



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/05-484

**CESR's guidelines for supervisors regarding the
notification procedure according to Section VIII of
the UCITS Directive**

Consultation Paper

October 2005



EXECUTIVE SUMMARY

Background

The 1985 UCITS Directive (85/611/EEC) introduced a passport for the investment funds harmonised by the Directive. The passport is based on mutual recognition. It foresees that the units of a UCITS authorised in its home Member State be marketed in other Member States subject only to a notification procedure set out in Art. 46 of the Directive.

The UCITS Directive requires the host authority to recognise the UCITS authorisation conferred by the home authorities. The notification procedure of Art. 46 does not encompass verification by the host authority of the extent to which the UCITS complies with the provisions governing authorisation as a UCITS. Section VIII of the UCITS Directive does however foresee residual powers for the host authority in verifying marketing arrangements for the UCITS and requires filing of a set of documents with the host authorities – in a language which is accepted by the host authority. The UCITS may begin to market its units two months after such filing unless the host authority issues a reasoned opinion regarding the inconsistency of the UCITS with those remaining provisions of host country laws, regulations and administrative provisions which may apply.

The UCITS passport is widely used. Over 29'000 cross-border notifications have been filed. Cross-border funds are competing successfully in many host country markets. However, the day-to-day operation of the notification procedure has in some instances been characterized by complication and uncertainty. These uncertainties also give rise to compliance cost and unnecessary delays.

These costs and delays are an important source of friction in a European market which has to date evolved without extensive fraud or mis-selling on a cross-border basis. It is therefore important, from a practical and legal perspective to do everything possible to facilitate the smoother functioning of the UCITS passport. This is why CESR members have decided that, following the work done regarding the transitional provisions of the UCITS III which has already contributed significantly to the notification process, the CESR Expert Group on Investment Management would conduct additional work on this area. The objective is to develop consistent standards for the notification requirements foreseen by the UCITS Directive. The importance of progress in this respect has been underlined by the Commission's Green Paper on investment funds last July.

This work takes place against the backdrop of two decades of divergent national practice in the enforcement of provisions of UCITS law – tolerated by ambiguities in the text of the Directive. Some of these differences are hard-coded in national law. In addition, there are areas of national law such as administrative law which influence the notification procedure but which are not subject to harmonization. These differences in national law hinder speedy alignment on a single approach to the notification procedure.

This work on notification procedures has to be seen in the context of the work CESR is currently undertaking on “eligible assets” of UCITS. Confidence that products notified for marketing are indeed UCITS-compliant is important to facilitate the stream-lined operation of notification requirements. The parallel work on clarification of ‘eligible assets’ is therefore important in achieving a fully functional European passport for UCITS.



Purpose

This document presents proposals for a common approach to the administration, by host authorities, of the notification procedures set out in Art. 46 of the Directive. The proposed arrangements seek to bring greater transparency and certainty to the notification process. The proposals aim to avoid uncertainty and prolongation of notification procedures. They do so, inter alia, by clarifying the way in which host authorities should communicate grounded and demonstrable concerns regarding the UCITS' compliance with any applicable host law under Art. 44(1) and Art. 45 of the Directive. The proposals also enshrine common approaches to the documentation that must be submitted in the context of the notification procedure and to clarify the handling of sub-funds of umbrella funds.

Some of the proposals for speedier processing cannot be guaranteed by all host authorities due to limitations imposed by national laws or regulations. However, there is a general commitment by all authorities to accelerate the processing of notifications where possible.

This consultation document from CESR seeks comments of all interested parties on the proposed guidelines on the notification procedure of UCITS. It is stressed that any proposal by CESR to simplify the notification procedure has to be in consistency with the provisions of the current UCITS Directive, including the competences given to host Member State authorities.

Consultation Period

The consultation closes on **27 January 2006**. Responses to the consultation should be sent via CESR's website (www.cesr-eu.org) under the section "Consultations".



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INTRODUCTION

1. CESR invites responses to this consultation paper on its proposed guidelines on the notification procedure of UCITS. Respondents to this consultation paper can post their comments directly on CESR's website (www.cesr-eu.org) under the section "Consultations".
2. This document is aimed at receiving responses to its content and to the specific questions included in the document. CESR has included a number of questions to highlight those areas in which it would be particularly helpful to have the views of respondents. Comments are, of course, welcome on all aspects of the proposed CESR guidelines but, if changes are required, any reasoning accompanied by practical examples of the impact of the proposals will be very useful. CESR also welcomes specific drafting proposals when respondents are seeking changes to the proposed guidelines.

