



EUROPEAN COMMISSION

Internal Market and Services DG

FINANCIAL SERVICES POLICY AND FINANCIAL MARKETS

Asset Management

## Exposure Draft

### Initial orientations for discussion on possible adjustments to the UCITS Directive

#### *1. Notification procedure*

***Important note:*** *This document is a working document of DG MARKT services which is published for discussion purposes only. It presents DG MARKT services preliminary reflections on possible future adjustments to the UCITS Directive. It does not necessarily reflect the views of the European Commission. The Commission retains full autonomy and discretion as regards the content of any subsequent legislative proposal.*

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## **1. Assessing the impacts of improvements to the notification procedure**

### **1.1. Background**

The UCITS Directive was the first to introduce a passport in the area of financial services. UCITS funds authorised in a Member State (home MS) could then be marketed in any other Member State (host MS). UCITS had only to inform beforehand their host MS authorities. The notification procedure (detailed in art. 46 of the Directive) was intended to allow simply for the verification by the host MS authorities of the UCITS marketing arrangements in its territory. However, it has often become a second re-authorisation of the fund (with host MS authorities checking fund documents and imposing additional requirements [to those provided for in the Directive] in order to complete the notification procedure<sup>1</sup>). As a result, the notification procedure is long and costly (a study in 2005 estimated the annual cost for the industry at €25 million for maintaining notification, in addition to some €20 million initial notification costs<sup>2</sup>). It also increases time to market of UCITS funds (to the benefit of competing products) without any obvious benefit for the investor.

The White Paper's Impact Assessment (IA) analysis concluded that a change of the Directive was unavoidable in order to address the identified inefficiencies. This change should concentrate in reducing the duration and costs of the procedure. The White Paper also considered that it was time to replace the notification procedure by a pure information exchange between authorities. The possibility to market its units in another MS, on the basis of its authorisation in its home MS, is a right of the UCITS. The host MS authorities just need to be informed thereof. It seems logical that it is the authorities responsible for authorising the UCITS the one in charge of transmitting that information. On the other hand, the host MS authorities remain competent outside the fields governed by the Directive.

The options presented in the next section describe which could be the main steps of a new notification procedure. In designing the options, the focus has been on streamlining the process. The main strategic choices, as put forward by the White Paper, are explained in the following box. The rationale behind other key choices is provided in section 1.6.

**Shorter delays:** A reduction of the time to market of UCITS is key. UCITS are competing closely with other financial products for investors' savings. Often competing products are subject to less strict information or investor protection requirements. Failure to rapidly launch new UCITS into the market will hinder the fund industry's ability to respond to evolving investors' needs and preferences. This may lead to a situation where investors are gradually directed towards products offering them lower levels of protection. Imposing shorter delays also seems feasible since already in the current version of the Directive the host regulator only needs to check the UCITS' marketing arrangements. (At present, the procedure is often used to check compliance of the fund with the Directive).

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<sup>1</sup> The fact that many MS see the notification as a re-authorisation procedure probably explains why in those MS the notification fees charged by the regulator are at the same level than authorisation fees (please see CRA's report on "Potential cost savings in a fully integrated European investment fund market", September 2006)

<sup>2</sup> "A harmonised, simplified approach to UCITS registration", EFAMA and IMA, April 2005.

**Direct communication between regulators:** This not only appears as the straightest way to increase the efficiency of the notification procedure but also aligns it with the procedure foreseen in other directives, such as the Prospectus Directive<sup>3</sup> and the MiFID<sup>4</sup>. Implications on the side of regulators should be limited since communication and information channels between regulators are already in place.

## **1.2. Option description**

### **Option 1: Reducing the period available to host MS authorities for checking marketing arrangements.**

*The procedure described in this option is based on the current notification procedure. Only changes are the regulator to regulator communication and the time reduction.*

- 1) An UCITS seeking to market its units in another MS informs its home authorities of its intention and sends them the notification documents (as per art. 46). The home MS authorities, after having checked the completeness of the notification file, transmit the file to the corresponding host MS authorities.
- 2) The host MS authorities have 2 weeks to check the marketing arrangements. Approval or refusal should be communicated to the fund promoter within those 2 weeks. The clock can be stopped only if those arrangements are not in line with national rules.
- 3) After 2 weeks, the UCITS can start to market its units in the host MS unless formal refusal has been provided.

#### *Pros*

- Significant time reduction (from 2 months to 2 weeks).
- If checks by the host MS authorities concentrate only on marketing arrangements, authorities' resources will be saved in many host MS (notification fees may then be lowered).
- Compliance with the applicable host Member State rules will be pre-checked. Lower risk for a fund promoter to violate these rules and to be subject to an infringement procedure.

#### *Cons*

- Risks that the 2 week checking limit would re-open the door to abuse of the 'stopping the clock' possibility.
- Host authorities may still have the 'temptation' to check fund compliance with UCITS rules.
- In case of non-compliance of marketing arrangements with national rules, using the UCITS home authorities as an interface may prove inefficient.
- (Small) risk that the home authorities will charge for this new notification service => more fees for the industry.

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<sup>3</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be offered to be published when securities are offered to the public or admitted to trading.

