



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/04-434b

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

**FEBRUARY 2005**



## Foreword

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 uncertainty.

CESR set up an Expert Group on Investment Management in April 2004. 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).

After having consulted the European investment management industry and in full consistency with the work programme established by the European Commission and the European Securities Committee, CESR decided that the uncertainties in the practical implementation of the Directive had to be resolved as a matter of urgency, and that the Expert Group on Investment Management should work to solve these issues with high priority.

CESR's work regarding the transitional provisions of the amending UCITS Directives is on the Level 3 of the Lamfalussy process, i.e. co-operation among regulators. The content of the 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.

The issues related to the European passports (of the management company and of the fund) included in part B of these guidelines will be complemented by the work that CESR is about to carry out on simplification of registration procedure for UCITS, aiming at reaching convergence on the registration procedures currently existing in the different jurisdictions within the EU, in accordance with the Directive 85/611/EEC as amended by the Directives 2001/107/EC and 2001/108/EC.



CESR's guidelines do not constitute European Union legislation. These guidelines have been developed in close co-operation with the Commission services and they will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

The present guidelines were originally released on 21th October 2004 for public consultation. The period for comments expired on 8th of December 2004, after a public hearing was held in the premises of CESR in Paris on 18th of November 2004.

During the consultation period 22 letters were sent by organizations mainly belonging to the European investment management industry. All comment letters received have been published on the CESR website.

A feedback statement (Ref. CESR/04-701) has been published along with the present final text of the guidelines, explaining CESR's position on the major comments expressed by respondents to the public consultation. The present guidelines should be read in the context of the feedback statement.



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## A. QUESTIONS ON THE TRANSITIONAL TREATMENT

### I. UCITS I management companies

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

Art. 2 (3) of Directive 2001/108/EC provides for management companies authorised before 13<sup>th</sup> February 2004 the possibility to continue their activity until 13<sup>th</sup> 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 agree that a grandfathered UCITS I management company is allowed to launch “passportable” UCITS III funds only **until April 30<sup>th</sup>, 2006**. By this deadline the conversion of the management company to UCITS III must be approved by the competent home State authority. **To be able to avail of this possibility, a grandfathered UCITS I management company has in any case to comply with the requirements of Article 21 of the UCITS Directive as amended by Directive 2001/108/EC concerning an appropriate risk-management process.** This has to be confirmed by a written attestation (see the Annex for the model 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 30<sup>th</sup>, 2006**.

The deadline of 30<sup>th</sup> April 2006 applies whether the management company has launched UCITS III funds before the issue of these guidelines or will do it later. It is also applied to UCITS I management companies, the UCITS I funds managed by which have been/are converted to UCITS III.

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

2. Can a grandfathered management company continue to launch “passportable” UCITS I funds after 13<sup>th</sup> 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 13<sup>th</sup> 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 13<sup>th</sup> February 2004; the UCITS I funds must have been authorised before 13<sup>th</sup> February 2004.



## II. UCITS I funds (single fund structure)

1. Can a UCITS I fund authorised between 13<sup>th</sup> February 2002 and 13<sup>th</sup> February 2004 and wishing to be marketed in another Member State obtain a UCITS I – product passport and benefit from a grandfathering period until 13<sup>th</sup> 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 13<sup>th</sup> February 2002 and 13<sup>th</sup> February 2004. Art. 2 of the Directive 2001/108/EC provides for a grandfathering period only for UCITS funds existing on 13<sup>th</sup> 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 13<sup>th</sup> February 2002 from a practical point of view: They were given time to prepare the transposition until 13<sup>th</sup> 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. 13<sup>th</sup> 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<sup>st</sup>, 2005** for UCITS I funds authorised between 13<sup>th</sup> February 2002 and 13<sup>th</sup> February 2004 to be converted to the regime of the amended UCITS Directive. By this deadline the conversion must be approved by the competent home State authority. Until this deadline, these funds 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.

## 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<sup>st</sup>, 2005** for UCITS I sub-funds to be launched in a grandfathered UCITS I umbrella fund. By that date, the overall UCITS I umbrella must be converted to UCITS III, i.e. the conversion must be approved by the competent home State authority. This applies whether the umbrella fund was itself authorised before 13<sup>th</sup> February 2002 or between 13<sup>th</sup> February 2002 and 13<sup>th</sup> 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 accept those UCITS I – sub-fund-passports.



Grandfathered UCITS I umbrella funds, which have not launched additional sub-funds since 13<sup>th</sup> February 2002, have until 13<sup>th</sup> February 2007 to convert to the UCITS III.

The deadline of December 31st, 2005 does not concern the closure of a sub-fund, nor the launch of new share classes in sub-funds. Therefore grandfathered UCITS I umbrella funds, which existed on 13<sup>th</sup> February 2002, can continue to launch new share classes in sub-funds, which already existed on 13<sup>th</sup> February 2002, until the end of the transitory period, 13<sup>th</sup> February 2007.

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 UCITS Directive 85/611/EEC or to that of the amending Directive 2001/108/EC. The combination of sub-funds of both regimes under one umbrella is not permissible.

In the case of corporate funds, this derives clearly from the basic factual requirement that the umbrella as a whole constitutes 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.

#### IV. Simplified prospectus

1. Must a 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/ umbrella 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 2004/384/EC on some contents of the simplified prospectus was published only on 30<sup>th</sup> April 2004, asking Member States to inform the Commission, in so far as possible, by 30<sup>th</sup> 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 28<sup>th</sup> February 2005.

Therefore, in CESR’s view UCITS I funds (launched before 13th February 2004) and umbrella funds, also including the sub-funds launched after 13th February 2004 in a grandfathered UCITS I umbrella fund as explained under point A III 1, should have available a simplified prospectus as soon as possible and **no later than 30<sup>th</sup> 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.

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.

## **B. 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.

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?

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. 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. 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 previously mentioned).

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.

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.

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.

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

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



CESR Members also agree to propose the European Commission to include the issue of the scope of the management companies' passport into the UCITS-review considering an amendment to the Directive that would clarify the position on this issue.

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.

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.

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.

## 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 Article 46 of the UCITS Directive. The two month period of Article 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.

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, as required by Article 46 of the UCITS Directive, that the conditions imposed by the Directive are fulfilled.



## ANNEX

### MODEL ATTESTATION

*(...the name of the authority in question...)* is the competent authority in *(...the home Member State in question...)* designated to carry out the duties provided for in the Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended by the Directives 2001/107/EC and 2001/108/EC, as required by Article 49, first paragraph of the amended Directive.

*(...the name of the authority in question...)* is content, that *(...the name of the management company in question...)*, which is the management company for *(...name of the UCITS in question...)*, has in place an appropriate risk-management process as required by Article 21, paragraph 1, of the amended Directive.

Date

*(...the name of the authority in question...)*

*(...signature...)*