Background

3. The 1985 UCITS Directive (85/611/EEC) introduced a passport for the investment funds harmonised by the Directive. The passport is based on mutual recognition. It allows the units of a UCITS authorised in its home Member State to be marketed in other Member States without seeking authorisation in those host States, provided that the notification requirements of Art. 46 of the Directive are fulfilled. This provision was only slightly amended by the amending UCITS Directive 2001/107/EC, while requirements concerning a new management company passport were added to the Directive.
4. The Asset Management Expert Group reviewed last year for the European Commission the status of the European regulation on investment management. In its final report in May 2004 the requirement for an investment fund to be registered separately in each host Member State was regarded as a key barrier to efficient cross border fund distribution. The notification procedure has developed to be a de facto registration procedure, which can be very time consuming and may increase costs significantly for the UCITS and, ultimately, its investors. The requirements e.g. on which documents have to be presented differ from market to market. The Group considered that the current system should be replaced by a simple notification procedure. As a first step, the Group recommended that CESR in co-operation with the Commission should develop consistent standards for the registration requirements foreseen by the UCITS Directive to streamline the registration process.
5. The mandate approved by CESR to the CESR Expert Group on Investment Management (Ref: CESR/04-160) was published on 9th June 2004. According to the mandate, following the work done regarding the transitional provisions of the UCITS III, which would already affect significantly the notification process, the Expert Group would conduct additional work on this area to develop consistent standards for the notification requirements foreseen by the UCITS Directive to streamline the notification process. CESR's guidelines for the notification procedure have also been included in the list of priority actions in the Commission Green Paper on the enhancement of the EU framework for investment funds, published 14th July 2005.
6. CESR published a Call for Evidence on 9th June 2004 (Ref: CESR/04-267b) on the mandate inviting all interested parties to submit views as to what CESR should consider in its future work on investment management. CESR received 13 submissions and these can be viewed on



CESR's website. The simplification of notification requirements was considered as a priority issue by many respondents to the call for evidence. Standardisation and streamlining of processes was considered to provide a significant benefit to cross border distribution of UCITS. Furthermore, it was raised that attention should be paid to avoid the introduction of the management company passport and any ensuing registration duties annulling the efficiency gains that may be achieved in the fund registration area. CESR was asked to avoid the disparity of management company's registration requirements from arising/growing by agreeing, at this early stage, on standardised requirements and formats that are shared by all Member States.

Objective of the guidelines

7. CESR proposes to draft guidelines that will facilitate the consistency of practices regarding the notification procedure of UCITS. The aim of CESR is to develop operational guidelines which are easy to understand and to use, and which at the same time provide an efficient and adequate response for the protection of investors and for the development and the competitiveness of the single European investment fund market. The guidelines aim to promote convergence, certainty and transparency to the supervisory practises.
8. The main aims of these guidelines can be summarised as follows:
 - Avoiding uncertainty related to procedures and necessary documents for a UCITS which proposes to market its units in a Member State other than that in which it is situated.
 - Avoiding uncertainty related to procedures and necessary documents for a UCITS which wants to maintain its authorisation for marketing in a Member State other than that in which it is situated.
9. These guidelines are developed to harmonise the key points affecting the notification procedure, not all the related details, keeping in mind proportionality between procedures to be set up and objectives to be achieved.
10. The elaboration of the guidelines will not only facilitate a consistent approach to these supervisory issues across the EU but also ensure, by way of this prior public consultation, that the views from market participants and end-users will be fully considered.
11. The outcome of CESR's work will be reflected in common guidelines which do not constitute European Union legislation. CESR Members will introduce these guidelines in their day-to-day regulatory practices on a voluntary basis.
12. CESR's guidelines will not prejudice, in any case, the role of the Commission as guardian of the Treaties.
13. Preparation of these guidelines is being undertaken by the Expert Group on Investment Management. The Group is chaired by Mr Lamberto Cardia, Chairman of the Italian securities regulator, the Commissione nazionale per le società e la Borsa (CONSOB) and supported by Mr Jarkko Syyrilä from the CESR Secretariat. The Expert Group set up a working sub-group on this issue, coordinated by Mr Thomas Neumann of the German financial regulator, Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin). The Expert Group is assisted by the Consultative Working Group on Investment Management composed of 16 market practitioners and consumers' representatives.



References

14. Documents already published by CESR which are relevant to this consultation paper are:

- *CESR starts work on its agenda for investment management (CESR/04-267b)*
- *Mandate for the Expert Group on Investment Management (CESR/04-160)*
- *CESR's guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC) (CESR/04-434b)*



DRAFT GUIDELINES

Definitions

- 1 References in this consultation paper to the "Directive" mean, unless the context requires otherwise, Directive 85/611/EEC of the Council of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as subsequently amended.
- 2 References in this consultation paper to terms defined in the Directive shall have the meaning given to them in the Directive.

General reservation

CESR Members are committed to act in accordance with these guidelines to simplify the notification procedure of UCITS. The draft guidelines contain various proposals on how to deal with issues related to the notification procedure in practice and how to facilitate a practicable application of the Directive.

However, as a consequence of the commitment of CESR Members to implement these guidelines, the amendment of their national legal provisions might be necessary. In many Member States this might also require a formal legislation procedure. Hence, in those cases a transitional period would be necessary for these CESR Members to implement the guidelines. This general reservation is without prejudice to Paragraph 11 of the Introduction.