<sup>4</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

- Notification procedure still longer than for other investment products competing with UCITS.

**Option 2: Host regulator checks 'ex post' compliance with national rules.**

1) An UCITS seeking to market its units in another MS informs its home authorities of its intention and sends them the notification documents. The home MS authorities, after having checked the completeness of the notification file, transmit the file to the corresponding host MS authorities.

2) The UCITS can start marketing its units in the host MS 3 days after transmission of the documents. Home MS authorities shall inform the UCITS of the date of transmission.

3) Host MS authorities checks 'ex post' that marketing is conducted in accordance with national rules (e.g. ad hoc checks based on a sample of distributors).

*Pros*

- Quickest access to host country's market (from 2 months to 3 days).
- Host authorities will not have the possibility to delay the marketing of the UCITS' units on its territory.
- Host authorities will be able to adapt 'ex post' checks to its available resources.
- Host authorities notification fees should be zero.

*Cons*

- Fears that checks only 'ex post' will reduce investor protection (linked to the uncertainty about UCITS compliance with national rules when entering the host market).
- Risk that the home authorities will charge for this new notification service => more fees for the industry.
- Potential risk of higher costs for the distributor (greater responsibilities).

### **1.3. Impacts analysis**<sup>5</sup>

*Comment: From the administrative costs point of view, as mentioned above, there exists the risk that the home MS regulator would charge a fee to compensate for its new role in the procedure (i.e. for checking file completeness and transmitting documents). The impact has been considered reduced<sup>6</sup>. The analysis below will thus not concentrate on this possibility, which is in any case shared by both options, but on the implications of their other main characteristics.*

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<sup>5</sup> This section should be seen as a preliminary analysis of the potential implications of the different options. A more detailed impact assessment will be carried out at a later stage.

<sup>6</sup> The additional burden for the home regulator should be limited (particularly if electronic filing and transmission is possible). If a fee is charged, it should be up to the industry to negotiate its level with its home regulator. In any case, this regulator has no interest in penalising the development of its own industry.

## **Option 1: Host MS regulator has two weeks for checking marketing arrangements**

### A. Economic benefits

The resulting situation would most probably differ very little from the current one. The need to check the marketing arrangements may be used to justify current notification fees. Additional resources may be needed on the side of the host regulator to comply with the two weeks deadline. (However, in many cases, this could just imply a reallocation of resources from those currently used to check fund's documents other than the 'marketing arrangements'.) From a practical point of view, if the host regulator requests clarifications or additional information on the marketing arrangements, using the home regulator as an interface may prove inefficient and delay the process. Hiring a local team of consultants to deal with the host regulator may still be required.

There also exists the risk that the two weeks deadline would be abused (and stopping the clock could become a normal practice in order to allow checking the other fund's documents).

Therefore, improvements vis-à-vis the current situation would be limited: economic savings would be small (if any) and uncertainty about UCITS time to market in host MS would remain. Entry barriers to foreign funds may in the medium-term protect the national fund industry. However, they will also restraint competition forces and therefore hinder national industry's incentives to pursue economic efficiency. In the longer-term, the resulting higher costs (or lower net performances) may have a dampening impact in other economic sectors.

### B. Investor protection impacts

Existing levels of investor protection will be maintained. The question is whether this would be done in a proportionate way. The conclusion of consultations carried out is that the current notification procedure rarely adds value from the investor protection point of view. The product is not only highly harmonised but also its home MS regulator has already checked its compliance with all the investor protection and other requirements of the Directive. Thus, the main concern should not be the product itself (as is often the case now) but how it is distributed to investors in the host MS. Besides, host MS have other instruments at their disposal to deal with potential abuses (such as misleading publicity, fraud..., including the harmonised rules applicable to distributors following MiFID<sup>7</sup>).

As regards the interest of investors, a burdensome notification procedure restricts the entry into national markets of foreign funds and, thus, reduces the choice available to investors and restrains healthy competition forces that could push prices down. The additional costs imposed by the procedure would be passed on to investors at the end of the day. It is also argued that UCITS long time-to-market limits industry's ability to exploit financial innovation possibilities and to respond timely to investors' needs. There is therefore the risk that faced with products both more costly and less adapted to their preferences; investors will turn to other similar ones (generally subject to less strict investor protection obligations). In that case, investor protection could be at risk.

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<sup>7</sup> MiFID introduces a series of operating conditions regulating the relationship between investment firms/credit institutions and their clients when they offer investment services.

## **Option 2: 'Ex post' checking of compliance with national rules**

### A. Economic benefits

As regards the industry's administrative burden, the current €20 million initial notification costs mentioned above (and even the annual €25 million notification maintenance fees) could be saved since there is no need anymore for the host regulator to check any document (or arrangements). From the point of view of the host regulators, the new procedure should not have a significant impact on their resources. Resources until now used to check marketing arrangements (and other UCITS related documents) will be freed for their new tasks (i.e. for 'ex post' checks)

It has been argued that this would imply more responsibilities (and possibly a higher burden) for distributors. Additional costs for those could then be passed back to the fund promoter through distribution agreements and, at the end of the day, to investors. Nevertheless, most of this additional burden would probably already have been incurred by the implementation of the MiFID.

