



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/04-434

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

Consultation Paper

October 2004



EXECUTIVE SUMMARY

Background

The deadline for the Member States to implement the amending UCITS Directives (2001/107/EC and 2001/108/EC) was on 13th February 2004. These amending Directives provide for transitional provisions whose application has given rise to much uncertainty including in relation to key-operating elements such as the simplified prospectus or the management company passport.

On the basis of information received both from the investment management industry and its members CESR decided, that these uncertainties must be resolved as a matter of urgency. It was decided, that the CESR Expert Group on Investment Management set up in April 2004 would have as its first short-term priority to work on the application of the transitional provisions of the amending UCITS Directives as well as issues related to the management companies' and the UCITS' passport.

The Lamfalussy approach for securities markets regulations comprises four levels: framework principles included in legislation adopted by the European Parliament and Council (Level 1), measures implementing those Directives and adopted by the Commission after advice from the Committee of European Securities Regulators (CESR) and the agreement of the European Securities Committee (Level 2), co-operation among regulators (Level 3) and enforcement (Level 4). CESR's work on the transitional provisions of the amending UCITS Directives is on Level 3.

Purpose

The purpose of this consultation document from CESR is to seek comments on the practical arrangements for supervisors that CESR proposes to issue on a number of items relating to the transitional provisions and the management companies' and the UCITS' passport introduced by the amending UCITS Directives (2001/107/EC and 2001/108/EC).

Consultation Period

Consultation closes on 8th December 2004. The time reserved for the consultation has been shortened from the normal three months period of CESR consultations. This is because the urgent nature of these issues. The open issues are widely known among the European asset management industry, so CESR believed it was possible to shorten the consultation period.

Areas Covered

The consultation covers:

- i. Issues related to the marketing of funds and the simplified prospectus (e.g. in case the home Member State regulator has not yet issued detailed guidance on the simplified prospectus);
- ii. Issues related to the scope of permissible activities of grandfathered management companies (e.g. with respect to the launching of "passportable" UCITS III funds);
- iii. Issues related to UCITS launched after February 2002 which benefit from a "grace period" (e.g. smooth convergence to the new UCITS regime, coordinated approach to a transitional treatment by statements of conformity etc.); similar issues related to grandfathered UCITS I umbrella funds which have launched further sub-funds after February 2002;



- iv. Practical questions related to the scope of the European passport and problems resulting from the relationship between the management company's passport and the fund's passport.

Further Details

Full details of CESR's proposed guidelines together with contact details can be found in the consultation paper.



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A. INTRODUCTION

1. CESR invites responses to this consultation paper on its proposed guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC) and further practical questions related to the management companies' and the UCITS' passport.
2. Respondents to this consultation paper can post their comments directly on CESR's website (www.cesr-eu.org) under the section "Consultations".

Objective of the guidelines

3. The objective was to ensure that administrative practices of supervisors do not hamper the functioning of the Single Market for UCITS. Therefore, CESR proposes to draft guidelines that will facilitate the consistency of practices regarding the transitional treatment of UCITS funds established under UCITS I and their management companies. They will also aim at developing a convergent approach to some issues regarding the management companies' and the UCITS' passport among the EU securities regulators. This view was shared by respondents to CESR's consultation.
4. The second interim report monitoring the Lamfalussy Process issued in December 2003 by the Inter-Institutional Monitoring Group also shares this approach and specifically encourages CESR and the national regulatory authorities to intensify and speed up its work at Level 3.
5. The elaboration of 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.
6. 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.
7. CESR guidelines for supervisors will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

Background

8. The amending UCITS Directives (2001/107/EC and 2001/108/EC) were published in the Official Journal of the European Union on 13 February 2002. Member States had to transpose and apply the Directives in the domestic laws or regulations not later than 13 February 2004. These amending Directives contain transitional provisions i) for UCITS established under Directive 85/611/EEC and ii) management companies established under 85/611/EEC. These transitional provisions have given rise to some uncertainties because of factors such as lack of clarity in the wording, e.g. regarding the scope of activity covered by transitional treatment, interaction between the transitional provisions on the UCITS and the management company, absence of provisions governing UCITS launched in the period between the date of entering into force of the Directive (February 2002) and the end of the application deadline (February 2004).

Experience with the amending Directives also highlighted questions concerning the scope of the management company passport and its relationship with the UCITS product passport.



As a result of the divergent approaches developed by Member States on these issues, the present situation regarding the UCITS implementation is characterized by considerable uncertainty.

