Please find below the comments and observations of the Association Luxembourgeoise des Compliance Officers du Secteur Financier on the CESR Consultation document on guidance for regulators to apply the transitional provisions introduced by the UCITS III Directive.

C. QUESTIONS ON THE TRANSITIONAL TREATMENT

I. UCITS I management companies

1. Can a grandfathered UCITS I management company, i.e. authorised before 13th February 2004, launch "passportable" UCITS III funds?

Art. 2 (3) of Directive 2001/108/EC provides for management companies authorised before 13th February 2004 the possibility to continue their activity until 13th February 2007. Supervisory authorities have developed diverging views under which conditions this provision would cover the launching of UCITS III funds. Some authorities require full compliance with the requirements of Directive 2001/107/EC (e.g. capital and organisational requirements) in addition to the employment of a risk-management process in accordance with Art. 21, as amended by Directive 2001/108/EC, whereas others consider that the employment of a risk-management process would be sufficient.

Taking into account these difficulties and in order to encourage progress towards compliance with UCITS III, CESR members propose that a grandfathered UCITS I management company is allowed to launch "passportable" UCITS III funds only until April 30th, 2006 at the latest; after that final date the management companies must be adapted to UCITS III. To be able to avail of this possibility, a grandfathered UCITS I management company has in any case to comply with the requirements of Art. 21 as amended by Directive 2001/108/EC concerning an appropriate risk-management process. This has to be confirmed by a written attestation by the competent authorities of the home Member State of the management company, in order it to be allowed to launch "passportable" UCITS III funds in the host Member State until April 30th, 2006.

Q: Do you agree with this proposal? If not, please state your reasons.

We agree with the proposal to the extent that all supervisory authorities agree to abide by it as it will clarify the extant position. It is, however, unfortunate that whilst the Directive appears to be ambiguous as to

whether a grandfathered Management Company is able to launch UCITS III compliant funds thereby allowing an interpretation by Member States, host Member States have appear not to be willing to accept the home Member States' interpretation of the ambiguity. Indeed, certain Member States have indeed interpreted the Directives and implementation thereof differently. In that instance, those Member States have taken a positive action in determining how their local market will be regulated. They should not by their action be able to subject another Member State to effectively comply with its interpretations of the EU Directives by refusing to authorise another Member States compliant product. The whole concept of UCITS was to have a uniform approach whereby host States could rely upon the home States authorisation of a UCITS compliant product. Without this concept and acceptance by host Member States of the home Member States' interpretation and compliance with the terms of the UCITS Directives (except where there is *clear and manifest* non conformity with the terms of the UCITS Directives), commercially the playing field of a single European market cannot be achieved to the detriment of the advancement of the investment fund industry.

2. Can a grandfathered management company continue to launch "passportable" UCITS I
funds after 13th February 2004?
Setting up a new UCITS I fund, i.e. an investment fund applying the rules of the UCITS Directive 85/611/EEC prior to its amendments by the Directive 2001/108/EC, is not possible
after 13th February 2004, which was the transposition deadline of the Directive 2001/108/EC.
After that deadline, new UCITS funds to be set up must apply the amended UCITS Directive,
they have to be so-called UCITS III funds.
A grandfathered management company cannot in CESR's view therefore continue to launch
passportable UCITS I funds after 13th February 2004; the UCITS I funds must have been authorised before 13th February 2004.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed, but it should still be able to launch UCITS I sub funds within an existing UCITS I umbrella structure.

II. UCITS I funds (single fund structure)
1. Can a UCITS I funds authorised between 13th February 2002 and 13th February 2004 and
wishing to be marketed in another Member State obtain an UCITS I – product passport and

