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

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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 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.
- 3 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 a complete notification 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.
- 4 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. Due to two decades of divergent national practice in the enforcement of provisions of UCITS law, 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. 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 may hinder speedy alignment on a single approach to the notification procedure.

- 5 The Group considered that the current system should be replaced by a simple notification procedure. As a first step, the Group recommended that CESR should develop consistent standards for the notification requirements foreseen by the UCITS Directive to streamline the notification process. The importance of progress in this respect has been underlined by the Commission's Green Paper on investment funds.
- 6 The mandate approved by CESR to the CESR Expert Group on Investment Management (Ref: CESR/04-160) was published on 9<sup>th</sup> 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 14<sup>th</sup> July 2005.
- 7 CESR published a Call for Evidence on 9<sup>th</sup> 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 ([www.cesr-eu.org](http://www.cesr-eu.org)). 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 requiring the management company passport<sup>1</sup> and any ensuing registration duties annulling the efficiency gains that may be achieved in the fund registration area.
- 8 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**

- 9 This document presents guidelines for a common approach to the administration, by host authorities, of the notification procedures set out in Art. 46 of the Directive. The guidelines seek to bring greater simplicity, transparency and certainty to the notification process. They aim to avoid uncertainty and prolongation of notification procedures and strive for speedier processing. 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 guidelines 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.
- 10 The main objectives of these guidelines can be summarised as follows:

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<sup>1</sup> Cf. footnote 1 of Annex I.



- 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.

- 11 The guidelines do not constitute European Union legislation. CESR Members will introduce these guidelines in their day-to-day regulatory practices on a voluntary basis. However, there is a general commitment by all authorities to accelerate the processing of notifications wherever possible. It is stressed that any CESR's guideline 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.
- 12 CESR's guidelines will not prejudice, in any case, the role of the Commission as guardian of the Treaties.
- 13 The progress on the implementation of these guidelines will be subject to review by CESR. CESR commits to a review of the guidelines within two years. That review should consider:
- whether the authorities have implemented the guidelines; the two years period is without prejudice to para. 3 of the Preamble;
  - whether UCITS passportability has objectively improved, including in respect to the length of time it takes to complete the notification process; and
  - what steps can be taken to improve further their freedom of movement.

### **Procedure**

- 14 Preparation of these guidelines has been undertaken by the Expert Group on Investment Management. The Group has been 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 was assisted by the Consultative Working Group on Investment Management composed of 16 market practitioners and consumers' representatives.

- 15 The draft guidelines have been subject to two public consultations each including an open hearing. The first consultation occurred from October 2005 to January 2006, a second one was held in May 2006. Both consultations aimed at receiving responses of all interested parties to the draft guidelines' content and to the specific questions included in the consultation 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.
- 16 CESR received 29 responses to the first consultation and 23 to the second one, mainly from asset managers and their associations. Comments on all aspects of the proposed CESR guidelines as well as submitted drafting proposals were taken into consideration while finalizing the guidelines to their present shape.
- 17 The responses to both consultations are published on the CESR website unless a responder has requested otherwise. Furthermore, the responses are summarized in a separate feedback statement to get an overview on all statements which were taken into consideration to improve the guidelines; the feedback statement is published on the CESR website as well. Therefore, responders' comments may primarily be seen in the feedback statement and comments are only displayed in the guidelines where it is required for transparency purposes.
- 18 **Major improvements**
- Language regime of the notification letter: Many contributors to CESR's consultations 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 consultations 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.
  - **Shortening of the two-month period:** 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.
  - **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 practices and reduce costs for the applicants 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 should include an English version.



- **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.



## THE GUIDELINES

### Preamble

- 1 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 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 11 of the Introduction.

Where the guidelines refer to an empowerment of third persons representing the notifying UCITS, CESR points out that not all Member States require the submission of the written mandate or a copy of it.

#### 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 international finance 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.<sup>1</sup>

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.
- 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, cannot 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

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<sup>1</sup> Due to inter alia a complicated interaction between investment and administrative law/regulation in several Member States CESR Members cannot commit to amend national legal/regulatory provisions.

- 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.

If there is no communication by the host State authority to the UCITS after two months of the delivery of the complete notification to this authority, the UCITS may upon the expiry of the two-month period start to market its units in that host State.

### **Explanatory text**

- 12 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 proposed throughout the consultations that industry members expect the two month period to automatically start upon the day that the notification is delivered. However, CESR Member States agree that the two month period does not start 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 Throughout the consultation it has also been suggested to compress the one-month period for the completeness check to a period of one week or at least two weeks at the maximum. CESR has considered this proposal. However, a period of one month at the maximum for the completeness check allows host Member States authorities to undertake not only a purely formal check of the physical presence of the necessary documentation but also a preliminary substantial check of the information and marketing arrangements. This is already administrative practice in some Member States and gives an appropriate timeframe to perform relevant checks in order to be able to shorten the two-month period (cf.

Guideline 5). Respondents to the consultation should not take this to mean that it is possible to shorten the two-month period in all Member States.

- 15 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.
- 16 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’.

## **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. In this case 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.

## **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-month 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-month period will not be affected unless a reasoned decision is issued.

In the case where the host States authority's endeavour 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-month 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**

- 17 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.
- 18 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 consultations. CESR Members have therefore agreed on a common approach regarding the use of the reasoned decision in practice.
- 19 The approach 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 procedure 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.

