THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/06-301

CESR's guidelines to simplify the notification procedure of UCITS

Feedback Statement

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INTRODUCTION

Background

1 CESR published a Call for Evidence on 9th June 2004 (Ref: CESR/04-267b) on the mandate inviting all interested parties to submit views as to what CESR should consider in its future work on investment management. CESR received 13 submissions and these can be viewed on CESR's website. The simplification of notification requirements was considered as a priority issue by many respondents to the call for evidence. Standardisation and streamlining of processes was considered to provide a significant benefit to cross border distribution of UCITS. Furthermore, it was raised that attention should be paid to avoid the introduction of the management company passport and any ensuing registration duties annulling the efficiency gains that may be achieved in the fund registration area. CESR was asked to avoid the disparity of management company's registration requirements from arising/growing by agreeing, at this early stage, on standardised requirements and formats that are shared by all Member States.

2 In October 2005 CESR published for public consultation of market participants a first consultation paper on its guidelines to simplify the notification procedure of UCITS (Ref. CESR/05-484). A second consultation paper on the same issues (Ref. CESR/06-120) was published by CESR in May 2006. The first draft asked a number of questions in order to gain some insight from market participants about the suggested way forward. That paper reflected also on divergent current practices among Member States and a clear distinction between current guidelines and explanatory text was not evident. The text put up for second consultation made this distinction clear. Final guidelines amount to thirteen (13). Written submissions to both consultations will be summarized in this feedback statement following the referred guideline-styled structure.

3 In January and May 2006, CESR hosted two open hearings at CESR's premises in Paris at which a number of issues raised in the draft guidelines was debated, particularly the managing of the two-month period, the language regime of the notification and the treatment of umbrella funds.

4 In response to the consultations, CESR received a total of 53 contributions in two rounds, 30 to the first consultation and 23 to the second. Two respondents to the second consultation preferred their response not to be made public. Copies of these written submissions can be found in CESR's website.

5 Half of these respondents belonged to the insurance, pension and asset management sector with an evenly split between industry associations and individual entities. Other relevant industry input was that of banking. There was little feedback from the investor/consumer side. Responses from other market participants (law firms, investment services…) were also limited.

6 The responses revealed to what extent market participants regard this procedure as a crucial step towards the elimination of barriers to the single market for the cross-border distribution of UCITS. CESR would like to thank all interested parties that responded to our two consultations and attended the open hearings.

7 The purpose of this document is to provide a summary of the main comments received by CESR along with some explanations on CESR's final approach on some of the most significant issues raised. As a preliminary comment, it should be noted that respondents to the second consultation

recognised the improvements CESR had introduced in the new version compared to the previous document.

Overview of main issues

8 There was widespread agreement from market participants that the main elements that needed special attention in order to streamline the notification procedure were the duration of the process and, subsequently, the management of its timing; the language regime affecting the notification and the notification of umbrella funds. Some respondents also aired the view that should CESR's solutions not be comprehensive enough, an amendment of the Directive could be sought. The suggestion to ask CESR to establish and recommend best practice benchmark standards in terms of procedures and deadlines also gained support.

- **Strong support for the reduction of the two-month period.** Responses to CESR consultations welcomed CESR's commitment to deal with the notifications as soon as possible. Most respondents asked for further explanation as regards the one month to test a notification file for completeness (Guideline 4). A high number of respondents raised objections about the proposal to "stop the clock" envisaged in Guideline 6.

- **Widespread demand to further allow the use of a language common in the sphere of finance.** A large majority of respondents considered that the scope for use of a language common in the sphere of finance, namely English was very limited. Respondents were of the view that only the simplified prospectus should be translated into the local language whilst other documents could be made available in a language common in the sphere of finance. However, CESR has reminded that level 1 gives the host Member State authorities the power to approve the language in which the documents are to be provided.

- **No need to apply the two-month period for the notification of sub-funds.** Throughout both consultations, most respondents have made it clear that the two-month period should not apply when new sub-funds are added to an existing umbrella, on the basis that it is unlikely that the sub-funds will have different own characteristics.

Implementation

9 Contributors to both consultations have asked CESR to monitor implementation of the guidelines by its Members. In the opinion of many respondents this need is exacerbated by the fact that some Members, in order to implement these guidelines, may have to amend their national provisions and this process may take an undetermined amount of time.

10 In the two documents put up for consultation CESR had not committed to any review process. After due consideration and with a view to address the industry's concerns, CESR has introduced in the final text a commitment to review within two years whether competent authorities have implemented the guidelines. However, it must be noted that this two-year period is without prejudice to paragraph 3 of the Preamble ("General Commitment and Transitional Period"). Implementation of the guidelines in some Member State may require a formal legislation procedure whose results could not materialise in two-year time after the guidelines are approved.

Definitions

11 References in this feedback statement to the "Directive" mean, unless the context requires otherwise, Directive 85/611/EEC of the Council of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as subsequently amended.

12 References in this feedback statement to terms defined in the Directive shall have the meaning given to them in the Directive.

