



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/06-120

**CESR's guidelines to simplify the notification
procedure of UCITS**

2nd Consultation Paper

May 2006



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 July 2005.

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 has undertaken while providing the Commission with an advice on the 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 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 simplicity, 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 immediately 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 wherever possible.

This 2nd consultation document from CESR 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.

CESR received 29 responses to the first consultation, mainly from asset managers and their associations. One common concern was that the text provided too many examples of current practices in CESR Member States but failed to identify common ground to develop CESR's guidelines. This 2nd consultation document has tried to overcome this criticism by changing its structure: under each main topic, CESR presents its guidelines, followed by accompanying supporting text.

In this 2nd consultation CESR seeks comments of all interested parties on the revised draft of 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 2nd consultation closes on 1st June 2006. Responses to the consultation should be sent via CESR's website (www.cesr-eu.org) under the section "Consultations".

In order to facilitate the consultation process, CESR will be holding an open hearing by the end of May 2006 in Paris at CESR's premises, 11-13 avenue de Friedland.

Areas Covered

The consultation covers:

- **Language regime of the notification letter:** Many contributors to CESR's first consultation stressed the need to broaden the scope for use of international languages in the sphere of finance. Therefore, CESR has agreed that the UCITS can submit the notification letter to the host authority in a language common in the sphere of finance, where this is not contrary to the domestic legislation or regulations.
- **Checking completeness of the notification letter:** Many respondents to the first consultation expressed the view that CESR should clarify when the two month period would start as regards receipt of the notification. 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 incomplete notification.

- **Certification of documents:** So far, many Member States have required the certification of the documents related to the notification procedure by the home State authority of the UCITS. This has been 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. To simplify the supervisory practices in this respect, CESR has agreed to rely on self-certification of copies of original attestations by the notifying UCITS as suggested by the consultation respondents. It has been agreed that the original attestation will be issued in English.
- **Treatment of umbrella funds:** Regarding new sub-funds which are added to the umbrella fund with the intention to be marketed in the host State, where the marketing arrangements are already familiar to the host country competent authority, CESR has agreed that the necessary time for the host authority to check should be significantly less than the two-month period. In addition, in order to simplify the processing by the host authority of the notification of umbrella funds with a large number of sub-funds, some proposals such as the self certification by the UCITS' authorised directors have been agreed.



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INTRODUCTION

Background

- 1 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.
- 2 The Asset Management Expert Group reviewed in 2004 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 notified 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 notification requirements foreseen by the UCITS Directive to streamline the notification process.
- 3 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.
- 4 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.
- 5 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.

- 6 The main objectives of these guidelines can be summarised as follows:
- Simplifying the notification and ongoing process and thus facilitating cross-border fund distribution;
 - Providing proportionate investor protection;
 - Reducing costs for investors and fund management companies;
 - Eliminating barriers to the single market on investment funds in Europe;
 - Furthering a level playing field between different investment products.
- 7 These guidelines present proposals for a common approach to the administration, by host authorities, of the notification procedures set out in Art. 46 of the Directive. The document is developed to simplify and 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.
- 8 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 taken into account.
- 9 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.
- 10 CESR's guidelines will not prejudice, in any case, the role of the Commission as guardian of the Treaties.
- 11 The progress on the implementation of these guidelines will be subject to a permanent review by CESR.
- 12 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). The 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.



