR Consultation Paper
[4] this argument was raised in the CESR Open Hearing on 17 January 2006 against the proposal with each official authorisation to automatically issue a UCITS attestation by home country authorities that can be used in all EU Member States

duty to be fulfilled by a UCITS and not as a registration requirement does avoid the constitution of different legal versions in various Member States depending on their status of translation. Any other reading would allow for inconsistencies among the unit-holders in one and the same UCITS.

- Part 2 is a *documentary proof* for the design of Part 1 as only a notification procedure. The attestation of UCITS compliance by the competent home-country authority serves as a basis for host-country authorities to not challenge this status. It is not designed to serve as notification to home country authorities as regards other Member States on where units of a UCITS are to be distributed. Such notification is only required to host-country authorities.[5]

- Part 3 goes beyond a notification for it requires details of marketing arrangements to be provided to host-country authorities, who may hinder the proposed cross-border distribution should they decide that such arrangements do not comply with applicable local regulation. To underline the differences to part 1 and 2 this part should be characterised as the *registration* element.

The IMA/EFAMA report mentioned the experience of some market participants suggesting that the registration procedure can be misused to question the UCITS' status. If this was acceptable, the part-2 attestation would be meaningless. In addition, as outlined above, the UCITS Directive clearly restricts the administrative discretion of host-country authorities to provisions which do not fall within the field covered by the UCITS Directive. We very much welcome the CESR Consultation Paper's line on this issue in making clear that such practice would not be in line with the UCITS Directive.

E.) Assuming there are no further legitimate benefits of registration left to be identified, the analysis has to investigate if the current procedure is at all capable (i.e. adequate) of achieving the three levels of comfort for host-country authorities:

- as it distinguishes between regulated and unregulated financial market products the competent authorities at least have permanent and easy access to the relevant legal documents of the regulated products distributed in their local area of responsibility the part 1 notification procedure as such is one possible way to achieve this goal. Whether it is the most efficient one is another question;
- the part 2 attestation of a UCITS' status by the competent home-country authority is without doubt one instrument that can achieve the necessary trust on the part of the host-country authorities. Again whether this is also the most efficient is another question;
- in principle, part 3 can help to avoid non-compliance with local regulation to the extent that the marketing arrangements provided to host-country authorities with the initial

[5] cf. first sentence of Art. 46 UCITS Directive

registration of a UCITS reveal such discrepancies. But whenever a UCITS is only added to existing marketing arrangements already accepted by a given host-country authority it should be impossible for non-compliance with applicable local regulation to occur. In such cases a simple notification concerning this addendum should be sufficient to fulfil all part 3 registration elements without any regulatory shortcomings. This is of particular relevance for umbrella UCITS but applies as well whenever a new UCITS is distributed via the same distribution infrastructure used by an asset management group for UCITS that are already registered.

F.) The assessment of a regulatory requirement as adequate does not mean it is necessary or that its benefit cannot be achieved more simply and/or at less cost.

1.) In order to be aware of a UCITS marketed in a particular Member State there is no other way than to notify the respective host-country authority. As long as this awareness is judged to be necessary, the current notification direct by the UCITS itself is simpler than indirect notification via the home-country authority (as for example stipulated in the Prospectus Directive).

Like any other financial instrument, a UCITS can only be identified by its legal documents. If awareness of a UCITS should also cover its particular features, the host-country authorities need to have these documents to hand. All legal documents to be provided under the part 1 notification serve this need, i.e. none of them is unnecessary.

But the key question is how these documents have to be sent to host-country authorities. When the UCITS Directive was passed in 1985 hard copies were the only option. Nowadays, in the age of electronic communication, such methods are outdated. In fact, all the documents in question are available to the public via the Internet and there is no compelling reason for host-county authorities still to require hard copies.

Without any loss of information needed by host-country authorities, the notification procedure under part 1 could be materially simplified if all a UCITS needed to do was to send a letter (or even simpler, an electronic mail) to the respective host-country authority in which the name of the UCITS to be marketed is *identified*, accompanied by a link to the internet page where the relevant legal documents can be found.

It should be noted that the UCITS Directive is silent on the means by which the information is to be provided. The acceptance of electronic communication can be achieved without any modification of the UCITS Directive.

