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**CESR consultation on draft guidelines for supervisors regarding
the transitional provisions of the amending UCITS Directives
(2001/107/EC and 2001/108/EC)**

FEEDBACK STATEMENT

FEBRUARY 2005



Feedback Statement on the Consultation on draft CESR's guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC)

On October 21st 2004 CESR published for comments draft CESR's guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC).

The period for comments expired on the 8th of December 2004, after a public hearing was held in the premises of CESR in Paris on the 18th of November 2004.

During the consultation period 22 letters were sent by organizations mainly belonging to the European investment management industry, i.e. investment management companies and their national or international associations. The comment letters received have been published on the CESR website.

These letters were considered by the CESR Expert Group on Investment Management. CESR takes the opportunity of this feedback statement for thanking all respondents and participants to the public hearing for their fruitful and constructive contribution. The present document focuses on the major issues on which respondents expressed views.

CESR observes that the draft guidelines have received general support from those who responded to the consultation to go on with the final publication of the guidelines, considering the amendments brought to the initial text proposal and the clarifications given via this feedback statement.

Many of the respondents to the CESR consultation raised the question, whether these transitional guidelines are applied only to those UCITS funds, that are marketed cross-border. In CESR's view, the transitional provisions of the UCITS Directive apply equally to passporting UCITS and UCITS that are only sold locally in individual Member States. In preparing its transitional guidelines, CESR has focused as a matter of priority on those funds which are already or will be sold cross-border. Issues on the treatment of local funds will be addressed at a later date.

A. 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?*

The respondents broadly agreed with CESR's proposal, i.e. that a grandfathered UCITS I management company is allowed to launch "passportable" UCITS III funds only until 30th April 2006. To be able to avail of this possibility, a grandfathered UCITS I management company has in any case to comply with the requirements of Article 21 of the UCITS Directive as amended by Directive 2001/108/EC concerning an appropriate risk-management process.

Some respondents had concerns about the proposed deadline, 30th April 2006, and suggested that grandfathered UCITS I management companies should rather have sought than obtained authorisation under UCITS III from their home Member State supervisor by 30th April 2006. If that would not be the solution in the final guidelines, some respondents draw the attention of regulators to that such applications should be dealt with promptly.

In the final guidelines the deadline of 30th April 2006 is clarified to mean the home Member State approval for the conversion of the management company in question from UCITS I to UCITS III. In order to meet this deadline, it has to be stressed that management companies should file their applications for conversion to the competent home Member State authorities in due time, leaving the authorities sufficient time to handle the applications.



To address questions of respondents, several other clarifications have also been made to the wording of the final guidelines. An amendment has been added to clarify, that the deadline of 30th April 2006 applies, whether the management company has launched UCITS III funds before the issue of these guidelines or will do it later. The deadline is also applied to UCITS I management companies, the UCITS I funds managed by which have been/are converted to UCITS III. The reason for this is that these funds may include the same features in their investment policy as “completely new” UCITS III funds.

It is also clarified, that grandfathered UCITS I management companies which have not launched UCITS III funds so far and will not launch them during the transitory period until 13th February 2007, are not affected by the deadline of 30th April 2006. These management companies can continue to operate their grandfathered UCITS I funds until 13th February 2007, taking however into account the necessary conversion to UCITS III by that date at the latest.

Some respondents expressed a concern about the need for an attestation by the home Member State authority to confirm that the grandfathered management company has an appropriate risk-management process in place. This concern has been addressed by adding to the final guidelines a model attestation as Annex. The purpose of the attestation is to state to the host Member State competent authorities, that the home Member State authorities are content that an appropriate risk-management process is in place in the management company in question.

Some respondents also raised a question, whether a “plain vanilla” UCITS III fund that for example does not use derivatives, needs to have a risk-management process as requested in CESR’s proposal. It has to be noted, that the text of Article 21 of the Directive itself already refers to an “appropriate” risk-management process, so the investment policy of the fund is to be considered when assessing if the management company has an appropriate risk-management process in place.

2. Can a grandfathered management company continue to launch “passportable” UCITS I funds after 13th February 2004?

The respondents agreed with CESR’s proposal, i.e. that setting up a new UCITS I fund is not possible after 13th February 2004. 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. One respondent was of the opinion, that even if CESR’s proposal follows the text of the UCITS Directive, the possibility to provide a grandfathering period similar to the one proposed for umbrella funds should be positively evaluated.

II. UCITS I funds (single fund structure)

1. Can a UCITS I fund authorised between 13th February 2002 and 13th February 2004 and wishing to be marketed in another Member State obtain a UCITS I – product passport and benefit from a grandfathering period until 13th February 2007?