The main economic benefits of this option would be varied. In the short-term, the new procedure will lead to an increase in the number of funds available for investors and, thus, allow a better match between demand and offer. The shorter time to market for funds will enhance their competitiveness vis-à-vis other investment products. In the long-term, the increase in the number of funds should foster competition and therefore put pressure on costs. A more efficient passport could also reduce the need to have national fund ranges. One cross-border fund could then pool assets from several MS, which would promote economies of scale and reduce costs (or increase returns) for investors.

### B. Investor protection impacts

The main concern regarding this option is that, in the absence of prior verification by the host regulator, the interest of its country's investors would be endangered. However, despite the fact that no pre-checking takes place, the UCITS needs to comply with all host country legislation relating to the fields not covered by the UCITS Directive. National rules on publicity, misleading information...would still apply. Besides, once MiFID is implemented, the risk of mis-selling or of conflict of interest would be reduced. Other on-going initiatives, such as the Simplified Prospectus planned repair work, would reinforce investors' ability to better compare funds and be more critical. Host regulators 'ex post' checks should also ensure a certain discipline. If a fund promoter does not comply with applicable local rules of a home Member State, it will risk infringement procedures and penalty payments.

It remains, however, the question of what the host MS authorities could do if the UCITS does not comply with the Directive rules. It may be necessary to reinforce the cooperation mechanism between national authorities to address this issue. This could include explicit reference to the possibility for the host regulator to address its concerns to the home regulator and for the latter one to act accordingly within reasonable time limits. Emergency powers for the host MS authorities (e.g. when the home MS authorities' measures prove inadequate or when they fail to act) may also need to be considered. Only then any potential detriment to investor protection could be avoided.

#### 1.4. Preferred option

In view of the above analysis, option 2 is the preferred one. It should maintain the same high level of investor protection ensured by the provisions of the current Directive while maximising the potential economic benefits of a streamlined notification procedure. The burden for the industry would be the lowest and competitiveness of funds vis-à-vis other (often less regulated products and therefore less protective of the interest of investors) would be improved. The below table provides a quick overview of the strengths and weaknesses of each option.

Reticence of some MS regulators to move in this direction could, however, need a revision of the cooperation mechanisms in the Directive as explained above. Chapter 6 on supervisory cooperation puts forward a series of possible adjustments which aim to enhance such cooperation and to eliminate any potential investor protection gaps.

#### 1.5. Impact table

<b>Option ↓</b>	<b>Impacts on →</b>	<b>Economic benefits</b>	<b>Investor protection</b>	<b>Preferred option</b>
2 weeks to check marketing arrangements		--	neutral / -	—
'ex post' checks		+++	neutral	X

#### 1.6. Rationale behind other key choices made in respect of possible adjustments to UCITS Directive

**Possibility of electronic filing and transmission:** Consideration of such a possibility has been motivated by the need to exploit the advantages that modern communication means offer in terms of efficiency. It also follows CESR's June 2006 recommendations and is in line with the practice in a number of MS. Limited or no adjustment costs linked to the use of this possibility are expected. Main advantages would be important time and resources reductions.

**Notification letter:** the proposed new procedure detailed in Section 2 (below), requires the submission of a new document, the notification letter. Potential additional costs should be limited since the notification letter could be based on the model that has already been developed by CESR<sup>8</sup>. On the other hand, the use of this document could facilitate communication exchanges.

**Translations under the responsibility of the UCITS:** This should have a positive impact on the resources invested by both the regulator and the industry. There would no longer be a need for the host regulator to check the translation of the documents prior to the UCITS being

<sup>8</sup> CESR's guidelines to simplify the notification procedure of UCITS (adopted in June 2006)

marketed on its territory. Sworn translations or translations by designated professionals (as is the case in certain Member States) would in principle no longer be required. This could significantly reduce costs. Investor protection would then be achieved through more proportionate means, e.g. 'ad hoc' checks once the product is available on the market instead of systematic prior verifications. (The possibility of being subject to ad hoc checks should impose a certain discipline on the industry side.)

**Translation regime:** The text suggested in section 2 introduces the possibility for most notification documents to be filed and transmitted in a 'language customary in the sphere of international finance'. Only the 'key investor information'<sup>9</sup> would have to be provided in the host MS' local language (or any other language accepted by the host MS authorities). This is based on the assumption that regulators are able to understand and communicate in a 'language customary in the sphere of international finance'. It also takes into account the fact that, very often, disclosure documents such as the (full) prospectus or the fund rules are not actually of much interest to investors. The possibility to use a 'language customary in the sphere of international finance' for a number of documents to be filed during the notification procedure would greatly reduce fund promoters' translation costs. Investor protection is considered to be preserved since the document really relevant for investors, the 'key investor information', is translated into their language. (Besides, the fund promoter is always free to choose to translate all the documents in the language of the host MS if considered appropriate.) These assumptions would however need to be tested with all stakeholders in the following months.