(I) THE GUIDELINES

General commitment and transitional period

1 CESR's first approach to the simplification of the notification procedure was broadly regarded as too divergent and non-harmonized. CESR members were aware of the fact that its work was taking place against a backdrop of two decades of divergent national practice in the enforcement of provisions of UCITS regulations. Some of these differences are hard-coded in national law. In this context, CESR Members introduced in the first version of the guidelines a "general reservation" that might have given the impression of non-implementation of the guidelines if the amendment of national legal provisions via a formal legislation procedure was necessary. This general reservation was understood by contributors to the first consultation as a lack of a compromise from CESR Members to enhance the processing of notifications. It was also regretted that the title of the first consultation paper made no reference to any simplification of the notification procedure.

2 CESR's second consultation paper shifted the emphasis from reservation to "commitment". According to the final wording, although legal amendments might still be necessary in some Member States, even where a transitional period takes place, "*there is an expectation that CESR Members will try to adhere to the guidelines to the extent permitted by their legal framework*" as soon as possible Moreover, CESR Members have committed to adopt working procedures that will aim at speeding the notification process and to enhance co-operation among themselves through certain mechanisms.

A. Procedure

Guideline 1

Language regime of the notification

3 According to CESR's first version of its guidelines, the notification had at least to be sent into the or one of the official languages of the host State. However, many respondents to the first consultation asked CESR to widen the scope for use of a language common in the world of finance, particularly as far as the standardized documents were concerned.

4 In its second consultation paper, after careful consideration, CESR has agreed that the UCITS can submit the notification letter to the host authority in a language common in the sphere of finance, where this is not contrary to the domestic legislation or regulations. While most respondents have welcomed the fact that the notification can be submitted in English, it has been criticized that this concession is weakened by the limitation "*if it is not contrary to the domestic legislation or regulations of the host Member State*". However, it should be recalled that at level 1, the Directive provides in Article 49 paragraph 3 certain responsibilities to the host State authorities concerning supervision of compliance by UCITS with Section VIII of the Directive. Level 1 gives the host Member State authorities the power to approve the language in which the documents as well as the notification and communication are to be provided. Approval must be based on the domestic legislation, including administrative requirements, and on the fact that these documents must be accessible by the general public.

Electronic filling of documents

5 CESR's first stance regarding filling of documents was to allow electronic filling as a best practice, taking into account the national legal framework and available IT-resources of CESR Members.

6 Respondents to the first consultation welcomed the possibility to file documents electronically in some Member states but many reminded CESR that electronic filling should be common (not best) practice. In its second consultation paper, removed any reference to best practice; regarding the fact that improvements in IT resources might be necessary (cf. Para 3 of the Preamble) CESR agrees (not to generally permit but) to facilitate electronic filing.

7 There is widespread concern about how this mechanism could work in practice. A large number of respondents suggested that CESR should develop standards (formats, templates, filing agent registration and authentification processes…) for harmonised electronic filling, in order to avoid incompatibility. Some respondents felt that host authorities should conduct adequate testing of these systems and arrange necessary back-up systems in case problems occur with electronic filing. CESR addresses this concern by stating in the explanatory text that electronic filing is *aimed* at.

There were mixed views about the need to disregard physical remittance of documents. While some respondents expressed a concern that the possibility of physical delivery could disincentive the developing of an electronic system, some others thought that it should always be possible delivering documents via mail/courier services in case the electronic system malfunctions.

Guideline 2

Refusal of the notification

8 CESR's stance on the issue reflected in this guideline has remained unchanged throughout both consultations. It can be summarized in two main ideas:

- The UCITS passport must be respected if the marketing arrangements comply with the provisions referred to in Art. 44(1) and Art. 45.

- Divergent interpretations of the Directive (for example, with regard to eligibility of new products) cannot be dealt within the notification procedure but within other mechanisms.

9 Respondents to both consultations have fully agreed with both statements. As it has been pointed out, the first idea derives from the text of the Directive but CESR's explicit agreement that the sole purpose of the notification procedure is to review compliance of marketing arrangements with relevant local regulations is deemed highly relevant. In the view of some industry associations, compliance with Art. 44(1) and 45 of the Directive should be deemed automatic if a UCITS distributes its shares or units in a host State exclusively through entities that are regulated by the authorities of that State. To this respect, CESR is of the opinion that the fact that distributors are authorised persons does not mean that all conditions related to marketing arrangements are fulfilled.

10 When CESR's first consultation paper introduced the principle to resort to alternative mechanisms to deal with divergent interpretations of the Directive, CESR's future mediation arrangement was presented as a possible solution. However, according to some respondents, the mediation proposal is too long winded to provide swift resolutions in the context of product development within the UCITS industry. Some participants have suggested a change of emphasis away from too formal structures. To these respondents, a more operational and open dialogue between CESR members is key to discuss interpretations of the Directive and new products and to solve any problems in advance.

11 Having considered these views, CESR's final guidelines refer to CESR's future mediation mechanism as a tool which might be of help, that is, one example among other solutions that could be developed.

