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Mr. Carlo Comporti
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CESR consultation paper on the level 2 measures related to mergers of UCITS, master-feeder UCITS structures and cross-border notification of UCITS (CESR/09-785)

Dear Mr. Comporti,

BVI[1] is grateful for the opportunity to submit its views on the proposals for implementing measures setting out a new operational framework for UCITS management companies. While in general supporting the draft regulation on level 2 proposed by CESR, we would like to comment on the specific questions as follows:

Section I: Mergers of UCITS

Q1. *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?*

[1] BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 88 members manage currently assets in excess of EUR 1.6 trillion both in mutual funds and mandates. For more information, please visit www.bvi.de.

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***Q2**. Do you agree that a summary of the key points of the merger proposal should be optional?*

***Q3**. Should there be more detail at level 2 about what ought to be included in the description of the rights of unitholders?*

***Q4**. Do you agree with the proposed treatment of the KID of the receiving UCITS?*

***Q5**. Would the proposals in Box 1 lead to additional costs for UCITS or management companies? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposals (e.g. compared to no prescription at level 2 on this issue)?*

Q1

BVI supports CESR's proposals in terms of language and content of information to be provided to customers in connection with fund mergers. They are likely to serve investor's needs to understand the impact of mergers on their investments.

We would like to point out that the term "potential impact", which should be disclosed according to Article 43 para. 3 lit. (b) of the UCITS Directive, is not sufficiently clear in terms of content, and the proposed level 2 regulation does not fully remedy the resulting uncertainty. By example, it remains unclear whether violation of investment limits of the receiving fund which result from the merger would be considered as relevant "impact" in this respect. It might be worthwhile to provide for more guidance on when a potential impact is to be considered relevant.

Q2

Yes, BVI agrees.

Q3

No further details appear necessary.

Q4

BVI agrees with the overall approach to distinguish between the information to be provided to the investors of the merging UCITS and those for the investors of the receiving UCITS. We would like to note, however, that according to Article 43 para. (3) lit. (e) UCITS Directive, the announcement of the merger also vis-à-vis the investors of the receiving fund shall contain the key investor information of the receiving UCITS. Given that this group of investors should be already in possession of this KII, clarification on level 2 would be helpful whether this is really necessary.

Q5

It is difficult to provide an estimate of costs for the different options at hand as it will essentially depend on a number of factors that may vary significantly from case to case (number of unitholders involved, complexity of the merger operation, number of countries in which both UCITS are registered, requirements of national regulators in terms of medium to be used to inform the shareholders, ...). In any case, it appears safe to guess that the information requirements will lead to a discernible increase of costs of a merger.

***Q6**. 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?*

The answer to this question depends on how far a harmonised procedure would affect national procedures and require adjustment to current practice. In any case, given the diversity of legal designs for fund participation rights within the EU, it will be crucial that the national information paths can be used also in the future. Especially in the case of fund units in the legal shape of bearer notes, national legislation provides adequate ways to disseminate relevant information to unit holders.

Section II: Master-Feeder Structures

***Q7**. Do you agree with CESR's proposals for specifying the content of the agreement?*

***Q8**. 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?*

***Q9**. Which option do you prefer in relation to the national law and jurisdiction applicable to cross-border agreements?*

***Q10**. Do you agree that measures to protect the interests of other unitholders in a master UCITS should be left to national law and regulation?*

***Q11**. What would be the additional costs of the proposals in Boxes 2 and 3? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposals, compared to no prescription at level 2 on this issue?*

Q7

BVI members are of the opinion that CESR's proposals for the content of a master-feeder agreement contain all important areas. We also welcome CESRs intention not to be prescriptive about either the exact content or the format of the agreement.

Q8

From today's perspective, the points listed in Box 2 appear to be appropriate elements to be included in an agreement.

Q9

BVI members are in favour of Option B as it allows for more flexibility to adjust to different situations.

Q10

BVI members agree with the proposed level 2 advice in Box 3. National freedom in this area, however, must not be abused in order to build up red tape via national regulation or distort the level playing field in Europe. By example, if a feeder UCITS is entitled to preferential information about substantial changes or incidents concerning the master UCITS, such national rules might affect a feeder's choice of master UCITS.

