

Response to CESR Call for Evidence on the Clarification of definitions of the UCITS Directive

Luxembourg, November 29, 2004

ALFI is the representative body of the Luxembourg fund industry. Its membership includes funds as legal entities and professionals of the fund sector, among which depositary banks, fund administrations, transfer agents as well as asset managers. We therefore welcome the opportunity to review some of the issues raised in CESR's Call for Evidence on the clarification of definitions concerning eligible assets for investment of UCITS.

As a general remark we would first like to underline that the questions raised in the Call for Evidence are not new issues and have in certain cases been discussed in the context of the preparation of the UCITS III Directive and by the UCITS Contact Committee. Secondly, whereas article 53a of the UCITS Directive confers, among other a power of clarification of the definitions of the Directive to the Contact Committee whose functions have been transferred to CESR, one should examine whether such clarification could also cover certain terms or expressions used in the text. Giving precisions on such terms could indeed lead to introducing restrictions which did not exist before and were not intended to be imposed in the mind of the legislator. In view of the current financial markets environment, ALFI is also of the opinion that a level-playing field between undertakings for collective investment and other competing retail savings products in the EU should in any case be achieved. This implies that in interpreting the UCITS III Directive's eligible assets issues one should aim at allowing as much flexibility as possible whilst maintaining at the same time the existing levels of investor protection and transparency.

More specifically, we think that the already exhaustive criteria laid down in Article 19 of the UCITS directive should be considered as sufficient to consider whether given financial instruments are transferable securities and eligible for investment by UCITS. Additional eligibility conditions should not be taken into account in this respect. Moreover, although we agree that liquidity is a good criteria to take into account in this analysis, one must be aware that this concept has evolved since the adoption of the first UCITS Directive. It should therefore be used with reference to today's financial environment.

With regard to shares of listed closed-end funds, these shares have to be considered as transferable securities in our view since they are listed on the secondary market like

listed transferable securities. Furthermore, no provision of the Directive seems to suggest that closed-ended funds should be imposed a particular treatment.

ALFI is also of the opinion that the Directive already gives detailed criteria as to the qualification of money market instruments under the UCITS regime and that other factors of appreciation would not add any value to the provisions formulated in this text. Furthermore we would recommend to adopt a pragmatic approach of the more qualitative questions related to money market instruments (prudential rules applicable to the issuer of such instruments and concept of equivalent investor protection) based on the practical situation of issuers and the application of equivalent essential rules to these establishments in terms of capital adequacy for example.

As to the factors needed to determine whether and under which conditions certain instruments fall within the meaning of efficient portfolio management or transferable securities embedding a derivative element, it must be underlined that no exhaustive definition or list could be drafted seen the ever faster innovation phenomena of financial markets. A descriptive approach should therefore be contemplated.

Finally, the same remark as that made in the paragraph above applies in our view to the definition of “equivalent supervision” and “equivalent level of protection of unitholders” referred to in Article 19(1) of the Directive. Such appreciation should be left to national authorities who should examine this problem on a case by case basis.

To conclude ALFI would like to stress the need for a pragmatic and flexible clarification of the provisions of the UCITS Directive regarding eligible assets. Too formal and theoretical definitions could indeed result in confusion and unnecessary additional regulation. CESR’s work in this context should also be aimed at maintaining an acceptable level-playing field between the fund industry and other types of financial products.

