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Response to the consultation paper on "CESR's technical advice to the European Commission on level 2 measures relating to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS"

Assogestioni is grateful for the opportunity to comment on the consultation paper on "CESR's technical advice to the European Commission on level 2 measures relating to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS" (hereinafter "Consultation Paper").

We deem important that the industry position is taken into account with reference to technical issues that are essential for the correct and well-balanced implementation of the UCITS Directive, also considering their significant impact on the future development of asset management service.

SECTION I – MERGERS OF UCITS

1.1 Content and format of the information

1. Do you agree with CESR's proposals for specifying the information to be given to unitholders? Is there any other information that is essential for them?

With reference to Box 1, paragraphs 2 and 3, we appreciate the flexibility suggested by CESR in identifying the information that should be given to the unitholders of the receiving UCITS. We share the idea according to which such information should not be identical to those provided to the unitholders of the merging UCITS, considering their respective needs. To this respect, it is important – as stated by CESR in paragraph 9 of the Explanatory text to Box 1 – to recognise that the information provided to the unitholders of the receiving UCITS should be suitably concise and focused on the operation and its potential impacts.

Furthermore, we would like to underline that, according to article 43, paragraph 5, of the UCITS Directive, CESR may adopt implementing measures "specifying" the content of the information listed in paragraph 3 of the same article and not adding

other information to those already indicated in level 1. Therefore, we deem that the analysis of the single information required in Box 1 of the Consultation Paper should be done in line with such general principle.

In the above perspective, paragraph 4, letter b), of Box 1 should be deleted, given that it contains information not required under article 43, paragraph 3, letter b). Moreover, such information could mislead an investor and induce him to ask the redemption of his units/shares when he does not recognise himself in the "profile of the typical investor for whom the UCITS is designed". The coherence between the UCITS investment policy and strategy and the "profile of the typical investor" is an assessment that is not pertinent to the collective portfolio management service, but it relates to the specific investment service provided to the client when he subscribes units/shares of the UCITS (i.e. investment advice/placement).

Although we deem important that investors are adequately informed about all the merger relevant aspects, at the same time, we believe that such information should not be excessively detailed, in order to avoid investor's confusion. To this respect, our understanding of the content of the information required in paragraph 4, letter d), of Box 1, is that the unitholders of the merging and of the receiving UCITS should be informed only about how the performance fee, eventually provided by such UCITS, will be applied, once the merger becomes effective. We deem that such information is exhaustive for those investors; a further specification concerning the guarantee of a fair treatment could raise confusion, given that it seems to express an evaluation of the management company which is, and should remain, purely internal.

2. Do you agree that a summary of the key points of the merger proposal should be optional?

We agree with CESR's proposal, because it guarantees an adequate flexibility requiring a further level of information, not excessively detailed, only when the merger operation is complex.

3. Should there be more detail at level 2 about what ought to be included in the description of the rights of unitholders?

We believe that the information suggested by CESR in order to specify those already included in article 43, paragraph 3, letter c), of the UCITS Directive are sufficiently detailed; investors will have all the relevant information on their rights with reference to the merger.

4. Do you agree with the proposed treatment of the KID of the receiving UCITS?

We agree with CESR's position, especially where CESR states that the KID is a free-standing document which can be included as an annex to the information document provided to investors.

1.2 Providing the information

6. Do you agree with CESR's assessment that the potential costs and benefits of a harmonised procedure do not support the case for providing advice on level 2 measures on this issue?

We believe that even if an harmonisation of the manner of providing information to unitholders is not strictly necessary, it is, any way, very useful to assure an equal level of protection of investors across Europe. To this aim, the statement according to which the information should be effective and prompt is important but not sufficient; therefore, we suggest to provide implementing measures also on this topic.

SECTION II – MASTER-FEEDER STRUCTURES

2.1 Agreement between feeder and master UCITS

7. Do you agree with CESR's proposals for specifying the content of the agreement?

8. Are all the points listed in Box 2 appropriate elements to be included in an agreement? Are there others that should be required to be included?

We agree with CESR's proposal on the content of the agreement between feeder and master UCITS. In particular, we share the need to harmonise the minimal content of such agreement and to leave UCITS free to decide, where appropriate, to add further issues to be regulated.

9. Which option do you prefer in relation to the national law and jurisdiction applicable to
cross-border agreements?

We believe that Option B guarantees to the UCITS the necessary flexibility to take into account the concrete circumstances that may arise in relation to the single master-feeder structure.

