

UCITS III News


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Pan-European UCITS III Newsletter

Certain national authorities have been fairly active since July, when we issued n°8 of our UCITS III News, and it could be argued that such activity has been less than constructive. In the absence of EU guidance on the interpretation of the UCITS III transitional provisions, each regulator has applied its own local views on these provisions, which may well conflict with those of neighbouring States.

It is well known by now that the Committee of European Securities Regulators (CESR) has been given an urgent mandate to work on two groups of issues relating to the harmonized interpretation of UCITS III: transitional provisions and clarification of the definition of eligible assets of UCITS. On the transitional issues, a first paper should be issued by CESR for public consultation in October of this year, the target deadline for issuance of guidelines being scheduled for March 2005!

In the meantime, the chart below shows how Host State regulators appear to be treating foreign products benefiting from the transitional provisions and wishing to be registered in that State. Note that this is true as at the end of September: the answers to the various situations described herein may, as it has in the past, change at any time!

Registration of:	AT	BE	DK	FR	DE	IR	IT	LU	NL	PT	ES	SE	UK	CH
(1) Foreign UCITS III vehicle with "Grandfathered" Manco	☺	☺ ?	☺	☺	☺	☺	☹	☺	☺	☺	☺ ?	☺	☺	☺
(2) Foreign UCITS I sub-fund created before 13/02/2004 in a GF UCITS I fund	☺	☺	☺	☺	☺	☺	☺	☺	☺	☺	☹ unless created before 2002	☺	☺	☺
(3) Foreign UCITS I sub-fund created after 13/02/2004 in a GF UCITS I fund	☺	☺	☺	☹	☺	☺	☹	☺	☺	☺	☹	?	☺	☺
(4) Foreign UCITS I vehicle newly registered in a EU country	☺	?	☺	☹	☺	☺	☺ ?	☺	☺	☺	☹	☺	☺	☺
(5) Irish UCITS III sub-fund created after 13/02/2004 in a GF UCITS I fund	☺	☹	☺	☹	☹ ?		☺ ?	☹	?	?	☺	?	☺	?

Although the Spanish CNMV had, until the beginning of this summer and subject to a simplified prospectus being produced, accepted newly created (i.e. after 13/02/04) UCITS I sub-funds for sale in its territory, it now seems to refuse any UCITS I sub-fund created after 13/02/02! Italy has meanwhile adopted the French approach, which refuses any post-2004 UCITS I sub-fund on its territory. It should hopefully also follow the French position as regards registration of UCITS I sub-funds created before 13/02/04, which is still allowed.

Furthermore, while it appeared before this summer that UCITS III products managed by a "grandfathered" Management Company would be accepted in most European countries (the French AMF had lifted their final doubts), the Italian authorities now require that the ManCo be itself UCITS III compliant! This position could well inspire Spain and Belgium to follow suit since they have already expressed their reluctance in accepting structures mixing old and new rules.

Many uncertainties also apply with regard to product questions of UCITS III.

Just a few examples to illustrate current divergences in interpretation: as bank deposits now become an acceptable investment for a UCITS III, subject only to a restriction of 20% of NAV of deposits with the same credit institution, one may wonder how the still permitted “ancillary liquid assets” should be treated. Is all cash a deposit and hence subject to the limitation?

The new “group concept” also raises difficulties in its practical implementation: how can one ensure that the 20% (in Spain: 15%) restriction applicable to investments in the same group is observed at any point in time, when information on groups is, at best, incomplete and generally not available? Will regulators be flexible?

It is commonly understood now that the global exposure related to derivative instruments may not exceed the total NAV of the fund's portfolio: are derivatives used solely for hedging purposes included in this limit? Most regulators seem to adopt a common and prudent approach. However, one may wonder if this interpretation is in line with the objective of the Commission Recommendation 2004/383/EC of 27 April 2004 on the use of financial derivatives. Is the purpose of this restriction to limit the use of any type of derivatives (i.e. including hedging derivatives) or to ensure that the UCITS' overall risk exposure may not exceed 200% of the NAV on a permanent basis (meaning that hedging derivatives should not be included)?

Use of derivatives:	AT	BE	DK	FR	DE	IR	IT	LU	NL	ES	SE	UK
(1) Distinction between “deposits” and “ancillary liquid assets” for the 20% investment restriction (“Y”) (or is all cash in “deposit” (“N”))?	N	Y	N	N	N	N	Y	N	?	N	N	N
(2) Practical implementation of group concept: “best efforts” obligation (“Y”) or strict obligation (“N”)?	Y	N	N	Y until 1 Jan 2005	N	Y	?	Y	?	N 15%	N	Y
(3) Are derivatives for hedging purposes included in the 100% global exposure limit applicable to derivatives?	Y	Y	Y	Y	Y	Y	?	?	?	Y	Y	Y

Again, caution is required: answers for Belgium are based on the draft “Arrêtés Royaux” and still subject to change. The same is true for Italy. The Netherlands, finally, has yet to even consider these issues!

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