**Host country rules apply for provision of disclosures relative to UCITS of another EU Member State marketed in their country:** The Directive has created a certain degree of controversy regarding disclosures delivery requirements. Article 45 obliges foreign UCITS to ensure that facilities are available for making available compulsory information, in accordance to the laws and provisions of the host MS. However, Article 47 requires that the fund's home country determines the way compulsory disclosure documents (such as SP) are made available to the public/provided to the investors. In order to correct this inconsistency, there are three possibilities: i) a full harmonisation of the methods for making available to the public/providing to the investors disclosures would take a long time and does not seem to be the most cost-effective measure; ii) following the logic of the current Article 47 drafting would make sense from an industry point of view, but not from an investor protection perspective; iii) requiring that the rules of the host country shall apply would imply higher costs for the industry. Fund promoters will need to know the information distribution rules in each MS in which they want to sell their funds and comply with them. This, however, will entail most probably one-off costs (once the rules are known and applied for the first fund notified into a MS, additional costs [unless those rules change] should be negligible). On the other hand, this would significantly improve investor protection since it will adapt the methods of distribution of foreign funds' disclosures to those used in the investor's country and which are familiar to the investor. Thus, the envisaged adjustments to the UCITS Directive reflect this latter possibility.

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<sup>9</sup> Please see Chapter 5 (Simplified Prospectus) for further details on the 'key investor information' concept.

## **2. Shape of possible adjustments to the UCITS Directive<sup>10</sup>**

### Section VIII

#### **Special provisions applicable to UCITS which market their units in Member States other than those in which they are situated**

##### **Article 44**

1. Member States shall ensure that a UCITS authorised by the competent authorities of another Member State can market its units within their territory upon notification under the provisions of Article 46.
2. Member States shall not impose any additional requirements or administrative procedures on such UCITS in respect of the field governed by the Directive.

#### **Explanatory comment**

The notification procedure should be amended to ensure that it is a real notification i.e. a simple information of a decision of a UCITS to market its units in a Member State other than its home Member State communicated by the authorities of the home Member State to the authorities of the host Member State. Under this procedure, the competent authorities of the host Member State should not be in a position to review, challenge or discuss the merits of authorisation given by the UCITS home Member State. They need to rely on the assessment made by the competent authorities of the UCITS home Member State with regards to UCITS compliance with the requirements of the UCITS Directive<sup>11</sup>.

#### **1. Potential new Article 44(1)**

Article 44(1) of the current Directive insists on the need for a UCITS wishing to be marketed in another Member State to comply with the rules applicable in such Member State outside the field governed by the Directive. The possible new wording of Article 44(1) would result from a need to better emphasize the freedom for a UCITS authorized in one Member State to be marketed in another Member State, subject only to a notification procedure. The envisaged new Article 44(2) could make clear that it is not possible for the host Member State to challenge the exclusive responsibility of the home Member State over the "fields governed by the Directive<sup>12</sup>". This principle is already set out indirectly in the current Article 44(1) and is

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<sup>10</sup> The provisions on supervisory cooperation in relation to this section are dealt with in a separate section.

<sup>11</sup> Cf. also on this subject Commission communication on the respective powers retained by the home Member State and the host Member State in the marketing of UCITS pursuant to Section VIII of the UCITS Directive.

<sup>12</sup> The field governed by the Directive should encompass: (i) fund authorisation (Section II of the Directive), (ii) fund structure (obligations regarding management companies and investment companies, obligations regarding the depositary) (Sections III, III(a), IV and IV(a) of the Directive), (iii) management (operating conditions, obligations concerning investment policies and eligible assets, general obligations such as prohibition of uncovered sales or limitations on borrowing) (same sections as for (ii), Section V and Section VII of the Directive), and (iv) compulsory information to be supplied to the unit-holders by the UCITS (Section VI). For a more detailed explanation of the contents of such field, see Commission communication on the respective

well known under EC internal market law<sup>13</sup>. However, there is a need to set out this principle more strongly in the Directive. On the other hand, the possible new Article 44(2) would not challenge the fundamental principle according to which the host Member State retains its powers outside the field governed by the Directive. However, it should be recalled that under EC internal market rules, (i) such powers should be used in a non-discriminatory way and (ii) any restrictions to the freedom to provide services or to the freedom of establishment resulting from the use of such powers should meet certain tests<sup>14</sup>.

## **2. Potential removal of current Article 44(2)**

Advertising is not covered by the Directive and thus falls outside the field governed by the Directive. As a result, a UCITS marketing its units in a host Member State must comply with the provisions of such host Member State applicable to advertising. Since the current Article 44(2) is a mere illustration of the general rule whereby all matters falling outside the field governed by the Directive fall under the responsibility of a host Member State, this provision does not really bring any added value. Due to the fact that it is impossible to provide for an exhaustive list of matters which would fall outside the scope of the Directive, listing some of them might create confusion as to the scope of the responsibilities of the host member State in the field not governed by the Directive.

## **3. Potential removal of current Article 44(3)**

Non-discrimination is a fundamental rule of internal market freedoms, guaranteed by the EC Treaty. The repetition of such rule at the level of the Directive could be avoided.