THE GUIDELINES

Preamble

- 1 Taking on board various remarks from responses to the first consultation that questioned the suitability of the first version of these guidelines to achieve its objectives, CESR has decided to include this preamble to reassure the industry that the arrangements proposed in these guidelines seek to enhance the efficiency of the notification procedure and to bring greater transparency and certainty to it. The proposals aim to avoid uncertainty and prolongation of notification procedures.
- 2 There is a general commitment by all CESR Members to enhance the processing of notifications where possible. As a response to calls for an improvement in the cooperation between regulators, CESR envisages that host authorities will in practice regarding individual notifications at first communicate with the respective UCITS to find practical solutions on possible open issues. As a second step informal contacts between the host and the home authorities will be enhanced to speed up the procedures. Due to the above mentioned commitment, national regulators will improve their cooperation between each other. CESR will create a contact list of UCITS-regulators for regulators for the purposes of UCITS notification. The objective of such a cooperation is to facilitate a rapid, effective and balanced solution on open issues by home and host State authorities in order to facilitate convergence and the fair implementation and application of the Directive and these guidelines.
- 3 Some of the proposals for speedier processing cannot be immediately guaranteed by all host authorities due to limitations imposed by national laws or regulations. In addition improvements in available human or IT resources might be necessary. Acknowledging respondents' calls for bolder deregulatory action, there is however a general commitment by all authorities to accelerate the processing of notifications wherever possible.

General Commitment and transitional period

CESR Members are committed to:

- fully implement these guidelines and to act in accordance with them to simplify the notification procedure of UCITS;
- adopt working procedures that will all in all aim at speeding up the notification process;
- enhance co-operation between themselves by among other things creating a contact list for regulators of the contact persons of each CESR Member for the purposes of UCITS notification.

As a consequence of the commitment of CESR Members to implement these guidelines and to act according to them, in some cases the amendment of their national legal provisions might be necessary. In many Member States this amendment might require a formal legislation procedure.



Where such a procedure must occur, a transitional period would be necessary for the respective CESR Members to implement the guidelines. Even in such a transitional period there is an expectation to CESR Members that they will try to adhere to the guidelines to the extent permitted by there legal framework.

Transitional periods apply to the individual guidelines in this document, where indicated by CESR Members on their website, and are without prejudice to Paragraph 9 of the Introduction.

Definitions

- 4 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.
- 5 References in this consultation paper to terms defined in the Directive shall have the meaning given to them in the Directive.

A. Procedure

Guideline 1

For the notification procedure – as far as the harmonized part is concerned – a standardized notification letter which is drafted according to the standard model letter in Annex II should be used by the UCITS.

The notification letter may be submitted in a language common in the sphere of finance at the international level or in the or one of the official languages of the host Member State if it is not contrary to the domestic legislation or regulations of the host Member State.¹

CESR Members agree to facilitate electronic filing of documents.

Explanatory text

- 6 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.
- 7 The model of the standardised notification letter is attached to these guidelines (Annex II). This standardised model will help to facilitate the notification procedure and provides the host State authority with a summary of the necessary information to process the notification.

¹ Due to inter alia a complicated interaction between investment and administrative law/regulation in several Member States there is no general commitment to amend national legal/regulatory provisions.



- 8 It is aimed by the Member States that 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. Where the notification documents are provided in electronic form it shall not be necessary to submit hard copies.

Guideline 2

Other reasons than non-compliance of marketing arrangements with the provisions referred to in Art. 44(1) and Art. 45 of the Directive, 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 notification according to the Directive.

Therefore, if the marketing arrangements comply with the provisions referred to in Art. 44(1) and Art. 45, the passport of the UCITS has always to be respected.

Explanatory text

- 9 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. The Directive does not provide for explicit tools to deal with problems such as divergent interpretations of the Directive. In particular, CESR Members agree that these issues cannot be dealt with within the notification procedure. Therefore, other solutions 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, might be of help.

I. The two-month period

Guideline 3

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, unless the host Member State establishes in a reasoned decision taken before the expiry of that period of two months, that the marketing arrangements do not comply with the provisions referred to in Art. 44(1) and Art. 45.

Explanatory text

- 10 This is however without prejudice to Art. 6a and Art. 6b of the Directive concerning the management company passport. As explained in footnote 1 of Annex I for marketing funds via a third party in a host State, providing the necessary information regarding the management company in the "product notification" makes a separate notification procedure regarding the management company unnecessary.
- 11 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).



1. Starting the two-month period

Guideline 4

The two-month period starts when the competent host State authority has received the complete notification. If the notification is not complete, the two-month period does not start.

Without prejudice of the provision of Article 46 (2) and of the ability of the competent authority of the host Member State to ask the UCITS for additional information within the two month period the notification would be considered 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 have been received by the competent authority of the host Member State.