9. CESR set up an Expert Group on Investment Management in April 2004. CESR decided that this Group would have as its first short-term priority to work on the application of the transitional provisions of the amending UCITS Directives. 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 coordinated by Mr Thomas Neumann of the German financial regulator, Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin).
10. In addition, under the terms of CESR's Public Statement of Consultation Practices (Ref: CESR/01-007c), a Consultative Working Group on Investment Management has been established to advise the Expert Group.
11. CESR published a Call for Evidence on 9 June 2004 (Ref: CESR/04-267b) inviting all interested parties to submit views as to what CESR should consider in its future work on investment management generally but especially welcoming comments related to the priorities identified as urgent, and in particular in relation to the application of the transitional provisions of the amending UCITS Directives. CESR received 13 submissions and these can be viewed on CESR's website. A summary of the main issues raised by respondents is included in Annex A.
12. The timetable for preparing the guidelines is set out below.

18th November	Open hearing
8th December	Deadline for comments on the consultation
December-January	Analysis of the responses and review of the proposals
January	CESR approves and publishes the final guidelines

In order to facilitate the consultation process, CESR will be holding an open hearing on the 18th of November 2004. When CESR published its Call for Evidence in relation to this work (CESR/04-267b) it was announced that the hearing would take place in January 2005. Nevertheless, following suggestions from the market, CESR decided to organise the hearing earlier in order to speed up the process. It will be in Paris at CESR's premises, *11-13 avenue de Friedland*. You can register for the open hearing via the website of CESR (www.cesr-eu.org) under the heading "Hearings".

References

13. Papers already published by CESR which are relevant to this consultation paper are:
 - *The role of CESR at "level 3" under the Lamfalussy process (CESR/04-104b)*
 - *CESR starts work on its agenda for investment management (CESR/04-267b)*
 - *Mandate for the Expert Group on Investment Management (CESR/04-160)*



B. PRELIMINARY STATEMENT BY LAMBERTO CARDIA

The 13th meeting of CESR, on 3/4 June 2004, gave a mandate to the Expert Group on Investment Management to produce guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC). The term “transitional provisions” refers to all practical issues which are faced by those management companies and UCITS that have not yet complied with the amending UCITS Directives (2001/107/EC and 2001/108/EC). The mandate focused on the following areas that the Group had identified:

- Issues related to the marketing of funds and the simplified prospectus (e.g. in case the home Member State regulator has not yet issued detailed guidance on the simplified prospectus;
- Issues related to the scope of permissible activities of grandfathered management companies (e.g. with respect to the launching of “passportable” UCITS III funds);
- Issues related to UCITS launched after February 2002 which benefit from a “grace period” (e.g. smooth convergence to the new UCITS regime, coordinated approach to a transitional treatment by statements of conformity etc.); similar issues related to grandfathered UCITS I umbrella funds which have launched further sub-funds after February 2002;
- Practical questions related to the scope of the European passport and problems resulting from the relationship between the management company’s passport and the fund’s passport.

The content of the proposed guidelines represents the common view of the regulators, the CESR members, on the solutions to the practical problems related to the day-to-day regulatory practices concerning the application of the UCITS Directive. These common solutions have been elaborated in order to converge the different administrative practices Member States have developed in view of the ambiguities contained in the text of the amending UCITS Directives.

These solutions do not purport to resolve the underlying differences of opinion among Member States in the interpretation of the various provisions in the directives. Instead, they represent common, practical approaches, which CESR members agree to implement, on how to deal with certain scenarios occurring in day-to-day administrative practices to ensure both the efficiency of the market of UCITS as well as the protection of UCITS’ investors. Therefore, this exercise aims to put an end to these uncertainties surrounding the implementation of the amending UCITS Directives.



C. QUESTIONS ON THE TRANSITIONAL TREATMENT

I. UCITS I management companies

1. Can a grandfathered UCITS I management company, i.e. authorised before 13th February 2004, launch “passportable” UCITS III funds?

Art. 2 (3) of Directive 2001/108/EC provides for management companies authorised before 13th February 2004 the possibility to continue their activity until 13th February 2007. Supervisory authorities have developed diverging views under which conditions this provision would cover the launching of UCITS III funds. Some authorities require full compliance with the requirements of Directive 2001/107/EC (e.g. capital and organisational requirements) in addition to the employment of a risk-management process in accordance with Art. 21, as amended by Directive 2001/108/EC, whereas others consider that the employment of a risk-management process would be sufficient.

Taking into account these difficulties and in order to encourage progress towards compliance with UCITS III, CESR members propose that a grandfathered UCITS I management company is allowed to launch “passportable” UCITS III funds only **until April 30th, 2006 at the latest**; after that final date the management companies must be adapted to UCITS III. **To be able to avail of this possibility, a grandfathered UCITS I management company has in any case to comply with the requirements of Art. 21 as amended by Directive 2001/108/EC concerning an appropriate risk-management process.** This has to be confirmed by a written attestation by the competent authorities of the home Member State of the management company, in order it to be allowed to launch “passportable” UCITS III funds in the host Member State until **April 30th, 2006**.