A. Procedure

- 3 For marketing of units of a UCITS in other Member States than those in which the UCITS is situated, Section VIII of the UCITS Directive applies. If the UCITS proposes to market its units in a Member State other than that in which it is situated, it must first notify the competent authority of that other Member State in advance.
- 4 According to the UCITS Directive, the host Member State authority's competences are confined to refusing the marketing of a foreign UCITS on its territory in case the marketing arrangements do not comply with the provisions referred to in Art. 44(1) and Art. 45 of the Directive. **CESR Members agree that other reasons, for instance those deriving from divergent interpretations on whether a UCITS complies with the Directive, can not be used as a reason to refuse the marketing according to the Directive. In other words, if the marketing arrangements comply with the provisions referred to in Art. 44(1) and Art. 45, the passport of the UCITS has to be respected.**
- 5 The Directive does not provide for tools to deal with such type of problems. In particular, they cannot be dealt with within the notification procedure according to Art. 46. Therefore, other solutions might need to be found. In this context, the results to be worked out by the CESR Task Force on Mediation which is mandated to develop a proposal for a general CESR *mediation mechanism*, should be awaited. The objective of such a mediation mechanism is to facilitate a rapid, effective and balanced solution to disputes between home and host State authorities in order to facilitate convergence and the fair implementation and application of the Directive and these guidelines.
- 6 CESR suggests that for this notification procedure – as far as the harmonized part is concerned – a standardized notification letter is used by the UCITS. The draft model of the letter is attached to these guidelines (Annex II). This standardised European model for a notification letter as a part of the notification procedure will help to facilitate the notification procedure and provides the host State with a summary of the necessary information to process the notification.
- 7 The notification letter as well as all other documents and information required in the notification procedure as mentioned in these guidelines may also be submitted electronically, for example via fax or e-mail, if this is permitted by the law of the host State. As a best practice, CESR Members agree to facilitate electronic filing of documents, as far as it is possible taking into account the national legal framework and available IT-resources of CESR Members.

I. The two-month period

- 8 An investment company or a management company may begin to market the units of UCITS in the host Member State two months after it has completed the notification by submitting the required information and documents to the competent host State authority. This is however without prejudice to Art. 6a and Art. 6b of the Directive concerning the management company passport. CESR has so far dealt with the “product passport” procedure, which is clearly the most urgent concern for the markets. The management company passport has only been dealt with regarding the necessary information to be provided for the application of Art. 6b(5) in the attestation and the notification letter (Annexes I and II). As explained in footnote 1 of Annex I, **providing the necessary**



information regarding the management company in the “product notification” makes a separate notification procedure regarding the management company unnecessary.

1. Starting the two-month period

- 9 The two-month period starts if the competent host State authority has received the complete notification. **If the notification is not complete, the two-month period does not start.**
- 10 The notification is complete if all information and documents as provided for in the Directive and these guidelines (cf. A.II., A.III., B. and D.) including its annexes (cf. E.) have been received by the competent authority of the host Member State. The text of the documents may not have any deletions in comparison with the documents which have been provided to the home Member State authority except to the extent that the changes are prescribed in the Directive or in the applicable provisions of the law of the host State. This circumstance will be attested by the UCITS in the notification letter.
- 11 **If the notification is incomplete, the competent host State authority shall inform the UCITS about the incompleteness and the missing information and documents as soon as possible and in any case within one month from the date of receipt of the notification letter.**
- 12 Host States may provide in their national law that the missing documents and information must be submitted by the UCITS upon request by the host Member State authority to this authority within a defined time period after the request to amend the original notification material. This is done to avoid a notification process to be held open for a long time period (e.g. one year) due to the UCITS not providing the requested additional information. The aim of this requirement is to direct the resources of authorities to applications that are still in the ‘active phase’.
- 13 If provided for by national legislation or on a voluntary basis the host State can also confirm the date of receipt of the complete notification within one month to inform the UCITS regarding the date of the start of the two-month period (cf. D).

Q1: Is the starting of the two-month period dealt with in a practicable way in your view?

2. Shortening the two-month period

- 14 The two-month period is the maximum period available for the host State competent authority to check the notification.
- 15 **The two-month period can be shortened.** CESR Members agree that if permitted by the national law of the host State, the competent authority can after checking the notification inform the UCITS that it can start the marketing in the host State immediately, even if the two month-period is still going on. CESR Members are committed to adopt on best efforts basis working procedures that will speed up the notification process.