Guideline 3

The two-month period

12 In the second consultation most of respondents noted that it would be important that a maximum period be established. This guideline deals with the beginning of marketing in the host Member State and refers to the period of two-months with regard to the "product notification" in Art. 46. It reproduces in the final guidelines the content of Art. 46 of the Directive and is without prejudice to Art. 6a and Art. 6b (1) to (4) .

13 Some respondents were concerned that it should be clarified that the notification period would be two calendar months.

Guideline 4

Starting the two-month period

14 According to CESR's final guidelines, the two-month period starts when the competent host State authority has received the complete notification. However, in the first consultation paper no reference was made to what constituted delivery of the notification. The majority of respondents to the first consultation suggested that CESR should avoid this uncertainty. A number of possible solutions was put forward:

- If UCITS opted for a physical submission, the use of a reliable commercial courier service was recommended on terms that this would allow the UCITS to confirm the file's delivery at the host State authority's premises. Were a notification to be delivered electronically, email verification of delivery should be accepted.

- Some of associations suggested that it should be mandatory for host State authorities to confirm the date of receipt of the notification.

13 In its second consultation paper, CESR tried to eliminate uncertainty agreeing on the principle that receipt of the notification will be assumed if it was confirmed by the authority. Where the host Member State authority confirms the date of receipt of the complete notification and additionally informs the UCITS regarding the date of the start of the two-month period due to national law, this should be done as fast as possible and at the latest within one month after receipt of the complete

notification; in this case a separate confirmation of sole receipt without the additional information of the start of the two-month period which also might be provided for by national law is not necessary. The records of a reliable commercial courier service would be considered as giving sufficient proof of sole delivery. The functioning of this system should be assessed subsequently.

15 These changes have been welcomed by most respondents although some participants felt that some grey areas persisted in particular regarding electronic filling.

A complete notification

16 Roughly half of the respondents (particularly large pan-European associations) expressed during the first consultation that the two-month period should start immediately at delivery of the documentation and not after the notification was deemed complete. These participants suggested that the two-month period should start even though the notification was incomplete. However, some of these agreed that if the notification was in objective terms incomplete, the two-month period should not start. Others agreed with the principle that only complete notifications should trigger the beginning of the two-month period.

17 During the second consultation respondents have concentrated remarks to the time host State authorities need to decide whether an application is complete (see below) away from the principle that only complete notifications can trigger the starting of two-month period.

18 Throughout both consultations and also in its final guidelines CESR has upheld the principle that the two-month period to check the marketing arrangements informed in the notification starts once the competent host State authority has received the "complete" notification. According to CESR's final guidelines, the notification is complete if all the documents and information have been provided.

Deadline to notify completeness and "completeness check"

19 In its first consultation paper, CESR stated that the competent host State authority should inform the UCITS about the incompleteness and the missing information and documents as soon as possible and in any case within one month from the date of receipt of the notification letter.

20 This proposal was regarded as unsatisfactory. All respondents thought that a "completeness check" on the notification should be performed in a much shorter timeframe considering that, in their view, it comprises a rather administrative exercise. An array of alternatives was put forward (2 weeks, 10 days, 1 week…). References to the deadlines established in the Prospectus Directive were not uncommon.

21 In an effort to sort out any possible misunderstandings, CESR made clear in its second consultation paper that the completeness check does not only imply a simple check to verify that all documents and information have been provided. As a matter of fact, competent authorities also carry out a preliminary assessment on the contents of those documents.

22 Although most respondents to the second consultation were of the opinion that host State regulators should only perform a formal verification of the documentation in a very brief period of time, many also saw the merit of this clarification because it represented an improvement of the previous

situation. If competent authorities were to use up this first month not only to determine whether any information is missing but also to complete a preliminary material check of the submissions then it would be reasonable to think that notifications can be cleared much sooner. Respondents urged CESR to clarify and endorse this interpretation.

23 According to CESR's final guidelines, the completeness review offers an appropriate timeframe to perform relevant checks. The implementation review of these guidelines will assess whether UCITS passportability has objectively improved, including in respect to the length of time it takes to complete the notification process.

A complete notification upon first submission

24 Many respondents to CESR's first consultation asked CESR to clarify that the "completeness check" was included in the two-month period if the notification was complete upon first submission.

25 Having pondered those comments, in its second consultation paper CESR clarified that "*if all the information and documents are complete and the latter contain all information, the two month period starts from the date of the receipt of the notification*". CESR also explained that in the absence of a communication after one month by the host competent authority to the UCITS "*it is assumed that the notification is complete since the date of the receipt by the host Member State authority*". Respondents to the second consultation and also attendants to the open hearing held in May approved this remark but for legal certainty asked CESR to include it in the guideline itself. CESR's final version has followed this suggestion.

Guideline 5

Shortening the two-month period

26 CESR members have gradually reinforced their initial proposal about the reduction of the two month-period. This agreement started establishing the referred reduction as a benchmark for best practice if it was permitted by national law. With regard to the transitional provision inserted and without prejudice to this para 3 of the Preamble in the second consultation paper, after considering the majority of comments received, CESR agreed to shorten the two-month period whenever possible, particularly with the notification of new sub-funds added to an existing umbrella. It was also agreed that competent authorities would inform the UCITS in a speedy way, even via email, that the notification procedure has been cleared and marketing could start.