Q: Do you agree with this proposal? If not, please state your reasons.

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

Setting up a new UCITS I fund, i.e. an investment fund applying the rules of the UCITS Directive 85/611/EEC prior to its amendments by the Directive 2001/108/EC, is not possible after 13th February 2004, which was the transposition deadline of the Directive 2001/108/EC. After that deadline, new UCITS funds to be set up must apply the amended UCITS Directive, they have to be so-called UCITS III funds.

A grandfathered management company cannot in CESR’s view therefore continue to launch passportable UCITS I funds after 13th February 2004; the UCITS I funds must have been authorised before 13th February 2004.

Q: Do you agree with this proposal? If not, please state your reasons.



II. UCITS I funds (single fund structure)

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

For answering this question the following aspects must be considered:

- The Directive 2001/108/EC does not regulate a grandfathering period for UCITS I funds authorised between 13th February 2002 and 13th February 2004. Art. 2 of the Directive 2001/108/EC provides for a grandfathering period only for UCITS funds existing on 13th February 2002, the date of entry into force of the Directive. However, Member States and particularly their supervisory authorities might have faced a difficult situation for UCITS launched after 13th February 2002 from a practical point of view: They were given time to prepare the transposition until 13th February 2004 (as provided for by Art. 3 of Directive 2001/108/EC) and at the same time they would have been obliged to ensure that all the UCITS I funds launched after February 2002 had been already converted to the new regime by the end of the application period, i.e. 13th February 2004.

Considering the fact that the situation was unclear from the date of entry into force of the amended UCITS Directive, CESR members provide for a period **until December 31, 2005 at the latest** for UCITS I funds authorised between 13th February 2002 and 13th February 2004 to be converted to the regime of the amended UCITS Directive. During this period, they still may continue to be marketed on the basis of the UCITS I product passport.

This time limit will urge such UCITS to adapt to the amended UCITS Directive in the smoothest time frame that is practically conceivable. The competent authorities should treat the necessary approvals as priority cases. In cases of exceeding this time limit host Member State authorities will no longer accept those UCITS I – passports.

Q: Do you agree with this proposal? If not, please state your reasons.

III. UCITS I umbrella funds

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

It should be considered that the transitional treatment of UCITS I sub-funds was unclear from the date of entry into force of the amended UCITS Directive which lead to divergent approaches of several supervisory authorities.

Therefore, CESR members provide for a period **until December 31, 2005 at the latest** for UCITS I sub-funds to be launched in a grandfathered UCITS I umbrella fund, i.e. by the end of this period, the overall UCITS I umbrella should be converted to UCITS III. This would apply whether the umbrella fund was itself authorised before 13th February 2002 or between 13th February 2002 and 13th February 2004.

This time limit will urge such UCITS I umbrella funds to adapt to the amended UCITS Directive within the smoothest time frame that is practically conceivable. The competent authorities should treat the necessary approvals as priority cases. In cases of exceeding this time limit host



Member State authorities will no longer be obliged to accept those UCITS I – sub-fund-passports.

Q: Do you agree with this proposal? If not, please state your reasons.

Respondents are asked to address specifically the issue, whether there are real practical obstacles to apply the proposed deadline. Respondents are asked to give concrete practical examples of these obstacles/ problems.

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

In CESR’s view this is not possible, because the whole umbrella fund including all the sub-funds should either be submitted to the regime of the Directive 85/611/EEC or to that of the new Directive 2001/108/EC. The combination of sub-funds of both regimes under one umbrella is not permissible.

In the case of corporate funds, this derives clearly from the basic factual requirement that the umbrella as a whole constitute one single legal entity. In the case of contractual funds, this can be concluded from the legal consideration that the amending UCITS Directive 2001/108/EC does not appear to provide any derogation for compartment funds in terms of differentiating the prudential regime at sub-fund level.

Consequently, the whole umbrella fund must be based on a common legal basis. This legal basis is provided by the fund rules or the instruments of incorporation. These documents have to establish all the general rules which are relevant for the whole umbrella. These documents should also provide for the creation of sub-funds.

Q: Do you agree with this proposal? If not, please state your reasons.

IV. Simplified prospectus

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

The amending UCITS Directive 2001/107/EC does not contain specific grandfathering provisions in relation to the simplified prospectus. Therefore, supervisory authorities have developed divergent approaches to whether they require a simplified prospectus for UCITS I funds or not. Furthermore, it needs to be considered that some Member States have already implementing regulations (including detailed guidance) on the simplified prospectus in place whilst some others are still working on their implementation.