3. Managing the two-month period

- 16 Art. 46(2) of the Directive provides that a UCITS may start marketing its units two months after the communication of the required information and documents unless the host Member State authority establishes in *a reasoned decision* that the marketing arrangements do not comply with Art. 44(1) and Art. 45.
- 17 However, the Directive does not expressly explain the details of the reasoned decision. The procedures regarding the issuing of a reasoned decision are governed by national law. In fact the ways the Member States have implemented this provision have lead to uncertainties. CESR Members have therefore agreed on the following common approach regarding the use of the reasoned decision in practice.
- 18 The proposal aims at striking a balance between the needs of the host State authority for adequate information, and the desire of the UCITS to start marketing. The approach should therefore neither allow the UCITS to shorten the review period available to the host State authority by delaying the submission of necessary additional information, for instance by submitting it to the host authority at the very last moments of the two-month period, nor allow host Member States to unfairly delay the marketing of the UCITS.
- 19 As presented above, the competent authority of the host State has two months to check the contents of the notification, after it has received the complete notification. **During this two-month period the host State authority has to inform the UCITS, if in its view the submitted documents/ information imply that the marketing arrangements by the UCITS would not comply with Art. 44(1) and Art. 45 of the Directive.**
- 20 In the course of this two-month period the host State authority may solicit clarification of information from the UCITS regarding the elements under the residual competences of the host Member State according to Art. 44(1) and Art. 45 of the Directive. Such informal exchanges at the initiative of the host authority are without prejudice to the right of the UCITS to start marketing after the two-month period. In other words, unless a formal communication is provided to the UCITS by the competent host State authorities, it can start the marketing after the two-month period.
- 21 Based on practical experience CESR Members are sometimes confronted with the following situation: According to their check of the submitted documents the marketing arrangements by the UCITS would not comply with Art. 44(1) and Art. 45 of the Directive. This would justify the use of a reasoned decision.
- 22 In these cases where the authority can assume that there is a realistic prospect that compliance with Art. 44(1) and Art. 45 from the applicant's side can be achieved, the following more graduated approach should be applied.
- 23 The host Member State authority may inform the UCITS in a written procedure, via *a duly motivated communication*, that it considers that there are convincing arguments to believe that the requirements to make a reasoned decision preventing the UCITS to start marketing are fulfilled, unless the host State authority receives the necessary information it explicitly requires.

24 Taking into account that the UCITS has a commercial interest to start the marketing very quickly, it will normally provide the required information as soon as possible. After receiving the required information, the host State authority will finalise the checking of the notification in the remaining time that was left of the two-month period, when the host State authority required for the additional information. If the notification does still not fulfil the requirements of Art. 44(1) and Art. 45, the host State authority will formalise its reasoned decision in the remaining time of the two-month period, to prevent the UCITS from starting the marketing.

25 Applying this approach to the following example would mean:

- Receipt of the complete notification file by the host State authority: **7 July**
- Check on the compliance with Art. 44(1) and Art. 45 of the Directive of the notification and regular expiring of the two-month period: **7 September**
- Non-compliance with Art. 44(1) and Art. 45 communicated via a duly motivated communication by the host State authority to the UCITS: in this case **12 August** (i.e. remaining time until regular expiring of the two-month period on 7 September: **26 days**)
- Receipt of the requested information in the requested quality by the host State authority: in this case **26 August** (i.e. start of the remaining time of the two-month period of 26 days)
- Expiring of the two-month period: 26 August + 26 days = **21 September** (which is also equal to the regular expiring of the two-month period on 7 September + 14 days, i.e. the time it took the applicant to submit the requested information).
- The deadline is in any case without prejudice to the possibility of the host Member State authority to shorten the two-month period, if this is permitted by the national law of the host State.

Q2: Respondents are asked to provide their view on the practicability of the proposed approach.

II. Certification of documents

26 The latest versions of the necessary documents to be attached to the notification letter (cf. Annex II), as approved by or filed with¹ the home State authority, must be sent to the host State authority.

¹ The terms “approved by or filed with” the competent home State Authority are both used in this document because of the fact that in some Member States e.g. prospectuses of the UCITS and amendments thereto are approved by the competent authority, whereas in other Member States only the fund rules/ instruments of incorporation are approved, and prospectuses are only filed with the authority.



- 27 CESR has discussed different ways on how it could be given evidence that it is always the latest version of the documents which is sent to the host State authority, after an attestation pursuant to Art. 46 of the Directive has been issued by the home State authority. This discussion is especially of relevance for the modifications and on-going process (cf. C). Art. 4(4), 30 and 32 of the Directive provide that the fund rules may only be amended with the approval of the competent authorities and that the UCITS must send its simplified and full prospectuses and any amendments thereto keeping them up-to-date, to the competent authorities. On the other hand, according to Art. 46 of the Directive the host State authority is not entitled to a further quality check of the documents concerning their compliance with the Directive without prejudice to Art. 44(1) and Art. 45 of the Directive (cf. especially Annex I Schedule A, No 4 of the Directive) once the attestation pursuant to Art. 46 of the Directive was issued. In this situation it could happen that documents are sent to the host State authority which do not correspond to the documents sent by the UCITS to its home State authority to comply with Art. 4(4), 30 and 32 of the Directive. Thus, documents could be circulated to the investors in the host State which neither have been filed with or approved by the home or host State competent authority.
- 28 Currently many Member States require the certification of the documents related to the notification procedure for UCITS. This is done to make sure, that the documents provided to the host State authorities are the most recent ones approved by or filed with the home State authority.
- 29 **To simplify the supervisory practice in this respect, CESR Members agree, that a host Member State authority may require such a certification of the simplified prospectus.** CESR Members agree that such certification is not necessary for any other documents. The simplified prospectus is considered to be the most essential document regarding the fund for the investor, the key tool to make well-informed investment decisions, as regulated by the amended UCITS Directive. The simplified prospectus is indeed the key element of the marketing of the UCITS in the host State. Therefore the simplified prospectus and its proper translation can be relevant for the supervision of the marketing of UCITS which is under competence of the host State. It is very important that the host authorities can be sure which is the latest version of the simplified prospectus.
- 30 All host State authorities do not consider specific certification necessary, therefore the UCITS would need to provide the certified simplified prospectus only to the authorities of those Member States, that explicitly require it. To facilitate transparency of the requirements to the UCITS, these jurisdictions should indicate the requirement on their websites among the requirements on national marketing rules as stated in Annex III.
- 31 **CESR Members agree that in case the simplified prospectuses of the UCITS are published on an official website in the internet under the responsibility of the home State authority, no further confirmation measures by the home State authority are needed,** because the documents are in that case available also for the host State authorities when they need to know which are the latest versions of the documents.
- 32 CESR Members are committed to work in close cooperation when acting as home/ host Member State authorities, and to provide timely to the host authorities the necessary information that these might require in potential enforcement cases, to facilitate the proper functioning of the regulatory system in accordance with Art. 50(1) and Art. 52.