10. Do you agree that measures to protect the interests of other unitholders in a master UCITS should be left to national law and regulation?

The need to prevent unfairly prejudice to the interests of any other unitholder of the master that is not itself a feeder UCITS represents an important topic that should be harmonised at European level; otherwise, master UCITS established in different Member States would be subject to legislations which probably do not guarantee the same level of protection between investors of such UCITS. As a consequence, an investor of a master UCITS established in a Member State could be treated, in respect to a main issue which directly affects his interests, differently from an investor of a master UCITS established in another Member State.

12. Do you agree with CESR's proposals in relation to internal conduct of business rules? If not, what should be required by such rules?

We agree with CESR's proposal in Box 4; in particular, we appreciate the statement in Box 4, paragraph 2, according to which the internal conduct of business rules shall include appropriate measures to mitigate conflicts of interests that may arise between the feeder and the master, to the extent that these are not addressed by the general requirements on conflicts of interests. Such specification guarantees an adequate coordination between the various requirements to which UCITS are subject.

2.2 Measures to avoid market timing

14. Do you agree with CESR's proposed approach to prevention of market timing?

The agreement between feeder and master UCITS (or the internal conduct of business rules, where applicable) should be the only *medium* through which regulate the measures to avoid market timing. Therefore, we share CESR's solution, also considering the technical aspects that are related to such issue.

2.3 Liquidation, merger or division of a master UCITS

15. Do you agree with CESR's analysis of the issues relating to liquidation, merger or division of a master UCITS?

We believe that CESR has considered the main issues that may affect the interests of all involved parties in case of liquidation, merger or division of a master UCITS.

16. Do you consider it likely that in practice a feeder UCITS would not become aware of the master's intention to liquidate, merge or sub-divide before receiving formal notice of the proposal?

In general terms, we support CESR's statement according to which the master UCITS should be encouraged to provide longer notice periods than those established in the UCITS Directive, where possible. In practice, we can expect that when the feeder UCITS and the master UCITS are managed by the same management company or by management companies included in the same group it is unlikely that the feeder UCITS doesn't know the intention of the master UCITS to liquidate, merge o sub-divide before receiving formal notice of the master's intention.

17. Do you agree with CESR's proposals in Box 5 for dealing with the liquidation of a master UCITS? In particular:

(a) is two months long enough in which to prepare a proposal for an option other than liquidation of the feeder?

(b) how quickly can the feeder make information for unitholders available once the competent authority's approval is received?

(c) would you expect the feeder to suspend subscriptions during any period in which it is unable to make new investments?

(d) does the proposed time extension in paragraph 10 strike a fair balance between the interests of investors and the practical needs of the feeder?

With reference to questions 17 (a) and 17 (b), we deem that a period of 2 months in order to give the feeder UCITS the time to make a decision and to prepare revised documentation for whichever option it chooses is sufficient. However, the period of time of 5 working days suggested by CESR to provide disclosure to investors is a timeframe excessively short. In this respect, it should be considered that the UCITS can not finalise and print the information and documents (included the KID) before the competent authority's approval; in fact, the competent authority could, during the approval process, ask for an amendment to the proposal.

In light of the above, we suggest to reduce up 53 days the period of time in which the feeder shall decide what proposal submit to the competent authority and, therefore, to extend to 10 working days the period of time within which the feeder UCITS should inform its investors of the decision adopted. For example, such solution could be summarised according to the following time table, which reflects the approach adopted by CESR in Annex III of the Consultation Paper:

- **31/8** master UCITS gives all investors (inc. feeder UCITS) three months' notice that it intends to liquidate on **30/11** (article 60(4))
- **22/10** feeder applies to its competent authority (CA) for approval to invest in another master (i.e. the day of expire of the time period of 53 days).
- **12/11** CA grants approval after 15 working days as allowed for by article 59
- **13/11** feeder confirms to master how liquidation proceeds are to be paid to it
- **26/11** feeder notifies its unitholders with information required by article 64(1) and (2)
- **30/11** liquidation of master commences; feeder suspends subscriptions
- **7/12** feeder receives proceeds of (initial) liquidation payment
- **26/12** end of 30 days' disinvestment period for unitholders allowed by article 64(1)(d)
- **27/12** feeder begins investing in new master and re-opens for subscriptions.

With reference to question 17 (d), we appreciate the flexibility proposed by CESR in paragraph 10, because it takes into account the several situations that could arise in practice and allows the UCITS to schedule all steps necessary to implement the option chosen according to article 60, paragraph 4, within a period of time longer than the strict time-frame provided by the UCITS Directive.