In this respect, it needs also be taken into account that the European Commission’s Recommendation on some contents of the simplified prospectus 2004/384/EC was published only on 30th April 2004, asking Member States to inform the Commission, in so far as possible, by 30th September 2004 on any measures they have taken further to this recommendation. The Members States were also asked to inform the Commission of the first results of the implementation of the recommendation; in as far as they are able, no later than 28th February 2005.



Therefore, in CESR's view UCITS I funds (launched before 13th February 2004) should have available a simplified prospectus as soon as possible and **no later than 30th September 2005**. In cases of exceeding this deadline host Member States are no longer obliged to accept UCITS I funds without simplified prospectuses.

In addition CESR strongly recommends, that funds marketed to host Member States, that already have implemented the UCITS regulations concerning the simplified prospectus in their national legislation, and which requires also foreign funds to provide a simplified prospectus, would provide information according to the requirements included into Schedule C of the Annex I of the UCITS Directive concerning the contents of the simplified prospectus.

Q: Do you agree with this proposal? If not, please state your reasons.

2. Is it possible for UCITS which have no simplified prospectus and which wish to be marketed in another Member State to obtain a UCITS III product passport?

UCITS funds that wish to obtain a UCITS III product passport to market their units in other Member States must have a simplified prospectus. The amending UCITS Directives do not include a transitional provision that would allow UCITS III funds not to have a simplified prospectus.

Q: Do you agree with this proposal? If not, please state your reasons.

D. QUESTIONS CONCERNING THE EUROPEAN PASSPORTS

I. Management company passport

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

The UCITS Directive currently provides for two separate passports. The passport for the management company, as a service provider, is new – since it was introduced by the amending Directive 2001/107/EC. At the previous stage, the UCITS legal framework (based on the Directive 85/611/EEC) only provided for the product passport (i.e. concerning the UCITS fund). In CESR's view, these passports are issued separately from each other.

Q: Do you agree with this proposal? If not, please state your reasons.

2. Does a management company which wants to distribute in a host Member State UCITS' units, without establishment of a branch only need a product passport or is a management company passport necessary in addition?

This question has shown to be extremely complex. CESR members share the view, that the purpose of the creation of the management company passport in addition to the product passport was not to increase administrative burdens related to cross-border marketing of investment funds. At the same time, any practical arrangements agreed within CESR must respect the requirements set out in the amending UCITS Directives. Two possible approaches have emerged from the discussion. CESR therefore proposes two options for the consultation to collect views from respondents on this issue and especially how to take into account the



rationale behind both of the options (legal framework/ avoidance of administrative burdens) to have a balanced solution.

OPTIONS

A) Both the management company passport and the product passport are necessary according to article 6b, paragraph 5 of the amended UCITS Directive: "A management company shall also be subject to the notification procedure laid down in this Article in cases where it entrusts a third party with the marketing of the units in a host Member State."

However, both passports (for the product and for the management company) are needed only in case that a management company wishes to market, for the first time, the units of its funds in a given Member State (accordingly Art. 6 b, paragraph 1).

Therefore, a management company that was already marketing its funds in another Member State before 13th February 2004, would only need the product passport for that Member State (recognition of a grandfathering regime for such situations).

B) Only a product passport and no management company passport should be required if a management company only wishes to distribute UCITS managed by itself in a host Member State. There would be little point in having a separate passport for a UCITS and one for a management company if the management company passport must always be used in addition to the product passport in these cases. Under this option, all the information foreseen for notification of the management company could be considered to be fully encompassed in the registration procedure for the product. This option requires full confidence that the arrangements put in place would effectively ensure compliance of the management company with the UCITS Directive (subject to the transitional arrangements previously mentioned).

Q: What is your view regarding this issue, and especially on how to take into account the rationale behind both of the options (legal framework/ avoidance of administrative burdens) to have a balanced solution? To what extent do you consider the distribution of third party funds by a third party as relevant in practical/ economic terms (Please consider also question D I 8)?

3. Does a management company which wants to distribute in a host Member State UCITS' units through an own branch need both the product and the management company passport?

Both the so-called product passport and the so-called management company passport are needed for this activity in CESR's view.

The product passport is necessary for each UCITS distributed in a host Member State. According to Art. 46 of the UCITS Directive, if a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first inform the competent authorities of that other Member State accordingly. A notification procedure is necessary for each of the UCITS to be distributed in the host Member State.