benefit from a grandfathering period until 13th February 2007?
For answering this question the following aspects must be considered:
• The Directive 2001/108/EC does not regulate a grandfathering period for UCITS I funds authorised between 13th February 2002 and 13th February 2004. Art. 2 of the Directive 2001/108/EC provides for a grandfathering period only for UCITS funds existing on 13th February 2002, the date of entry into force of the Directive. However, Member States and particularly their supervisory authorities might have faced a difficult situation for UCITS launched after 13th February 2002 from a practical point of view: They were given time to prepare the transposition until 13th February 2004 (as provided for by Art. 3 of Directive 2001/108/EC) and at the same time they would have been obliged to ensure that all the UCITS I funds launched after February 2002 had been already converted to the new regime by the end of the application period, i.e. 13th February 2004.
Considering the fact that the situation was unclear from the date of entry into force of the amended UCITS Directive, CESR members provide for a period until December 31, 2005 at the latest for UCITS I funds authorised between 13th February 2002 and 13th February 2004 to be converted to the regime of the amended UCITS Directive. During this period, they still may continue to be marketed on the basis of the UCITS I product passport.
This time limit will urge such UCITS to adapt to the amended UCITS Directive in the smoothest time frame that is practically conceivable. The competent authorities should treat the necessary approvals as priority cases. In cases of exceeding this time limit host Member State authorities will no longer accept those UCITS I – passports.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

III. UCITS I umbrella funds
1. Can a "passportable" UCITS I sub-fund be launched in a grandfathered UCITS I umbrella fund?
It should be considered that the transitional treatment of UCITS I sub-funds was unclear from the date of entry into force of the amended UCITS Directive which lead to divergent approaches of several supervisory authorities.
Therefore, CESR members provide for a period until December 31, 2005 at the latest for UCITS I sub-funds to be launched in a grandfathered UCITS I umbrella fund, i.e. by the end of this

period, the overall UCITS I umbrella should be converted to UCITS III. This would apply whether the umbrella fund was itself authorised before 13th February 2002 or between 13th
February 2002 and 13th February 2004.
This time limit will urge such UCITS I umbrella funds to adapt to the amended UCITS Directive
within the smoothest time frame that is practically conceivable. The competent authorities
should treat the necessary approvals as priority cases. In cases of exceeding this time limit host
Member State authorities will no longer be obliged to accept those UCITS I – sub-fundpassports.
Q: Do you agree with this proposal? If not, please state your reasons.
Respondents are asked to address specifically the issue, whether there are real practical
obstacles to apply the proposed deadline. Respondents are asked to give concrete practical
examples of these obstacles/ problems.

We refer back to our answer at I,1 and the concept of reliance upon a home state's interpretation of the UCITS Directives by a host state. Of course it would be best to have clarity and uniformity in approach – but where there is room for each Member State to interpret the Directive – the host Member States should accept that interpretation. .We consider that UCITS I funds that have been created prior to 13 February 2002 should be able to continue as a grandfathered UCITS I and be able to launch UCITS I compliant sub funds until February 2007. We can see no reason, in principle, on a reading of the Directive why this should not apply.

We do not understand why the 31 December 2005 has been chosen as an earlier date. From a commercial standpoint, there are many fund providers that do not require the added scope of the products under UCITS III and are content to continue to provide their investment products pursuant to UCITS I. From a practical perspective , especially for smaller funds, there is the cost element of transferring and meeting the requirements of the UCITS III Directive and many would prefer to delay for as long as possible – especially where they have no need to change. Furthermore, a longer lead in time for converting also helps in allowing for a smooth and rapid transfer process once a submission is made to regulators. To move the deadline to 31 December 2005 may well cause a drain on the resources and timeliness of regulators with the volume of fund conversions. What will be the position where a promoter has submitted his file for conversion prior to 31 December 2005 and is still awaiting approval after that date? Cross border funds would not want their authorisation revoked in host Member States.

Can a "passportable" UCITS III sub-fund be launched in a grandfathered UCITS I umbrella

fund?
In CESR's view this is not possible, because the whole umbrella fund including all the subfunds
should either be submitted to the regime of the Directive 85/611/EEC or to that of the new Directive 2001/108/EC. The combination of sub-funds of both regimes under one umbrella is not permissible.
In the case of corporate funds, this derives clearly from the basic factual requirement that the
umbrella as a whole constitute one single legal entity. In the case of contractual funds, this can
be concluded from the legal consideration that the amending UCITS Directive 2001/108/EC
does not appear to provide any derogation for compartment funds in terms of differentiating
the prudential regime at sub-fund level.
Consequently, the whole umbrella fund must be based on a common legal basis. This legal basis
is provided by the fund rules or the instruments of incorporation. These documents have to
establish all the general rules which are relevant for the whole umbrella. These documents
should also provide for the creation of sub-funds.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

