



Association Luxembourgeoise des Fonds d'Investissement – Association of the Luxembourg Fund Industry

Response to CESRs Consultation Paper on guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives

Luxembourg, December 7, 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. The Luxembourg investment fund sector is truly European. It is the second largest fund industry in Europe with over EUR 1,058bn net assets and most of the funds set up in the Grand Duchy are sold across borders (73.3% of cross-border UCITS distributed in Europe are domiciled in our jurisdiction). Therefore we are particularly concerned by the efficient functioning of the passport granted by the UCITS Directives and welcome the opportunity to comment on the compromise proposed in CESR's Consultation Paper on various issues related to transitional clauses of the new texts.

GENERAL REMARKS

As mentioned above the Luxembourg fund business is very much cross-border oriented. ALFI therefore regrets that the flexible and pragmatic approach adopted by the Luxembourg legislator with regard to the transitional provisions of the Directive has not been given enough consideration in the drafting of the compromise as formulated in CESR's paper.

It must be underlined that the solutions suggested in the consultation document do not only reduce the length of the grandfathering clauses foreseen in the Directive but actually cancel the effects of these provisions in practice, which can certainly not have been the intention of the European legislator when such transitory clauses were drafted. Although ALFI is fully aware that the proposed compromise was politically difficult to achieve, one should examine whether agreeing on reducing those grandfathering periods is in the scope of competence of CESR's members. In our view the proposed guidelines would only add to the already existing legal uncertainties pertaining to other rules of the Directive and represent another hurdle for fund players trying to bring their businesses in compliance with the new legal environment. Moreover, taking into account the fact that other interpretative issues such as eligible assets are bound to be dealt with in a few months time only, we are of the opinion that the fund industry as well as national supervisory authorities will have difficulties in meeting the tight deadlines set down in CESR's document.

SPECIFIC COMMENTS

ALFI would like to comment on the following issues:

1. *Section I, question 1 of the consultation paper: Can a grandfathered UCITS I management company launch passportable UCITS III funds?*

CESR's proposal is that a grandfathered UCITS I management company could launch passportable funds under the UCITS III Directive only until April 30, 2006 and that to be able to benefit from this possibility such a company would have to comply with the requirements of article 21 of the Directive concerning the obligation to have an appropriate risk-management process.

In our view, management companies have in good faith interpreted the provisions of the Directive as allowing them to benefit from a grandfathering period up to February 13, 2007. It must be underlined that this original deadline was already relatively short. From a pure practical point of view the date chosen is unrealistic as management companies will have to adapt even earlier than foreseen to the new Directive's provisions.

As regards the conditions relating to risk-management methods, it is useful to note that in Luxembourg those management companies that do launch UCITS III funds always use an appropriate risk-management method which is thoroughly controlled by the supervisory authority.

2. *Section III of the consultation paper on umbrella funds, question 1: Can a passportable UCITS I sub-fund be launched in a grandfathered UCITS I umbrella fund?*

CESR's document provides 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.

ALFI is of the opinion that there is no reason why the grandfathering period should be reduced for such structures. The creation of a new sub-fund complying in all its aspects with the UCITS I Directive under a UCITS I umbrella fund is actually only a continuation of the business of a single legal entity (the grandfathered umbrella fund) and not the setting up of a new legal entity.

3. *Section IV of CESR's document, question 1: Must a UCITS I have a simplified prospectus available in order to maintain its registration?*

In CESR's view UCITS funds launched before February 2004 should have available a simplified prospectus no later than September 2005.

The Luxembourg legislator concluded in good faith from the texts of the Directives that the transitional provisions provided for applied to the rules concerning the obligation to publish a simplified prospectus as well. This is logical in our view as not granting a grandfathering period to the simplified prospectus which is closely linked to the product as such would have deprived the grandfathering of the fund of its usefulness.

To conclude, we would like to reiterate our regrets that the ultimate aim of the UCITS Directive which is the efficiency of cross-border offering of funds through a European passport has not been taken into account in the compromise and that this text negates the principle of grandfathering provisions as such. We would therefore urge European regulators to avoid ending up into similar situations in the future and ensure more legal certainty by using more precise formulations in regulatory documents, especially with regard to essential provisions like transitory rules. Legal certainty is indeed a matter of credibility for European legislation as a whole and is paramount to building a true European market for financial services.