The management company passport is required for the setting up of a branch in a host Member State, even if the sole activity of the branch may be to distribute the units of a UCITS managed by the management company. According to Art. 6a of the UCITS Directive any management company wishing to establish a branch within the territory of another Member State shall



notify the competent authorities of its home Member State. Only one notification procedure is necessary for each host State where services shall be offered.

Q: Do you agree with this proposal? If not, please state your reasons.

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

When a management company wants to provide in a host Member State only the services listed in Art. 5 paragraph 3 of the UCITS Directive (individual portfolio management, investment advice, safekeeping and administration), in CESR's view only the so-called management company passport is needed, i.e. articles 6, 6a and 6b of the UCITS Directive apply.

Q: Do you agree with this proposal? If not, please state your reasons.

5. Does a management company which wishes to combine the provision of the so-called ISD services in a host Member State with the cross-border distribution of UCITS' units, either directly, by itself, or indirectly, entrusting a third party, need both the product and the management company passport?

Both the so-called product passport and the so-called management company passport are needed for this activity in CESR's view.

The product passport is necessary for each UCITS distributed in a host Member State. According to Art. 46 of the UCITS Directive, if a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first inform the competent authorities of that other Member State accordingly. A notification procedure is necessary for each of the UCITS to be distributed in the host Member State.

When a management company wants to provide in a host Member State the services listed in Art. 5 paragraph 3 of the UCITS Directive (individual portfolio management, investment advice, safekeeping and administration), the so-called management company passport is needed, i.e. articles 6, 6a and 6b of the UCITS Directive apply.

Q: Do you agree with this proposal? If not, please state your reasons.

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

CESR members agree that they will only permit an open ended investment company to designate a management company in the same EU jurisdiction.

Almost all CESR members consider that according to Article 3 of the UCITS Directive, and taking into account the interaction between this Article, recital 7 of the amendment 2001/107/EC of the UCITS Directive and the combined reading of Article 5g and Annex II, the legislator's intention does not seem to have been to impose to UCITS home Member States to recognise the possibility for a foreign management company to set up an investment company in their own constituency.



CESR members also agree that the European Commission should consider an amendment that would clarify the position on this issue under the UCITS Directive.

Q: Do you agree with this proposal? If not, please state your reasons.

7. Does a management company which manages based on an outsourcing mandate the portfolio of an open ended investment company or of an investment fund domiciled in another EU jurisdiction need a management company passport and if yes, for individual or for collective portfolio management?

The insourcing management company is mandated bilaterally by the outsourcing company which remains responsible to the investors; there does not arise a contractual relationship between the insourcing management company and the investors. Thus a direct responsibility to the investors does not exist.

Consequently, in CESR's view a bilateral delegation agreement subject to the safeguards of Article 5g should be sufficient. Where a UCITS appoints a management company in another Member State to carry out investment management activities, the management company is not carrying out services in the State of the UCITS. Therefore it is not required to have a passport. Because investment management can only be delegated by the UCITS to an entity which is subject to prudential supervision, an investment manager established in the EU must however be authorised under the ISD or UCITS Directive. Similarly, third country investment managers providing services to UCITS are not providing this service under an EU passport, but they must be subject to prudential supervision according to Article 5g of the UCITS Directive.

Q: Do you agree with this proposal? If not, please state your reasons.

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

In CESR's view the distribution of third party funds is included in the scope of activity of a management company. In CESR's view, it needs to be considered that "marketing" is mentioned in the non-exhaustive Annex II of the UCITS Directive without any further specification or limitation regarding the issue of the distribution of third party funds. In addition, the distribution of UCITS' units in practical terms is linked to the safekeeping and administration which is not limited to those managed by the management company. Before a customer mandates a management company for the safekeeping of units, these units are distributed which is natural to be conducted by the management company itself.

Q: Do you agree with this view? Do you consider the distribution of third party funds through a management company on a cross-border basis relevant in practical/ economic terms? If not, please state your reasons.

9. Can a management company benefit from the management company passport (in particular for its ISD services) whilst it is no longer, at a given moment, managing harmonised UCITS or whilst it is not yet managing harmonised UCITS but preparing an



application procedure for approval of a harmonised UCITS or whilst it does not manage harmonised UCITS funds as designated management company in its home Member State?

To avail of the management company passport, a management company must manage at least one harmonised UCITS as the designated management company. It is not sufficient that a management company has been appointed solely as the investment manager to a UCITS (by delegation) - it must be the designated manager.

Article 5d(1) of the UCITS Directive requires a management company to comply "*at all times with the conditions laid down in Article 5 and Article 5a(1) and (2) of this Directive*", hence the concerned management company has to comply with Article 5(2): management of UCITS – since paragraph 2 refers to the management of non-UCITS as "additional" activity.