We very much welcome the fact that the CESR Consultation Paper proposes similar measures. We understand that local regulation in some Member States might still hinder such administrative procedures. Greater transparency could be achieved by compiling the information on the CESR website rather than have it dispersed on the websites of the local authorities.

2.) If the ability of a host-country authority to trust the status of a UCITS depends critically on the competence of the home-country authority, there seems, at first glance, to be no alternative to an attestation as stipulated in Article 46 of the UCITS Directive.

On this basis genuine simplification could be achieved if the attestation was not needed on a country-by-country basis. Since the UCITS' status does not depend in any way on the prospective host-country, an initial attestation issued by the home-country authority should allow the same level of comfort to host-country authorities. This "one-off" attestation could be issued automatically with any approval of a UCITS by its relevant home-country authority, regardless of any intention for cross-border distribution. An attached copy of this documentary proof to the part 1 notification should offer the same level of comfort to host-country authorities across Europe, as is current practice, again without any modification of the current UCITS Directive.

Taking into consideration the potential use of electronic communication, the whole attestation procedure could be replaced without any loss of authenticity by an electronic database of all registered UCITS to be run by each competent authority in the EU Member States. Such databases could be accessible via the Internet by host-country authorities as well as by the general public. Internet databases of registered foreign UCITS are already common in Europe as a service tool for the general public. Therefore it would only be a small step to implement the opposite structure (i.e. registration of home-country UCITS) in a similar way. By doing so, the whole attestation procedure, as currently stipulated in Article 46 of the UCITS Directive, would become obsolete. Again we welcome CESR's apparent openness in the Consultation Paper to such a concept.

2.1 How an electronic filing system might work in practice can be seen by looking at the United States. Though the legal system of the United States for the distribution of mutual funds differs from that of Europe, there are relevant similarities in that a notification for the 50 states is required as well.

In early 1993 the US Securities and Exchange Commission ("SEC") began to mandate electronic filings through its Electronic Data Gathering, Analysis and Retrieval system ("EDGAR"). According to the SEC "this system is intended to benefit electronic filers, enhance the speed and efficiency of the SEC processing, and make corporate and financial information available to investors, the financial community and others in a matter of minutes."

Mutual funds and other issuers in the US are required to make all their filings with the SEC electronically through the EDGAR system. Once filed, these materials are available to the SEC and also to the public, through EDGAR.

As regards selling SEC registered funds in the 50 states, the US has in place a "notice" filing system. A fund that is registered with the SEC files a short form with each state in which it intends to sell its shares and pays a state registration fee. Typically these forms are filed on paper. The state registration is effective as soon as the form is filed. There is no state review of the registration.

Most states do not ask funds to file their prospectuses and other disclosure documents along with the short notification form. Firstly, states can easily access these documents through EDGAR, and secondly, it can be assumed that they do not want to warehouse a lot of paper they do not review.

3.) The IMA/EFAMA report pointed to the fact that nowadays direct sales of UCITS to the public are highly uncommon, which means that the actual responsibility for marketing is with the distributor, usually a financial intermediary located in the respective host Member State. In this case compliance with local regulation is already enforceable at the local level. The

need to provide host-country authorities with marketing related agreements, which repeat the local obligations of the distributor does not add any meaningful compliance safeguard.

Based on the evolved market structures with around 29,000 UCITS in Europe, we are not convinced of the relevance of marketing arrangements for UCITS registration. As in other financial market sectors, this should not be a product related requirement. For all practical reasons it is highly unlikely that a management company will operate multiple distribution systems on a UCITS by UCITS basis. Furthermore Code of Conduct compliance is typically dealt with on company rather than product level. Following the UCITS III introduction of the management company passport it should be a logical consequence to ensure (local) Code of Conduct compliance at the management company level, in a manner comparable to the system introduced in 1993 under the former Investment Services Directive ("ISD") and now under the Markets in Financial Instruments Directive ("MiFID").

Chapter 3: The EU Commission Green Paper

The July 2005 EU Commission "Green Paper on the Enhancement of the EU Framework for Investment Funds" identified the need for a simplification of the "notification" procedure to bring sufficient legal certainty to the implementation of the UCITS Directive. The Green Paper itself did not address potential ways to streamline procedures nor did it raise any question about the current legal framework as constructed by Article 46 of the UCITS Directive in conjunction with Articles 44, 45 and 47.