- 20 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.
- 21 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.
- 22 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.
- 23 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.
- 24 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.



## 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 notifying UCITS or a third person empowered by written mandate to act on behalf of the notifying UCITS 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

- 25 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.
- 26 To simplify the practices and reduce costs for the applicants in this respect, CESR has agreed to rely on self-certification by the notifying UCITS as suggested by the consultation respondents.
- 27 CESR Members have also agreed not to require the use of the Hague-Apostille for certification of documents.

## 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**

- 28 Many contributors to the consultations of the 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.
- 29 Correct, sufficient, and unambiguous information for the investor is one of the core elements of investor protection provided for by the Directive.
- 30 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. CESR recommends that Members do not require that translations are sworn as true by a court, notary or similar public agent.

#### **IV. Umbrella funds**

##### **Explanatory text**

- 31 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**

- 32 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.
- 33 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.
- 34 A harmonized definition of the terms “marketing” and “proposes to market” has not been dealt with so far in CESR’s work, since 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 to be marketed, CESR recommends having one full prospectus. If the notifying UCITS provides a separate full prospectus for each sub-fund, the UCITS' authorised directors or a third person empowered by written mandate to act on behalf of the notifying UCITS must self-certify that the information on the marketing arrangements in the host State are the same in each prospectus or indicate where they are different.

#### **Explanatory text**

35

The large majority of respondents to the consultations 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 31, 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.

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 to be marketed it is recommended that one full prospectus comprising all sub-funds should be submitted, since otherwise it demands lot of work by the host authority to go through all these prospectuses if a full prospectus is submitted for each sub fund.

If new share classes are added to the sub-funds of an umbrella, the UCITS shall notify the host State authority the new share classes added to the sub-funds of an umbrella disclosing the objective criteria (e.g. the amount of subscription, fees/expenses) on which they are based and

the two-months period shall not apply, i.e. the UCITS may begin marketing the share classes immediately provided that other reasons which prohibit marketing do not apply.

### **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 the UCITS' authorised directors or a third person empowered by written mandate to act on behalf of the notifying UCITS self-certify that the copy is a true copy of the valid original in their possession and that it is the latest version issued by the home State authority. The original attestation should include an English version to be provided by the UCITS. In those cases where the home Member State authority and the host Member State authority have the same official language/s, the English version of the attestation will not be required.
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; To simplify the processing by the host authority of the notification of umbrella funds with a large number of sub-funds to be marketed, CESR recommends to have one annual and half-yearly report dealing with all sub-funds of an umbrella fund. If the notifying UCITS provides a separate annual and half-yearly report for each sub-fund, the UCITS' authorised directors or a

third person empowered by written mandate to act on behalf of the notifying UCITS must self-certify that the information on the marketing arrangements, if any, in the host State are the same in each annual and half-yearly report or indicate where they are different.

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.

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 sub-funds, 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, sometimes certain documents can be helpful in order to streamline the notification process, for example, letters describing what changes have been made to the prospectus being filed can be an appropriate measure to streamline the notification procedure.

### **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) or the addition of new share classes, 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**

- 37 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; however this is without prejudice to the notification procedure for new sub-funds and to other information referred to in Annex I, Schedule A. No. 4 of the UCITS Directive.
- 38 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.
- 39 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.

**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**

- 40 This chapter deals with the provisions of national law which do not fall in the fields harmonised by the UCITS-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.
- 41 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.
- 42 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 fulfil 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.
- 43 According to these guidelines apart from Art. 44 and Art. 45 of the Directive the following issues are governed by national regulation and without prejudice to the commitments as outlined before in these Guidelines:
- 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.

## **ANNEXES TO THE CONSULTATION PAPER**



**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 *telex 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)<sup>1</sup> of the Directive,  
.....

<sup>1</sup> 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.



*(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)*

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 all sub-funds approved in the home 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 all sub-funds approved in the home 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)*





.....

.....

.....

.....

.....

.....

.....

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, fax 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 documents<sup>1</sup>:**

- 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 authorised directors or a third person empowered by written mandate to act on behalf of the UCITS that the copy is a true copy of the valid original in their possession and that it is the latest version issued by the home State authority
  
- 9    \_\_\_ The latest up-to-date fund rules or instruments of incorporation (they need not be submitted separately if they are included in the prospectus; the latter must be indicated by the notifying UCITS or a third person empowered by written mandate to act on behalf of the notifying UCITS).
  
- 10   \_\_\_ The latest up-to-date full and simplified prospectus
  
- 11   \_\_\_ The latest published annual report and any subsequent half-yearly report
  
- 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 or a third person empowered by written mandate to act on behalf of the UCITS 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.

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<sup>1</sup> 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.



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.

## 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, including whether translations are required to be sworn as true
- VI. Transitional provisions with respect to the General reservation under point 3



- VII. Documented evidence of fee payment
- VII. Conditions for ending marketing/ registration
- VIII. Other issues



## 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](http://www.bafin.de) | Für Anbieter | Investmentfonds/Hedgefonds | ausländische Investmentfonds

#### 2. UK

[www.fsa.gov.uk/pubs/other/cispr\\_02\\_eea.pdf](http://www.fsa.gov.uk/pubs/other/cispr_02_eea.pdf)