CESR's Draft Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

Response to second consultation paper regarding admission of financial instruments to trading on regulated markets

Luxembourg, March 3, 2005

According to PriceWaterhouseCoopers and based on figures provided by Lipper, Luxembourg domiciles over 70% of "true cross-border funds" (i.e. fund or sub-funds registered for sale in at least two EU countries except their home state). 42 out of the 50 biggest promoters in the EU have chosen Luxembourg as their center of operations thereby confirming that the Grand-Duchy provides for the right balance between reputation, investor protection and efficiency.

The Association of the Luxembourg Fund industry (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.

Practice and investor expectation have demonstrated that listing investment funds should be actively promoted by securities supervisors and by European institutions. It is one essential step towards greater transparency on the valuation of such financial assets and could be one of the tools for greater distribution of such funds, notably on a cross border basis.

Indeed it should be clear that investor protection would always be greater with a listed collective investment undertaking compared to the same collective investment undertaking with no listing, irrespective of CESR proposal on this issue.

- We expect CESR members will have in mind when adopting their advice on this issue not to hamper the freedom of capital movement, including on the admission of securities to capital markets mentioned in Articles 56 and 57 of the EC Treaty and not to discourage transparency and investor protection by excessive burdening the process of listing investment funds. Article 40 of Directive 2004/39/EC deals with limited issues compared to the whole consequences of a listing. CESR members should keep in mind that hampering listing of certain types of financial instruments will reduce the integration of European capital markets and will definitely decrease the quality and

quantity of disclosure available to issuers, and therefore the investor protection. As a consequence of increase burdening, such issuers might therefore fall no more in the scope of the IAS Regulation, Market Abuse, Prospectus and Transparency Directives or corporate governance codes. It is also important to note that a listing is not only synonym to access to a trading mechanism (and possibly liquidity) but is also accompanied by a variety of additional services such as clearing and settlement or access to corporate information. Listing creates the conditions for virtuous effects on the management of issuers because of increase of notoriety and transparency.

- In addition, and before considering fundamental changes to the listing of UCITS, CESR should balance the expected potential benefits against the disruption such a regulatory change would entail. It can not be excluded that, if an investment fund were to stop listing, certain investors (mostly institutional) could consider leaving the fund, thereby causing disruption and additional cost to the funds operation and to remaining (retail) investor.

- As a general comment, we consider that legislation (or regulation) cannot dictate liquidity of a given financial instrument that will always depend on external factors, which cannot be regulated. Furthermore, the liquidity will vary from time to time. However, we can assume that liquidity might always be greater with a listing on a regulated market compared to the same financial instrument not listed. The same reasoning is valid when such financial instrument is traded on OTC markets. An additional listing on a regulated market might add to the liquidity of such financial instruments and will therefore always be in favor of investors.

As a specific answer to question 7, ALFI would like to submit that_Article 40 of Directive 2004/39/EC deals with the prior conditions for admission to trading of financial instruments on a regulated market (and not for a public offer of securities). Therefore, we consider that the first item for open-end funds is not relevant in this context. UCITS Directives do not address the issue of initial disclosure obligations for a listing and we understand that national legislations might have addressed this issue. It is self evident that a collective investment scheme will have to comply with the applicable national regime for listing such open-end funds but we cannot support that an implementing measures related to Article 40 of the MIFID deals with initial disclosure requirements before a listing, even through a reference to the applicable national legislations because it goes beyond the scope of such Directive. It is also unclear what are the different types of requirements covered by the so called the 'necessary procedure'.

We are also concerned by the second item for open-end funds because it seems also self evident that in case of open-end funds, the liquidity of such units is structurally and legally incumbent to the fund itself and not to the market. Therefore, we consider this additional requirement as a superfluous one. We consider that any additional liquidity deriving from trading on a regulated market should be welcome and encourage but the effective arrangements for the liquidity of units of such funds will always rely on the fund itself.

As a summary, ALFI would recommend that the requirement for a “viable market” be omitted in the CESR advice in the context of UCITS, or that at the least CESR should assess the impact of this regulatory change on the markets and the individual investors.