It is not clear if the EU Commission intents to stick to this first step or if it also aims at a situation where a UCITS will be automatically admitted for distribution in all Member States of the European Community once it has been authorised by its Home Member State.

By using the word "notification" instead of "registration" the EU Commission seems to imply an interpretation of the current UCITS Directive as already only containing a "simple notification procedure". This is at least the sentiment of the EU Commission Staff Working Paper that serves as background paper to the UCITS Review (the "Background Paper"). According to this Background Paper, the "simple notification procedure" of the UCITS Directive "is often confused with registration". Unfortunately this statement is not completely in line with the fact that Host Member States under the current UCITS Directive are indeed

able to veto the local marketing of UCITS for non-compliance with local regulation. To avoid re-authorisation or re-approval, the competence of host-country authorities to review marketing arrangements needs to be deleted from the text of the UCITS Directive. Nevertheless it is worth noting that the EU Commission appear to be of the opinion that the host-country control over marketing arrangements should only require the provision of some basic country-specific marketing information "within the margins of the notification procedure" in order to ensure compliance with local requirements on marketing and advertising. Form this it should only be a small step to conclude that compliance with local marketing arrangements is not product specific and should therefore be implemented on a management company level. This approach would also fit better with Article 44(3) of the UCITS Directive, as in the case of domestic UCITS it is uncommon for regulators to ask for product-related marketing information as a prerequisite to public marketing.

The Background Paper rightfully points out that regulators have not yet expressed a clear position about the costs and benefits of the "notification procedures". As already stated, we believe regulators should be obliged to explain what the benefits have been. But the EU commission is also correct in asking for an assessment of these benefits when set against their costs. Furthermore, such a cost-benefit analysis should also consider the extent to which the intended benefits can be achieved at all. In this regard, it is also relevant that the e-commerce Directive – as outlined in the Background Paper – entitles providers to distribute UCITS (and non-UCITS) "by the means of the Internet throughout the EU exclusively on the basis of the rules of the Home Member State without any further restriction," i.e. "without any need to pass through a registration process." This element of the e-commerce Directive only serves to underlines the argument in favour of a modernisation of the UCITS-Directive, which covers local marketing arrangements at the level of the management company rather than at the level of the UCITS product.

The Commission's Green Paper fell short of asking for improved inter-administrative collaboration "in order to avoid home country authorisation from being contested." Instead the Green Paper – as does the CESR Consultation Paper – makes clear that the registration procedure should not be misused to question the UCITS-compliance of funds.

Neither the Green Paper nor the Background Paper addressed the legal basis for requiring translation as part of the registration despite the fact that, as the Background Paper puts it, "translation requirements are diverse and more or less onerous". This is an important issue and the Commission should make very clear – as outlined above – that Article 47 of the UCITS Directive only refers to the actual marketing of UCITS and has nothing to do with its registration.

Finally, and following the Report of the Asset Management Expert Group, the Green Paper did not seem fully to understand the additional relevance of fragmented private placement regimes for UCITS. It is wrong to assume this is only a problem for alternative investments. Though the Background Paper is correct insofar as UCITS are by definition publicly marketed, this does not mean that this is the case in all Member States. In fact there is huge demand for private placements of UCITS in Member States where the UCITS provider does not want to accept the additional costs associated with public marketing in that particular Member State. Moreover as the definition of the term "marketing" is the key factor in determining the scope for the residual authority of home-state regulators an answer to this question cannot be left open.

Chapter 4: FEAM conclusion – Abolition of Notification requirements

To summarise, FEAM is convinced that UCITS registration as implemented under the current regime is unnecessary. If such a system were proposed today, it would fail every test for regulatory action since it does not provide substantial benefits to consumers or regulators. But UCITS registration does generate significant direct and indirect costs. Its abolition would be an easy way to overcome one important obstacle to the single market without any meaningful disadvantage to consumers or regulators.

The fact that the marketing of UCITS is not harmonised by European legislation does not mean compliance with local regulation needs to be imposed at the product level. It would be more efficient to require this Code of Conduct compliance at management company or distributor level as it is the action of the provider and not the product that may conflict with relevant regulation. Moreover, a new regulatory system along these lines would add meaning to the UCITS management company passport and would also be consistent with other European Directives, primarily the e-commerce Directive and MiFID.