Most respondents agreed with CESR’s proposal to provide for a period until December 31st, 2005 for UCITS I funds authorised between 13th February 2002 and 13th February 2004 to be converted to the regime of the amended UCITS Directive. Some respondents had concerns about the proposed deadline, end of 2005, especially regarding the meaning of the wording of the proposed guidelines: “to be converted to the regime of the amended UCITS Directive”.

Some respondents suggested that a grandfathered UCITS I fund need only have sought (rather than obtained) authorisation under UCITS III from its home Member State supervisor by 31st December 2005. If that would not be the solution in the final guidelines, some respondents draw the attention of regulators to that such applications should be dealt with promptly.

In the final guidelines the deadline of December 31st, 2005 has been clarified to mean the home Member State approval for the conversion of the investment fund in question from UCITS I to UCITS III. In order to meet this deadline, it has to be stressed that management companies should file their



applications for conversion to the competent home Member State authorities in due time, leaving the authorities sufficient time to handle the applications.

III. UCITS I umbrella funds

1. *Can a “passportable” UCITS I sub-fund be launched in a grandfathered UCITS I umbrella fund?*

The respondents broadly agreed with CESR’s proposal, i.e. to provide for a period until December 31st, 2005 for UCITS I sub-funds to be launched in a grandfathered UCITS I umbrella fund. Few respondents requested that this should be possible until 13th February 2007, the end of the transitory period.

Some respondents had concerns about the proposed deadline, 31st December 2005, and suggested that grandfathered UCITS I umbrella funds should rather have sought than obtained authorisation under UCITS III from their home Member State supervisor by 31st December 2005. If that would not be the solution in the final guidelines, some respondents draw the attention of regulators to that such applications should be dealt with promptly.

In the final guidelines the deadline of 31st December 2005 is clarified to mean the home Member State approval for the conversion of the umbrella fund in question from UCITS I to UCITS III. In order to meet this deadline, it has to be stressed that the applications of the umbrella funds for conversion should be filed by their operators to the competent home Member State authorities in due time, leaving the authorities sufficient time to handle the applications.

To address questions of some respondents, it has been clarified in the text of the final guidelines, that if the grandfathered umbrella fund has not launched new sub-funds after the enter into force of UCITS III, i.e. 13th February 2002, it has until 13th February 2007 to convert. It has also been clarified, that neither the closure of a sub-fund nor the launch of new share classes in existing sub-funds is a factor, that requires the umbrella fund to convert by 31st December 2005.

2. *Can a “passportable” UCITS III sub-fund be launched in a grandfathered UCITS I umbrella fund?*

The respondents agreed with CESR’s proposal, i.e. that this is not possible, because the whole umbrella fund including all the sub-funds should either be submitted to the regime of the UCITS Directive 85/611/EEC or to that of the amending Directive 2001/108/EC. The combination of sub-funds of both regimes under one umbrella is not possible.

IV. Simplified prospectus

1. *Must a UCITS I have a simplified prospectus available in order to maintain its registration?*

Most respondents agreed broadly with CESR’s proposal, according to which UCITS I funds should have available a simplified prospectus as soon as possible and no later than 30th September 2005. Some respondents were of the opinion that the deadline for UCITS I funds to have a simplified prospectus should be 13th February 2007, i.e. the end of the transitional period. Some respondents considered the proposed deadline of 30th September 2005 tight for the industry in their Member States because the competent authorities have not yet implemented the necessary legislation and have still to carry out consultation processes etc. They suggested, that if the national regulators fail to issue the national implementation rules regarding the contents of the simplified prospectus by February/March 2005, the deadline in CESR’s guidelines should be extended accordingly for the industry to be able to meet the requirements, e.g. to the end of 2005.

The final CESR guidelines follow the original proposal. Many Member States have already implemented the new rules concerning the simplified prospectus for their domestic funds. Extending the deadlines even more would discriminate the domestic management companies in these countries compared to foreign ones from jurisdictions that have not yet implemented.



To address requests of some respondents, the wording of the final guidelines has been amended to clarify, that the deadline of 30th September 2005 concerns both UCITS I single funds launched before 13th February 2004, and grandfathered UCITS I umbrella funds and their sub-funds, also the ones launched after 13th February 2004 as expressed under question A III 1.

2. 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?

Almost all respondents agreed with CESR's proposal, according to which UCITS funds that wish to obtain a UCITS III product passport to market their units in other Member States must have a simplified prospectus.

One respondent was of the view that the same deadline should be applied to both UCITS I and UCITS III funds, i.e. that UCITS III funds should also have available a simplified prospectus as soon as possible and no later than 30th September 2005.