In conformity with article 5a(5) of the UCITS Directive a management company has, however, 12 months from the date of its authorisation to become the designated management company of a harmonised UCITS. During this time it can already use its management company passport to provide e.g. the services covered in Article 5 (3) of the UCITS Directive (individual portfolio management, investment advice, safekeeping and administration). In the event that the management company ceases to be the designated management company of a harmonised UCITS it will lose its authorisation and passport if it is not appointed to manage another UCITS as the designated management company within 6 months.

Q: Do you agree with this proposal? If not, please state your reasons.

II. Product passport

1. Do those non-UCITS funds which pursuant to the national provisions of the host Member State have already been entitled to distribute their units in the host State and which now adapt to UCITS III lose their former permission?

Both the former permission based on the national provisions of the host Member State as well as the new product passport of the fund based on the amended UCITS Directive allow the marketing of the units of the investment fund in question in the host State. Therefore the marketing of the fund can in CESR's view continue uninterrupted in the host Member State.

However, a notification of this change in the authorised status of the investment fund to a UCITS must be provided for the competent host Member State authorities according to Art. 46 of the UCITS Directive. The two month period of Art. 46 paragraph 2 of the UCITS Directive does not apply, so even before the expiry of the two month period reserved for the host State competent authorities to handle the notification, the distribution of fund units can continue on the basis of the former permission.

Q: Do you agree with this proposal? If not, please state your reasons.



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

The UCITS passport will in CESR's view continue to be effective i.e. the foreign fund may proceed distributing its units in the host Member State without interruption. However, if as a consequence of the new registration the fund rules and prospectus of the UCITS are amended, such new documents must be delivered to the host Member States authorities as an update accompanied by an attestation by the home Member State authority that the conditions imposed by the Directive are fulfilled.

Q: Do you agree with this proposal? If not, please state your reasons.

POSSIBLE OTHER ISSUES/ QUESTIONS

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



ANNEXES TO THE CONSULTATION PAPER



ANNEX A

Call for Evidence – summary of the main points made

CESR published a Call for Evidence on 9 June 2004 (Ref: CESR/04-267b) inviting all interested parties to submit views as to what CESR should consider in its future work on investment management generally but especially welcoming comments related to the priorities identified as urgent, and in particular in relation to the application of the transitional provisions of the amending UCITS Directives. CESR received 13 submissions and these can be viewed on CESR's website.

The following is a summary of the principal recurrent issues which emerged in the responses to the Call for Evidence and CESR's reactions to them. A full list of those who responded can be found at the end of this annex.

The respondents largely agreed that CESR's priorities for investment management are appropriate, and that the highest priority for the Expert Group on Investment Management should be the application of the transitional provisions of the amended UCITS Directive. These transition issues should be addressed as soon as possible. It was hoped that in the interest of promoting a single market pragmatic solutions could be found very urgently. Many respondents presented the wish that the guidelines for supervisors on the transitional provisions could be adopted by CESR even before March 2005, which is the deadline indicated in the mandate of the Expert Group (Ref. CESR/04-160). Few respondents had the opposite view saying that in all the Member States there can not be seen a need for a specific guidance on the transitional provisions.

Regarding the transitional provisions in many responses it was urged to get quick clarification of the situation especially relating to the simplified prospectus. Some respondents were of the view that the importance of the simplified prospectus is not sufficiently highlighted in the mandate. In detailed level as an open issue especially requiring clarification was raised the question whether the so-called UCITS I grandfathered umbrella funds (which are operating under the rules of the UCITS Directive before its amendment 2001/108/EC) can set up new UCITS I sub-funds that can be marketed cross-border after the implementation deadline of 13th February 2004.

In addition the respondents agreed that the work on clarification of some central definitions of the UCITS Directive relating to e.g. index funds and derivatives needs to be done in the short term. In fact it was suggested by some that the areas of work mentioned in the mandate of the Expert Group to be completed by the end of 2005 should not even be initiated until CESR's work on these urgent priority areas is resolved.

The need to have consistency between the application of the UCITS Directive and the MiFiD Directive was also raised. Some respondents were of the view that the results to be reached on the Level 2 mandate under the MiFiD should be thoroughly checked as to whether there is need for special guidelines on Level 3 in the area on investment management, especially regarding conduct of business rules and outsourcing.

Simplification of the registration procedure of UCITS was an initiative unanimously supported by the industry. The registration process can be very expensive and time consuming in their experience. However, some respondents felt the timetable suggested in the mandate (by the end of 2005) does not reflect the commercial significance of improving this aspect of the UCITS regulatory framework and suggested that this work would be prioritised straight away. CESR was also urged to pay attention to avoid the introduction of the new UCITS management company passport and any ensuing registration duties annulling the efficiency gains that may be achieved in the fund registration area.