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### **Article 45**

~~In the case referred to in Article 44, the UCITS must, inter alia, in accordance with the laws, regulations and administrative provisions in force in the Member State of marketing, take the measures necessary to ensure that facilities are available in that State for making payments to unit holders, re-purchasing or redeeming units and making available the information which UCITS are obliged to provide.~~

### **Explanatory comment**

**[Potential removal of current Article 45]** As in the case of advertising, the current Article 45 covers a list of examples of arrangements related to marketing of UCITS in a host Member State, falling outside the field governed by the Directive. They are under the responsibility of such host Member State. As a result, a UCITS marketing its units in a host Member State must comply with the provisions of such host Member State applicable to these fields. This is a mere illustration of the general rule whereby all matters falling outside the field governed by

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powers retained by the Home Member State and the Host Member State in the marketing of UCITS pursuant to Section VIII of the UCITS Directive.

<sup>13</sup> See on this subject and on the basis of the existing UCITS Directive, Commission communication on the respective powers retained by the Home Member State and the Host Member State in the marketing of UCITS under Section VIII of the UCITS Directive.

<sup>14</sup> See the forthcoming Commission communication cited above and, for instance, ECJ Case C-55/94 of 30.11.1995 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.

the Directive shall fall under the responsibility of a host Member State. Due to the fact that it is impossible to provide for an exhaustive list of matters which would fall outside the scope of the Directive, listing some of them might create confusion as to the scope of the responsibilities of a host Member State in the field not governed by the Directive.

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#### **Article 46**

1. **[notification letter]** If a UCITS proposes to market its units in a Member State other than that in which it is situated, it must first submit a notification letter to the competent authorities of its home Member State. The notification letter shall include information on arrangements made for the marketing of units of the UCITS in that other Member State, in particular:

- details of a paying agent and other arrangements for making payments to unit-holders and re-purchasing or redeeming units;
- information on distribution channels;
- if applicable, the contact point where the information on third parties entrusted by the UCITS with the marketing of its units on the market in that other Member State is available;
- information on how compulsory information to be provided to investors in accordance with Section VI will be made available to investors in that other Member State.

2. **[obligatory disclosures in the host Member State]** UCITS shall enclose to the notification letter as referred to in paragraph 1 the latest version of:

- its fund rules or its instruments of incorporation, its prospectus and where appropriate, its latest annual report and any subsequent half yearly report. If applicable, the documents shall be translated in the or one of the official language of the host Member State or in a language approved by the competent authorities of the host Member State or in a language customary in the sphere of international finance, at the choice of the UCITS, and
- its key investor information as provided for in Article *[cross-reference to relevant article on key investor information]*<sup>15</sup>. If applicable, it shall be translated in the or one of the official language(s) of the host Member State or in a language approved by the competent authorities of the host Member State.

This translation shall be produced under the responsibility of UCITS. It shall faithfully reflect the contents of the original information and/or document and shall be correct, understandable and not misleading.

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<sup>15</sup> On the basis of the proposed amendments to the Directive, the "key investor information" would consist of two parts: (i) product information: information that the average retail investor needs to take an informed investment decision and (ii) practical information: information that the investor needs to receive to be able to exercise its rights, which will be adapted to each host Member State (cf. section on the obligations concerning information to be provided to investors/ review of simplified prospectus regime).

## **Explanatory comment**

### **1. Envisaged solutions for the notification procedure – general principles**

The current notification procedure is marked by delays and diverging administrative practice. It has sometimes become a second authorisation procedure, whereby the host Member State authorities are tempted to challenge the authorisation granted to the UCITS by its home Member State. As explained under Article 44, this situation is in contradiction with the fundamental freedom for a UCITS authorised by the authorities of the Member State where it is situated to be marketed in any other Member State, subject to a notification procedure.

Under the envisaged solutions for a revised notification procedure, the host Member State would be competent to review the compliance with its own rules in the field not covered by the Directive (e.g. compliance of arrangements made for marketing in the host Member State). However, such review should only occur *ex post*, i.e. following the beginning of the marketing phase, and not at notification stage, as this is currently the case. This would also be the case in respect of compliance with Article 47 paragraphs (1)(c) to (1)(e) (translation) and 48 (use of generic names).

### **2. Detailed procedure**

As provided for in a similar manner in the MiFID Directive and in the Prospectus Directive, the notification procedure could rely on a regulator to regulator approach (see Article 18 et seq. of Prospectus Directive and Article 31 et seq. of MiFID).

An initial solution for paragraph 1 could be to introduce a notification letter which would provide authorities of a host Member States with information relating to marketing. The notification letter would provide such authorities with essential information on the arrangements made for the distribution of units of UCITS in that Member State and on the facilities put in place for the publication of compulsory disclosures. This information should be sufficient to enable authorities of a host Member State to prepare for the ongoing supervision of compliance by the UCITS with the rules falling within the scope of competence/responsibility of such host Member State. The Information to be provided in the notification letter would be harmonised at EU level in both form and contents. Therefore, the new wording of Art 47a would foresee such harmonisation at level 2 via a delegation to the Commission under comitology arrangements<sup>16</sup>.

In parallel, and where applicable<sup>17</sup>, the notification letter would be accompanied by a translation of the prospectus, the financial reports, the fund rules or instruments of incorporation and the new "key investor information" (including a section on the characteristics of the product and a section on practical information adjusted to the market of the host Member State)<sup>18</sup> produced under the responsibility of the investment company or in case of a common fund or units trust – a management company. This translation would have to comply with the conditions set out in envisaged shape of Article 46(2). These documents

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<sup>16</sup> It is anticipated that the current comitology arrangements of the Directive should be amended in the coming months as a result of the reform of the comitology procedure.