FEAM accepts that Host Member States may want to be aware which financial products are marketed to the public in their respective territories, be it a domestic or a foreign product. But to achieve this goal notification of the generic name would suffice. Given the capabilities of modern communication technologies, all further information needs of host-country authorities should be easily accessible via the Internet.

In particular, the attestation requirement for UCITS compliance would be rendered superfluous by home-country authorities enlarging their Internet databases with a list of all authorised UCITS. Ideally this would be linked to all authorised legal documents of a UCITS.

The consequence of the proposed revision would be that UCITS could be distributed cross-border without any material time delays. It would also eliminate significant costs from UCITS that are currently borne by investors.

The translation requirement in Article 47(2) of the UCITS Directive should be taken literally as well. It has nothing to do with registration and applies only if actual marketing of UCITS occurs. This distinction should not be given up. It can make a difference if a UCITS is registered in a Host Member State even if public marketing has not started. For example there could be relevant tax reasons for host-country fund-of-funds to acquire only registered UCITS.

Despite the proposed simplification of the notification requirement to an identification only system, there is still a need for a coherent private placement regime across Europe. Such a regime should be identical for UCITS and other collective investment vehicles.

Chapter 5: Immediate means to streamline the registration process

Having in mind the target structure described in Chapter 4 above, the recently started discussions to streamline the registration process under the current UCITS Directive should take as their starting point the recommendations made by the IMA/EFAMA report. The following examples illustrate what a streamlined process would look like and where the CESR Consultation Paper falls short of our expectations.

1.) *Only the information required under Article 46 of the UCITS Directive should be filed with the competent host-country authority.* First and foremost this should exclude any translation requirements imposed by Article 47(2) of the UCITS Directive as well as additional certifications of any kind to establish what should, in fact, be self-evident – namely that the latest version of the documents is filed with the host-country authority. It would also avoid additional registration requirements not foreseen in the UCITS Directive such as the appointment of a local paying agent, local transfer agent or any other local representative with no practical contribution to make. A strict reading of the UCITS Directive would also rule out the requirement to pay fees to secure registration. But as long as registration fees are at acceptable levels and

simple money transfer confirmations are sufficient, this aspect should not pose material problems.

2.) *The two-month period stipulated in Article 46(II) UCITS-Directive should be understood as a maximum which, under normal circumstances, should be long enough to cover further inquiries from host-country authorities without any need to expand the time frame by an interception period that has no basis in the UCITS – Directive itself*. Article 47(II) of the UCITS Directive supports this view: the reasoned decision has to be taken *before* – and not at the end of – the expiry of the two-month period. While the CESR Consultation Paper helpfully proposes to remove perceived uncertainties about the calculation of the two-month period, it misses the critical point, namely that the simpler the notification procedure, the less time ought to be needed by host-country authorities to check compliance with relevant regulations. Moreover, the underlying assumption of the CESR Consultation Paper that host-country authorities can claim a two-month checking period is hardly in line with co-operative and service-oriented financial markets supervision which we regard to be in the common interest of clients, authorities, our industry and, last but not least, financial markets in Europe.

3.) The UCITS-Directive fails to specify the form of UCITS compliance attestation. It would, therefore, be fully in line with the UCITS Directive to agree on a simple copy (no original, no translation) of the instrument from the competent home-country authority. Such a simple form of attestation should be automatically issued with any UCITS authorisation regardless of whether it is intended to be marketed cross-border and therefore not be country-specific. A standardised wording – as proposed in principle by the CESR Consultation Paper – should enhance the acceptance of this procedure among CESR members.

4.) To avoid unnecessary bureaucratic procedures Member States should abstain from formalistic hurdles such as detailed forms for registration, unreasonable signature requirements (e.g. notarisation or legalisation of proxy) or even visa stamped prospectuses. If applied at the sub-fund level of an umbrella (a widespread current practice), it should be obvious that 750 visa stamped copies of (for example) 30 sub-funds in one single umbrella that is distributed in all 25 Member States is bureaucratic overkill. FEAM welcomes CESR's agreement with this principle in the Consultation Paper.