IV. Simplified prospectus
1. Must an UCITS I have a simplified prospectus available in order to maintain its registration?
The amending UCITS Directive 2001/107/EC does not contain specific grandfathering provisions in relation to the simplified prospectus. Therefore, supervisory authorities have
developed divergent approaches to whether they require a simplified prospectus for UCITS I
funds or not. Furthermore, it needs to be considered that some Member States have already
implementing regulations (including detailed guidance) on the simplified prospectus in place
whilst some others are still working on their implementation.
In this respect, it needs also be taken into account that the European Commission's Recommendation on some contents of the simplified prospectus 2004/384/EC was published
only on 30th April 2004, asking Member States to inform the Commission, in so far as possible,
by 30th September 2004 on any measures they have taken further to this recommendation. The
Members States were also asked to inform the Commission of the first results of the implementation of the recommendation; in as far as they are able, no later than 28th February

2005.
Therefore, in CESR's view UCITS I funds (launched before 13th February 2004) should have
available a simplified prospectus as soon as possible and no later than 30th September 2005. In
cases of exceeding this deadline host Member States are no longer obliged to accept UCITS I
funds without simplified prospectuses.
In addition CESR strongly recommends, that funds marketed to host Member States, that
already have implemented the UCITS regulations concerning the simplified prospectus in their
national legislation, and which requires also foreign funds to provide a simplified prospectus,
would provide information according to the requirements included into Schedule C of the
Annex I of the UCITS Directive concerning the contents of the simplified prospectus.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed. Although, CESR should work to put in place an agreed uniform content for the Simplified Prospectus. Already different Member States have or are in the process of devising different content and disclosure requirements subject to the requirements of the Directive 2001/07/EC. For European investors to compare and contrast different products a standard content needs to be adopted by all. Should the European Commission's recommendations be taken as that standard?

Is it possible for UCITS which have no simplified prospectus and which wish to be marketed in another Member State to obtain a UCITS III product passport?
UCITS funds that wish to obtain a UCITS III product passport to market their units in other
Member States must have a simplified prospectus. The amending UCITS Directives do not
include a transitional provision that would allow UCITS III funds not to have a simplified
prospectus.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

D. QUESTIONS CONCERNING THE EUROPEAN PASSPORTS

I. Management company passport

1. Are the product and the management company passport issued separately or combined?
The UCITS Directive currently provides for two separate passports. The passport for the

management company, as a service provider, is new – since it was introduced by the amending
Directive 2001/107/EC. At the previous stage, the UCITS legal framework (based on the
Directive 85/611/EEC) only provided for the product passport (i.e. concerning the UCITS
fund). In CESR's view, these passports are issued separately from each other.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

Does a management company which wants to distribute in a host Member State UCITS'
units, without establishment of a branch only need a product passport or is a management
company passport necessary in addition?
This question has shown to be extremely complex. CESR members share the view, that the
purpose of the creation of the management company passport in addition to the product
passport was not to increase administrative burdens related to cross-border marketing of
investment funds. At the same time, any practical arrangements agreed within CESR must
respect the requirements set out in the amending UCITS Directives. Two possible approaches
have emerged from the discussion. CESR therefore proposes two options for the consultation to
collect views from respondents on this issue and especially how to take into account the
rationale behind both of the options (legal framework/ avoidance of administrative burdens) to
have a balanced solution.
OPTIONS
A) Both the management company passport and the product passport are necessary according
to article 6b, paragraph 5 of the amended UCITS Directive: "A management company shall also
be subject to the notification procedure laid down in this Article in cases where it entrusts a
third party with the marketing of the units in a host Member State."
However, both passports (for the product and for the management company) are needed only
in case that a management company wishes to market, for the first time, the units of its funds
in a given Member State (accordingly Art. 6 b, paragraph 1).
Therefore, a management company that was already marketing its funds in another Member

State before 13th February 2004, would only need the product passport for that Member State
(recognition of a grandfathering regime for such situations).
B) Only a product passport and no management company passport should be required if a
management company only wishes to distribute UCITS managed by itself in a host Member
State. There would be little point in having a separate passport for a UCITS and one for a
management company if the management company passport must always be used in addition
to the product passport in these cases. Under this option, all the information foreseen for
notification of the management company could be considered to be fully encompassed in the
registration procedure for the product. This option requires full confidence that the arrangements put in place would effectively ensure compliance of the management company
with the UCITS Directive (subject to the transitional arrangements previously mentioned).
Q: What is your view regarding this issue, and especially on how to take into account the
rationale behind both of the options (legal framework/ avoidance of administrative burdens) to
have a balanced solution? To what extent do you consider the distribution of third party funds
by a third party as relevant in practical/ economic terms (Please consider also question D I 8)?