B. QUESTIONS CONCERNING THE EUROPEAN PASSPORTS

I. Management company passport

1. Are the product and the management company passport issued separately or combined?

The respondents agreed with CESR's proposal, i.e. that the UCITS Directive currently provides for two separate passports, which are issued separately from each other.

2. 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?

The final guidelines are based on option B presented in the consultation paper, according to which only a product passport and no management company passport shall be required if a management company only wishes to distribute UCITS managed by itself in a host Member State. Option B takes due account of market realities according to which the traditional way of marketing UCITS via a third-party is still the predominant. Furthermore, it is a way of applying the necessary notification procedures in a way that does not disproportionately distort the single market for UCITS. The aim to ensure that only fully UCITS-compliant management companies are distributed on a cross-border basis can be achieved by considering the notification of the management company as being encompassed by the product notification procedure provided that sufficient information on the management company is provided. This option takes this into account. This approach was also widely supported by respondents to the consultation.

Only few respondents answered to the additional question presented, i.e. to what extent the distribution of third party funds by a third party is considered as relevant in practical/ economic terms. The respondents that answered considered this activity partly relevant already today, and at least they wish to reserve the possibility to develop it in the future.

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?*

The respondents agreed with CESR's proposal, according to which both the so-called product passport and the so-called management company passport are needed for this activity.

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

The respondents agreed with CESR's proposal, i.e. 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), only the so-called management company passport is needed.

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?*

The respondents agreed with CESR's proposal, according to which both the so-called product passport and the so-called management company passport are needed for this activity.

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

Several respondents disagreed with CESR's proposal, according to which CESR Members agree that they can only permit an open ended investment company to designate a management company in the same jurisdiction. The respondents believed that the benefits of a management company passport are significantly diminished without the ability to designate a management company in another EU jurisdiction.

The final guidelines follow the original proposal. For the time being, CESR Members agree that they can only permit an open ended investment company to designate a management company in the same EU jurisdiction.

The majority of the respondents supported CESR's suggestion that the European Commission should consider an amendment to clarify the position on this issue under the UCITS Directive.

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 respondents agreed with CESR's proposal. Where a UCITS appoints a management company in another Member State to carry out investment management activities, the mandated management company is not carrying out services in the State of the UCITS. Therefore it is not required to have a passport (i.e. no notification procedure in the home Member State of the UCITS) for this particular activity, but the management company in question must of course have proper authorisation from its home Member State competent authorities to provide these services. Consequently, a bilateral delegation agreement subject to the safeguards of Article 5g of the UCITS Directive is sufficient in this situation.

8. *Is distribution of third party funds included in the scope of activity of a management company?*

The respondents agreed with CESR's proposal, i.e. that the distribution of third party funds is included in the scope of activity of a management company. Regarding the additional question, whether the distribution of third party funds through a management company on a cross-border basis is considered

relevant in practical/ economic terms, only few respondents answered. Those that responded, considered it relevant already now or at least in the foreseeable future.

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?*

Almost all respondents agreed with CESR's proposal. To avail of the management company passport, a management company must manage at least one harmonised UCITS as the designated management company. The management company has twelve months from the date of its authorisation to become the designated management company of a harmonised UCITS. 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 six months.

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 lose their former permission?*

The respondents agreed with CESR's proposal, i.e. that the marketing of the investment fund in question can continue uninterrupted in the host Member State, even if the necessary notification according to Article 46 of the UCITS Directive has to be done. This is because of the fact that 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 fund in the host Member State.

2. *Do those UCITS I funds which adapt their registration to UCITS III lose their UCITS I passport?*

The respondents agreed with CESR's proposal, according to which the UCITS passport will continue to be effective and the foreign fund may proceed distributing its units in the host Member State without interruption.

Some respondents expressed a concern, however, about the need for an attestation by the home Member State authority that the conditions imposed by the Directive are fulfilled. This concern has been addressed by adding to the final guidelines a reference to Article 46 of the UCITS Directive, which states the requirements for an attestation by the competent UCITS home Member State authorities.

POSSIBLE OTHER ISSUES/ QUESTIONS

Question: Are there some other relevant issues or questions regarding the transitional provisions, that are not discussed in this consultation paper, and on which you feel it would be essential for CESR to give guidance? Please state these issues/ questions.

Several respondents raised questions and issues concerning the current regulatory practises on the notification process of UCITS, e.g. the practises based on the Art. 46 of the UCITS Directive mentioned above. As indicated in the mandate and working programme of the CESR Expert Group on Investment Management, following the work done regarding the transitional issues of UCITS, the Expert Group will conduct additional work on this area to develop consistent standards for the registration requirements foreseen by the UCITS Directive to streamline the registration process. The responses to the consultation relevant in this regard will be taken into consideration, when CESR starts to work on the simplification of the registration procedures, presumably during the first quarter of 2005.