Q11

BVI members see no way to meaningfully estimate the costs which would derive from implementation of the proposed level 2 rules in Boxes 2 and 3.

***Q12**. Do you agree with CESR's proposals in relation to internal conduct of business rules? If not, what should be required by such rules?*

***Q13**. What would be the additional costs of the proposals in Box 4? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposal?*

Q12

BVI agrees with the proposed elements to be covered in internal business rules. The details of the rules, however, should be left to the management company's discretion.

Q13

We see no way to provide meaningful figures in this respect.

***Q14**. Do you agree with CESR's proposed approach to prevention of market timing?*

BVI agrees with CESR's proposal on how to prevent market timing.

***Q15**. Do you agree with CESR's analysis of the issues relating to liquidation, merger or division of a master UCITS?*

***Q16**. 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?*

Q15

BVI agrees with CESR's analysis of the issues that need to be addressed in relation to liquidation, merger or division of a master UCITS. While being aware of the three month period stipulated in Article 60 para. 4 UCITS Direc-

tive, we see the problem that in case of liquidation of a master UCITS, the feeder UCITS will have to decide on next steps according to Article 60 para. 4 UCITS Directive under serious time pressure. In practice, this might lead to liquidations of feeder UCITS which could have been avoided if the feeder UCITS had been granted more time for assessment of its options. Please refer in this respect also to our answer on Question 17.

Q16

It appears unlikely, however not impossible that the feeder UCITS might learn about the master's intention to liquidate not before he receives formal notice. It could happen especially in cases when master and feeder UCITS are domiciled in different Member States and do not belong to the same group.

***Q17**. 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?

***Q18**. Does the proposed procedure in Box 5 make it more or less likely that feeder UCITS would pursue an alternative option to liquidation? What would be the additional costs of the proposals? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposals, compared to no prescription at level 2 on this issue?*

Q17

While being well aware that the key problem is the three months period stipulated in Article 60 para. (4) UCITS Directive, BVI is of the opinion that two months are too short as a period for the feeder UCITS to come up with a proposal for an option other than liquidation of the feeder. Furthermore, the formal notice of liquidation of the master UCITS might trigger considerable

redemptions by investors of both master and feeder UCITS, leaving other options for the feeder UCITS than liquidation even less attainable.

BVI therefore supports EFAMA's proposal that consists in a disclosure by the master UCITS to the feeder UCITS with a confidentiality agreement (such agreement would be necessary for the feeder UCITS in order not to be held liable by its own investors for not having informed them of the master UCITS's intention to liquidate). That confidential information should be given to the feeder UCITS as early as possible, in order to allow the feeder UCITS to plan an alternative solution. By the time of the public announcement by the master UCITS of its intention to liquidate, the feeder UCITS could then already announce the chosen solution for its own future, and the feeder UCITS investors would not be exposed to unnecessary uncertainty.

On Box 5 para. 9 and 10, we would like to point out that the term "commencement date of liquidation" is not sufficiently clear. In case CESR plans to stick to the term in its final advice, it should be defined more precisely.

Q18

Provided that there is no room to incorporate EFAMA's proposal on prior disclosure to feeder UCITS, the proposed procedure in Box 5 appears to be the best solution under the requirements of the UCITS Directive.

***Q19**. 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?

***Q20**. Does the proposed procedure in Box 6 make it more or less likely that feeder UCITS would pursue an alternative option to liquidation? What would*

be the additional costs of the proposals? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of the proposals, compared to no prescription at level 2 on this issue?

Q19

By and large, similar issues arise as in the context of liquidation of a master UCITS. The 5 days period for the feeder UCITS to inform its shareholders is too short, considering in particular the needs for translation and the fact that the documentation cannot be finalised and printed before approval is granted.

Q20

BVI does not believe that the proposals in Box 6 will make a significant difference regarding the likeliness for a feeder UCITS to pursue an alternative option to liquidation.

