

**EFAMA REPLY 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
(CESR/09/785)**

EFAMA¹ is grateful for the opportunity to comment on the CESR consultation paper on level 2 measures relating to mergers, master-feeder structures and cross-border notifications of UCITS. EFAMA members would like to congratulate CESR for their excellent work, despite the time constraints. To a large extent, we support the approach taken by CESR in its technical advice.

EFAMA also take this opportunity to thank CESR for recommending that the Commission should act on the **tax issues** that need to be solved in order for the management companies to be able to make full use of the efficiency gains that the UCITS IV directive aims to achieve. The absence of a favourable tax regime (for instance, on cross-border mergers) would indeed be a major drawback that would certainly prevent management companies to apply the possibilities offered by the UCITS IV Directive to their own business model. Given the importance of this issue for our members, EFAMA is currently conducting an analysis in order to identify these tax barriers. We will, of course, be happy to share the conclusions of this analysis with CESR and with the Commission as soon as they will be available.

Finally, we would like to apologize for not being able to provide detailed estimates of the expected costs entailed by CESR's proposals. Indeed, this is a difficult exercise, knowing that these costs will essentially depend on a number of factors that may vary significantly from case to case.

¹ EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 44 corporate members about EUR 11 trillion in assets under management of which EUR 6.1 trillion managed by around 54,000 investment funds at end 2008. For more information, please visit www.efama.org

SECTION I – MERGER OF UCITS

1.1 Contents and format of the information

Question 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?

EFAMA fully agrees with CESR’s recommendation that the information to be provided to unitholders should be written in a brief manner and in a non-technical language that is reasonably likely to enable them to understand the nature of the merger proposal. The information to be provided to the unitholders should not be excessively detailed in order to avoid confusion and to increase the likelihood for investors to actually read the information that is made available to them.

Equally important is CESR’s acknowledgment that unitholders of the merging and of the receiving UCITS does not have the same needs in terms of information concerning the merger and that Article 43 of the Directive does not require these unitholders to be given identical information.

EFAMA strongly supports this approach and is therefore pleased with CESR’s proposal that the information to be provided to the unitholders of the receiving UCITS will assume that they are already reasonably familiar with the features of the UCITS and will therefore focus on the operation of the merger and its potential impact on the receiving UCITS. It should indeed be stressed that, in practice, most mergers will take place without any impact (or a very limited impact) on the receiving UCITS.

Concerning the details of the information to be provided in accordance with Article 43 (3) b) of the Directive, we would like to make the following comments:

- Box 1, paragraph 4, (a): that information seems to add little to the requirement already contained in Article 43(3), (c) of the Directive. Moreover, requiring additional details of any differences in the rights of unitholders would go beyond the obligations set by the Directive.
- Box 1, paragraph 4, (b): we strongly disagree with the proposal to provide information on the “profile of the typical investor for whom the UCITS is designed”; indeed, that kind of information is not included in the KID and cannot be predefined. A UCITS is not designed only for a specific investor profile, but could be suitable for different investor types depending on the other assets in the investor’s portfolio and the amount to be invested in the UCITS. A determination of suitability can only be made by an advisor who has knowledge of the investors’ financial situation and of its assets.
- Box 1, paragraph 4, (d): we would like to obtain clarifications on this requirement. Our understanding is that unitholders of the merging and of the receiving UCITS should only be informed about how the performance fee will be applied once the merger will become

effective. Any further information would, in our opinion, go beyond the obligations set by the Directive and should therefore be avoided.

It should also be noted that most of the information that is required under Box 1, paragraph 4 (b), (c) and (d) is already contained in the KID of the receiving UCITS that will be provided to the unitholders. It is therefore highly questionable whether there is any use in repeating that information, in particular for the unitholders of the receiving UCITS.

Finally, in order to avoid legal uncertainty for management companies and to ensure a better harmonisation among the Member States, we believe that the information to be provided in accordance with paragraph 43(3) of the Directive should explicitly be set as an exhaustive list.

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

We fully agree with CESR's proposal as it guarantees an adequate level of flexibility, allowing the management company to provide summary information only in cases where it deems it appropriate. It should however be clarified that the option to provide the unitholders with a summary of the key points of the merger proposal should be left to the appreciation of the management company, not to the national regulator (as such a situation might lead to a lack of harmonisation among Member States).