Regarding the intention of CESR to develop a common approach to non-harmonised funds some respondents suggested that working to achieve a common approach to the private placement rules and standardising them would be an approach more favoured by them instead of a product-focused approach, especially in regard to institutional and sophisticated investors.

As a general remark CESR was also asked to take full account of the fact that the European investment management industry is engaged in a worldwide competition and for these reasons needs a stable, clear and cost-efficient regulatory environment.

Regarding issues not included in the timetabled working programme of the Expert Group especially fund mergers and pooling techniques were mentioned as areas of work that CESR should also pay attention to.

CESR has tried to find practical answers to the open issues of the transitional provisions of the amending UCITS Directives as quickly as possible to meet the wishes of the respondents. The time reserved for the consultation has also been shortened from the normal three months period of CESR consultations. This is because the urgent nature of these issues. The open issues are widely known among the European asset management industry, so CESR believed it was possible to shorten the consultation period.

The comments of respondents regarding the further work of CESR in the field of investment management and the working programme indicated will be taken into consideration when the work on the relevant parts of the working programme is being started by the Expert Group on Investment Management.

Respondents to the Call for Evidence

Banking

European Savings Banks Group
Italian Private Equity and Venture Capital Association
Zentraler Kreditausschuss

Insurance, pension & asset management

Association Française de la gestion financière
Barclays Bank PLC
Bundesverband Investment und Asset Management
FEFSI
Investment Company Institute
Investment Management Association
M&G Limited

Investment Services

British Venture Capital Association
Danish Bankers Association

Regulated markets, exchanges & trading systems

Euronext



ANNEX B

Mandate for the Expert Group on Investment Management

(Ref. CESR/04-160)

1 Introduction

The 11th Meeting of CESR in Dublin, 11 and 12 December 2003, decided to establish a provisional Expert Group on Investment Management (Ref. CESR/03-411). It was also decided that after establishment of the Expert Group, the Group would work on drawing up its specific mandate based upon the Consultation Paper “The role of CESR in the regulation and supervision of UCITS and asset management activities in the EU” (Ref. CESR/03-378b) and the comments arising from the consultation.

It was decided, that the Expert Group should consider in particular the following areas and priorities: promotion of single market; supervisory convergence; harmonised implementation of the UCITS Directives; simplification of registration procedure for UCITS; harmonisation of marketing rules for UCITS; consistency with other EU Directives (e.g. ISD); common approach to non-harmonised funds; fund mergers and pooling techniques.

2 Areas of work with urgent priority: transitional provisions and clarification of definitions of the UCITS Directives

The deadline for the Member States to implement the amending UCITS Directives (2001/107/EC and 2001/108/EC) was 13 February 2004. To get the single market on investment funds fully functional the open issues relating to these Directives have to be dealt with as a matter of urgency. The short-term priority of the Expert Group will be to work on the two central groups of issues relating to the harmonised implementation of the UCITS Directives: the application of the transitional provisions of the amending Directives and the clarification of some central definitions in the Directives.

2.1 Transitional provisions

The term “transitional provisions” refers to all practical issues which are faced by those management companies and UCITS that have not yet complied with the amending UCITS Directives (2001/107/EC and 2001/108/EC). Thus, the following issues could be considered as “transitional”:

- Issues related to the marketing of funds and the simplified prospectus (e.g. in case the Home Country regulator has not yet issued detailed guidance on the simplified prospectus);
- Issues related to the scope of permissible activities of grandfathered management companies (e.g. with respect to the launching of “passportable” UCITS III funds);
- Issues related to UCITS launched after February 2002 which benefit from a “grace period” (e.g. smooth convergence to the new UCITS regime, coordinated approach to a transitional treatment by statements of conformity etc.); similar issues related to grandfathered UCITS I umbrella funds which have launched further sub-funds after February 2002.



Practical questions related to the scope of the European passport and problems resulting from the relationship between the management company's passport and the fund's passport need to be clarified.

The Group will prepare draft guidelines for supervisors for the transitional period to be accepted by the CESR meeting at the latest in March 2005. Being aware of the urgency to get practical guidance for the supervisors to ensure the proper functioning of the markets, the Group will prepare such guidance even earlier, where possible.

2.2 Clarification of definitions

The need to clarify some definitions of the UCITS Directives relates mainly to the eligible assets of UCITS (i.e. in which financial instruments the UCITS can invest their assets). The main open issues might include investments of UCITS to money market instruments, structured securities and non-harmonized funds and also questions related to closed-end funds.