33 CESR has also discussed the possible benefits of the use of the Hague-Apostille as a means for certification of documents, and concluded that it is not necessary. **CESR Members therefore agree not to require the use of the Hague-Apostille for certification of documents.**

Q3: Respondents are asked to provide their view on the practicability of the proposed approach.

III. Translation

34 The notification according to Art. 46 of the Directive including the documents which have to be submitted by the UCITS must be sent in the original language and translated into the or one of the official languages of the host State.

35 Since the documents are distributed to the investors, only a correct translation ensures that the information which has to be provided to the investors in the host Member State is actually transmitted to them. However, it is neither the task of the competent host State authority nor would it be possible to check whether the translations are consistent with the original versions. Therefore, the translated versions should be primarily literal translations of the latest original language versions approved by or filed with the home State authority. The translation has to be correct, i.e. the documents have to be understandable and should not contain material errors, omissions or misleading expressions. Supplementary text, modifications, omissions or any other changes to the text in the translated version are permissible only to the extent that the changes are prescribed by the Directive and by the applicable provisions of the law of the host Member State.

36 Correct, sufficient, and unambiguous information for the investor is one of the core elements of investor protection provided for by the Directive.

37 In accordance with Art. 47(2), the competent authorities of the host Member State can approve also the use of another language than the official language. To facilitate transparency of the language requirements to the UCITS, CESR Members will provide information on these requirements on their websites (cf. Annex III).

Q4: Do you consider the suggested approach as appropriate?



IV. Umbrella funds

- 38 Though umbrella funds are acknowledged by the market practice and also the supervisory practice under the UCITS Directive, the Directive does not further address their treatment. However, CESR Members agree that in an umbrella UCITS all sub-funds must comply with the UCITS Directive. Nevertheless, sub-funds of an umbrella fund sometimes differ between themselves as regards the marketing arrangements in the host State (e.g. distribution channels).
- 39 Member States have developed different approaches on how to deal with the characteristics of umbrella funds with respect to the notification procedure.

1. Marketing of only part of the sub-funds

- 40 As stated in Art. 46 of the Directive, a UCITS has to inform the host State authority if it proposes to market its units in the host State. However, the Directive does not define the term “marketing” and how it could be interpreted especially for the application of Art. 46 of the Directive. Thus, from the Directive’s perspective it is not clear when a UCITS or the sub-fund of an umbrella UCITS might be marketed in a Member State with the consequence that the host State authority has to be informed by a notification procedure before the start of marketing.
- 41 As a result, Member States have provided own definitions of marketing in their national law. The scope of marketing varies from a narrow understanding to a very broad understanding. Especially with regard to the full prospectus or other documents of the umbrella UCITS published and offered in the host State, including a description of all existing sub-funds, the offer to switch units between the different sub-funds and thereby the offer to sign units of every sub-fund, these activities are considered to be marketing of all sub-funds in those Member States where a broad definition of marketing prevails. As a consequence, those host States generally require a notification of each single sub-fund of the umbrella fund, even if the umbrella intends to market actively only a few sub-funds. This procedure would also apply when a new sub-fund is established under the umbrella although from the UCITS’ perspective active marketing of this sub-fund is not intended in the host State. On the other side, where a narrower understanding of marketing prevails, other host State authorities only require the notification of those sub-funds which are actively marketed.
- 42 A harmonized definition of the terms “marketing” and “proposes to market” has not been dealt with so far in CESR’s work, because the interpretation of these definitions is pending with the EU Commission. Until a common understanding has been formed, it is at national discretion how to define this criterion.
- 43 However, without prejudice to the general reservation of CESR Members as referred to under paragraph 2 of the draft guidelines, **CESR Members agree that if a UCITS intends to market actively only part of the sub-funds of an umbrella UCITS in the host State, only those sub-funds proposed to be marketed actively have to be notified.**

2. Notification procedure for new sub-funds

- 44 As outlined above, some Member States currently require the notification of the umbrella fund as a whole including a notification of all its sub-funds. Some other Member States just require those sub-funds that are actively marketed to be notified. If new sub-funds are added they request a separate notification procedure of the added sub-funds including the application of the two-month



period, which can be shortened if this is permitted by the national legislation. A third group of Member States requires the notification of the umbrella and the sub-funds to be actively marketed and consider the adding of further sub-funds as a modification of the notification of the umbrella. In this case, the documents for the respective sub-fund including the marketing arrangements have to be filed but the two-month period is not applied.