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

No. EFAMA believes that Article 43(3), (c) of the Directive is already sufficiently detailed and will provide unitholders with all the information they need concerning their rights in the context of the merger.

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

A large majority of EFAMA members are of the opinion that the decision to distribute the KID of the receiving UCITS as a freestanding document or as part of the information document should be left to the discretion of the management company.

Question 5: 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).

There is no doubt that the requirements in the Directive and in Box 1 will lead to a significant increase in the costs of a merger, in particular where national rules require information to be sent through a durable medium, such as a letter or a publication in the newspapers.

It is difficult to provide an estimate of these costs 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 media to be used to inform the shareholders, ...). However, in those Member States where it was not already the case, it is safe to assume that the obligation to inform the unitholders of the receiving UCITS, will at least double the costs of providing investors with information on the merger.

Combined with the fact that the costs of the merger can no longer be charged to the UCITS (even in cases where the costs of the merger are outweighed by its benefits for the unitholders), requirements in Box 1 could become prohibitively expensive to justify the merger itself, given the cost of sending information to the receiving fund holders (to the point of costs such as printing and postage outweighing the benefits). This would, for instance, be the case when a merging fund, with small assets under management and a limited number of unitholders, is merging into a larger fund with thousands of unitholders that is registered in a large number of countries.

In order not to undermine one of the key objectives of the Directive, which is to encourage cross-border mergers, we therefore urge CESR to take a pragmatic approach on this issue, and to help to keep the costs of mergers to a reasonable level by:

- Limiting the content of the information to be provided to the unitholders to what is really necessary for them to make an informed decision as to the merits of the merger proposal, clearly distinguishing the needs of the unitholders of the merging UCITS from those of the receiving UCITS (see our comments under question 1);
- Allowing management companies to make the best use of cost-efficient media (such as Internet/websites) to inform unitholders (in a similar way as what is already foreseen under the Prospectus Directive). It should, for instance, be possible for a management company to refer investors to a website where the KID (or other information concerning the merger) is available.

For similar reasons, there should be no obligation for a management company to publish information through several channels in the same country (for instance through a letter and a publication in the newspapers). Management companies should be free to opt for the most cost efficient communication channels.

1.2 Providing the information

Question 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?

A large majority of EFAMA members strongly agree with CESR's proposal not to advise the Commission to harmonise the way in which information should be provided to the unitholders in the case of a merger.

EFAMA also fully agrees with the recommendation to carry out a post-implementation review of the effectiveness of the merger regime after a suitable interval, in order to determine whether improvements could be made to it.

SECTION II – MASTER-FEEDER STRUCTURES

2.1 Agreement between feeder and master UCITS

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

EFAMA agrees with CESR's proposal for specifying the contents of the agreement without being prescriptive about either the exact content or the format of such an agreement.

However, the list of elements to be included in the agreement as defined in Box 2 should be **exhaustive**, in order to reduce legal uncertainty and ensure a higher degree of harmonisation.

As to the areas to be covered in the agreement, a majority of EFAMA members is of the opinion that paragraphs 2, 3, 4 and 5 in Box 2 contains detailed operational specifications that, in practice, are subject to frequent changes and should therefore be left to a **service level agreement** to be entered into between the parties, and should not be part of the agreement between the feeder and master UCITS. Otherwise, each time a change occurs in those specifications, the agreement would have to be updated and filed again with the competent authorities. Such frequent filings would prove extremely burdensome, not only for the management companies of master and feeder UCITS, but also for the competent authorities.

To the contrary, sections 1, 6 and 7 in Box 2 are covering key areas of the agreement, which are also less subject to changes, and should therefore be left in the agreement.

Concerning in particular the requirement under Box 2, paragraph 1, (c), a large majority of EFAMA members is of the opinion that breaches by the master UCITS should only be disclosed to the feeder UCITS when the **master's** home State legislation requires disclosure to investors. In this respect, the feeder should be treated like any other investor, with no additional disclosure. It should be clearly stated that the master's home rules should determine the need for disclosure, not the feeder's home rules.

Question 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?