We would consider option A as the appropriate way forward. As per the previous question, the two UCITS IIII Directives are separate. They provide for separate matters. A UCITS III fund has the option either to be self managed – in which case it can distribute it shares itself or through appointed intermediaries – or to appoint/designate a Management Company to carry out the activities of investment management, administration and distribution. It is by this very fact that it is a distinct service provider – although closely connected to the UCITS III fund for which it has been appointed/designated – that it should be subject to a notification procedure for the carrying out of services in another Member State. The Management Company should have the option either to establish a branch or to provide those distribution services cross border in support of the product. The notification to act as a distributor for passported funds should only be made once. In relation to third party fund distribution see D I 8 below.

3. Does a management company which wants to distribute in a host Member State UCITS' units through an own branch need both the product and the management company passport?

Both the so-called product passport and the so-called management company passport are needed for this activity in CESR's view.

The product passport is necessary for each UCITS distributed in a host Member State. According to Art. 46 of the UCITS Directive, 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. A notification procedure is necessary for each of the UCITS to be distributed in the host Member State.

The management company passport is required for the setting up of a branch in a host Member State, even if the sole activity of the branch may be to distribute the units of a UCITS managed by the management company. According to Art. 6a of the UCITS Directive any management company wishing to establish a branch within the territory of another Member State shall

notify the competent authorities of its home Member State. Only one notification procedure is necessary for each host State where services shall be offered.

Q: Do you agree with this proposal? If not, please state your reasons.

Agreed. Where a Management Company has established a branch in a host Member State, providing it has been designated as a Management Company for at least one UCITS III in its home Member State, it should be able through that branch offer all and any of the management company services for which it has been authorised to provide in the home Member State) - whether on a delegated or designated basis.

4. Which passports are needed when a management company wants to provide in a host Member State only the so-called ISD services?

When a management company wants to provide in a host Member State only the services listed in Art. 5 paragraph 3 of the UCITS Directive (individual portfolio management, investment advice, safekeeping and administration), in CESR's view only the so-called management company passport is needed, i.e. articles 6, 6a and 6b of the UCITS Directive apply.

Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

5. Does a management company which wishes to combine the provision of the so-called ISD services in a host Member State with the cross-border distribution of UCITS' units, either directly, by itself, or indirectly, entrusting a third party, need both the product and the management company passport?

Both the so-called product passport and the so-called management company passport are needed for this activity in CESR's view.

The product passport is necessary for each UCITS distributed in a host Member State. According to Art. 46 of the UCITS Directive, 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. A notification procedure is necessary for each of the UCITS to be distributed in the host Member State.

When a management company wants to provide in a host Member State the services listed in Art. 5 paragraph 3 of the UCITS Directive (individual portfolio management, investment advice, safekeeping and administration), the so-called management company passport is needed, i.e. articles 6, 6a and 6b of the UCITS Directive apply.

Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

6. Can an open ended investment company designate a management company in another EU jurisdiction?

CESR members agree that they will only permit an open ended investment company to designate a management company in the same EU jurisdiction.

Almost all CESR members consider that according to Article 3 of the UCITS Directive, and taking into account the interaction between this Article, recital 7 of the amendment 2001/107/EC of the UCITS Directive and the combined reading of Article 5g and Annex II, the legislator's intention does not seem to have been to impose to UCITS home Member States to recognise the possibility for a foreign management company to set up an investment company in their own constituency.

CESR members also agree that the European Commission should consider an amendment that would clarify the position on this issue under the UCITS Directive.

Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

7. Does a management company which manages based on an outsourcing mandate the
portfolio of an open ended investment company or of an investment fund domiciled in
another EU jurisdiction need a management company passport and if yes, for individual or
for collective portfolio management?
The insourcing management company is mandated bilaterally by the outsourcing company
which remains responsible to the investors; there does not arise a contractual relationship
between the insourcing management company and the investors. Thus a direct responsibility to
the investors does not exist.
Consequently, in CESR's view a bilateral delegation agreement subject to the safeguards of
Article 5g should be sufficient. Where a UCITS appoints a management company in another
Member State to carry out investment management activities, the management company is not
carrying out services in the State of the UCITS. Therefore it is not required to have a passport.
Because investment management can only be delegated by the UCITS to an entity which is
subject to prudential supervision, an investment manager established in the EU must however
be authorised under the ISD or UCITS Directive. Similarly, third country investment managers
providing services to UCITS are not providing this service under an EU passport, but they must
be subject to prudential supervision according to Article 5g of the UCITS Directive.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

8. Is distribution of third party funds included in the scope of activity of a management
company?
In CESR's view the distribution of third party funds is included in the scope of activity of a
management company. In CESR's view, it needs to be considered that "marketing" is
mentioned in the non-exhaustive Annex II of the UCITS Directive without any further
specification or limitation regarding the issue of the distribution of third party funds. In
addition, the distribution of UCITS' units in practical terms is linked to the safekeeping and

administration which is not limited to those managed by the management company. Before a
customer mandates a management company for the safekeeping of units, these units are
distributed which is natural to be conducted by the management company itself.
Q: Do you agree with this view? Do you consider the distribution of third party funds through a
management company on a cross-border basis relevant in practical/ economic terms? If not,
please state your reasons.

Agreed – on both a cross border and branch basis.

9. Can a management company benefit from the management company passport (in
particular for its ISD services) whilst it is no longer, at a given moment, managing harmonised UCITS or whilst it is not yet managing harmonised UCITS but preparing an application procedure for approval of a harmonised UCITS or whilst it does not manage
harmonised UCITS funds as designated management company in its home Member State?
To avail of the management company passport, a management company must manage at least
one harmonised UCITS as the designated management company. It is not sufficient that a
management company has been appointed solely as the investment manager to a UCITS (by
delegation) - it must be the designated manager.
Article 5d(1) of the UCITS Directive requires a management company to comply " at all times
with the conditions laid down in Article 5 and Article 5a(1) and (2) of this Directive", hence
the concerned management company has to comply with Article 5(2): management of UCITS –
since paragraph 2 refers to the management of non-UCITS as "additional" activity.
In conformity with article 5a(5) of the UCITS Directive a management company has, however,
12 months from the date of its authorisation to become the designated management company
of a harmonised UCITS. During this time it can already use its management company passport
to provide e.g. the services covered in Article 5 (3) of the UCITS Directive (individual portfolio
management, investment advice, safekeeping and administration). In the event that the

management company ceases to be the designated management company of a harmonised
UCITS it will lose its authorisation and passport if it is not appointed to manage another UCITS
as the designated management company within 6 months.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

II. Product passport
1. Do those non-UCITS funds which pursuant to the national provisions of the host Member
State have already been entitled to distribute their units in the host State and which now
adapt to UCITS III loose their former permission?
Both the former permission based on the national provisions of the host Member State as well
as the new product passport of the fund based on the amended UCITS Directive allow the
marketing of the units of the investment fund in question in the host State. Therefore the
marketing of the fund can in CESR's view continue uninterrupted in the host Member State.
However, a notification of this change in the authorised status of the investment fund to a
UCITS must be provided for the competent host Member State authorities according to Art. 46
of the UCITS Directive. The two month period of Art. 46 paragraph 2 of the UCITS Directive
does not apply, so even before the expiry of the two month period reserved for the host State
competent authorities to handle the notification, the distribution of fund units can continue on
the basis of the former permission.
Q: Do you agree with this proposal? If not, please state your reasons.

Agreed

2. Do those UCITS I funds which adapt their registration to UCITS III loose their UCITS I passport?
The UCITS passport will in CESR's view continue to be effective i.e. the foreign fund may
proceed distributing its units in the host Member State without interruption. However, if as a
consequence of the new registration the fund rules and prospectus of the UCITS are amended,

such new documents must be delivered to the host Member States authorities as an update
accompanied by an attestation by the home Member State authority that the conditions
imposed by the Directive are fulfilled.

Q: Do you agree with this proposal? If not, please state your reasons.

Agreed