19. Do you agree with CESR's proposals in Box 6 for dealing with the merger or division of a master UCITS? In particular:

(a) is one month long enough in which to prepare a proposal for an option other than liquidation of the feeder?

(b) how quickly can the feeder make information for unitholders available once the competent authority's approval is received?

(c) would you expect the feeder to suspend subscriptions during any period in which it is unable to make new investments?

(d) does the proposed time extension in paragraph 10 strike a fair balance between the interests of investors and the practical needs of the feeder UCITS?

As regards questions 19 (a) and 19 (b), as already said in relation to Box 5, we deem the 1 month period appropriate in order to allow the feeder UCITS to choose what option pursue in case of merger or division of the master UCITS. However, the 5 working days term for the feeder UCITS to provide information to its unitholders seems to be excessively short. Therefore, we suggest to reduce the first term up to 23 days and to extend the second term to 10 working days.

The suggested solution should apply also with respect to paragraph 3 of Box 6, in order to consider the cases where national laws and regulation of the feeder's home State require to inform its unitholders on the decision taken.

With reference to question 19 (d), we share CESR's proposal in Box 6, paragraph 10, given that such provision introduces flexibility in all the procedure, taking into account the various situations that could, in concrete, arise.

2.4 Agreement between depositaries

21. Do you agree with CESR's proposals for defining the content of the depositaries' agreement?

22. Does Box 7 cover the right issues? Should other issues be addressed?

We agree with the approach pursued by CESR in ruling the depositaries agreement. At the same time, we deem that Box 7 includes all the issues that the agreement between the feeder depositary and the master depositary should cover.

23. Which option do you prefer in relation to the national law and jurisdiction applicable to crossborder agreements? Would you prefer the law of the master depositary's home State to be applicable in every case?

We share the proposal to align the law applicable to the depositaries agreement to that adopted for the master-feeder agreement. As regard Box 7, paragraph 8, subparagraph b), Option B assures to the depositaries the necessary flexibility.

2.5 Reporting by the master UCITS depositary

25. Do you agree with CESR's proposals in relation to the irregularities to be reported by the depositary?

26. Do you agree that the interests of other unitholders in a master UCITS will be adequately protected under national laws if these proposals are implemented?

27. What would be the additional costs of the proposals in Box 8? Please quantify your estimate of one-off and ongoing costs. What would be the benefits of these proposals, compared to no prescription at level 2 on this issue?

We understand that CESR's approach is the only one practicable, given that, at the moment, the UCITS Directive defines the duties applicable to the depositaries only in principle and, as a consequence, such duties differ among Member States. However, we would like to underline that the solution described in Box 8 could give rise to different levels of investors protection among Member States.

Furthermore, we deem appropriate that Box 8, paragraph 4, provides coherently with our comment on Box 3 an harmonisation of the requirement of the master UCITS to notify or otherwise inform those of its unitholders that are not feeder UCITS with reference to the matter listed in Box 8.

2.6 Agreement between auditors

28. Do you agree with CESR's proposals in relation to auditor agreements?

29. Which option do you prefer in relation to the national law and jurisdiction applicable to crossborder agreements?

30. Do you foresee that feeder UCITS will generally align their accounting periods with those of their master, or are there good reasons for having different accounting year-end dates?

We agree with the issues listed in Box 9 as topics of the auditors' agreement, given that they cover all the aspects that auditors reasonably have to address in order to fulfil their respective duties.

We share the proposal to align the law applicable to the auditors' agreement to that adopted for the master-feeder agreement. As regard Box 9, paragraph 6, subparagraph b), Option B assures to the auditors the necessary flexibility.

2.7 Change of feeder UCITS objective

32 Do you agree that it is not necessary for CESR to provide advice on level 2 measures on this issue?

We disagree with CESR's approach on change of feeder UCITS objective. In fact, the

way in which information listed in article 64, paragraph 1, of the UCITS Directive should be provided has a relevant impact on investor protection; without an harmonisation among Member States, UCITS could use communications *media* which may differ, even significantly, in respect of their capacity to guarantee an effective investors knowledge (*i.e.* publication of a notice on newspapers *vs.* communication addressed to each unitholder). As a consequence, we propose that CESR adopts a legal advice which includes, at least, the definition of the *medium* to be used by UCITS in order to implement article 64, paragraph 4, letter a).