<sup>17</sup> i.e if translation is necessary. .

<sup>18</sup> See section on the "obligations concerning information to be provided to investors/ review of simplified prospectus regime"

would form the "information package" for investors. Taking into account the relevance of the key investor information to the retail investors, UCITS would be obliged to provide such information in an official language of the host Member State or in a language approved by the host Member State. However, it would be at the discretion of the UCITS whether other obligatory documents available at the request of investors (such as prospectus, fund rules or instruments of incorporation or financial reports) are translated in a language customary in the sphere of international finance or in a local language of the host Member State. This approach would be in line with the language regime of the Prospectus Directive which applies to other, also retail oriented financial instruments.

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### **Article 46 (cont.)**

**3. [obligations of the UCITS home Member State authorities]** The competent authorities of the UCITS home Member State shall verify whether the documentation submitted by the UCITS according to paragraphs 1 and 2 is complete.

If the documentation is complete, the competent authorities of the UCITS home Member State shall transmit it to the competent authorities of the Member State in which the UCITS proposes to market its units, together with an attestation to the effect that the UCITS fulfils the conditions imposed by this Directive.

The competent authorities of the UCITS home Member State shall inform the UCITS of such transmission without delay.

**4.** Member States shall ensure that the notification letter referred to in paragraph 1 and the attestation referred to in paragraph 3 are provided in a language customary in the sphere of international finance.

**5.** Member States shall facilitate electronic filing of documents requested under paragraphs 1 to 3 between the UCITS and the competent authorities of its home Member State and between competent authorities of Member States.

**6.** The UCITS can start marketing its units in a Member State other than that in which it is situated, upon expiry of a period of three working days after the transmission of the documentation referred to in paragraph 3 by the competent authorities of the UCITS home Member State to the competent authorities of that other Member State.

**7.** For the purpose of the notification procedure provided for in this Article, the competent authorities of the Member State in which the UCITS proposes to market its units shall not request any additional documents, certificates or information other than those provided for in this Article.

### **Explanatory comment**

The solutions discussed in this working paper reorganize the notification procedure on a regulator-to-regulator basis. Since the scope of information and documents required under the notification procedure would be limited and clearly defined, the competent authorities of UCITS home Member State would have to ensure that the information package to be sent to the competent authorities of UCITS host Member State is complete. They should only carry out a formal check of the documents received; it would not be up to the competent authorities of the home Member State to check the translation of the documents accompanying the notification letter and the validity of the contents of the "practical information". Once completeness of the file has been established, the home Member State authorities should transmit the notification file to the host Member State authorities. Transmission would mean that it is not enough to send the documents. However, it would be sufficient for the home Member State authorities to receive an automatic proof of reception by the host Member State authorities (i.e. such as acknowledgment of receipt of a letter) to establish transmission. The UCITS should be informed by the home Member State about the date of transmission. The competent authorities of the host Member State would not have any procedural means to prevent 'ex-ante' UCITS from marketing its units (a similar procedure applies in the case of the Prospectus Directive). Compliance with the host Member State rules applicable to marketing, as well as with any other host Member State rules falling outside the field governed by the Directive, would have to be reviewed on 'ex-post' basis following notification. In addition, cooperation mechanisms between authorities would need to be strengthened (cf separate section on cooperation).

If the competent authorities of the host Member State identify any missing information, they should use the co-operation mechanism between supervisory authorities to obtain clarification or missing documents. Due to the fact that compliance with the local rules and translations of the documents will only be subject to 'ex-post' ongoing supervision by the competent authorities of UCITS host Member State, this could put more responsibilities on UCITS' management companies or investment companies in the preparatory phase for distribution.

Finally, to simplify and speed up the notification procedure, possible solutions in Article 46 envisage the facilitation of electronic filing between Member States authorities and between the home Member State authorities and the UCITS. This could be put in concrete from via a delegation to the Commission under comitology arrangements (cf potential Article 47a).

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#### **Article 47**

1. If a UCITS markets its units in a Member State other than that in which it is situated it shall make available to the public, or provide to investors within the territory of such Member State all information and/or documents, that it is required to make available to the public or provide to investors in its home Member State pursuant to Section VI of this Directive. Such information and/ or documents shall be made available to the public or provided to investors in compliance with the following provisions:

(a) unless already transmitted pursuant to Article 46 and prior to being made available to the public or provided within the territory of the host Member State, translations of such

information and/or documents, produced according to paragraphs 1(c) to 1(e) of this Article shall be transmitted together with a notification letter by the competent authorities of the home Member State to the competent authorities of the host Member State;

(b) without prejudice to Articles *[cross-reference to relevant articles on delivery methods of prospectus and key investor information in Section VI]*, such information and/or documents shall be made available to the public or provided to investors in the way prescribed by the laws, regulations and/or administrative provisions of the host Member State;

(c) without prejudice to Article 47(1)(d) information or documents referred to in this paragraph shall be translated in the or one of the official language of the host Member State or in a language approved by the competent authorities of the host Member State or in a language customary in the sphere of international finance, at the choice of the UCITS;

(d) key investor information as referred to in the Article *[cross-reference to relevant articles on key investor information in Section VI – points 2 and 3]* shall be translated in the or one of the official language of the host Member State or in a language approved by the competent authorities of the host Member State;

(e) translations of information and/or documents under paragraphs 1(c) and 1(d) of this Article shall be produced under the responsibility of the investment company or the UCITS' management company accordingly and shall faithfully reflect the contents of the original information and/or document and shall be correct, understandable and not misleading.