27 Respondents to both consultations have welcomed these proposals but reminded that there are some jurisdictions that for some reason have implemented the two-month period as an obligatory waiting period; changes of these regulations are therefore expected by the respondents to implement this guideline.

Guideline 6

The reasoned decision

28 According to Art. 46(2) the reasoned decision is a mechanism envisaged in the Directive that prevents a UCITS from marketing its units. CESR acknowledged that the Directive did not expressly explain the details of this decision. Therefore, CESR members agreed on the first version of the

guidelines a common approach regarding the use of this mechanism in practice. The main features of this common approach were:

a. If necessary, the reasoned decision should be used during the two-month period that the competent authority has to check the contents of the notification after having received the complete notification

b. It serves to inform the notifying UCITS that in the competent authorities' view, the submitted documents/information imply that the marketing arrangements by the UCITS would not comply with Art. 44(1) and Art. 45 of the Directive and therefore the UCITS may not begin to market its units in the host Member State

c. It is envisaged as a last ratio mechanism:

- Host State authorities may solicit clarifications from the UCITS with regard to documents and information submitted with the notification in order to check compliance with the aforementioned articles.

- In cases where the authority can assume that there is a realistic prospect that compliance with the referred articles can be achieved, a more graduated approach should be applied.

29 The majority of submissions received in both consultations did not raise any objections to this mechanism and to CESR's suggested approach. The reference to informal exchanges was seen as a flexible attitude on the part of CESR to sort out possible problems and was interpreted as a sign of good faith of host State authorities to carry out their responsibilities with the best possible speed.

Suspension of the two month period

30 The graduated approach mentioned in the previous section was already envisaged in CESR's first consultation paper. It was meant to be a written procedure under the form of a "duly motivated communication". The main features of this procedure as depicted in the first version of the guidelines were:

- It would serve to communicate to the UCITS that the requirements to make a reasoned decision preventing the UCITS to start marketing were fulfilled, unless the host State authority received the necessary information it explicitly required.

- If issued, the two-month period would be suspended. After receiving the required information, the host State authority would finalise the checking of the notification in the remaining time left.

- It would not prevent the use of a reasoned decision eventually if the circumstances to issue such a decision were met.

31 Most respondents feared it meant the introduction of a new full-fledged procedure raising issues associated to that kind of instrument: what happens when the motivation is not duly motivated, to whom should be the appeal escalated in case of disagreement?...

32 Many respondents noted that the guidelines did not establish a deadline for this kind of motivated communication to be issued, opening the door to possible abuses. The majority of respondents suggested that, if necessary, this communication had to be sent to the notifying UCITS within the first month of the two-month period.

33 As regards of suspension, respondents opposed the stop-and-go approach. Since it was considered unnecessary because it could delay the whole process. Some industry associations mentioned that speed is served best through good faith and not with complex, new procedures. A fair amount of respondents suggested an alternative approach:

- The duty for regulators should be to raise any material issues as soon as possible.
- If these issues are raised and the notifier fails to address them before the two-month period elapses, marketing of the UCITS units will not start.
- Two months after the requested information is received, marketing could begin unless the host State authority indicates otherwise.

34 After careful consideration, CESR agreed to inform the UCITS as soon as possible on the feasibility to issue a reasoned decision but maintained the remaining elements. In CESR's view, suspension of the two-month period transfers to the notifier the incentive to keep the suspension down to a minimum number of days. There is a commercial interest to start marketing very quickly. Therefore, the UCITS will likely provide the required information as soon as possible.

35 Respondents to the second consultation dwelled on the same arguments put forward on the first consultation since there was resistance to accept any suspension of the two-month period. Some industry associations were ready to accept a suspension of the two-month period but only to handle exceptional cases (i.e. where applicants submitted complex missing information at the very last moment of the 2 months period despite a timely request from the host State).

36 Some of the submissions to the second consultation have also pointed out that the dates mentioned in the example in paragraph 23 are incorrect and should be amended. However, CESR's proposal is that it should be issued as soon as possible and not within any pre-established deadline (for example, one month). Gaining assurance on the completeness of a notification and deciding whether there are convincing arguments to believe that the requirements to make a reasoned decision preventing the UCITS to start marketing are fulfilled are processes that call for a specific assessment and therefore, may call for different timing requisites.

Guideline 7

Certification of documents

37 According to CESR's initial stance, certification was a task for home State authorities. They had to provide the notifying UCITS with certificates of the latest versions of their simplified prospectus if these UCITS were to file a notification with certain Host State competent authorities. For the sake of transparency, the latter committed to indicate this requirement on their websites. It was also agreed that in case the simplified prospectuses of the UCITS were published on an official website in the internet under the responsibility of the home state authority, no further confirmation measures by that authority were needed.

38 Most respondent supported CESR's proposal to restrict certification to the simplified prospectus as this would result in a significant easing of requirements. However, these very same respondents felt that even for the simplified prospectus a certification by the home State authority was unnecessary. Alternatively, they suggested self-certification as a feasible alternative (i.e. certification that the documents presented are true copies of the latest simplified prospectus approved by or filed with the home state regulator).