45 **For simplification purposes CESR Members agree on the following:**

1) Instead of a separate notification of each sub-fund it is possible to include all sub-funds in one notification letter if these notices are provided simultaneously. Furthermore, cross-references concerning documents, for instance if the articles of incorporation of the overall umbrella have remained unchanged can be made and therefore the documents have only to be submitted once.

2) If in a later stage the **UCITS intends to market sub-funds, which were already included in the original notification material, but which were not proposed to be marketed in the host State at that stage (cf. Paragraph 43), without changing the marketing arrangements** already in place for other sub-funds, and to the extent that the relevant information already submitted is unchanged, a simple communication concerning the adding of these sub-funds is needed and **the two-month period does not apply.** The adoption of this practise is an option that the host State authority may use, if it considers this might provide additional flexibility in the notification process. CESR Members will inform on their websites, if they adopt this practice (cf. Annex III).

3) If new sub-funds are added to the umbrella fund and these sub-funds are proposed to be marketed in the host State, **the notification procedure and the two-month period applies; this procedure also applies in case the above option no. 2) is not made use of in the host State.** This is in order to allow the host State authority to examine e.g. the translation of the prospectus. The two-month period may be shortened if this is permitted by the national legislation of the host State.

All host authorities do not consider it necessary to apply the two-month period in the latter case. To facilitate transparency of the requirements to the UCITS, the jurisdictions that will apply the two-month period should indicate the requirement on their websites among the requirements on national marketing rules as stated in Annex III.

Q5: Do you consider the suggested approach as appropriate?

B. Content of the file

46 UCITS should not be obliged by the host State to send other documents and information than those mentioned in this chapter, however without prejudice to the documents and information due to Art. 44(1) and Art. 45 of the Directive. This chapter only deals with the documents and information required according to Art. 46 of the Directive whilst the documents and information due to Art. 44(1) and Art. 45 of the Directive are dealt with in Chapters D. and in Annex III and Annex IV.

47 If a UCITS proposes to market its units in a host State, it must first inform the competent host State authority of its intention and provide the following documents and information:

1. a valid original attestation granted by the competent home Member State authority, to the effect that the UCITS fulfils the conditions imposed by the Directive (cf. Annex I, with a model attestation to market units of UCITS in an EEA Member State);
2. a notification letter (cf. Annex II, with a model notification letter to market units of UCITS in an EEA Member State);
3. its latest up-to-date fund rules or instruments of incorporation (they need not be submitted separately if they are included in the prospectus; the latter must be indicated by the notifying UCITS or a third person empowered by written mandate to act on behalf of the notifying UCITS);
4. its latest up-to-date full and simplified prospectuses, containing all information as provided for by Art. 28(2) including Schedule A of Annex I and Art. 28(3) including Schedule C of Annex I of the Directive, and as endorsed by the Commission's Recommendation on some contents of the simplified prospectus¹;
5. its latest published annual report and any subsequent half-yearly report; and
6. details of the arrangements made for the marketing of units in the host Member State (cf. Annexes III and IV).

Q6: Do you consider the suggested approach as appropriate?

C. Modifications and on-going process

48 Generally according to Art. 47 of the Directive, documents and information have to be published in the host State in accordance with the same procedures as those provided for in the home State. In CESR Members' view it is important that the investors in the host State have the same information available as the investors in the home State.

49 Based on the reference of Art. 47 to Art. 29 and Art. 30 of the Directive, Member States expect foreign UCITS to keep their documents and information up-to-date, e.g. any amendments to the fund rules or instruments of incorporation (which do not need to be submitted separately if they are included in the full prospectus; the latter must be certified by the notifying UCITS or a third

¹ Commission Recommendation 2004/384/EC of 27 April 2004 on some contents of the simplified prospectus as provided for in Schedule C of Annex I to Council Directive 85/611/EEC, OJ L 144, 30.4.2004, p. 42.



person empowered by written mandate to act on behalf of the notifying UCITS), the full and/or simplified prospectuses, or new prospectuses, if applicable, have to be sent to the competent authority in the host State; also the latest published annual report and any subsequent half-yearly report have to be submitted.

- 50 The guidelines set out in chapters A.II., III. and B, where applicable, also apply if a UCITS notifies the host State authority of any modifications of the fund rules or instruments of incorporation, the full and/or simplified prospectuses, or, if applicable, the introduction of new prospectuses.

Q7: Do you consider the suggested approach as appropriate?

