

## **Dutch position on asset management**

### **Background**

In the Netherlands we have three kinds of investment funds: (i) UCITS , (ii) (nationally) authorized non -UCITS funds and (iii) non-UCITS investment funds which are authorized in other states with supervisory regimes that are deemed adequate. The second category is a “catch-all” category whereby the *fund manager* has to be authorized. The fund managers that offer participation rights in their funds to the public will need to comply with the provisions of our act on supervision of investment funds in order to receive the authorization. These provision concern the trustworthiness and know how of the fund manager, capital requirements, organisational requirements and internal control mechanisms and transparency requirements. All these provisions have to be met in order for the fund manager to receive authorization. Once the fund manager is authorized, the funds that he manages do not need to be authorized individually. It is important to note that the Dutch law do not contain provisions on eligible assets and investment policy.

### **Our position**

#### *General*

We are in favour of reviewing the UCITS directive and enhancing the EU framework for investment funds. The allocation of capital within the EU should take place as efficiently as possible. Investment funds are an important aspect of efficient capital allocation because investment funds reduce costs for retail investors to gather information, reduce costs to investors because of economies of scale and investment funds facilitate spreading risks.

#### *Scope of EU regulation*

The Netherlands are of the opinion that non-UCITS investment funds and other alternative investments should be included in the asset management discussion. The growing interest in private equity, structured products and hedge funds shows that the industry and investors alike do not limit themselves to UCITS investment funds. In our view private equity and hedge funds are investments that are helpful in diversifying an investment portfolio. Private equity can contribute to innovation and economic growth by financing new and growing business for example. Hedge funds can be capable of providing returns even in difficult market circumstances. These investment opportunities should be supported not only nationally but also on a cross border basis. However the European discussion and legislation should only focus on investment products offered to retail investors. In our view professional investors are not in need of protection by legislation. Professional investors are better capable of judging risks than the legislator. Furthermore professional investors are able to acquire from the investment fund the information that they deem necessary. Professional investors should not be limited in their cross border investments.

#### *UCITS regulatory framework*

As far as the regulation of investment funds is concerned, our view is that strict product and investment policy restrictions can hamper market developments. The above mentioned growing interest in alternative investments illustrates that there is market interest in investments without strict investment limits. Retaining (only) the current prescriptive UCITS framework could diminish the attractiveness of the UCITS label.

We therefore feel that product and investment policy restrictions in the UCITS directive should be reduced. This does not mean that (UCITS) investment funds should be able to operate without legal safeguards; in order to be allowed to attract funds from retail investors, investment fund managers should have a license. This license can only be obtained if the fund manager complies with certain criteria such as trustworthiness and know-how of the fund manager, capital requirements, organisational requirements and internal control mechanisms. In addition to these requirements investment funds should be transparent about its investment policy and the risks involved. If all these requirements are met restrictions on investment policies are no longer necessary. The level of transparency vis-à-vis the retail investor should correspond to the complexity of the fund.

This viewpoint means that all authorized investment funds, including hedge funds, can be offered to retail investors in the entire EU if the fund manager has an EU license. An important thing to note is that investment funds are financial instruments in the sense of the Markets in Financial Instruments Directive. Therefore the distribution of investment funds is governed by article 19 of the MiFID concerning investor protection. This means that when investors are provided with investment advice, the investment firm applies the consumer suitability test of article 19 paragraph 4 (together with article 35 of the implementing directive) of the MiFID. This means that the investment firm shall obtain such information from the client as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for believing that the specific transaction to be recommended, or entered into meets the investment objectives of the client, is such that the client is able financially to bear any related investment risks consistent with his investment objectives and is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

When investment advice is not provided, the investment firm shall nonetheless apply the appropriateness test of article 19 paragraph 5 of the MiFID. This means that the investment firm shall assess whether the financial instrument is appropriate for the (retail) investor. These provisions ensure investment protection. In our view investment funds that are no longer subject to investment policy restrictions, should not be considered as non-complex financial instruments in the sense of article 19 paragraph 6 of the MiFID and therefore the light-touch regime mentioned there should not be applicable to these investment funds.

This view is not the same view as expressed by the Alternative Investment Expert Group. Firstly we do not believe regulation is necessary for professional investors. Secondly we do believe that alternative investments can be offered to retail investors. However this should only be allowed when the fund complies with all the requirements set out above (license, transparency and obligatory application of the MiFID conduct of business requirements by the institution which concludes contracts with end-investors). The difference between the Dutch view and the view of the Expert Group is that investment funds without investment policy restrictions may be offered to non-professional investors provided that they are subject to regulation and its managers are authorized.

*We realize that this view might encounter resistance from member states within which UCITS are a mayor part of their defined contribution pension systems. Therefore we could imagine a system in the directive where one category of investment funds retains the current UCITS framework. Individual member states will then be able to prescribe use of those funds in case of defined contribution pensions.*

### *Costs and benefits*

An important factor for the entire operation is the fact that the benefits of legislative measures should weigh up to the costs. Overregulation concerning investor protection and prescriptive rules on investment policies should be avoided. In any event legislative measures should not refer to professional investors, as mentioned above.

### *Timing and scope green paper*

In our view there is scope for a greater level of ambition by the Commission. Firstly some issues that the Commission considers as long term, are relevant at this moment and should be studied as soon as possible (for example pooling of assets, fund mergers and a properly working passport for fund managers). On these issues the Netherlands generally agree with the report of the Expert Group on Investment Fund Market Efficiency. There is a need to swiftly tackle certain obstacles that hamper the development of the European fund industry.

Secondly we are concerned about differing levels of regulation for similar products. The current framework for investment funds places these funds at a disadvantage compared to for example unit linked insurance. We should look at differences in regulation concerning the product rules and concerning the distribution of these products and consider whether they are justified. Studying the possibilities of a level playing field in this industry seems to be in line with the Commission's ambition to create a so called "EU financial services rule book".

In our view it is very important to make the UCITS directive a Lamfalussy directive as soon as possible. It has been made clear that for example the notification procedure and the simplified prospectus do not work in the way that was intended. Important differences in application and interpretation of the provisions of the directive could be resolved much more effectively by CESR if there was a broader base for application of the Lamfalussy structure.

We are in full agreement with the short term priorities that the commission has described although work on these issues is currently being carried out. These issues involve the clarification of eligible assets, studies on the working of the simplified prospectus, guidelines on transitional provisions and the notification procedure (which in our view should truly be a notification, with no decision of the host supervisor being required).

### *Simplified prospectus*

The simplified prospectus has been an issue for discussion recently. Generally speaking, criticism has been expressed regarding the simplified prospectus. In the Netherlands, we have had a document that used to be more or less similar to the current simplified prospectus. This document had been evaluated recently and has been radically changed on the basis of the results of this evaluation. The document has been greatly shortened and graphically enhanced in order to better convey its message to the consumers. We feel that the UCITS simplified prospectus contains too much information to be an effective document for the retail investors at this moment.