39 Were CESR to disregard self-certification, it was suggested that certifications by home State Authorities should have a longer expiry date or no expiry date at all. It was proposed that certification among competent authorities should be carried out electronically.

40 The argument in favour of self-certification was pondered by CESR's Expert Group, also bearing in mind that the elimination of document certification would result in the easing of an administrative burden and reduce costs for the applicants.

41 In its second consultation paper CESR accepted self-certification of all necessary documents (and not only of the simplified prospectus) by the UCITS authorised director stating that the versions attached to the notification letter are the latest ones approved by or filed with the home State authorities; this step was widely appreciated by respondents to the second consultation and attendants to the Open Hearing held last May. In this regard only a minor comment was made across the board: the term "authorised directors" should be replaced by that of "UCITS' duly appointed representatives".

42 CESR's final guideline has followed that suggestion, replacing its previous wording with one that takes into account the different legal structures in which UCITS operate: *"third person empowered by written mandate to act on behalf of the notifying UCITS*".

Guideline 8

Translations

43 CESR's subsequent proposals regarding the language regime have been regarded as too modest (cf. Guideline 1). This view has been reflected in the submissions of both the first and second consultations. According to the first version of the guidelines, the notification, including the documents which have to be submitted by the UCITS, had to be sent in the original language and translated into the or one of the official languages of the host State. This first proposal left no room for exceptions (see also previous comment under paragraph 4 under section "Guidelines").

44 A large number of contributors to the first consultation suggested that, along the lines of the Prospectus Directive, it should be enough to provide the simplified prospectus in the official local language. The remaining documents should not be translated or, if so required, they could be delivered in a language common in the sphere of finance. A smaller number of respondents felt that the remaining documents should be translated if it was required by investors. Were final investors to be institutional investors, then this "right" would not be granted.

45 A minority of respondents said they could live with this requirement as far as CESR clarified certain ambiguities regarding to what amounts to "correct translation", what is "material error", or "omission" and establish the consequences of an incorrect translation as far as the notification procedure was concerned.

46 Having listened to these comments, CESR in its second consultation paper, made it clear that the original UCITS attestation could include an English version, to be provided by the UCITS. (cf. Guideline 11). This effort has been appreciated by most respondents to the second consultation although criticism about the limited scope granted to the use of English or other languages common in the sphere of finance remains. Some respondents would have liked to see CESR promoting regulators to approve the use of another language as a best practice instead of just noting that the Directive allows Member States to do so. However, it should be mentioned that documents listed under Article 46 of the Directive are meant to be correlated to investors and unit holders. According to Article 47 of the Directive, they must be translated into the official language of the host Member State or in a language approved by the competent authorities of the host Member State.

47 Another concern (already present throughout the first consultation) is that of sworn translations. CESR's lack of comments leaves undesirable room for interpretation. According to most respondents, this requirement would not derive from the Directive and, therefore they have urged CESR to agree to drop it. In its final guidelines CESR has been unable to go as far as that. However, it is recommended that Members do not require this kind of translations.

48 It should also be noted that there have been many respondents that have come to the conclusion that the language requirement contained in Art. 47 of the Directive refer to actual marketing of the UCITS in the host State and not to the notification phase. In their view, the Directive treats the language requirement as a post-notification obligation.

Guideline 9

Marketing of only part of the umbrella fund

49 The proposal to require the notification of only those sub-funds –part of an umbrella UCITS- that are intended to be actively marketed in the host State has been fully supported since it was introduced in the first draft version of CESR guidelines. This guideline has remained unchanged throughout both consultations and also in the final paper.

50 However, numerous comments have been made pointing out that CESR's proposal fall short of addressing one problem encountered in marketing only parts of an umbrella fund: the modifications required to the prospectuses and other documents to be filed. In the view of these contributors, no modification (i.e. expunging text) should be requested to the text of these documents to eliminate the sub-funds not marketed in the host State, as their existence in the prospectus is not equivalent to active marketing. This activity would cause administrative problems and extra cost for the UCITS. These respondents believe that mention should be made (preferably in a table separate from the prospectus) of the countries where each sub-fund is being marketed, or of all UCITS marketed in a specific country, so as to give a clear picture to investors of which funds are available to them. CESR did not deal with this problem; it is left to the discretion of the host Member States.

Guideline 10

Simultaneous notification for new sub-funds

51 For simplification purposes, CESR permits to include several sub-funds in one notification letter and to use cross-references concerning documents that only have to be submitted once.

52 Respondents to the first consultation found this measure a positive development. However, according to numerous comments it should be clarified that this benefit was also available for the notification of umbrella funds in contractual and unit trust form. CESR's second version of its guidelines was amended to include this comment. This has been appreciated by contributors to the second consultation.

53 In its first consultation paper CESR Members agreed that host State authorities could adopt as an option the following practice: "*If in a later stage the UCITS intends to market sub-funds, which were already included in the original notification material, but which were not proposed to be marketed in the host State at that stage without changing the marketing arrangements already in place for other sub-funds, and to the extent that the relevant information already submitted is unchanged, a simple communication concerning the adding of these sub-funds is needed and the two-month period does not apply*". CESR Members will inform on their websites, if they adopt this practice.