***Q21**. Do you agree with CESR's proposals for defining the content of the depositaries' agreement?*

***Q22**. Does Box 7 cover the right issues? Should other issues be addressed?*

***Q23**. Which option do you prefer in relation to the national law and jurisdiction applicable to cross border agreements? Would you prefer the law of the master depositary's home State to be applicable in every case?*

***Q24**. What would be the additional costs of the proposals in Box 7? 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?*

Q21

BVI agrees with CESR's proposals for defining the content of the depositaries' agreement. We recommend, however, taking any coming results deriving from the Commission's work on the UCITS Depositary Function into consideration.

Q22

BVI would like to make two remarks on the areas to be covered in the agreement according to the proposals in Box 7:

On para. 3, it remains unclear to us whether the required "co-ordination of the involvement" shall extend to cross border sub-custody arrangements.

On para. 4, we are of the opinion that the reference to the "depositary's report to unitholders" should be deleted. We are not aware of any report that the depositary is supposed to provide to unitholders under the UCITS directive (except in the context of fund mergers).

Q23

BVI members are in favour of Option B.

Q24

For the time being, we see no way to provide meaningful figures in this respect.

***Q25**. Do you agree with CESR's proposals in relation to the irregularities to be reported by the depositary?*

***Q26**. 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?*

***Q27**. 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?*

Q25

BVI agrees with CESR's proposals in relation to irregularities to be reported by the depositary.

Q26

In general “yes”, provided that the proposal tabled by EFAMA in relation to Question 17 is being implemented.

Q27

We have no indication for a significant difference in terms of costs between this rule and relying on national rules.

***Q28**. Do you agree with CESR’s proposals in relation to auditor agreements?*

***Q29**. Which option do you prefer in relation to the national law and jurisdiction applicable to cross border agreements?*

***Q30**. 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?*

***Q31**. What would be the additional costs of the proposals in Box 9? 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?*

Q28

BVI agrees with CESR’s proposals on auditor agreements.

Q29

BVI favours Option B.

Q30

Generally speaking, there seem to be clear advantages in aligning the accounting periods of master and feeder UCITS. However, accounting processes are different among Member States and the option of having accounting periods that are not aligned should be left open, in order to allow UCITS and their management companies to take into account any specific circumstances.

Q31

For the time being, we see no way to provide meaningful figures in this respect.

***Q32**. Do you agree that it is not necessary for CESR to provide advice on level 2 measures on this issue?*

Yes.

***Q33**. Do you agree that it is not necessary for CESR to provide advice on level 2 measures on this issue?*

For the time being, we have no indication that level 2 measures on this issue would be necessary.

Section III: Notifications

***Q34**. Do you agree with CESR's proposals in relation to publication of marketing information?*

***Q35**. What would be the additional costs of the proposal in Box 10? Please quantify your estimates for one-off and ongoing costs. What would be the benefits of this proposal, compared to no prescription at level 2?*

Q34

In Box 10, para. 2, the term "series of references or links" creates the impression that relevant information according to Article 93 (3) may be "hidden" behind a chain of internet links or other kinds of references. BVI would like to point out that according to Article 93 (3), the information in question is supposed to be "easily accessible at distance and by electronic means". As a minimum, it should be made clear that such information is to be made available at one place and, ideally, in one single document.

In addition, it should be made clear that UCITS and their management companies are able to rely entirely on the information published by Member States and can not be held liable if they fail to comply with a requirement that was not published.

In terms of procedure, Box 10 para. 5 to 7 pose some ambiguities on the effects of certain irregularities. While para. 5 gives the UCITS or its management company sufficient confidence that it is allowed to start cross-border distribution as soon as the notification e-mail has been sent off by the home State authority, questions remain on what would be the effect if the e-mail has been sent incorrectly due to an error the home State authority is responsible for. In such a case, the procedure according to para. 7 would stop cross border distribution for an indefinite time, even though the UCITS or the management company, respectively, neither is responsible for the error nor has any means to remedy the problem.

BVI therefore suggests deleting the second sentence of para. 7 in Box 10.

Q35

We have no indication on any additional costs deriving form implementing the proposal in Box 10.