D. National marketing rules and other specific national regulations

- 51 This chapter deals with the non-harmonized national provisions which relate to the application of the Directive. Non-harmonized provisions may be found in each Member State, as the Directive either expressly does not rule on a specific issue in detail and instead instructs the Member States to deal with the particulars of this issue in their own national legislation, or the Directive is simply silent regarding an issue and thus leaves room for interpretation of this issue by national law of each Member State. Thus, the same issue may be either subject to diverging regulations in Member States, or an issue may be subject to regulation in a jurisdiction whilst it is not regulated in the national law of another Member State.
- 52 Due to Art. 45 of the Directive, UCITS are obliged to make facilities in the host State available for making payments to unit-holders, re-purchasing or redeeming units (e.g. paying agent) and for making available the information which UCITS are obliged to provide (e.g. information agent). The Directive does not rule these requirements in more detail and leaves it to the Member States how to establish and to design the respective facilities in their own national law.
- 53 According to Art. 44(2) of the Directive, UCITS must comply with the provisions governing advertising in the host State. Pursuant to Art. 44(1) of the Directive, UCITS which market their units in other Member States are required to comply also with the laws, regulations and administrative provisions in force in the host State which do not fall within the field governed by the Directive. This circumstance can also affect the notification procedure (for instance administrative law). Due to these legal provisions which are not harmonised, UCITS may also be required to fulfill certain requirements or may be required to send additional documents or information, other than those mentioned in Art. 46 of the Directive and listed in Chapter B. of these guidelines, to the host State authority.
- 54 According to these guidelines apart from Art. 44 and Art. 45 of the Directive the following issues are governed by national law:
- electronic submission of documents for example via fax or e-mail (cf. A. Procedure);



- confirmation of the date of receipt of the complete notification within one month to inform the UCITS of the date of the start of the two-month period (cf. A.I.1.);
- submission period for missing documents and information (cf. A.I.1.);
- shortening of the two-month period (cf. A.I.2.);
- submission of certified documents (cf. A.II.);
- marketing within the sense of Art. 46 of the Directive (cf. A.IV.1.); and
- transitional provisions with respect to the General reservation under point 2.

55

To simplify the access to information for UCITS, the host State authorities will be requested to fill in Annex III of these guidelines and to publish it on their websites. This Annex gives a standardized overview on the non-harmonized national provisions of a host State which relate to the application of the Directive. CESR Members are also expected to publish any amendment or abolition of these provisions or the enactment of new provisions to keep the compilation published with Annex III on their website up-to-date. Annex IV gives the details on which website each host State authority publishes its overview and where it can be downloaded. CESR Members are expected to inform CESR on any amendment of the internet address so that the Annex IV can be updated accordingly.

- Q8: Do you agree with the proposals concerning the publication of the information or do you prefer another procedure and if, which one?
- Q9: Do you feel that an issue in this consultation paper should be dealt with in more detail or that other aspects of an issue already contained in the consultation paper should also have been treated?
- Q10: Should some additional issues related to the notification procedure have been dealt with in this consultation paper, and if yes, which?



ANNEXES TO THE CONSULTATION PAPER



Annex I

MODEL ATTESTATION TO MARKET UNITS OF UCITS
IN AN EEA MEMBER STATE

1 is the competent authority
(name of the competent home Member State authority)

2 in
(the home Member State)

3 address

4 telephone number

5 telefax number

6 e-mail address

7 that carries out the duties provided for in the Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (hereinafter, the Directive), as required by Art. 49(1) of the Directive.

8 For the purpose of Art. 46(1) and Art. 6b(5)¹ of the Directive,

(the competent home Member State authority)

9 certifies that:

.....
(the name of the UCITS, i.e. the name of the common fund/ unit trust/ investment company)

10 - has been set up on
(date of establishment of the UCITS)

¹ According to CESR’s guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (Ref. CESR/04-434b), point B.I.2, “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... All the information foreseen for notification of the management company is considered to be fully encompassed in the registration procedure for the product. This requires full confidence that the arrangements put in place effectively ensure compliance of the management company with the UCITS Directive (subject to the transitional arrangements ... mentioned).” This guideline covers the marketing of funds via a third party. Even if CESR has not yet addressed more specifically issues concerning the management company notification procedure, the requirement of a UCITS-compliant management company with respect to Art. 6b(5) needs to be taken into account in any case within the product passport mechanism. Therefore it is suggested that the model attestation should include an element on the UCITS-compliance of the management company.



11 - has registry no.
(UCITS' registry no. in the home Member State, if any)

name of the authority
(name of the authority by which the register is conducted, if applicable)

12 - is based in
(the home Member State and details of the address of the UCITS' head office)

13 - is a common fund/unit trust,

List of sub-funds to be marketed in the host Member State, if applicable	
Serial no.	Name
1	
2	
3	
...	

- managed by the management company

.....
(name of the management company)

14 an investment company,

List of sub-funds to be marketed in the host Member State, if applicable	
Serial no.	Name
1	
2	
3	
...	

- that has designated as its management company

.....
(name of the designated management company)

- that is self-managed

15 - is a grandfathered UCITS I, i.e. it is fully compliant with the requirements laid down in the Directive 85/611/EEC prior to its amendments by the Directive 2001/108/EC

16 - is a UCITS III, i.e. it is fully compliant with the requirements laid down in the Directive 85/611/EEC as amended by the Directive 2001/108/EC



17 also certifies that:
(the home Member State authority)

18 a)
(name of the UCITS' management company, if applicable, according to what has been indicated above)

19 - is a grandfathered UCITS I management company, i.e. it is fully compliant with the requirements laid down in the Directive 85/611/EEC prior to its amendments by the Directive 2001/107/EC

20 - is a UCITS III management company, i.e. it is fully compliant with the requirements in the Directive 85/611/EEC as amended by the Directive 2001/107/EC

21 b) the latest version of the fund rules/instruments of incorporation has been approved by the home Member State competent authority on *(date of approval)*;

22 Date

..... *(signature of the representative of the home Member State authority)*

..... *(name in full and position of the undersigned representative of the home Member State authority)*

Q11: Is the model attestation practicable in your view?