54 Those respondents to the first consultation who made a specific comment about this point did not understand the proposal:

- Why would a UCITS notify a host State authority about a sub-fund other than to market it.
- Why would it be optional for host State authorities not to apply the two-month period for approval of the marketing arrangements if the relevant information already submitted is unchanged.

55 According to these contributors, the rule should be that the two-month period does not apply. Respondents noted the existence of different practices throughout Europe and emphasized the need to avoid different approaches among different.

56 In its second consultation paper CESR thought than an integrated reading of Guidelines 9 and 10 made this point redundant and therefore it was eliminated.

Marketing of new sub-funds

57 According to the first version of CESR's guidelines, if new sub-funds are added to the umbrella fund and these sub-funds are proposed to be marketed, the notification procedure and the two-month period would apply. However, not all authorities considered it necessary to apply the two-month period.

58 This early proposal raised numerous comments, all displaying opposition to a new two-month period if the marketing arrangements remain unchanged. It was said that if a new sub-fund relies upon its UCITS' full prospectus, articles of incorporation, central administration, marketing infrastructure, etc… all of which will have been submitted to the host State authority under the standard notification procedure, the host State should treat the first notification of an umbrella fund as the only notification to which the two-month rule should be applied. Comments against the persistence of different approaches among Member State were also submitted.

59 In its second consultation paper, CESR tried to clarify that these sub-funds should receive the same treatment as any other single fund as they may not only have different marketing arrangements but have different own characteristics. However, it was acknowledged in the guideline that given that most of the notification material is likely to be already familiar to the host State authority, the necessary time for check should be significantly less than the regular two-month period.

Processing of umbrella funds with a large number of sub-funds

60 This proposal was introduced x after the first consultation. According to CESR, to simplify the processing by the host authority of the notification of umbrella funds with a large number of sub-funds, the whole umbrella should have one full prospectus. However, if the notifying UCITS cannot avoid providing a separate full prospectus for each sub-fund, the UCITS' authorised directors must self-certify that the information on the marketing arrangements in the host State are the same in each prospectus.

61 Comments to this guideline were positive, acknowledging CESR's stated aim of providing a framework for efficient use of the information the host authority receives or has received with the notification or with previous ones (paragraph 35). However, some contributors to the second consultation have expressed the opinion that the text of the guideline should be modified to eliminate the statement "*Basically, the whole umbrella should have one full prospectus…*". It was noted to CESR that there are jurisdictions where separate full prospectuses are available for each sub-fund (as permitted by the national regulator). Therefore, CESR should not imply that such system is unacceptable because it complicates the notification procedure.

62 CESR has weighted these comments and consequently in its final guidelines it has fallen short of implying that full prospectuses for sub-funds are unacceptable in every case. However, umbrella UCITS with a large number of sub-funds are recommended to have only one full prospectus dealing with all sub-funds to be marketed in the other Member State.

63 Taking into account comments from the industry and for the sake of coherence with Guideline 7, the reference to self-certification has been also amended.

Reference to share classes

64 Throughout both consultations there have been several comments in favour of including an explicit reference to the issue of share classes in CESR guidelines. According to some contributors it has been noted that some Member States apply the two-month rule to new share classes of a sub-fund. In their view, it should be confirmed that new share classes of already registered sub-funds do not require an additional notification. As it was pointed out, it is already the view taken by CESR in the transitional guidelines for UCITS III (Ref. CESR/04-434b, Question A.III.1) that share classes are 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.

65 In the final version of its guidelines, CESR has found common ground to put forward the following proposal: "*If new share classes are added to the sub-funds of an umbrella, the UCITS shall notify the host State authority the new share classes added to the sub-funds of an umbrella disclosing the objective criteria (e.g. the amount of subscription, fees/expenses) on which they are based and the two-month period shall not apply, i.e. the UCITS may begin marketing the share classes immediately provided that other reasons which prohibit marketing do not apply*".

B. Content of the file

Guideline 11

66 The first version of this guideline only dealt with documents and information required to UCITS according to Art. 46 of the Directive, irrespective of the host State authorities' justifications for demanding additional documents in accordance with Art. 44(1) and Art. 45. Comments were made to CESR that evidence was available about unjustified request of additional documents whose net effect was to hinder cross-border distribution of UCITS within the EU.

67 Consequently, in its second consultation paper, CESR included examples of what host State authorities may not ask for (paragraph 36) unless foreseen and compliant with Art. 44 and Art. 45 . Respondents have thanked this clarification but, at the same time, have expressed their concern that, as stated in CESR's guidelines, still certain documents could be helpful or appropriate to streamline the notification procedure.

68 CESR also used the second version of its guidelines to announce its agreement to rely upon self-certified copies of the home State authority's attestation. This was a consequence of the decision taken as regards Guideline 7 and therefore has been met with widespread approval.