2.8 Transfer of assets in kind

33. Do you agree that it is not necessary for CESR to provide advice on level 2 measures on this issue?

We agree that no level 2 measures should be adopted with reference to transfers of assets in kind, also considering that Box 2, paragraph 2, letter b), explicitly provides that the agreement between the feeder UCITS and the master UCITS should include even *"if applicable, the terms on which any initial or subsequent transfer of assets in kind may be made from the feeder to the master"*.

SECTION III – NOTIFICATIONS

3.1 Scope of the information to be published by each Member State

34. Do you agree with CESR's proposals in relation to publication of marketing information?

As regards the way in which the competent authorities of the host State should provide information, we believe that the publication only of a narrative description is not sufficient, given that it would be necessarily not exhaustive and, therefore, it would give rise to different disclosures among Member States. As a consequence, such approach would undermine the aim of article 91, paragraph 3, of the UCITS Directive. Therefore, the best solution should be to provide a narrative description on the applicable laws, regulations and other provisions that relates specifically to the marketing of UCITS together with a series of references or links to source documents.

3.2 Facilitating host State access to notification documentation

36. Do you support the development of a centralised IT system to facilitate the notification procedure and provide a central repository for fund documents? Could the OAM developed under the Transparency Directive be adapted for this purpose?

38. What would be the benefits of these proposals, compared to no prescription at level 2?

We support the idea to create a centralised IT system to facilitate the competent

authorities exchange of information and their access to the relevant documents indicated in article 93, paragraph 2, of the UCITS Directive. However, we believe that the costs of such system should be faced only by the competent authorities because UCITS and investors do not have, from this solution, a direct benefit that justifies the charge of the costs necessary to implement it.

3.3 Standard notification letter and attestation

39. Do you consider the notification letter (Annex I) satisfactory? Are there any other matters that it ought to cover?

40. Do you have any comments on the draft attestation letter (Annex II)?

41. Do you consider that use of the proposed letters would generate any additional costs, compared to the existing procedure following the CESR Guidelines? What would be the additional benefits, again compared to the existing procedure?

We appreciate that CESR has followed the approach adopted in its Guidelines of 2006, considering that some Member States have already implemented a notification letter and an attestation model very similar to those attached to the mentioned Guidelines. Therefore, for those States, the implementation of the new Annexes would represent a development, in line with the new UCITS Directive provisions, of practices already in place and to which UCITS are used.

3.4 Electronic transmission of notification files

42. Do you support the development of a dedicated electronic system to effect transmission of notifications between competent authorities? What would be the costs and benefits of such a system to UCITS and their management companies?

We support the development of a dedicated electronic system because it facilitates a quick transmission of the notification between the competent authorities, given the short timeframe required by the UCITS Directive in this respect.

43. Do you agree with the proposed procedures in Boxes 11 and 12 for use of e-mail to transmit notifications, if no dedicated system is made available? Do you consider that any additional measures are desirable, and what would be their costs and benefits?

44. Does the proposed procedure for transmission and acknowledgement of receipt give sufficient certainty to UCITS that wish to access the market of another Member State? Does it give adequate protection to investors in a host State, in the event that an incomplete notification takes place?

In general terms, we agree with the transmission procedure between the authority of the home State and that of the host State defined by CESR and between the home State authority and the notifying UCITS.

However, with reference to the first procedure, the failure of the notification is a full responsibility of the competent authorities involved in the procedure, given that the UCITS has not any role in this respect. Therefore, the failure of the notification or the impossibility to rectify the problem under Box 11, paragraph 7, should not imply the interruption of the marketing of the UCITS in the host State; in fact, such event would damage significantly the UCITS for a problem with which it has no relation.

As regards the transmission procedure between the home State authority and the notifying UCITS, we deem appropriate that the authority informs the notifying UCITS of its right to access the market of the host State in a quick and reliable manner. To this end, it should be considered the opportunity even to use e-mail, in order to guarantee the immediate notice of the transmission to the host State authority of the documents required by article 93, paragraph 3, of the UCITS Directive by the home State authority. However, if CESR does not consider appropriate to use e-mail for such notification, we deem important the harmonisation of the *medium* to be used by the home State authority.

45. Should CESR develop level 3 guidelines in this area instead of advising the use of level 2 measures?

It should be useful that CESR develops level 3 guidelines only if they are in addition to level 2 implementing measures, in order to take into account specific cases pursuant to the rules established at level 2.

We remain at your disposal for any request of clarification or further comments on the content of our reply.

The Director General