2. The requirements set out in paragraph 1 shall also be applicable to any changes, updates or amendments to the information and documents referred to in paragraph 1.

3. Member States shall facilitate electronic filing of such information and/ or documents between UCITS and the competent authorities of its home Member State and between competent authorities of Member States.

4. The frequency of the publication, sale, purchase or redemption price of units or shares of UCITS provided for in Article 34 shall be subject to the laws, regulations and/or administrative provisions of the home Member State.

### **Explanatory comment**

**Publication of compulsory information in a cross-border context:** the new drafting of Article 47 would clarify the rules applicable to a UCITS which markets its units in another Member State when it comes to the provision to investors or the publication of the compulsory information of Section VI within the territory of such Member State.

**The first key principle** would be that the compulsory information/ documents to be provided under Section VI to investors in its home Member State would also have to be provided to investors in the host Member State. Unless the information/ documents have already been filed pursuant to Article 46,<sup>19</sup> translations of the compulsory documents and information

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<sup>19</sup> Certain compulsory information may indeed have not been filed pursuant to Article 46, cf annual report or semi-annual reports.

should be transmitted by the home Member State to the host Member State prior to being made available to the public. The same applies to the updates or amendments to the compulsory information and documents. The home Member State would have to ensure that its authorities are properly and timely informed on amendments or updates to compulsory information or documents and provided with relevant translations. The provisions also foresee electronic communication of such information to speed up and simplify the updating process. This would be put in concrete form via delegation to the Commission under comitology arrangements (cf proposed Article 47a).

**A second key principle** would be that the information/documents to be provided in another Member State should be distributed to investors in the way prescribed by the laws of such Member State.

**A third key principle** would be that the information/documents to be provided in another Member State should be communicated in an official language of such Member State or in a language customary in the sphere of international finance at the choice of the UCITS. However, the key investor information should be translated in the (or one of the official language(s) of the host Member State. The translation of the original information/document should be done under the responsibility of the investment company/management company and should comply with certain quality standards.

Article 47(4) would clarify that the frequency of the publication of the sale, purchase or redemption price of units or shares set out in Article 34 should be decided upon by the authorities of the home Member State. As the Directive sets out minimal standards in relation to such publication in Article 34, this would serve as a sufficient guarantee for investors, wherever they are situated.

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#### **Article 47a (New)**

In order to ensure the uniform application of Articles 46 and 47 and to facilitate the effective operation of the single market the Commission shall adopt, in accordance with the procedure referred to in Article 53a, implementing measures concerning:

- the form and contents of a standard model of the notification letter to be used by UCITS for the purpose of notification, as referred to in Article 46 (1) and in Article 47 (1);
- the form and contents of a standard model of attestation to be used by Member States competent authorities, as referred to in Article 46 (3);
- the use of electronic communication between an UCITS and the competent authorities of its home Member State and between competent authorities of Member States for the purpose of notification under the provisions of this Article 46 and Article 47, including electronic filing of documents required under Article 46 (1) to (3) and Article 47;

- the application of the procedure set out in Article 46 and 47 to the marketing of units of investment compartments of UCITS when such UCITS has already been notified in accordance with Article 46 for marketing of its units in another Member State; and
- the facilitation of electronic access for the competent authorities of host Member States to the information and/ or documents referred to in Article 46 (1) to (3) and Article 47.

### **Explanatory comment**

The Commission, following the procedure of Article 53a, would be in a position to adopt implementing measures to provide for standards models of notification letter and attestations and to harmonise the scope of information to be included in such documents.

The regulation of the technical aspects of electronic filing of documentation, electronic communication between competent authorities of Member States and between UCITS and the competent authorities of its home Member State as well as the facilitation of access to databases incorporating such documents could also be further defined by way of implementing measures.

Finally, it could be envisaged that implementing measures clarify the procedure applicable to compartments of UCITS when the UCITS has already been notified for marketing in accordance with Article 46.

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### **Article 48**

For the purpose of carrying on its activities, a UCITS may use the same **reference to its legal form** (such as investment company or unit trust) **in its designation in a host Member State** as it uses in its home Member State. In the event of any danger of confusion, the host Member State may, for the purpose of clarification, require that the **reference to the legal form in the UCITS designation** be accompanied by certain explanatory particulars.

### **Explanatory comment**

The proposed amendment would remove uncertainty related to the definition of "generic name". It would clarify that Article 48 applies to the reference to the legal form of the UCITS in its designation in a host Member State. Any explanatory particulars, if required by a host Member State, might refer only to the legal form of the UCITS.