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 incomplete notification.

Explanatory text

- 12 Many respondents to the first consultation expressed the view that CESR should clarify when the two month period would start as regards receipt of the notification. Accordingly receipt of the notification will be assumed if delivery by physical submission or by electronic filing via e-mail has been confirmed by the authority. The records of a reliable commercial courier service in case of physical submission will be considered as giving sufficient proof of delivery. Where the host Member State authority confirms the date of receipt of the complete notification and additionally informs the UCITS regarding the date of the start of the two-months period due to national law, this should be done as fast as possible and at the latest within one month after receipt of the complete notification; in this case a separate confirmation of sole receipt without the additional information of the start of the two-months period which also might be provided for by national law is not necessary.
- 13 It has been made clear throughout the first consultation and also at the open hearing that industry members expect the two month period to automatically start upon the day that the notification is delivered. However, CESR Member States feel that the starting of the two month period should not be operational until competent authorities are confident that all documents and information have been provided and a preliminary assessment on the contents of those documents gives assurance to them that all information is at their disposal. This means that if all the information and documents are complete and the latter contain all information, the two month period starts from the date of the receipt of the notification. If there is no communication after one month by the competent authority of the host Member State to the UCITS, it is assumed that the notification is complete since the date of the receipt by the host Member State authority.
- 14 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 regulation of the host State. This circumstance will be attested by the UCITS in the notification letter.



15

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 authority to it within a defined time period after the request to amend the original notification material. A term of six months may be considered as an appropriate time period. This is done to avoid a notification process to be held open for a long time period due to the UCITS not providing the requested additional information. The aim of this requirement is to help directing the resources of authorities to applications that are still in the ‘active phase’.

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

2. Shortening the two-month period

Guideline 5

Without prejudice to Guideline 6, the two-month period is the maximum period available for the host State competent authority to check the notification.

The two-month period should be shortened whenever possible. The competent authority should as soon as it has checked the notification inform the UCITS for example via email that it can start the marketing in the host State immediately, even if the two-month period is still going on.

3. Managing the two-month period

Guideline 6

The host State authority has two months to check the contents of the notification, after it has received the complete notification. After the two-months period has expired, the investment company or the management company may begin to market its units in the other Member State, unless the host State authority establishes, in a reasoned decision taken before the expiry of that period that the arrangements made for the marketing of units do not comply with the provisions referred to in Article 44(1) and Article 45.

In the course of this two-months period the host State authority may solicit clarification from the UCITS with regard to the documents and information submitted with the notification letter to check if the marketing of units would comply with the provisions referred to in Art. 44(1) and Art. 45 of the Directive. The right of the UCITS to start marketing after the two-months period will not be affected unless a reasoned decision is issued.

In the case where the host States authority’s endeavor is not satisfied, but the authority can nevertheless assume that there is a realistic prospect that compliance with Art. 44(1) and Art. 45 from the applicant’s side can be achieved without the need for a reasoned decision, the following more graduated approach should be applied:

The host Member State authority shall inform the UCITS as soon as possible in a written and duly motivated communication (which can be by email) that it considers that there are convincing arguments to believe that the requirements to make a reasoned decision are fulfilled, unless the host State authority receives the required information within the two-months period. Without prejudice to shorten the two months period according to guideline 5, the expiring of the two-months period will be suspended by this communication to prevent the applicant from a reasoned decision.

If the requested information has been received by the host authority and the arrangements made for the marketing of units do 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.

Explanatory text

- 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 led to uncertainties that have been pointed out by respondents to the first consultation. CESR Members have therefore agreed on a 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 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.
- 20 The authority can nevertheless assume that there is a realistic prospect that compliance with Art. 44(1) and Art. 45 from the applicant's side can be achieved. A more graduated approach to the use of the reasoned decision should be applied.
- 21 The host Member State authority shall inform the UCITS as soon as possible 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.
- 22 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 (cf. A.I.1. to determine the date of receipt), the host State authority will finalise the checking of the arrangements made for the marketing of units in the remaining time that was left of the two-month period, when the host State authority required for the additional information.