69 Also to upheld consistency with Guideline 10, CESR's final version of this guideline recommends to have annual and half-yearly reports dealing with all sub-funds of an umbrella fund. In case the notifying UCITS provides separate annual and half-yearly reports, self-certification according to the principles contained in Guideline 7 should operate.

C. Modifications and on-going process

Guideline 12

70 In CESR's view, it is important that investor in the host State have the same information available as the investors in the home State but without prejudice to the notification procedure of new sub-funds. This principle is the basis to expect foreign UCITS to keep their documents and information up-to-date.

71 CESR's second consultation paper clarified that submission of modifications is requested without delay after the documents and information have been made available the first time available in the home Member State and without prejudice to the notification procedure for new sub-funds. The final guideline has also included a reference to other information referred to Annex I, Schedule A, No. 4 of the Directive).

72 Many contributors to the second consultation felt that the reference to "without delay" should be clarified. CESR should be aware that translation and service of process takes time. Therefore, a certain amount of delay is inevitable.

73 A common remark of those that responded to second consultation was that CESR could have produced a non-exhaustive list of changes that CESR members agree can be provided immediately

and without delay. If not, new investors could be mislead in purchasing a fund on the last available prospectus and/or simplified prospectus whilst certain documents have not been cleared yet.

74 Finally, some comments were recorded suggesting CESR to develop a model attestation (preferably in a language that is common in the sphere of finance) in order to report possible modifications.

D. National marketing rules and other specific national regulations

Guideline 13

75 CESR agreement of host State authorities to give an overview of the non-harmonized national provisions of a host State which relate to the application of the Directive and its expectation to keep them up-to-date was already contained in the first version of its guidelines. This overview should be accessible on the website of each host State authority.

76 Respondents to the first consultation generally welcomed this measure on the grounds of improved transparency. However, in the view of many, it would have been preferable to publish all additional requirements from CESR members in CESR's website. This would have had the advantages both of having the necessary information in one place and of allowing regulators to compare requirements and see where national differences could be ironed out.

77 Other contributors felt that publication of non harmonized national provisions was helpful but did not provide the best possible solution. These respondents made calls for a thorough review of the current accumulation of regulations in order to eliminate all those not providing any added investor protection and those contrary to the wording and/or the spirit of the Directive.

78 It is noted that some industry associations have expressed their disappointment to see the lack of proposal from CESR regarding a standardized format for submission of marketing information and supporting material.

Guideline 13 has remained unchanged because the Directive does not harmonise marketing rules which are left to national legislation. The purpose of this guideline is to facilitate transparency of the requirements to the UCITS.

(II) ANEXXES

Annex I. Model Attestation to market units of UCITS in an EEA Member State

79 Annex I contains the standard model of a valid original attestation. This model helps verifying that the UCITS fulfils the conditions imposed by the Directive.

80 In its first version, it included information on the list of sub-funds "to be marketed" in the host Member State, if applicable (points 13 and 14). Numerous respondents to the consultations

expressed that, in their view, an attestation should be limited to the facts that the home State authority can know. Therefore, the home State authority should not be obliged to attest the identity of the sub-funds that the UCITS wishes to market in the host State. CESR's final guidelines have been consequently amended.

81 Regarding items 15-21 should (grandfathering clauses) there were some suggestions that they be included in an appendix which could then be removed in February 2007.

Annex II. Model notification letter to market units of UCITS in an EEA Member State

82 CESR's model notification letter contains two elements that, in the view of many contributors to both consultations need either clarification or removal. The first is the "duration" and the second is the "scope of activities of the management company in the host Member State".

83 A number of industry associations also felt that the reference to CESR guidelines (point 14) should be deleted because, in their view, information contained in the notification should only conform to requirements by the Directive and national legislation.

Annex III. National marketing rules and other specific national regulations.

84 It was decided that to facilitate transparency of the requirements to the UCITS, each CESR jurisdiction should indicate the overview of the national marketing rules and other specific national regulations in their websites (cf. Guideline 13 above).

85 Respondents have expressed the need to simplify and standardise national requirements and therefore CESR members should be committed to having national differences only where absolutely necessary. This would keep this Annex as limited in size as possible.

86 Several respondents also suggested information in Annex III should also be solely in English and that reference to point VIII "Other issues" should be deleted.

Annex IV. List of CESR Member's websites for the downloading of national marketing rules and other national regulations regarding the notification process

87 No significant comments were made regarding this annex.

(III) OTHER ADDITIONAL ISSUES THAT COULD HAVE BEEN DEALT WITH IN THE GUIDELINES

88 Respondents to both consultations offered CESR a significant amount of comments that were not pertaining to any specific guideline but are of interest in the wider context of CESR's aim of bringing greater simplicity, transparency and certainty to the notification process. The following list contains those that were brought up by a higher number of respondents:

- Competent authority. It has been suggested that in those CESR Members where currently more than one authority has competence over the notification procedure, one authority were left as the sole responsible.

- Fees for supervisors. According to some respondents, the official fees covering the notification procedure differ a lot among Member States. It would be desirable if these fees could be standardised and be proportional to the tasks involved.

- Correspondence between UCITS and competent authorities. It has been proposed that this kind of communications should always be carried out in English.