5.) *Host-country authorities should acknowledge receipt of relevant information to avoid the need for further filing of such available information.* One concrete consequence of this principle would be that the enlargement of an umbrella by a further UCITS would require no more than the provision of updated legal documents to host-country authorities. FEAM very much welcomes the respective proposals made in the CESR Consultation Paper and urges CESR to push hard for them to become a unified standard across all Member States as soon as possible. Again, a compilation of local practises on the CESR website rather than only on the websites of local authorities should help to accelerate the introduction of a common European standard.

6.) *A*s regards umbrella funds and multiple share classes it should be recognised that these features enable truly pan-European products by enabling them to reflect local peculiarities in one product. In order to support these structures better it would be helpful if maximum flexibility was given on the inclusion or exclusion of sub-funds/share classes not marketed in a given Member State. It is highly questionable if a switching option within an umbrella fund genuinely constitutes public marketing of all the sub-funds in question. For the end-consumer this can result is the provision of the complete prospectus containing mostly irrelevant information. On the other hand – depending on the circumstances of each structure – it might be that a complete prospectus is cheaper than multiple prospectuses for various Member States; i.e. the efficiency gains for the unit-holder could outweigh the provision of irrelevant information. Unfortunately the CESR Consultation Paper does not address this issue.

7.) *In the case of a local distributor operating within the jurisdiction of the Host Member State and responsible for marketing the UCITS in that Member State, no details beyond that statement need to be provided to Host Member States.* This differs from the situation in 1985 in that UCITS nowadays are predominately distributed via regulated entities that are supervised in this regard by host-country authorities. FEAM cannot detect what additional safeguards could be offered by duplicating the knowledge of the relevant regulation to host-country authorities in the course of a UCITS registration.

8.) *In the case of foreign distributors operating from outside the jurisdiction of the Host Member State and responsible for marketing the UCITS in that Member State, only the key essentials of the marketing arrangements should need to be provided.* In order to achieve a satisfactory level of comfort that local marketing regulation will be adhered to a generic description of arrangements to comply with local marketing and advertising regulation should be sufficient. Regulators should be asked to explain in

detail which key essentials they expect to be adhered to by UCITS that are marketed to the public in their respective territory. Once all such key essentials are identified for each Member States, CESR should try to compile a complete handbook for UCITS registration within Europe. We would assume this proposal to be quite close to the CESR concept as indicated under Part B No. 13 of the CESR Consultation Paper.[6] But unfortunately the CESR Consultation Paper is not precise on this. Annex III, to which the document refers, only contains procedural aspects of the notification, albeit under the heading "National marketing rules and other specific national regulations." We cannot assess whether Annex IV will offer more practical transparency in the future as this is still - intentionally - left blank.

9.) *CESR members should agree on the wider use of standardised electronic means of communication.* As the UCITS Directive is silent on how information is to be sent to the respective authorities, CESR should agree to accept electronic filings by a UCITS, i.e. file attachments of legal documents. FEAM very much welcomes the respective proposals made in the CESR Consultation Paper and urges CESR to push hard for them to become a unified standard across all Member States as soon as possible. Again, a compilation of local practises on the CESR website rather than only on the websites of local authorities should help to accelerate the introduction of a common European standard.

10.) Finally CESR members should, at the very least, reach an agreement on what *does not* constitute marketing of UCITS. FEAM appreciates that the EU Commission has also decided to work on interpretative guidance for this key term. Again it is unfortunate that the CESR Consultation Paper did not deal with this central issue. We understand the difficulty of arriving at a common definition for all EU Member States. It might, therefore, be advisable first to concentrate on what does not constitute marketing of a UCITS within the meaning of Article 46 of the UCITS Directive. To give some concrete examples, the following action should be possible without any registration in all European Member States where no active sales activities are intended:

- the description (rather than the simple identification) of sub-funds in an umbrella that are not marketed in a respective Member State
- the existence of switching options in umbrella funds
- UCITS advertisements in internationally published magazines which can be purchased in a respective Member State

[6] cf. Annex II of the CESR Consultation Paper

- simple references to non-registered funds as evidence for proven track record of a fund manager
- simple publication of fund prices in a respective Member State