23 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.

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

II. Certification of documents

Guideline 7

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

The host authorities shall not request certification of these documents by the home State authorities. A self certification by the UCITS' authorised directors will be accepted by the host State authority. The certification must state that the versions of the documents that have been attached to the notification letter are the latest ones which have been approved by or filed with the home State authority.

Explanatory text

24 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. So far many Member States have required the certification of the documents related to the notification procedure by the home



State authority of the UCITS. This has been 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.

- 25 To simplify the supervisory practices in this respect, CESR Members agree, that the host State authorities shall rely on self-certification by the UCITS. This agreement addresses a widespread demand from those that contributed to the first consultation.
- 26 CESR Members have also agreed 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

Guideline 8

The documents which have to be submitted by the UCITS to the host authority must be sent in the original language and translated into the or one of the official languages of the host State except for the UCITS Attestation (see also Guideline 11).

However, 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 the documents that must be translated as well as on the accepted languages on their websites (cf. Annex III).

Explanatory text

- 27 Many contributors to CESR's first consultation on these draft guidelines stressed the need to broaden the scope for use of international languages in the sphere of finance. Some respondents suggested that, along the lines of the recently introduced Prospectus Directive, it would be enough to provide the simplified prospectus in the official local language. CESR has carefully considered this option. However, since UCITS investors are mainly retail investors, CESR decided for the sake of investor protection to leave such an assessment to the host country authorities. Transparency of admissible languages is ensured by the commitment of CESR Members to disclose on their web-site the accepted relevant languages and the documents which have to be translated.
- 28 Correct, sufficient, and unambiguous information for the investor is one of the core elements of investor protection provided for by the Directive.
- 29 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, translated documents should be faithful representations of the original documents. 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 regulation of the host Member State.

Q4: Do you consider the suggested approach as appropriate?

IV. Umbrella funds

Explanatory text

30 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). Moreover, sub-funds of an umbrella funds may have different own characteristics (e.g. risk profile) which may have an impact upon the requirements of the host State regarding marketing arrangements, selling or advertising conditions (e.g. the commercial information and advice given to investors by distributors). Member States have developed different approaches on how to deal with the characteristics of umbrella funds with respect to the notification procedure. CESR has tried to reach convergence in these practises as far as possible.

1. Marketing of only part of the sub-funds

Guideline 9

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.

Explanatory text

31 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.

32 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.



- 33 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.

2. Notification procedure for new sub-funds

Guideline 10

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. These simplifications also apply to umbrella funds in the contractual and unit trust form.

2) 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. Given that the most of the notification material e.g. the marketing arrangements will likely in such a case be already familiar to the host authority, the necessary time for check by the host authority should be significantly less than the regular two-month period. The two-month period should therefore be shortened in accordance with Guideline 5.

Some host authorities do not consider it necessary to apply the two-month period at all 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.

3) To simplify the processing by the host authority of the notification of umbrella funds with a large number of sub-funds, the following procedure applies: Basically, the whole umbrella should have one full prospectus but if the notifying UCITS cannot avoid providing a separate full prospectus for each sub-fund, the UCITS’ authorised directors must self-certify that the information on the marketing arrangements in the host State are the same in each prospectus.

Explanatory text

- 34 The large majority of respondents to CESR’s first consultation objected that host State competent authorities apply the two-months period to notifications of new sub-funds added to existing umbrella funds that would be actively marketed in the host State when marketing arrangements remain unchanged. However, as explained under paragraph 32, CESR Members came to the conclusion that these sub-funds should receive the same treatment as any other single fund as they may have different own characteristics.
- 35 The proposed guidelines aim to simplify the notification process by providing a framework for efficient use of the information the host authority is receiving with the notification or has received with previous notifications. Duplication of work should be avoided by both sides i.e. notifying same information twice by the UCITS and checking twice the same information by the host authority should be avoided as far as possible. A level playing field should also be promoted between funds



operating in different legal formats, e.g. same simplified procedures should be where possible applied to contractual or unit trust funds where their notifications include repetitive information. Also the UCITS can contribute to simplify and fasten the process. Especially for large umbrella funds with many sub-funds it is preferable that one full prospectus comprising all sub-funds to be marketed should be submitted, i.e. separate full prospectuses for every single sub-fund should not be issued, since it demands lot of work by the host authority to go through all these prospectuses. This right should be “reserved” to the simplified prospectuses which may be produced for an individual sub-fund or share class within an umbrella.