EFAMA considers that the points listed in Box 2 are appropriate elements to be included in an agreement (with the important reservation that part of it should be left to a service level agreement – see question 7 above).

We do not believe any other point should be included in the agreement.

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

Concerning the applicable law, a large majority of EFAMA members is in favour of Option B (choice between the laws of the home State of either UCITS) as it provides the required flexibility to take into account the particular circumstances of the UCITS.

Question 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?

Most EFAMA members agree with CESR's analysis that measures aiming at ensuring a fair treatment of all unitholders in a master UCITS should be provided for under national law.

However, some EFAMA members call for a higher degree of harmonisation as they are of the opinion that it would ensure a more equal treatment of all unitholders, should they be invested in the feeder or directly in the master.

Question 11: 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?

N.A.

Question 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?

EFAMA agrees with CESR's proposals in relation to internal conduct of business rules.

Question 13: 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 proposals, compared to no prescription at level 2 on this issue?

N.A.

2.2 Measures to avoid market timing

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

In principle, EFAMA agrees with the approach proposed by CESR in order to avoid market timing activities.

However, we refer to our previous comment that operational specifications should be treated in a service level agreement to be concluded between the feeder and the master UCITS, rather than in the agreement itself (see question 7 above). This, in our opinion, should also apply to measures aiming at preventing market timing activities.

It should also be pointed out that in a number of cases units are traded on a secondary market without any explicit consent or intervention whatsoever of the UCITS or its management company in the transaction. In such cases, UCITS may not be in a position to make any provisions to effectively combat market timing.

2.3 Liquidation, merger or division of a master UCITS

Liquidation of the master UCITS

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

EFAMA agrees that CESR's analysis correctly identified the issues that need to be addressed in relation to the liquidation, merger or division of a master UCITS.

However, concerning in particular the liquidation of a master UCITS, and the proposals made in Box 5, EFAMA would like to suggest an alternative proposal which- is compatible with the time constraints in Article 60 of the Directive and would strike a better balance between the interest of the unitholders of the feeder fund (and the feeder itself) and those of the other unitholders of the master fund (see our answer to question 17 hereunder).

One additional aspect that would need to be considered is that currently certain non-EU regulators require any changes to a UCITS' prospectus (and the supporting documentation such as a notice of an EGM) to be approved by themselves either in advance of, or simultaneously to, the home regulator's approval. With the current timeline, it would be difficult, if not impossible, to secure such approval in the 3 weeks allowed for home regulator's approval. This would ultimately mean that it would not be feasible to have a UCITS feeder fund registered for sale in a non-EU jurisdiction.

Question 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?

Most members consider it unlikely, in particular when the feeder and the master are managed by the same Management Company (or by management companies belonging to the same group).

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

In EFAMA's view, the main issue with CESR's proposal in Box 5 is that it does not seem to take sufficient account of the potential redemptions by other unitholders in the master UCITS once the master has announced its intention to liquidate. It is clearly not in the interest of investors in the feeder to remain locked in the master, while other direct investors in the master may redeem. On the other hand, it would be in nobody's interest to have all redemptions in the master UCITS

blocked for all investors for three months or until the feeder has been able to find an alternative solution.

Furthermore, it would be very confusing for the feeder's investors if the master were to announce its liquidation and the feeder had not yet been able to define an alternative solution for its own future. This would likely lead most unitholders of the feeder to redeem their units as quickly as they can, thereby precipitating the liquidation of the feeder fund

EFAMA would therefore suggest an alternative solution that would consist in a disclosure by the master to the feeder 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's intention to liquidate). That confidential information should be given to the feeder UCITS as early as possible, in order to allow the feeder to plan an alternative solution.

By the time of the public announcement by the master of its intention to liquidate, the feeder could then already announce the chosen solution for its own future, and the feeder investors would not be exposed to unnecessary uncertainty.