The work of the Expert Group relating to the clarification of definitions will be based on a Level 2 mandate from the European Commission on the basis of Art. 53a of the UCITS Directive.

3 Areas of work by the end of 2005

3.1 Simplification of the registration procedure for UCITS

The requirements for fund registration (e.g. which documents have to be presented) differ from market to market. Following the work done regarding transitional provisions, which will already affect significantly the registration process, the Expert Group will conduct additional work on this area to develop consistent standards for the registration requirements foreseen by the UCITS Directives to streamline the registration process.

3.2 Conduct of business rules

The Group will at first contribute to the harmonised implementation of conduct of business rules in the field of collective investment management ensuring consistency with the Level 2 mandate under the FIM Directive by giving input to other CESR groups.

Secondly the group will consider the existing CESR Standards for Investor Protection and the work done on the Level 2 mandate under the FIM Directive in order to check, whether it is necessary to develop specific rules on Level 3 for collective investment management (this might include establishing rules i.e. on issues like ensuring consistency with the investment policy described in the prospectus, and rules concerning churning and soft-commissions).

3.3 Outsourcing

The Group will at first contribute to the work being done on outsourcing in other CESR groups on the Level 2 mandate under the FIM Directive to ensure consistency between the fields of collective investment management and financial instruments in general.

Secondly the Group will consider whether it is necessary to develop specific rules on Level 3 for collective investment management on outsourcing taking into account the work done on the Level 2 mandate under the FIM Directive. The Group has initially indicated a need to clarify especially what functions of management companies can be delegated and to which kind of entities, also taking into account the delegation of functions to third country service providers and the safeguards included in Article 5g of the UCITS Directive, in particular, on the delegation of the



investment management function. Also the term “letter box entity” used in that same Article should be clarified.

3.4 Common approach to non-harmonized funds

Non-harmonised funds are outside the scope of the UCITS Directive and therefore regulated and supervised on a national basis. This prevents these funds from taking advantage of single EU-wide marketplace.

The Expert Group will first make an inventory on the non-harmonised collective investment schemes which are marketed throughout Europe. On the basis of the inventory, which will prepare the ground for a common view of certain issues such as prudential rules or rules on adequate disclosure, the Group will draft a common approach to non-harmonized funds (hedge funds, real estate funds, private equity funds, also in relation to the specificities of closed-end funds).

4 Areas of work by early 2006

4.1 Consistency with other EU Directives

The Group will work on the clarification of the interaction between the several relevant EU Directives (FIM, E-Commerce, Distance selling) to facilitate cross border marketing of UCITS. The Group will prepare draft guidelines for supervisors by early 2006.

4.2 Convergence of supervisory systems

It is considered necessary that CESR members develop a common view of the central risks related to the investment fund activity, risks that may cause undesirable effects for investors. To further this common view the Expert Group will explore differences and similarities in the supervisory approaches to key areas of investor protection with the following objectives:

- to make enforcement responses adaptable to various situations (e.g. on-site inspections, requests of further information of fund managers, interview of internal auditors)
- to prioritize supervisory resources in order to carry out focused and cost-effective enforcement actions
- to update regulatory practices including reporting requirements and supervisory techniques on the basis of a common assessment of product and process innovations in the European market.

The common view should lead to more efficient and effective communication between regulators and also to a more consistent regulatory response to issues that may arise.

5 Issues for which the Group will give continuous input to the work done by other CESR groups

5.1 Accounting rules for investment funds

The Group will input the work already started by CESR-FIN on the application of IFRS to UCITS.

5.2 Conduct of business rules and outsourcing

As described under items 3.2 and 3.3, the Expert Group on Investment Management will contribute to the work being done in other CESR groups on the Level 2 mandates under the FIM



Directive in the areas of conduct of business rules and outsourcing to ensure consistency regarding collective investment management.

6 Possible requests of assistance by the European Commission

The European Commission has on 30 March 2004 adopted the Communication “Regulation of UCITS depositaries in the Member States: review and possible developments”, COM(2004) 207 final. It is indicated in this Communication, that the Commission may ask CESR to work on two sets of standards: 1) standards of investor information and conflicts of interest, 2) standards on the depositary’s missions, resources and liability.

The Commission has on 27 April 2004 adopted two Recommendations on UCITS: the Commission Recommendation on the use of financial derivative instruments for undertakings for collective investment in transferable securities (UCITS) and the Commission Recommendation on some contents of the simplified prospectus as provided for in Schedule C of Annex I to Council Directive 85/611/EEC. Both these recommendations include a call for further work to be done by the regulators on some central issues e.g. risk-measurement methodologies.

Further work on these issues and its timetable is related to the legislative agenda of the new Commission to be established autumn 2004.