- Registration and de-registration. CESR should try to develop a harmonised approach for maintaining registration and de-registration. A standard initial registration form applicable to all UCITS registering in Member States could be created.

- Interruption of the offering. CESR Members could agree a standard procedure for the interruption of the offering of the units in a host State (including standard notification model, duties of communications towards interested investors…)

PROCESS AND WORK PLAN

1 CESR's guidelines and its feedback statement have been prepared by the CESR Expert Group on Investment Management. The Group is chaired by Mr Lamberto Cardia, Chairman of the Italian securities regulator, the Commissione Nazionale per le Società e la Borsa (CONSOB). Two members of the CESR Secretariat, Mrs. Lucie Anna Matolinova and Mr. Enrique Velázquez assist the Chairman, the former acting as Rapporteur of the Expert Group. The Group set up a working sub-group on this issue, coordinated by Mr. Thomas Neumann of the German financial regulator, Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). The Group is assisted by the Consultative Working Group on Investment Management composed of 16 market practitioners and consumers' representatives.

2 On 27th October 2005 CESR published its first consultation paper (Ref. CESR/05-484) on its draft guidelines regarding the cross-border notification procedure of UCITS funds. CESR requested comments and reactions to its proposal and to the specific questions raised in the document by 27 January 2006, from both market participants and from retail investors. Thirty responses were received. CESR launched a second consultation on May, 5 (Ref CESR/06-120). The closing date was June, 1. To this second consultation, twenty-three contributions were submitted (two of them were not authorised for publication).

3 Two public hearings on the Simplification of the Notification Procedure took place at CESR's premises in Paris. The first was held on January, 17 and the second on May, 23 2006. More than 70 participants attended in total.

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Dr. Stefan Duchateau, Chairman of the Board of KBC Asset Management

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Mr. James Firn, General Counsel - Europe, Middle East and Africa of Russell Investment Group

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Mr. Felix López Gamboa, Chairman of BBVA Gestión

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Mr. Marco Mazzucchelli, Head of European Investment Banking, Credit Suisse First Boston Ltd.

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Mr. Vesa Puttonen, Professor in Finance at Helsinki School of Economics

Mr. Peter Reisenhofer, Board Member of C-Quadrat Investment AG

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LIST OF CONTRIBUTORS TO CESR'S CONSULTATIONS

CESR's first consultation paper (Ref. CESR/05-484)

Nº	Name	Activity
1	Association of Foreign Banks in Germany	Banking
2	Banca Intesa	Banking
3	Deutsche Bank AG	Banking
4	Deutscher Sparkassen- und Giroverband eV	Banking
5	ESBG	Banking
6	European Association of Co-operative Banks	Banking
7	European Banking Federation	Banking
8	State Street Corporation	Banking
9	WKO	Banking
10	AFG	Insurance, pension & asset management
11	ALFI	Insurance, pension & asset management
12	Assogestioni	Insurance, pension & asset management
13	BVI	Insurance, pension & asset management
14	Dublin Funds Industry Association	Insurance, pension & asset management
15	DWS Investments	Insurance, pension & asset management
16	EFAMA	Insurance, pension & asset management
17	Forum of European Asset Managers	Insurance, pension & asset management
18	IMMFA	Insurance, pension & asset management
19	Investment Management Association	Insurance, pension & asset management
20	JPMorgan Asset Management	Insurance, pension & asset management
21	Raiffeisen Kapitalanlage-Gesellschaft	Insurance, pension & asset management
22	Schroders	Insurance, pension & asset management
23	Swedish Investment Fund Association	Insurance, pension & asset management
24	Threadneedle Investments	Insurance, pension & asset management
25	Barclays Capital	Investment services
26	Danish Shareholders Association	Investor relations
27	Bird&Bird Milan	Legal & Accountancy
28	Dechert LLP	Legal & Accountancy
29	Law Society of England & Wales	Legal & Accountancy
30	PricewaterhouseCoopers, DE	Legal & Accountancy

CESR's second consultation paper (Ref. CESR/06-120)

Nº	Name	Activity
1	ALFI	Banking
2	Banca Intesa	Banking
3	Bundessparte Bank und Versicherung	Banking
4	Deutscher Sprakassen- und Giroverband	Banking
5	Dublin Funds Industry Association	Banking
6	European Savings Banks Group (ESBG)	Banking
7	AFG	Insurance, pension & asset management
8	Assogestioni	Insurance, pension & asset management
9	BVI	Insurance, pension & asset management
10	EFAMA	Insurance, pension & asset management
11	Fidelity International Limited	Insurance, pension & asset management
12	Forum of European Asset Managers	Insurance, pension & asset management
13	IMMFA	Insurance, pension & asset management
14	JPMorgan Asset Management	Insurance, pension & asset management
15	KBC	Insurance, pension & asset management
16	Schroders	Insurance, pension & asset management
17	Threadneedle Investments	Insurance, pension & asset management
18	Barclays	Investment services
19	Belgian Asset Managers' Ass.	Investment services
20	Investment Management Ass.	Investment Services
21	M&G International	Investment Services

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