Following this proposal, the timeline suggested in Annex 1 to CESR's consultation paper (scenario 1), might be modified as follows:

- 30/6 Through use of a confidentiality agreement, master UCITS gives feeder UCITS additional two months notice that it intends to liquidate on 30/11
- 30/6 Feeder UCITS starts to plan for its future
- 30/8 Master UCITS gives all investors three month notice that it intends to liquidate on 30/11(Art. 60(4))
- 1/9 Feeder applies to its competent authority (CA) for approval to (i) invest in another master or (ii) convert into a non feeder UCITS. Or informs CA of its intention to liquidate
- 21/9 CA grants approval after 15 working days as allowed for by Art. 59
- 22/9 Feeder confirms to master how liquid proceeds are to be paid to it
- 5/10 Feeder notifies its unitholders with information required by Art. 64(1) and (2)
- 26/10 (If necessary) feeder holds an EGM (to decide on new investment policy or on liquidation)
- 30/11 Liquidation of master. Feeder receives proceeds of liquidation payment
- 30/11 Feeder (i) starts investment in new master or (ii) becomes a non-feeder fund or (iii) liquidates

The confidentiality agreement would allow for a more equal treatment of the feeder's unitholders and the other unitholders of the master. If it is not possible to achieve such fairness, the feeder might prove to be unattractive to potential investors and the proposed master-feeder structure might never come to fruition.

Question 18: 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 prescriptions at level 2 on this issue?

CESR's proposals in Box 5 would make it difficult for a feeder UCITS to pursue an alternative option to liquidation, whereas EFAMA's proposal would enhance the possibility of an alternative option, as the feeder could quickly reassure its own investors.

Merger or subdivision of the master UCITS

Question 19: Do you agree with CESR's proposals in Box 6 for dealing with merger or division of a master UCITS, in particular:

EFAMA broadly agrees with CESR's proposal for dealing with merger or division of a master UCITS, with some reservations on the proposed timeline (see hereunder).

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

Yes.

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

EFAMA believes that the 5 days period for the feeder UCITS to inform its shareholders is clearly too short, considering in particular the needs for translation and the fact that the documentation cannot be finalized and printed before the approval is granted.

We would therefore suggest to extend this period to 10 days and to reduce accordingly the above mentioned one month period (to 23 days).

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

This is likely to be the case, particularly if the feeder becomes unable to comply with its mandate (and, in particular, with the maximum 15% cash and derivatives limit, as foreseen under Article 58, paragraph 2 of the Directive).

Question 20: 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?

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

2.4 Agreements between depositaries

Question 21: Do you agree with CESR's proposals for defining the contents of the depositaries' agreement?

EFAMA agrees with CESR's approach to indicate the areas that should be covered by the agreement, rather than being prescriptive as to the precise contents and format.

However, the list of elements to be included in the agreement as defined in Box 7 should be **exhaustive**, in order to reduce legal uncertainty and ensure a higher degree of harmonisation.

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

Concerning the areas to be covered in the agreement according to the proposals in Box 7, we would like to make the following comments:

- Box 7, paragraph 3.a.: it should be pointed out that in a number of countries, the NAV calculation is not performed by the depositary, but by the fund administrator or by the management company. Information concerning the procedure to be applied for the calculation of the NAV should in that case be provided by the entity that actually carries out this activity. We therefore suggest amending paragraph 3.a), accordingly (“... **where applicable**, the procedure for calculating the NAV of each UCITS ...”). We also deem it inappropriate to charge the depositary with measures to prevent market timing, considering that such measures should be taken by the management companies of the master and of the feeder UCITS.
- Box 7, paragraph 4: we are of the opinion that the reference to the “depositary’s report to unitholders” should be deleted as we are not aware of the existence of any report that the depositary should provide to the unitholders under the UCITS directive (except in the context of fund mergers).
- Box 7, paragraph 5: the same procedure should apply to records of breaches as already mentioned under question 1: breaches at the level of the master fund should only be disclosed to the feeder UCITS when the master’s home State legislation requires disclosure to the investors. In this respect, the feeder should be treated like any other investor with no additional disclosure, and it seems even less warranted to give access to the depositary to any and all breaches. If disclosure is required, the master’s depositary should inform the master UCITS first.

Question 23: 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?

A majority of EFAMA members is in favour of Option B, as this would allow depositaries the flexibility to agree the appropriate applicable law governing the agreement.

Question 24: What would be the additional costs of the proposals in Box 7? Please quantify your estimate on one-off and ongoing costs. What would be the benefits of these proposals, compared to no prescription at level 2 on this issue?