Q5: Do you consider the suggested approach as appropriate?

B. Content of the file

Guideline 11

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. The 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). The UCITS may however, as an alternative, submit a copy of the original attestation, provided that its authorized directors self-certify that the copy is a true copy of the valid original in their possession. The original attestation should be issued as an English version.
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 prospectus;
5. Its latest published annual report and any subsequent half-yearly report; for umbrella funds annual reports and subsequent half yearly reports comprising the whole umbrella should be submitted; and
6. Details of the arrangements made for the marketing of units in the host Member State (cf. Annexes III and IV).



Explanatory text

- 36 This chapter only deals with the documents and information required according to Art. 46 of the Directive. UCITS should not be obliged by the host State to send other documents and information than those mentioned in these guidelines, however without prejudice to the documents and information due to Art. 44(1) and Art. 45 of the Directive. The documents and information due to Art. 44(1) and Art. 45 of the Directive are dealt with in Chapter D and in Annex III and Annex IV.
- 37 Unless provided for by the laws, regulations or administrative provisions in the host Member State in accordance with Art. 44(1) and Art. 45 of the Directive, host State authorities are not allowed to request additional documents or information which are not required according to Art. 46 of the Directive as outlined in this chapter and which do not speed up the notification process. Therefore, the host State regulator is not allowed to request for example letters warranting the veracity of the information submitted with the notification letter; letters of “commercialisation”, describing the main characteristics of a fund and its subfunds, including investment policies, subscription and redemption procedures, fees etc.; or letters warranting that the foreign UCITS’ management company will remit trailer fees in respect investments by domestic funds only to those funds, unless these submissions are foreseen by national law, regulations or administrative provisions complying with Art. 44(1) and Art. 45 of the Directive. However, if documents are appropriate to streamline the notification process, they might be requested by the host State regulator. For example, letters describing what changes have been made to the prospectus being filed are appropriate to streamline the notification procedure and may therefore requested by the host State authority.

Q6: Do you consider the suggested approach as appropriate?

C. Modifications and on-going process

Guideline 12

CESR Members 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 indicated by the notifying UCITS or a third 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.

Submission is requested without delay after the documents and information have been made the first time available in the home Member State and without prejudice to the notification procedure for new sub-funds.



Explanatory text

- 38 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.
- 39 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.
- 40 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

Guideline 13

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.

Explanatory text

- 41 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 regulation of another Member State.
- 42 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.

43 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.

44 According to these guidelines apart from Art. 44 and Art. 45 of the Directive the following issues are governed by national regulation:

- electronic submission of documents for example via 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.);
- translation (cf. A.III.)
- marketing within the sense of Art. 46 of the Directive (cf. A.IV.1.); and
- transitional provisions with respect to the General commitment and transitional period under the Preamble.

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 approval of the fund rules 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 numbers in the sub-fund(s) to be marketed in the host MS ¹	Duration (if applicable)	Code 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 or a copy of the original attestation self certified by the UCITS authorized directors that the copy is a true copy of the valid original in their possession

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).

¹ The 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 Guideline 8.



- 10 ___ The latest up-to-date full and simplified prospectus
- 11 ___ The latest published annual report and any subsequent half-yearly report
- 12 Note:

The latest versions of the documents to be attached to this letter, as approved by or filed with the home State authority, must be sent to the host State authority. A self certification by the UCITS' authorised directors will be accepted. The certification must state that the versions of the documents that have been attached to the notification letter are the latest ones which have been approved by or filed with the home State authority.

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?



Annex III

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, third person empowered to act on behalf of the notifying UCITS – e.g. lawyer – , other information)
- 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