Annex II

MODEL NOTIFICATION LETTER TO MARKET UNITS OF UCITS
IN AN EEA MEMBER STATE

COMMUNICATION FOR MARKETING UCITS IN
(the host Member State)

PART A Harmonized part

- 1 Name of the UCITS:
.....
- 2 Home Member State of the UCITS:
.....
- 3 Legal form of the UCITS: *common fund/ unit trust/ investment company (please circle the correct choice)*
- 4 Does the UCITS have sub-funds or compartments: *yes/ no*
- 5 Name of the fund(s) and/or the sub-fund(s) to be marketed in the host MS¹ Duration (if applicable) Code numbers in the host MS, if available (e.g. ISIN-code):
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

¹ If the UCITS intends to market only some share classes it may list only these share classes.



6

Management company/ Self-managed investment company:
.....

Address and registered office/seat/domicile if address and registered office/seat/domicile are not identical:
.....

Name, telephone number, telefax number and e-mail address of the contact person:
.....

Duration of the company, if applicable:
.....

Scope of activities of the management company in the host Member State:
.....
.....

7

Possible additional comments of the UCITS:
.....
.....
.....
.....

Attached documents¹:

- 8 ___ A valid original attestation granted by the competent home Member State authority
- 9 ___ The latest up-to-date fund rules or instruments of incorporation (they need not be submitted separately if they are included in the prospectus; the latter must be indicated by the notifying UCITS or a third person empowered by written mandate to act on behalf of the notifying UCITS).
- 10 ___ The latest up-to-date full and simplified prospectus
- 11 ___ The latest published annual report and any subsequent half-yearly report

¹ All documents must be sent in the original language and translated into at least one of the official languages of the host State, as explained in Chapter A.III.



12 *Note:* The notification letter may refer to documents that have already been sent to the host Member State competent authority, if still valid. The attestation from the home Member State competent authority must be sent in any case.

PART B Documents and information according to national marketing rules and other specific national regulations

13 ___ Details of the arrangements made for the marketing of the units in the host Member State (cf. Annexes III and IV)

Confirmation by the UCITS

14 I hereby confirm that the documents attached to this notification letter contain all relevant information as provided for in the Directive and CESR's guidelines regarding the notification procedure, including its annexes. The text of the documents does not have any deletions in comparison with the documents which have been provided to the home Member State authority but without prejudice to Art. 44(1) and Art. 45 of the Directive (cf. A.II. and especially Schedule A, Annex I, No. 4 of the Directive for full prospectus).

15 **Date and place**

..... (signature of the authorised signatory of the UCITS or of a third person empowered by written mandate to act on behalf of the notifying UCITS)

..... (name in full and position of the undersigned authorised signatory of the UCITS or of the third person empowered by written mandate to act on behalf of the notifying UCITS)

16 **Explanatory text**

The model notification letter is the common model developed to cover the harmonised contents of the notification procedure according to Art. 46 and Art. 6b(5) of the Directive (see footnote 1 of the model attestation). However, in addition to this, there are national requirements regarding marketing arrangements and advertising based on Art. 44 and art. 45, which grant powers for host Member State competent authorities (the national provisions of the host country may include requirements concerning paying agents, representatives in the host Member State etc.). This means that in addition to the model notification letter, there would in practise be a national annex for each jurisdiction regarding the requirements that are in the national discretion of the host MS. To simplify the access to information, CESR Members will publish on their websites a standardized overview on the non-harmonized national provisions of a host State which relate to the application of the Directive. CESR Members are also expected to publish any amendment or abolition of these provisions or the enactment of new provisions to keep the compilation up-to-date.

Q12: Is the model notification letter practicable in your view?

National marketing rules and other specific national regulations

- I. Member State
- II. Date of last update
- III. Supporting documents or information to the notification letter that are not required by the Directive but by national law (e.g. information in the full prospectus, certifications and/or written mandate, paying agent, information agent, other information, certifications of documents)
- IV. Additional information
 1. electronic submission of documents for example via fax or e-mail: yes / no
 2. two-month period may be shortened: yes / no
 3. date of receipt of the complete notification is confirmed within one month: yes / no
 4. maximum submission period for missing documents and information, if the notification is incomplete: yes / no
- V. Required languages for translation
- VI. Transitional provisions with respect to the General reservation under point 2
- VII. Documented evidence of fee payment
- VII. Conditions for ending marketing/ registration
- VIII. Other issues

Q13: What would you suggest CESR to do regarding the national requirements to simplify the notification procedure?



Annex IV

List of CESR Members' websites for the downloading of national marketing rules and other national regulations regarding the notification process

[only presented as examples at this stage]

1. Germany

www.bafin.de | Für Anbieter | Investmentfonds | ausländische Investmentfonds

or

www.bafin.de/cgi-bin/bafin.pl?verz=0407010000&sprache=0&filter=&ntick=0

2. UK

www.fsa.gov.uk/pubs/other/cispr_02_eea.pdf

Annex V Indicative CESR work plan on the guidelines on the notification procedure of UCITS