***Q36**. 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?*

***Q37**. What are the current costs of the notification process? What would be the additional costs (direct or indirect) to stakeholders other than competent authorities of developing a centralised system? Please quantify your estimate of one-off and ongoing costs.*

***Q38**. What would be the benefits of these proposals, compared to no prescription at level 2?*

Q36

In principle, BVI supports the idea of developing a centralised IT system that would provide further efficiencies to the notification procedure. However, as we do not have any details at this stage as to what this centralised system would contain, how it might operate and what it would involve in terms of costs, we are not in a position to provide a more comprehensive answer to this question.

Q37

Today, the costs of notification vary widely, depending on the individual requirements posed by the different Member States. Likewise, the costs of developing a centralised IT system would depend on a variety of different factors, which can only be assessed after the details of a centralised system are sorted out. In any case, the idea of a centralised EU system proposed by CESR might create material savings potential in the area of cross-border notification.

Q38

Although we see certain benefits in the development of a centralised IT system (in terms of transparency and availability of the documentation), we think that costs involved and additional benefits of an alternative solution (e.g. delivery of the documents to the host State authority by email) need to be carefully evaluated.

***Q39**. Do you consider the notification letter (Annex I) satisfactory? Are there any other matters that it ought to cover?*

***Q40**. Do you have any comments on the draft attestation letter (Annex II)?*

***Q41**. 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?*

Q39

BVI fully agrees with the principle of a standardised notification letter, as proposed by CESR. However, we have strong reservations as to the contents of Part B (non-harmonised part) of the notification letter.

Indeed, although Article 93 para. 1 of the Directive foresees that “The notification letter shall include information on arrangements made for marketing of units of the UCITS in the host Member State (...)”, BVI is of the opinion that, as far as the content of the notification letter is concerned, a clear distinction ought to be made between requirements which fall within the field governed by the Directive and marketing requirements under national regulation.

Our major concern in this respect is, indeed, that a host Member State could stop a notification because the information required to be sent in Part B might require some form of approval from the host State. Delays in notification approval could arise either due to missing information in Part B, or simply due to the time necessary for pre-approval of marketing material (where required under national law). Either way, such delays should not lead to a halt in the notification process, as this would interfere with the exercise of the passport.

UCITS and their management companies will, of course, have to comply with those specific arrangements in each Member State where they intend to market their units, but this should not, in any case, hold up the notification process.

BVI also strongly disagrees with the need to identify individual distributors in the notification letter. In most cases, that kind of information is subject to frequent changes and would therefore require constant updates, which would be extremely burdensome not only for the management companies but also for the regulators of the host Member States. Furthermore, we do not see what additional benefits this information would bring to the host State regulator. If, at a certain point in time, a regulator requires the list of all the distributors marketing the units of a UCITS in one or several Member States, it will be possible to obtain this information on very short notice directly from the management company of that UCITS. It should therefore be possible to make a high level disclosure regarding the type of distribution channels to be used, or mention that distribution will be carried out through regulated firms.

In addition, BVI notes that there is no mention of share classes in Annex I and that it is not always possible to define an ISIN code at sub-fund level. Therefore, in BVI's view, it would be more appropriate to list the sub-funds without mention of the ISIN code.

Q40

BVI has no specific comments.

Q41

BVI has no indication that the use of the proposed letter would generate substantially higher costs.

***Q42**. 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?*

***Q43**. 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?*

***Q44**. 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?*

***Q45**. Should CESR develop level 3 guidelines in this area instead of advising the use of level 2 measures?*

Q42

BVI generally supports the development of a dedicated electronic system, as described under Box 11. Also in this context, however, the considerations in our answer to question 34 will have to be borne in mind.

Q43

Although there may be some benefits to the development of an efficient, secure electronic communication tool, given the potential time and costs associated with the development of such a system, BVI considers that the use of e-mail, as proposed by CESR in Box 11 and 12, would be sufficient for the time being.

Q44

See our answers to Questions 34 and 42.

Q 45

In order to obtain maximum harmonisation, BVI would support the idea of implementing guidelines on level 2.

We hope that our suggestions will help CESR to adopt a conclusive and practicable approach to the operational framework for UCITS management companies and remain at your disposal for any further discussion of the consultation at hand.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

Signed:
Stefan Seip

Signed:
Marcus Mecklenburg