N.A

2.5 Reporting by the master UCITS depositary

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

A majority of EFAMA members agrees, in principle, with CESR's proposals in relation to irregularities to be reported by the depositary or the auditor.

However, for legal certainty, it may be useful to state that matters to be reported under Box 8, paragraph 2, will be subject to the materiality levels that are foreseen in the national laws and regulations of the master depositary.

Some EFAMA members also suggest that the depositaries should also report on errors in settlement and therefore suggest rewording Box 8, paragraph 2(b) as follows: "Errors in transaction and settlement for the sale or repurchase on units in the master undertaken by the feeder".

Question 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?

A majority of EFAMA members believe that other unitholders in a master UCITS will be adequately protected under national laws if the proposals in Box 8 are implemented.

Question 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?

EFAMA believes that there would appear to be no significant difference in terms of costs between this rule and relying on national rules (which will treat a feeder as any unitholder).

2.6 Agreements between auditors

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

EFAMA agrees with these proposals.

However, the list of elements to be included in the agreement as defined in Box 9 should be **exhaustive**, in order to reduce legal uncertainty and ensure a higher degree of harmonisation.

Question 29: Which option do you prefer in relation to the national law and jurisdiction applicable to cross-border agreements?

A majority of EFAMA members is in favour of Option B, following the same logic as for the agreement between depositaries.

Question 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?

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 which are not aligned should be left open, in order to allow UCITS and their management companies to take into account any specific circumstances.

Question 31: 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?

N.A.

2.7 Change of feeder UCITS objective

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

A large majority of EFAMA members agree with CESR's assessment that there is no need to provide level 2 measures on this issue.

2.8 Transfer of assets in kind

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

EFAMA fully agrees with CESR's assessment in this respect.

SECTION III – NOTIFICATIONS

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

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

EFAMA agrees with CESR's proposals in Box 10 but strongly insists upon the fact that UCITS and their management companies should be able to rely entirely on the information published by

Member States and should not be held liable if they fail to comply with a requirement that was not published.

In order to be really helpful in practice, the information to be provided by Member States should be complete, up to date and should disclose any obligations in a concise and specific manner (preferably in the form of a narrative, rather than by references or links to other documents).

When the information is provided through references or links to source documents, these source documents should also be available in a language customary in the sphere of international finance (i.e., at least in English).

Finally, it would be extremely helpful if Member States could state clearly whether pre-approval of marketing material is required.

Question 35: What would be the additional costs of the proposals 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?

The expected benefits of proposals in Box 10 will consist in a smoother marketing process and, potentially, in reduced legal costs, provided, once again, that the information made available by Member States is sufficiently clear, specific and up to date.

3.2 Facilitating host State access to notification documentation

Question 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?

In principle, EFAMA 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.

Question 37: 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 one-off and ongoing costs.

N.A.

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

Although EFAMA sees 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.

3.3 Standard notification letter and attestation

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

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

Indeed, although Article 93 (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 (...)*”, EFAMA 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.

EFAMA 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.

Finally, concerning Part A of the notification letter, we would suggest taking out any reference to the ISIN codes. Indeed, the ISIN codes are usually attributed at the level of the share class (and not of the sub-fund) and we deem it important to clarify that no obligation to register at share class level should be imposed.

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

We have no specific comments on CESR's proposed model of attestation.

Question 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?

N.A.

3.4 Electronic transmission of notification files

Question 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?

EFAMA members generally support the development of a dedicated electronic system, as described under box 11.

However, a majority of EFAMA members strongly oppose paragraph 7 of Box 11 as it would penalise a UCITS for an error or omission that is beyond his control. It should be noted that it may be very costly and burdensome, and therefore unacceptable, for a UCITS to cease the marketing of its units after it has been duly authorised to access a market (e.g. when a marketing campaign has already been launched).

EFAMA therefore suggests that when an error or omission occurs in good faith and where immediate steps have been taken to rectify the problem (even if it cannot be solved within 24 hours) the UCITS should not be penalised.

Question 43: Do you agree with the proposed procedures in Box 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?

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, EFAMA considers that the use of e-mail, as proposed by CESR in Box 11 and 11, would be sufficient.

Question 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?

See our answer to question 42.