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Section I

**General provisions and scope**

**Article 1(6)**

Subject to the provisions governing capital movements and to Article **52(2)** no Member State may apply any other provisions whatsoever in the field covered by this Directive to UCITS situated in another Member State or to the units issued by such UCITS, where they market their units within its territory

**Explanatory comment**

These amendments would result from the amendments to Articles 44 and the removal of Article 45 (see comments on Articles 44 and 45 respectively). This Article would reflect a general rule that within the reserved field UCITS are governed solely by the rules and regulations in force in the Member State where they are situated, even if they market their units in another Member State.

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**Additional comment**

**Is there a need for a general definition of "marketing"?**

**The first reason** for defining "marketing" could be to clarify the residual powers of the host Member State, especially in the context of the review of the marketing arrangements during the notification procedure. This would not be necessary anymore as the residual powers are clarified in the discussed wording of Articles 44 and 46 without the need for a definition, i.e. via (i) the removal of the possibility to review marketing arrangements ex ante by the host Member State in the notification procedure and (ii) the confirmation of the competence of the host Member State outside the field governed by the directive, which goes beyond the mere rules applicable to marketing. This could also limit the interest of a definition of "marketing".

**The second reason** was to clarify the contents of the reference to "marketing" of Annex II of the existing Directive in relation to the activity of collective portfolio management for management companies. This might be done within the scope of initial solutions in the management company passport section. Marketing as included in the activity of collective portfolio management in Annex II of the Directive would be understood by offering for sale, selling and/or delivering units in funds managed by the management company to investors or potential investors. The UCITS Directive would recognize the faculty for management companies to sell the units of their own funds, and of their own UCITS, also on a cross border basis (subject to Article 46, cf discussed provisions of Article 6), without falling under the scope of the MiFID Directive (Article 2(h) of MiFID).

**The third reason** was generally to better articulate the notion of "*marketing of UCITS units*" with the MiFID Directive. The notion of marketing (or of distribution) is not defined under

the MiFID. Accordingly, it is difficult to establish to what extent MiFID and UCITS interact when it comes to distribution, especially:

(i) When it comes to UCITS marketing their own units. However, it has been clarified in the context of MiFID transposition that management companies or investment companies are not to be subject to MiFID if they offer for sale/ sell/ deliver the units of their own funds. As explained earlier, this should also be clarified in the context of the management company passport.

(ii) When it comes to UCITS using third parties to market their units. The problem here is that the definition may vary depending on the entity in charge of such distribution. In the case of MiFID, should this only cover reception-transmission of orders/ execution of orders? And what would be the scope of the definition in the case of entities not covered by MiFID? Furthermore, it is not clear what would be the added value of such an exercise considering the envisaged clarifications to be made in respect of the management company passport and the notification procedure.

To conclude, the key issues which were created because of the absence of definition of marketing (uncertainty about the scope of the powers of the host Member State under the notification directive, extent of the management company passport, powers given to management companies and UCITS) could either be solved by the presented initial solutions or by the transposition work on MiFID. We therefore do not believe that a clarification of "marketing" Directive would bring any real added value.

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### **3. Questions**

#### **Legal questions (section 2)**

1. Does the proposed approach represent the most effective basis for achieving the smooth functioning of the passport? How could the proposed approach be improved and what alternative approaches could/should be envisaged?
2. Do the proposed provisions represent a sound and operational basis for informing host authorities about the marketing of UCITS in their Member States? Are the responsibilities and obligations of the respective competent authorities sufficiently clear?
3. In the event of host country's questions relating to matters not harmonised by the Directive (e.g. advertising/promotional material, commercial communications, and distribution channels) how can these be addressed/resolved without obstructing or delaying the right of the fund to circulate its units in that market?
4. Proposed solutions foresee that obligatory publications are distributed to investors in a host Member State according to its local rules. Is harmonisation of those methods of distribution to investors desirable? Feasible?
5. Will new rules on use of languages for obligatory disclosures affect investor protection?

#### **Economic questions (section 1)**

6. Do you agree with the analysis of the expected impacts? Are there any other economic or investor protection implications that should be taken into account?
7. What do you expected to be the size of the different savings highlighted in the analysis (possibility of using electronic means, translation regime, etc.)? Which other costs could be saved thanks to the proposed procedure?
8. Do you agree with the following assumptions?

	<b>Yes</b>	<b>No</b>
‣ The envisaged adjustments should lead to reduction of current notification fees	<input type="checkbox"/>	<input type="checkbox"/>
‣ Electronic communication between the fund promoter and its home MS regulator and between the home regulator and the host regulator is possible	<input type="checkbox"/>	<input type="checkbox"/>
‣ The envisaged option will facilitate cross-border access for UCITS more than viable alternatives?	<input type="checkbox"/>	<input type="checkbox"/>
‣ The envisaged option will free resources on the side of host regulators	<input type="checkbox"/>	<input type="checkbox"/>
‣ Implementation of new rules re. use of languages and making the UCITS responsible for translations will considerably reduce translation costs	<input type="checkbox"/>	<input type="checkbox"/>
9. Which further possibilities could be considered in order to reduce the industry's and regulators' administrative burden and other compliance costs linked to the proposed provisions?